

NOTE
VICTIM OPINION STATEMENTS: PROVIDING JUSTICE
FOR GRIEVING FAMILIES

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I. INTRODUCTION

On a horrific night in the summer of 2002, Mark Ott cut the phone lines to the home of his estranged wife, broke in, and brutally stabbed her boyfriend, Allen Lawrence, nearly to death.¹ When Mr. Ott's stepdaughter tried to intervene he stabbed her in the abdomen.² Mr. Ott continued stabbing Allen until the knife actually broke.³ Ott then obtained gasoline from the garage, poured it over Mrs. Ott's bed and then lit a love seat and sofa on fire.⁴ He yelled at everyone to get out of the house.⁵ Mrs. Ott, her two children, and her daughter's friend escaped.⁶ Allen also miraculously escaped, and lived; but his daughter was not as fortunate.⁷ Lacey Lawrence was sleeping on the main floor and did not make it out of the house alive.⁸

After entering an *Alford*⁹ guilty plea and receiving a sentence of life in prison without the possibility of parole, Mr. Ott appealed, claiming, *inter alia*, that his lawyer's failure to object to portions of the victim impact statements constituted ineffective assistance of counsel.¹⁰ The Utah Supreme Court agreed; it held that the portions of Allen Lawrence's victim impact statement claiming that Mr. Ott was a terrorist who would act again, violated the Eighth Amendment.¹¹ Because Ott's

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¹ State v. Ott, No. 20040638, 2010 WL 11138, *1 (Utah 2010).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at *1-2.

⁸ *Id.* at *1.

⁹ By entering an *Alford* plea, a defendant does not admit guilt. Rather, the defendant enters a guilty plea because he recognizes that a prosecutor has enough evidence to obtain a guilty verdict. For the original ruling, see *North Carolina v. Alford*, 400 U.S. 25 (1970).

¹⁰ *Ott*, 2010 WL 11138, at *2.

¹¹ *Ott*, 2010 WL 11138, at *6. The text of the Eighth Amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" U.S. CONST. amend. VIII (emphasis added). The argument is that allowing the jury to hear the opinions of the victims in a capital case will so prejudice the jurors that their decision will not be based on the facts, and therefore constitute cruel and unusual punishment. The Eighth Amendment was made applicable to the states through

lawyer failed to object, the Court ruled in favor of Ott's ineffective assistance of counsel claim.¹²

Why would a juror need to hear the victim call Mr. Ott a terrorist before she could make that judgment herself? It is hard to fathom coming to any other conclusion after hearing the gruesome details of what Mr. Ott did that night. The pain and suffering experienced by Allen Lawrence's family is unimaginable, and yet, what adds insult to injury is the Court's holding disallowing his opinion at trial.

While greater emphasis has recently been placed on victims' rights in violent crimes, their voices are often unheard during the sentencing portion of a capital trial. In a capital trial the victims are most often the surviving family members of the deceased.¹³ The federal government and most states allow a victim to present at sentencing, "information bearing on the appropriate sentence in the form of a 'victim impact statement.' . . ."¹⁴ Unfortunately, however, the U.S. Supreme Court has not been clear on whether a victim should be allowed to express his opinion about the type or length of sentence a murderer should receive.¹⁵ Accordingly, there exists a split of authority in the lower courts, with the Utah Supreme Court joining what the author perceives to be the incorrect view by prohibiting the admission of victim opinion statements during the sentencing phase of a capital trial.¹⁶

This Note addresses in five parts the need for victims to have an opportunity to voice their opinions on the type and length of sentence that should be imposed on a defendant in a capital case. Part I gives a brief history of *Booth v. Maryland* and *Payne v. Tennessee* and address the ambiguities resulting from the Supreme Court's lack of clarity on whether a victim opinion statement may be admitted during the sentencing portion of a capital trial. Part II then outlines the lower court split and discusses how some courts perceive *Payne* as holding that the Eighth Amendment creates a *per se* bar against a victim's sentencing recommendation in a capital case. Part III reviews the reasoning of Professor Paul Cassell—one of the Nation's leading experts on victim's rights—for supporting the admission of victim impact statements during capital cases. Next, part IV addresses the opposition to the admissibility of victim opinion statements as violating the Eighth

the Due Process Clause of the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660, 666 (1962).

