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Re-Examining the Admissibility of Victim Impact Statements in Capital Cases

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— Note —

RE-EXAMINING THE ADMISSIBILITY OF
VICTIM IMPACT STATEMENTS IN
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INTRODUCTION

On March 27, 1995, Sister Joanne Marie Mascha, a member of the Ursuline Sisters of Cleveland, Ohio, was raped and murdered in the woods of the Ursulines’ property.¹ She was discovered in the woods a day later under a quilted mattress pad;² she had been strangled and suffocated with a scarf.³ Although one of their own had endured such a

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1. Jennifer A. Webb, *Jury Sparing Murderer Guilty of Nun’s Death*, CATH. UNIVERSE BULL., Sept. 22, 1995, at 1.
 2. *Id.*
 3. Barbara Cervenka, *The Night Joanne Died*, MICH. TODAY, Mar. 10, 1996, at 10; *see also* Webb, *supra* note 1 (“[The murderer] claimed [Sister Joanne Marie] accidentally suffocated when he stuffed her scarf into her mouth.”).

brutal murder, the other Ursuline Sisters immediately requested that the then-twenty-one-year-old man⁴ charged with the crime be spared the death penalty.⁵ Sister Joanne Marie was passionate about helping those in need, and she demonstrated her passion through the life she lived. During the holidays, she bought toys and gave them to children of prisoners.⁶ She also advocated to ban nuclear weapons and encouraged Congress to “make hunger a political priority.”⁷ In the words of Sister Maureen McCarthy, General Superior of the Ursuline Sisters: “Isn’t it ironic to think that this woman of justice, this woman of peace would experience death through violence?”⁸ Sister Joanne Marie was a peace lover, a nature lover, and a lover of birdwatching—which she was originally doing the day she encountered her killer in the woods.⁹

That March 1995 encounter was not the first between Sister Joanne Marie and Daniel Pitcher.¹⁰ The extent of their relationship, however, was not entirely clear. Some accounts claimed that “[Pitcher] was obsessed with her,” waiting for her in the parking lot of the Ursulines’ property;¹¹ whereas Pitcher testified that he had met her only once before March 27.¹² Sister Joanne Marie confirmed that she had met this man approximately a year and a half before her death.¹³ While going through Sister Joanne Marie’s possessions, searching for proof of a connection with Pitcher, Sister Joanne Gross, a member of the Ursuline Sisters and an attorney, found a paper in which Sister Joanne Marie documented an encounter with “a troubled young man searching for peace in the quiet of our forest.”¹⁴ According to the paper, Sister Joanne Marie hoped that, as she left the woods after her encounter with Pitcher

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4. Original court documents stating that Daniel Pitcher was twenty-four years old at the time of the murder were inaccurate and later corrected to reflect that he was twenty-one years old. See Ken Baka, *Pitcher Gets the Maximum*, SUN PRESS, Sept. 14, 1995 (“Pitcher is not 24, as was previously reported and which was based on court documents.”).
 5. Webb, *supra* note 1.
 6. *Friends Seek Meaning as They Bury Slain Nun*, PLAIN DEALER (on file with author) [hereinafter *Friends Seek Meaning*].
 7. *Id.*
 8. *Id.*
 9. *Id.*
 10. Baka, *supra* note 4.
 11. *Id.*
 12. Joanne Gross, *The Deliberations of Mortals and the Grace of God*, 27 TEX. TECH. L. REV. 1159, 1162 (1996).
 13. *Id.* at 1160.
 14. *Id.*

that day, he could hear her sing her prayer for him: “May the blessing of God be upon you. May God’s peace be with you. May God’s presence illuminate your heart, now and forevermore.”¹⁵ When it came time for trial, the Ursuline Sisters made their stance known to the prosecutors and to the world: they did not want the death penalty for Daniel Pitcher¹⁶ and they believed that Sister Joanne Marie would never have wanted it as well.¹⁷ The Sisters were not the only ones who tried to sway the minds of the prosecutors, though. Support for their position poured into the prosecutors’ offices and the judge’s chambers from religious congregations around the world.¹⁸