¹² Ott, 2010 WL 11138, at *6-9.

¹³ In this Note, the term "victims" refers to the surviving family members of the deceased.

¹⁴ DOUGLAS E. BELOOF ET AL., *VICTIMS IN CRIMINAL PROCEDURE* 625 (2d ed., Carolina Academic Press 2006) (1999).

¹⁵ For purposes of this Note, the portion of a victim impact statement containing the opinion of the victim regarding the appropriate type and length of sentence for a defendant will be referred to as a victim opinion statement.

¹⁶ Ott, 2010 WL 11138. Although Ott was not a capital case, the Utah Supreme Court adopted the reasoning of those courts opposing the admission of victim opinion statements during the sentencing phase of a capital trial.

Amendment. Part V concludes by providing a brief recap of why the Supreme Court needs to rule with finality that allowing victims to submit their opinions during the sentencing phase of a capital trial does not violate the Eighth Amendment.

II. THE SUPREME COURT: *BOOTH V. MARYLAND* AND *PAYNE V. TENNESSEE*

A. Booth v. Maryland

The first time the Supreme Court addressed the question of whether the Constitution prohibits a jury from considering a victim impact statement during the sentencing phase of a capital murder trial was in *Booth v. Maryland*.¹⁷ In 1983, John Booth and Willie Reid broke into the home of Irvin Bronstein and his wife Rose, both of whom were in their late seventies, ostensibly to steal money to buy drugs.¹⁸ Because Booth was a neighbor of the Bronsteins he knew that the elderly couple could identify him.¹⁹ Accordingly, Booth and his accomplice bound and gagged the elderly couple, and then stabbed them repeatedly in their chests with a kitchen knife.²⁰ The bodies were discovered two days later by the Bronsteins' son.²¹ In this case the victim impact statement contained "two types of information." First, descriptive information about "the personal characteristics of the victims and the emotional impact of the crimes on the family . . ." The second type of information establishes "the family members' opinions and characterizations of the crimes and the defendant."²²

In regards to the personal characteristics of victims and the emotional impact of the crimes families, the Court found an "impermissible risk that the capital sentencing decision [would] be made in an arbitrary manner,"²³ because the jury would be allowed to consider information that the defendant was not aware of and could not have foreseen.²⁴ The Court found that information about the character and reputation of the victim and the effect of the killing on the victim's family "may be wholly unrelated to the blameworthiness of a particular defendant."²⁵ This was found to be especially true in a capital murder case where the jury's role is to "express the conscience of the community on the ultimate question of life or death."²⁶

¹⁷ *Booth v. Maryland*, 482 U.S. 496, 497 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991).

¹⁸ *Id.* at 497-98.

¹⁹ *Id.* at 498.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 502.

²³ *Id.* at 505.

²⁴ *Id.*

²⁵ *Id.* at 504.

²⁶ *Id.* (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

As for the information which establishes the family members' "opinions and characterizations of the crimes and the defendant,"²⁷ the Court found it would "serve no other purpose than to inflame the jury and divert it[s]" attention from "the relevant evidence concerning the crime and the defendant."²⁸ Specifically, the victims' daughter stated that she could never forgive someone who killed her parents in the manner in which they were killed, and added that even "animals wouldn't do this."²⁹ The daughter also stated that she did not believe the defendants could be rehabilitated and that she did not "want them to be able to do this again or put another family through this."³⁰ Ultimately, the Court held that the introduction of such victim impact statements during the sentencing phase of a capital murder trial violates the Eighth Amendment.³¹