Despite those pleas to the contrary, the prosecutors still sought the death penalty for Daniel Pitcher.¹⁹ The reasoning behind the prosecutors’ decision varied. Cuyahoga County Assistant Prosecutor Karl Wetzel said about the decision: “With any case, the victim, or the victim’s family, their intentions come into play, but there are other factors . . . [including] the type of crime, strength of the case, and the defendant’s history.”²⁰ During a meeting between the prosecutors and a few of the Ursuline Sisters, though, the reasoning seemed slightly different. According to Sister Joanne Gross, “The prosecutors were polite and sympathetic but ultimately, unmoved.”²¹ After the Ursuline Sisters tried to change the prosecutors’ minds at the meeting, the prosecutors gave the Ursuline Sisters “an article about death penalty politics and how prosecutors across the country are being elected and rejected based on their stance on capital punishment.”²²

Daniel Pitcher was found guilty of aggravated murder, aggravated robbery, kidnapping, and rape.²³ In a turn of events that was described by the judge as “pray[ing] this man out of the electric chair,” the jury failed to attach the felony-murder specification form to their aggravated murder verdict when determining Pitcher’s fate, which meant that he

15. *Id.*

16. Webb, *supra* note 1.

17. See Gross, *supra* note 12, at 1161 (“[General Superior Maureen McCarthy] and [Social Justice Coordinator Beverly LoGrasso] talked [to the prosecutors] about Joanne Marie’s life, her commitment to nonviolence, and how the killing of this man would be against everything she ever stood for.”).

18. *Id.* at 1162.

19. Eleanor Mallet, *Sisters Remember One of Their Own*, PLAIN DEALER, Mar. 5, 1996.

20. U.B. Staff and Wire Reports, *Ursuline Community Won’t Support Death Penalty for Nun’s Accused Killer* (on file with author).

21. Gross, *supra* note 12, at 1161.

22. *Id.*

23. *Id.* at 1162–63.

was no longer eligible to receive the death penalty.²⁴ It was said that the jury misunderstood the form and believed that their aggravated murder verdict alone would allow Pitcher to get the death penalty.²⁵ Daniel Pitcher was sentenced to “fifty years to life, the maximum sentence on each count, to be served consecutively.”²⁶

Although the Sisters’ intervention may have helped save Pitcher from the criminal justice system’s ultimate punishment, their statements’ effect is the exception, not the rule. This Note explores the role victims’ statements play, generally, in death penalty cases. Part I of this Note will outline the historical treatment of the death penalty as the ultimate punishment by the Supreme Court and will explore the justifications for the Court’s continual limitations imposed on the penalty.

Part II will examine the relationship between the movement for increasing victim’s roles in the criminal justice system and the evolution of admissibility of a Victim Impact Statement (“VIS”) in capital cases leading up to the current ruling in *Bosse v. Oklahoma*.²⁷

Part III will examine the issues left by the Court in refusing to reconsider part of the holding in *Booth v. Maryland*²⁸ when deciding *Bosse*. This will include questioning the constitutionality of VISs’ admissibility, examining the current rule in light of the Court’s historic treatment of death as “different,” and will discuss the motivations of prosecutors in seeking the death penalty in contrast to the interests of the State.

Finally, Part IV will propose a new asymmetrical rule regarding the admissibility of VISs in capital cases, allowing the opinions of a victim’s family who opposes the death penalty to be heard and taken into account by juries during the sentencing phase, and will address criticisms of the proposed rule.

I. DEATH VS. “EVERYTHING ELSE”

Over the past few decades, the Supreme Court has taken significant steps to limit the use of the death penalty in the United States. The first of these steps came from the Court’s decision in *Furman v. Georgia*.²⁹ In *Furman*, the Court determined that each of the capital punishment statutes at issue violated both the Eighth and Fourteenth

24. *Id.* at 1163–64; *see also* Webb, *supra* note 1 (“In a sense, it is a procedural error. [The jurors] really didn’t do what they had intended to do.”).

25. Gross, *supra* note 12, at 1163.

26. *Id.* at 1164.

27. 137 S. Ct. 1 (2016).

28. 482 U.S. 496 (1987).

29. 408 U.S. 238 (1972).

Amendments by allowing the juries full discretion in imposing the death penalty, which in turn led to the possibility of arbitrary and discriminatory application.³⁰ As put by Justice Douglas: “Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.”³¹ Although the Court did not find the death penalty to be unconstitutional *per se*, the holding in *Furman* effectively abolished the death penalty across the country, as its decision nullified the capital punishment laws of thirty-nine states (and the District of Columbia) out of the forty that allowed the death penalty at that time.³²

The *Furman* decision was by no means a united one: all nine of the Justices wrote separate opinions.³³ Throughout the individual opinions, though, many of the Justices reiterated a common idea: death is different. As stated by Justice Stewart,

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.³⁴

This rationale gives an idea of why the Court has continued to limit the applicability of the death penalty. After *Furman* was decided, states reformed their capital punishment statutes to eliminate any unconstitutionally arbitrary application, thus “reinstating” the death penalty that had been effectively eliminated.³⁵ The Supreme Court clarified the constitutionally permissible ways of imposing the death

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30. *Id.* at 256–57, 305–06, 310, 314, 371 (Douglas, J., Brennan, J., Stewart, J., White, J., Marshall J., each concurring separately); Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 U. RICH. L. REV. 693, 702–03 (2015).
31. *Furman*, 408 U.S. at 253 (Douglas, J., concurring).
32. *Id.* at 417 n.2 (Powell, J., dissenting). The lone remaining state was Rhode Island, whose capital statute was mandatory for murder by a life term prisoner. *Id.* The question of the constitutionality of mandatory capital punishment statutes remained undecided. *Id.* at 257 (Douglas, J., concurring).
33. *Id.* at 240.
34. *Id.* at 306 (Stewart, J., concurring); *see also id.* at 291 (Brennan, J., concurring) (“In comparison to all other punishments today . . . the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.”); *id.* at 315 (Marshall, J., concurring) (“The question . . . is whether capital punishment is ‘a punishment no longer consistent with our own self-respect.’”) (citation omitted).
35. Malik & Holdsworth, *supra* note 30, at 703.

penalty in 1976 in *Gregg v. Georgia*³⁶ and *Woodson v. North Carolina*.³⁷ After Georgia's death penalty statute was found unconstitutional in *Furman*, Georgia amended its statute to no longer allow arbitrary imposition of the death penalty but narrowed the class of murderers eligible for the death penalty by requiring the jury to find one of ten statutory aggravating circumstances to exist beyond a reasonable doubt before a death sentence could be imposed.³⁸ The Court upheld the new statute, stating that with these revisions, "[n]o longer should there be 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'"³⁹

After the *Furman* decision, and with the issue of the constitutionality of a mandatory capital punishment statute still undecided,⁴⁰ the North Carolina General Assembly enacted a statute that remained essentially the same as the previous death penalty statute held unconstitutional by *Furman*. The North Carolina statute severed the jury's discretionary authority to apply the death penalty and instead made the death penalty mandatory for all first-degree murder convictions.⁴¹ The Supreme Court held that statute unconstitutional for a number of reasons.⁴² The first reason was that the mandatory statute "depart[ed] markedly from contemporary standards respecting the imposition of the punishment of death and thus [could not] be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.'"⁴³ The Court pointed to the facts that "mandatory death penalty statutes had been renounced by American juries and legislatures"⁴⁴ and that even those states that retained the death penalty after *Furman* did so in a way that was "consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing."⁴⁵

The Court's second rationale for holding the statute unconstitutional was "[the statute's] failure to provide a constitutionally tolerable response to *Furman's* rejection of unbridled

36. 428 U.S. 153 (1976).

37. 428 U.S. 280 (1976).

38. *Gregg*, 428 U.S. at 196–97 (plurality opinion).

39. *Id.* at 198 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

40. *See supra* note 32 and accompanying text.

41. *Woodson*, 428 U.S. at 285–86.