B. *Payne v. Tennessee*

In *Payne*, the Court reconsidered its holding in *Booth* that the Eighth Amendment bars the admission of a victim impact statement during the sentencing phase of a capital trial.³² The petitioner, Pervis Tyrone Payne was convicted and sentenced to death by a jury on two counts of first-degree murder for the deaths of Charisse Christopher and her two-year-old daughter Lacie.³³ Payne was also convicted and sentenced to thirty years in prison on one count of assault with intent to commit murder in the first degree for stabbing Charisse's three-year-old son, Nicholas, in the abdomen.³⁴

During the sentencing phase of the trial Charisse's mother testified about how the murder had affected her grandson.³⁵ She spoke of how her grandson cries for his mother and sister.³⁶ Then, during closing arguments, the prosecutor described the continuing effects of Nicholas's experience as follows: "[b]ut we do know that Nicholas was alive. And . . . he knew what happened to his mother and baby sister."³⁷ Members of the jury were then told that Nicholas would grow up "want[ing] to know what type of justice was done . . . ," and that their verdict would "provide the answer."³⁸

The court determined that the prosecutor's comments during closing argument were relevant to "[Payne's] personal responsibility and moral

²⁷ *Id.* at 502.

²⁸ *Id.* at 508.

²⁹ *Id.* (quoting victim impact statement).

³⁰ *Id.*

³¹ *Id.* at 509.

³² *Payne v. Tennessee*, 501 U.S. 808, 811 (1991).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 814-15.

³⁶ *Id.*

³⁷ *Id.* at 815.

³⁸ *Id.*

guilt.” The court explained that “[w]hen a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight-year-old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his ‘blameworthiness.’”³⁹

The U.S. Supreme Court ultimately held that:

[I]f a State decides to permit consideration of this evidence, “the Eighth Amendment erects no *per se* bar.” If, in a particular case, a witness’ testimony or a prosecutor’s remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.⁴⁰

This ruling essentially overturned the Court’s previous precedent in *Booth*. However, because *Payne* did not involve the admission of a victim opinion statement, the Court did not address the issue of whether the Eighth Amendment prohibits a state from admitting such evidence. Accordingly, this ambiguity has created a clear split of authorities in the lower courts.

III. SPLIT IN THE LOWER COURTS

A. Courts Prohibiting Victim Opinion Statements

In *Hooper v. Mullin*, the Tenth Circuit agreed with the Petitioner’s claim that the trial court erred by admitting victim-impact testimony during the sentencing phase where three members of the victim’s family expressed their opinions that the Petitioner deserved to die.⁴¹ While acknowledging that the Supreme Court overruled its decision in *Booth* with its ruling in *Payne*, the Tenth Circuit recognized that: “*Payne* left one significant portion of *Booth* untouched. . . . [T]he portion of *Booth* prohibiting family members of a victim from stating ‘characterizations and opinions about the crime, the defendant, and the appropriate sentence’ during the penalty phase of a capital trial. . . .”⁴²

³⁹ *Id.* at 817 (citation omitted).

⁴⁰ *Id.* at 831 (O’Connor, J., White, J., and Kennedy, J., concurring) (citation omitted).

⁴¹ *Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002). Despite the Court’s finding that the admission of the victim opinion statements constituted error, it held that this constitutional error “was harmless because it did not have a ‘substantial and injurious effect or influence in determining the jury’s verdict.’” *Id.* (quoting the U.S. Supreme Court in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

⁴² *Id.* (quoting *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (quoting *Payne*, 501 U.S., at 830 n.2)).

In *Ex parte Rieber*, the Supreme Court of Alabama held that the admission of portions of the victim's husband's opinion on the appropriateness of the death penalty "should not have been permitted" during the guilt phase of a capital murder trial.⁴³ The Court relied on its interpretation of *Payne* regarding the part of *Booth* that prohibits victim opinion statements at the sentencing phase of a capital murder trial.⁴⁴ In *Lynn v. Reinstein*, the Arizona Supreme Court followed this same *Payne/Booth* analysis and "held that: (1) the Eighth Amendment prohibits a victim from making a sentencing recommendation to the jury in a capital case"⁴⁵

Several additional courts have also interpreted *Payne* in a way that prohibits the admission of victim opinion statements during the sentencing phase of a capital murder trial based on the ruling in *Booth*.⁴⁶