42. *Id.* at 305 (citation omitted).

43. *Id.* at 301 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

44. *Id.* at 298.

45. *Id.*

jury discretion in the imposition of capital sentences.”⁴⁶ Although the *Furman* Court made it clear that the decision did not hold mandatory death penalty statutes unconstitutional,⁴⁷ the Court in *Woodson* explicitly did so. *Woodson* stated that since the North Carolina mandatory death penalty statute provided “no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die,”⁴⁸ the statute was inconsistent with the holding of *Furman* because it did “not fulfill *Furman*’s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.”⁴⁹

The Court identified a third reason to hold the statute unconstitutional by reiterating the themes that were held by the Justices in *Furman*: death is different. “In *Furman*, members of the Court acknowledge what cannot fairly be denied—that death is a punishment different from all other sanctions in kind rather than degree.”⁵⁰ The Court reasoned that a statute that did not allow for the consideration of each defendant’s character and record before imposing the death penalty “treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”⁵¹

Two years after *Woodson* was decided, the Court returned to the issue of individualized considerations in capital sentencing in *Lockett v. Ohio*⁵² to determine what mitigating circumstances the sentencing authority must be allowed to consider when deciding whether or not to impose the death penalty. Ohio’s death penalty statute required that once a guilty verdict of aggravated murder was returned, the trial judge was obligated to impose the death penalty unless he found that one of three statutory mitigating circumstances was present.⁵³ After

46. *Id.* at 302.

47. *See supra* note 32 and accompanying text.

48. *Woodson*, 428 U.S. at 303.

49. *Id.*

50. *Id.* at 303–04 (first citing *Furman v. Georgia*, 408 U.S. 238, 286–91 (1971) (Brennan, J., concurring); and then citing *Furman*, 408 U.S. at 306 (Stewart, J., concurring)).

51. *Woodson*, 428 U.S. at 304.

52. 438 U.S. 586 (1978).

53. *Id.* at 593–94. The statute required a death sentence unless, after “considering the nature and circumstances of the offense” and the defendant’s “history, character, or condition,” the trial judge found beyond a preponderance of the evidence that “(1) the victim had induced or facilitated the offense, (2) it was unlikely that [the defendant] would

consideration, the trial judge said that he “had ‘no alternative, whether [he] like[d] the law or not’ but to impose the death penalty.”⁵⁴ The Court determined that “given that the imposition of death by public authority is so profoundly different from all other penalties,”⁵⁵ an individualized determination is essential in capital cases, and that during that determination, the Eighth and Fourteenth Amendments “require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”⁵⁶

The death penalty’s profound difference from other punishments has additional Eighth Amendment implications. The Court has held that the Eighth Amendment precludes sentencers from imposing the death penalty on either those who are mentally retarded⁵⁷ or those who were under the age of eighteen when they committed their crimes.⁵⁸ One justification for the Court’s consistent limitations on the scope of the death penalty is the theme repeated since *Furman*: death truly is different.

II. EVOLUTION OF THE VIS

The original idea behind our criminal justice system was that the State, acting on behalf of the victim of a crime, would fairly measure and impose punishment on the accused, in order to avoid any unfair retribution based on revenge.⁵⁹ Beginning in the early 1970s, however, advocates began to campaign for increased roles for victims in the criminal justice system.⁶⁰ One way victims’ rights were advocated was through the use of VISs, which are accounts by the victim or victim’s

have committed the offense but for the fact that she ‘was under duress, coercion, or strong provocation,’ or (3) the offense was ‘primarily the product of [the defendant’s] psychosis or mental deficiency.’” *Id.* at 593–94 (quoting OHIO REV. CODE ANN. §§ 2929.03–2929.04(B) (LexisNexis 1975)).

54. *Id.* at 594 (citation omitted).

55. *Id.* at 605.

56. *Id.* at 604.

57. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

58. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

59. Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 143 (1999).

60. *Id.* at 144.

family⁶¹ of the physical, psychological, and financial harm caused by the accused's actions.⁶² For most of the 1980s, the majority of states allowed VISs to be introduced at sentencing.⁶³

That changed, however, in 1987, when the Supreme Court held that the introduction of a VIS at the sentencing phase of a capital murder trial violated the Eighth Amendment.⁶⁴ In *Booth v. Maryland*,⁶⁵ both of the accused were found guilty of the first-degree murders of Irvin Bronstein, age seventy-eight, and his wife Rose, age seventy-five, along with two counts of robbery and conspiracy to commit robbery.⁶⁶ Maryland's statute at the time required that in all felony cases a VIS had to be included to be read to the jury at sentencing.⁶⁷ The VIS introduced at sentencing in *Booth* was based on the Bronsteins' family's comments on how much the Bronsteins would be missed and the emotional problems the family faced as a result of the crime.⁶⁸ The family went on to detail how the deaths had ruined a family wedding,

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61. "Victim's family" is used throughout this Note to represent those to whom victims' rights are extended through applicable state law; that extension beyond the victim's family—or a limitation to *only* the victim's family—is not uniform. For examples of states that have both the death penalty and state laws extending victim's rights, see ALA. CODE § 15-23-60 (1975), ARIZ. REV. STAT. ANN. § 13-4401 (2012), ARK. CODE ANN. § 16-90-1101 (West 2017), CAL. PENAL CODE § 679.02 (West 2012), COLO. REV. STAT. § 24-4.1-302 (2017), FLA. STAT. ANN. CONST. art. 1 § 16 (West 1968), GA. CODE ANN. § 17-17-3(11) (2013), IDAHO CODE § 19-5304(1)(e) (2017), IND. CODE § 35-40-13-2 (Supp. 1999 & 2004), KAN. STAT. ANN. § 74-7333 (West 1989), KY. REV. STAT. ANN. § 421.500 (West 2013), LA. STAT. ANN. § 46:1842 (2010), MISS. CODE ANN. § 99-43-3 (172), MO. ANN. STAT. § 595.200 (West 1986), MONT. CODE ANN. § 46-24-106 (2001), NEB. REV. STAT. § 29-119 (2016), NEV. REV. STAT. § 176.015 (2017), N.H. REV. STAT. ANN. § 21-M:8-k (1955 & supp. 2018), N.C. GEN. STAT. § 15A-830 (2017), OHIO REV. CODE ANN. § 2930.02 (West 1999), OKLA. STAT. tit. 21 § 142.3 (supp. 1985 & 2018), OR. CONST. art. 1 § 42; 18 PA. STAT. AND CONS. STAT. ANN. § 11.103 (West 1998), S.C. CODE ANN. § 16-3-1510 (2003), S.D. CODIFIED LAWS § 23A-28C-4 (2004 & supp. 2010), TENN. CODE ANN. § 40-38-203 (2014 & supp. VIIC 2018), TEX. CODE CRIM. PROC. ANN. art. 56.01 (West 2013), UTAH CODE ANN. § 77-38-2 (West 1994), VA. CODE ANN. § 19.2-11.01 (2015 & supp. 2018), WASH. REV. CODE ANN. § 7.69.020 (LexisNexis 2017), WYO. STAT. ANN. § 7-21-101 (2017).
62. David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35, 50 (1989).
63. *Id.* at 51.
64. *Booth v. Maryland*, 482 U.S. 496, 509 (1987).
65. 482 U.S. 496 (1987).
66. *Id.* at 497–98.
67. *Id.* at 498–99.
68. *Id.* at 499.