Finally, the Utah State Supreme Court has, unfortunately, followed suit. In a very recent opinion, *State v. Ott*, the Court held that certain portions of victim statements admitted during the sentencing phase of Ott's trial were inadmissible because they violated the U.S. Supreme Court's precedents in *Booth* and *Payne* because they ". . . featured the victims' opinions of the defendant's character or the appropriate sentence."⁴⁷

B. Courts Allowing Victim Opinion Statements

In *Ledbetter v. State*, the Court of Criminal Appeals of Oklahoma found that "whatever ban against" admitting victim opinion statements during the sentencing portion of a capital trial resulting from *Payne* "does not lie in the Eighth

⁴³ *Ex parte Rieber*, 663 So.2d 999, 1006 (1995).

⁴⁴ *Id.* at 1007.

⁴⁵ *Lynn v. Reinstein*, 68 P.3d 412, 412 (2003).

⁴⁶ See, e.g., John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, n.137. Professor Blume lists several court rulings supporting this view:

State v. Card, 825 P.2d 1081, 1089-90 (Idaho 1991) (finding opinion as to the proper sentence inadmissible, but harmless because sentencing judge did not consider it); *State v. Bernard*, 608 So. 2d 966, 970-73 (La. 1992) (finding survivors' opinions about the crime and appropriate punishment irrelevant and, as such, inadmissible); *State v. Roll*, 942 S.W.2d 370, 378 (Mo. 1997) (holding that opinion of four of the victims' family members that defendant should receive the death penalty was inadmissible, but that the error was harmless); *State v. Joubert*, 455 N.W.2d 117, 129-30 (Neb. 1990) (finding victim's family members' characterizations about the defendant or their opinions as to the appropriate sentence inadmissible, but harmless because the sentencing judge is entitled to a presumption that he did not rely upon erroneously admitted evidence); *State v. Muhammad*, 678 A.2d 164, 176-77 (N.J. 1996) (holding that admission of survivor's opinions on the correct punishment, the defendant and the crime violates the Eighth Amendment); *State v. Treesh*, 739 N.E.2d 749, 776-78 (Ohio 2001) (finding error in allowing the court to hear opinion as to the appropriate sentence, but not reversible error because there was no evidence that the judge relied on the information in affirming the jury's recommended sentence).

⁴⁷ *State v. Ott*, No. 20040638, 2010 WL 11138 (Utah 2010).

Amendment.”⁴⁸ The Court allowed the admission of such evidence while acknowledging there could be instances where the evidence admitted was “‘so unduly prejudicial that it render[ed] the trial fundamentally unfair,’ thus implicating the Due Process Clause of the Fourteenth Amendment.”⁴⁹

The Court of Criminal Appeals of Alabama upheld the admissibility of victim impact evidence containing the opinion of the victim’s family members regarding the type or length of sentence to be imposed on the defendant.⁵⁰ It was recognized, however, that the admission of such evidence could result in reversible error if it could be shown that it affected the outcome of the trial or otherwise prejudiced a substantial right of the defendant.⁵¹

Finally, the Supreme Court of Kansas has also allowed the admission of victim opinion statements.⁵² The Court found that “the *Payne* Court did not set limits on the type of victim impact evidence which may be admissible.”⁵³ Specifically, the Court pointed to Article 15, Section 15 of the Kansas Constitution which “permits the victims of crimes to be heard at sentencing as long as the defendant’s statutory and constitutional rights are not violated.”⁵⁴

IV. PROFESSOR PAUL CASSELL ON THE BENEFITS OF VICTIM IMPACT STATEMENTS

In the article, *In Defense of Victim Impact Statements*,⁵⁵ Professor Cassell presents four thoughtful arguments in support of allowing victim impact statements. The logic of his arguments applies to victim opinion statements as well. Cassell states that victim impact statements: (a) provide information for the sentencer; (b) benefit the victim; (c) explain the crime’s harm to the defendant; and (d) improve the perceived fairness of sentencing.⁵⁶

A. *Providing Information for the Sentencer*

Victim impact statements (and victim opinion statements) provide the sentencer with a more in depth account of the actual harm done.⁵⁷ “[S]eriousness of the offense” is one of the factors governing federal sentencing; without full

⁴⁸ *Ledbetter v. State*, 933 P.2d 880, 890-91 (1997).