how the Bronsteins' granddaughter had sought counseling but eventually quit because "no one could help her," and the Bronsteins' daughter added that she could not forgive the murderers and that "such a person could '[n]ever be rehabilitated.'"⁶⁹ The defense counsel moved to suppress the VIS, arguing that it was "irrelevant and unduly inflammatory, and that therefore its use in a capital case violated the Eighth Amendment."⁷⁰ The Court noted that the VIS in this case contained two types of information for the jury: (1) "the personal characteristics of the victims and the emotional impact of the crimes on the family,"⁷¹ and (2) the family's "opinions and characterizations of the crimes and the defendant."⁷² As for the first category of VIS, the Court agreed with the defense that descriptions of the harm to the family and the characteristics of the victim were irrelevant in a capital sentencing hearing. Citing their decision in *Woodson*, the Court reiterated that when deciding whether or not to impose the death penalty, "the jury is required to focus on the defendant as a 'uniquely individual human bein[g].'"⁷³ By allowing a VIS of this type to be considered at sentencing, the Court was afraid that the focus would turn from the defendant to the victim's character and the emotional consequences that the crime had on the victim's family.⁷⁴ Additionally, by allowing these characterizations of the victim, the Court was concerned that once the defendant had a chance to rebut this evidence, the sentencing may turn into a "mini trial" on the victim's character, which could distract the jury from their ultimate sentencing goals—"determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime."⁷⁵ Turning to the second category of VIS offered in the case, the Court concluded that this type of information "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."⁷⁶ Despite breaking down the VIS into two distinct categories, the Court ultimately held that the introduction of *any* VIS at the sentencing phase of a capital murder trial was a violation of the Eighth Amendment.⁷⁷

69. *Id.* at 500 (citation omitted).

70. *Id.* at 500–01.

71. *Id.* at 502.

72. *Id.*

73. *Id.* at 504 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

74. *Id.*

75. *Id.* at 507.

76. *Id.* at 508.

77. *Id.* at 509.

The Court affirmed this ruling in *South Carolina v. Gathers*,⁷⁸ holding that a prosecutor's comments on the personal qualities of a victim, which the prosecutor inferred from a religious tract and a voter registration card that were in the victim's possession, and "[a]llowing the jury to rely on [this information] . . . could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."⁷⁹

Two years later, in *Payne v. Tennessee*,⁸⁰ the Court clarified whether *Booth* and *Gathers* barred all VISs in all situations in capital cases. In *Payne*, the accused was convicted of the first-degree murders of Charisse Christopher and her two-year-old daughter, Lacie, and of first-degree assault with intent to murder against Charisse's three-year-old son, Nicholas, who survived the brutal knife attack on the family.⁸¹ Against the rulings in *Booth* and *Gathers*, the State called Nicholas's grandmother during sentencing, who testified how much Nicholas missed his mother and his baby sister.⁸² Additionally, the prosecutor, while arguing for the death penalty, commented on the continuing effects that Nicholas experienced from the attack and on the effects of the crimes upon the victims' family.⁸³ The Court overruled *Gathers* and *Booth* in part, holding that the Eighth Amendment does not create a *per se* ban on the introduction of a VIS during the sentencing phase in a capital case.⁸⁴ Insofar as the overturning the holding in *Booth*, the Court specified that this ruling overturned the inadmissibility of the first category of VIS distinguished in the case—the "evidence and argument relating to the victim and the impact of the victim's death on the victim's family," but noted that no evidence relating to the second category of VIS was introduced in this case, thus *Booth* continued to hold that "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment."⁸⁵

78. 490 U.S. 805 (1989).

79. *Id.* at 808–11 (quoting *Booth v. Maryland*, 482 U.S. 496, 505 (1987)). The *Gathers* Court extended *Booth's* prohibition on victim impact evidence to comments made by a prosecutor, but the Court subsequently rejected and overturned this view in *Payne v. Tennessee*, 501 U.S. 808, 826–27 (1991).

80. 501 U.S. 808 (1991).

81. *Id.* at 811–12.

82. *Id.* at 814–16.

83. *Id.*

84. *Id.* at 827, 830.

85. *Id.* at 830 n.2.