⁴⁹ *Id.* (quoting *Cargle v. State*, 909 P.2d 806, 826 (1995), *superseded by statute* OKL. STAT. ANN. tit. 12, § 2403 (West 2009), *as recognized in* *Coddington v. State*, 142 P.3d 437 (Okla. Crim. App. 2006)).

⁵⁰ *Hyde v. State*, 778 So.2d 199 (1998).

⁵¹ *Id.* at 213-14.

⁵² *State v. Gideon*, 894 P.2d 850, 863 (1995).

⁵³ *Id.*

⁵⁴ *Id.* at 864.

⁵⁵ Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611 (2009).

⁵⁶ *Id.* at 619-25.

⁵⁷ *Id.* at 620.

knowledge of how a particular crime affected a victim and her family the sentencer cannot know the seriousness of the offense.⁵⁸ Increased knowledge of the severity of harm allows the sentencer to mete out a punishment more in line with the seriousness of the offense.⁵⁹ Knowledge of what the victim deems appropriate punishment likewise bolsters the sentencer's understanding of the severity of the harm and, therefore, the seriousness of the offense.

In the case of *State v. Ott*, for instance, the victim who shared his opinion at trial was the father of the deceased, was at the scene of the crime, and was also a direct victim of the defendant.⁶⁰ The father, Allen Lawrence, was stabbed multiple times and witnessed his stepdaughter get stabbed in the abdomen by the defendant.⁶¹ Allen Lawrence personally lived the nightmare and experienced the terror of Mark Ott. No other individual could have more effectively conveyed to the sentencer the full extent of the damage and pain caused by the defendant's actions. Without this information the sentencer is handicapped in his ability to dole out a sentence commensurate with the defendant's crime.

B. Benefits to the Victim

Professor Cassell cites a judge who calls the admission of the victim impact statement a "rite of allocution."⁶² There is something more to this than just expressing one's feelings. It is an opportunity to directly, publicly, and individually acknowledge the victim.⁶³ Professor Cassell also shares several anecdotal reports by victims who expressly attribute the admission of their victim impact statement to their being able to deal with the nightmare of the defendant's crime.⁶⁴ By prohibiting the victim from opining about whether death is an appropriate sentence for a defendant, the victim is not fully acknowledged and often prevented from beginning the healing process. Therefore, allowing the family

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *State v. Ott*, No. 20040638, 2010 WL 11138 (Utah 2010).

⁶¹ *Id.* at *1.

⁶² Cassell, *supra* note 56, at 621.

⁶³ *Id.*

⁶⁴ *Id.* at 621-22. One victim reported:

The Victim Impact Statement allowed me to construct what had happened in my mind. I could read my thoughts. . . . It helped me to know that I could deal with this terrible thing. Another victim said, "[W]hen I read [the victim impact statement] [in court] it healed a part of me-to speak to [the defendant] and tell him how much he hurt me." Still another victim reported that "I believe that I was helped by the victim impact statement. I got to tell my step-father what he did to me. Now I can get on with my life." And, if the judge acknowledges what the victim has said in the statement, the judge's words can be (as one victim put it) "balm for her soul."

of the victim to opine on sentencing in a capital case is beneficial by acknowledging that each family member is a victim of the defendant's crime.

C. *Explaining the Crime's Harm to the Defendant*

In many jurisdictions the victim is able to read her impact statement in front of the judge, jury, and also the defendant.⁶⁵ Professor Cassell asserts this is often a necessary step for the defendant to begin the process of rehabilitation.⁶⁶ Only by understanding, or at least hearing, the full ramifications of the defendant's actions can he start the rehabilitation process. While this is not applicable in a capital case where the defendant is sentenced to death, it would be applicable in a capital case where the defendant is sentenced to life in prison with the possibility of parole.

D. *Improving the Perceived Fairness of Sentencing*

One of the reasons a defendant is given the opportunity to speak at trial is to ensure an appearance of justice.⁶⁷ Similarly, by allowing victims to read a victim impact statement at trial, many jurisdictions are creating at least a perceived fairness at trial.⁶⁸ This perception of fairness helps create confidence in our legal system, which allows victims to accept verdicts and sentences that may not be ideal in their minds. This benefit is especially paramount in a capital case.

These benefits in no way tip the scales in favor of allowing the admission of victim opinion statements at trial if doing so infringes on the defendant's constitutional rights. As illustrated above, however, the Fourteenth Amendment and the regular rules of evidence provide safeguards to ensure that the defendant's constitutional rights (specifically his Eighth Amendment right) are not violated. With the defendant's constitutional rights fully intact, these benefits only serve to strengthen the argument in favor of admitting victim opinion statements in capital cases.

V. ADDRESSING OPPONENTS OF VICTIM OPINION STATEMENTS

In the article *Opining on Death: Witness Sentence Recommendations in Capital Trials*, Professor Wayne A. Logan brings up three reasons why victims and relatives of victims should not be allowed to submit a victim opinion statement during the sentencing phase of a capital trial; he asserts that such evidence: (1) has "[c]onstitutional [i]rrelevance"; (2) is a "[s]pecter of [a]rbitrariness"; and (3) is a "[u]surpation of the [s]entencing [a]uthority's [r]ole."⁶⁹

⁶⁵ *Id.* at 623.

⁶⁶ *Id.* at 623-24.

⁶⁷ *Id.* at 625.

⁶⁸ *Id.*

⁶⁹ Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 539-47 (2000).

A. Constitutionally Irrelevant

Professor Logan states that “[a] witness’s opinion . . . that a defendant deserves death in no way serves to aggravate a murder to death-worthiness.”⁷⁰ Even if the victim or his family were to opine that the defendant did not deserve the death penalty, he continues, it would be equally irrelevant.⁷¹ This assertion misapprehends the Court’s reasoning in the death penalty context. In *Payne*, the Court quoted *McCleskey v. Kemp*, in which it was held:

[T]here is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker’s judgment as to whether the circumstances of a particular defendant’s case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer’s consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot challenge the sentencer’s discretion, but must allow it to consider any relevant information offered by the defendant.⁷²

The Court then went on to clarify this holding with its ruling in *California v. Ramos*: “[b]eyond these limitations . . . the Court has deferred to the State’s choice of substantive factors relevant to the penalty determination.”⁷³

In citing this language about deferring to the states to decide what substantive factors are relevant to the penalty determination, the Court acknowledged there may be controversial factors that nonetheless remain completely within the ambit of the Constitution. Therefore, the Court should explicitly acknowledge that this kind of evidence should be allowed because it is not unconstitutional, because many states find it appropriate, and because there are safeguards in place (which will be discussed next) to ensure the Constitution is not violated.⁷⁴

Furthermore, even if the opinion of a victim is constitutionally irrelevant to a defendant’s sentence (which is very different from being unconstitutional), it is completely relevant to help satisfy the demands of justice. Society has for too long focused solely on the defendant and his rights, often forgetting or deliberately dismissing any rights of victims. Justice is a broad term that encompasses more than just punishment and appropriately should seek to address the irreparable loss a family experiences when someone selfishly takes the life of one of its members.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Payne v. Tennessee*, 501 U.S. 808, 824 (1991) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 305-06 (1987)).

⁷³ *Id.* (quoting *California v. Ramos*, 463 U.S. 992, 1001 (1983)).

⁷⁴ *See supra* Part II.