In 2016, the Supreme Court further explained the relationship between *Payne* and *Booth* in *Bosse v. Oklahoma*.⁸⁶ A jury convicted Bosse of three counts of first-degree murder.⁸⁷ Bosse was sentenced to death after the State requested that three of the victim's family members recommend a sentence for the jury, and all three relatives recommended death.⁸⁸ The Oklahoma Court of Criminal Appeals held that *Payne* "implicitly overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence."⁸⁹ The Supreme Court reiterated that "[courts] remain[] bound by *Booth*'s prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban."⁹⁰

III. PROBLEMS LEFT FROM THE BAN ON VICTIMS' FAMILY MEMBERS' CHARACTERIZATIONS AND OPINIONS ABOUT THE CRIME

A. *Do All Admissions of These Types of VISs Violate the Eighth Amendment?*

Currently, *Booth* is still good law as far as the "prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence."⁹¹ The Court rationalized this bar by stating that the presentation of this information "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant," and would therefore violate the Eighth Amendment.⁹²

What the ruling in *Booth* fails to consider, though, is what should happen in the cases in which the victim's family requests that the accused should be spared the death penalty. The introduction of this type of VIS (an Opposition VIS) is currently still prohibited by *Booth*, but the prohibition is not justified in this case by the Court's fear of inflaming the jury when deciding whether or not to impose the death penalty. Certainly, statements from a victim's family requesting the death penalty could fall within the justification of the prohibition. In *Booth*, the relevant VIS included during sentencing were from the victims' daughter and son, with their son saying that the petitioner

86. 137 S. Ct. 1 (2016) (per curiam).

87. *Id.* at 2.

88. *Id.*

89. *Id.* (quoting *Conover v. State*, 933 P.2d 904, 920 (1997)).

90. *Id.*

91. *Id.*

92. *Booth v. Maryland*, 482 U.S. 496, 508–09 (1987).

should not get away with this crime and their daughter saying that she did not feel as if the petitioner could ever be rehabilitated.⁹³

These VISs no doubt violate the Eighth Amendment. As Justice Marshall stated in *Furman*, “the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.”⁹⁴ A vengeful opinion like the one presented in *Booth* from those impacted by a crime would likely have no insight as to whether or not the convicted could be rehabilitated, and this type of statement would only serve to inflame the jury and potentially sway jurors towards a harsher punishment based on emotion alone. As the Court stated in *Booth*, “the admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision-making we require in capital cases.”⁹⁵ A passionate plea from a victim’s family member to impose the death penalty would run the risk of the jury making their determination based on emotion rather than based on reason, which is exactly the contrary of what *Booth* requires.⁹⁶ But the Court also held that VISs encouraging the jury *not* to impose the death penalty because of either the victim’s or her family’s opposition to the death penalty is the same kind of “emotionally charged opinion” disallowed under *Booth*.⁹⁷

Additionally, a victim’s family convincing the jury that the victim was a better person than the “average victim” should not result in a harsher punishment than would be imposed for the murder of said “average victim.” The Court in *Payne* made clear, though, that “victim impact evidence is not offered to encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not.”⁹⁸

B. A Prohibition on Opposition VISs is Inconsistent with the Ideals of Furman

In *Furman*, States argued in favor of the imposition of the death penalty by reasoning that “[t]he infliction of death . . . serves to manifest the community’s outrage at the commission of the crime.”⁹⁹ Without the admission of a VIS from a victim’s family requesting that the accused should be spared his life, the imposition of the death

93. *Id.* at 508.

94. *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring).

95. *Booth*, 482 U.S. at 508–09.

96. *Id.* at 508.

97. *See id.* at 508–09.

98. *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

99. *Furman v. Georgia*, 408 U.S. 238, 303 (1972) (Brennan, J., concurring).

penalty may do the exact opposite. Allowing the death penalty to be imposed when the victim's family holds the contrary opinion would allow the State to enforce "the ultimate sanction" beyond the scope of the original intent of the punishment.¹⁰⁰

Although the *Furman* Court's concern was the arbitrary and discriminatory imposition of the death penalty, Justice White stated that "the policy of vesting sentencing authority primarily in juries" was "a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence"¹⁰¹ A likely reason why the Court was concerned with mitigating the harshness of the law is reflected in the reoccurring theme that death is different.¹⁰² Justice Brennan added the notion that when a person is executed, "[it] is a way of saying, 'You are not fit for this world, take your chance elsewhere.'"¹⁰³ If the decision to impose the death sentence is vested in the jury truly to mitigate this kind of verdict using the judgment of the community, it follows that evidence of the community, and especially the victim herself, wishing for peace for the accused and the opposition of death should be admissible for the jury to make their determination.