While allowing a victim to submit a victim opinion statement will do nothing to bring back a deceased family member, it acknowledges the reality of the loss to the family, and often provides a beginning for the healing process.⁷⁵

B. Specter of Arbitrariness

Professor Logan finds that opinion testimony “allows the sentencer to impose (or abstain from) death not because the evidence warrants such an outcome, but because of the unpredictable desires of witnesses.”⁷⁶ While admittedly this is the case, this view places a low vote of confidence in the sentencers in our judicial system—both judges and juries. Not only is this unwarranted, it is also unnecessary. As the Court stated in *Payne*:

We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.⁷⁷

In her dissent, Justice O’Connor emphasized this point by acknowledging that there are times when a victim’s opinion could be unduly inflammatory, and yet it still does not justify a constitutionally based rule categorically prohibiting this evidence.⁷⁸ She states: “[t]rial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was

⁷⁵ See Mary Lay Schuster & Amy Proppen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 6 L. CULTURE & HUMAN. 1, 77 (2010). The authors cite a study of 171 victims, over half of whom (54%) “reported that indeed they felt different after making their statement to the judge, and 59 percent expressed positive feelings of satisfaction or relief.” *Id.* (quoting Edwin Villmoare & Virginia V. Neto, *Victim Appearances at Sentencing Hearings under the California Victims’ Bill of Rights*, U.S. Department of Justice, National Institute of Justice. Study undertaken by the Center for Research, McGeorge School of Law, University of the Pacific, March 1987). The authors posit that victims’ opinions having a specific effect on the sentence may not be what brings satisfaction to the victims, but rather, getting a judicial response. *Id.* They then cite Edna Erez, who found that “‘a major source of satisfaction for victims’ comes . . . ‘when the judges pay attention to their input by citing victims’ own phrases from impact statements in judicial sentencing comments.’” Edna Erez, *Who’s Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. 545-46 (1999).

⁷⁶ Logan, *supra* note 71, at 541.

⁷⁷ *Tennessee*, 501 U.S. at 825.

⁷⁸ *Id.* at 830.

prejudicial.”⁷⁹ There is, therefore, no reason to fear an inflammatory opinion will unduly prejudice a jury. If evidence is admitted, and it is of such a nature, or influences the decision of the court in such an unduly prejudicial manner, the Fourteenth Amendment and the regular rules of evidence provide the means to correct the mistake.

C. Usurpation of the Sentencing Authority’s Role

Professor Logan is concerned that victim opinion statements usurp a critical responsibility from the sentencer, i.e., “mak[ing] the difficult and uniquely human judgments that defy codification and buil[t] [in] discretion, equity, and flexibility into a legal system.”⁸⁰ This assertion oversimplifies a very complex process by the sentencer. Professor Logan assumes that despite any and all other evidence introduced during trial, the jury or judge is likely to feel compelled to base its decision entirely on one opinion. This, again, underestimates the ability of our judges and juries, and also fails to take into account the power of the Fourteenth Amendment and the regular rules of evidence⁸¹ to rectify any decisions that were indeed a usurpation of the sentencer’s power.

VI. CONCLUSION

The split in authority in the lower courts is apparent. This state of confusion is the result of the U.S. Supreme Court’s ambiguous holding in *Booth*, followed by its obfuscating opinion in *Payne*. Some courts are construing the Court’s ruling in *Payne* to mean the Eighth Amendment creates a *per se* bar on the admission of victim opinion statements in capital cases. This view fails to appreciate the power and the reality of the regular rules of evidence, and more importantly, the Fourteenth Amendment, which provides a safety mechanism in the unlikely event a victim opinion statement is relied on by a sentencer in a way that is “so unduly prejudicial that it renders the trial fundamentally unfair.”⁸² Because allowing the admission of victim opinion statements will not violate the Constitution, it is important for the Court to consider the many salutary effects for the victims in capital cases when victim opinion statements are allowed. A careful analysis by the Court will lead to a ruling that will provide justice not only for society, but also for grieving families. Therefore, it is the province and responsibility of the Court to rule with finality that victim opinion statements should be allowed during the sentencing phase of a capital trial.

⁷⁹ *Id.* at 831.

⁸⁰ *McClesky v. Kemp*, 481 U.S. 279, 311 (1987).

⁸¹ *Tennessee*, 501 U.S. at 831.

⁸² *Id.* at 809.