Such evidence may have made a difference in Daniel Pitcher's case. There, the jury may have used the loss of Sister Joanne Marie—"a woman of justice, a woman of peace"¹⁰⁴—to justify taking Pitcher's life. But if the jury had heard the opinions of the Sisters against the death penalty at sentencing, the jury may have viewed their decision in a different way: their sentence would simply mirror Pitcher's crime. Through the death penalty, the jury would be taking another person's life in the name of the crime's justice-seeking, peaceful victim. In this circumstance, an Opposition VIS being admissible at sentencing could have had an effect on the jurors while making their decision; although, as a result of the jury's confusion, Pitcher did not receive the death penalty even though the jury intended to impose it.¹⁰⁵ In other cases, though, a real difference may have been made if the victims and victims' family members were allowed to present their opinions to the jury that they did not want, or the victim would not have wanted, the death penalty.

100. *Id.* at 286.

101. *Id.* at 313 (White, J., concurring).

102. *See supra* note 34 and accompanying text.

103. *Furman*, 408 U.S. at 290 (Marshall, J., concurring).

104. *Friends Seek Meaning*, *supra* note 6.

105. *See supra* INTRODUCTION.

C. *Motivations of the Prosecutors*

In criminal cases, the State acts in the name of the victim in order to avoid revenge and achieve a fair punishment.¹⁰⁶ At trial, though, the State is represented by an individual—a prosecutor “whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”¹⁰⁷ At the same time, a prosecutor balances his personal interests, such as winning an election or reelection for his position.¹⁰⁸ Although a violation of a prosecutor’s ethical standards,¹⁰⁹ in many instances, a prosecutor’s motivation to pursue the death penalty is at least in part a political one.¹¹⁰ In *Payne*, the Court stated, “As a general matter . . . victim impact evidence is not offered to encourage comparative judgments . . . for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not.”¹¹¹ But occasionally, this same reasoning is what motivates a prosecutor to decide whether or not to seek the death penalty.¹¹²

It is not inconceivable, for instance, that the prosecutor’s decision to pursue the death penalty in Pitcher’s case was especially influenced

106. Logan, *Through the Past*, *supra* note 59, at 143.

107. *Berger v. United States*, 295 U.S. 78, 88 (1935).

108. Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates’ Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 946 (1994).

109. See AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6 (4th ed. 2015) (“A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion.”); *id.* at § 3-1.7(f) (“The prosecutor should not permit the prosecutor’s professional judgment or obligations to be affected by the prosecutor’s . . . political . . . or other interests or relationships.”).

110. See, e.g., Gross, *supra* note 12, at 1161 (“[The prosecutors] gave us an article about death penalty politics and how prosecutors across the country are being elected and rejected based on their stance on capital punishment.”); Thomas Johnson, *Death Penalty on Trial: When Prosecutors Seek the Death Penalty*, 22 AM. J. CRIM. L. 245, 280 (1994) (“The decision [for a prosecutor to seek the death penalty] will be a political one, or it will have a political context which may be dictated by promises the prosecutor made during an election campaign or by previous cases.”).

111. *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

112. See Johnson, *supra* note 110, at 280 (stating that the media’s coverage of a case will have a “critical impact” on whether or not a prosecutor decides to seek the death penalty). “Significant media attention given to the murder of a young child of an affluent White family will trigger a very different reaction from a prosecutor than a case that gets little media attention and involves a victim from a poorer community.” *Id.*

by the fact that Sister Joanne Marie was a nun. If this were the case, one way to combat the idea that a nun's murderer deserves the death penalty over a murderer of anyone else would be for the Sisters themselves to be able to state their opinions that they, and Sister Joanne Marie, believe the exact opposite.¹¹³ In circumstances where the prosecutor is pressured politically and by the media to consider cases this way, perhaps the only way to avoid the "comparative judgments" that the media seems to instinctively make is to introduce the type of VIS that *Payne* and *Bosse* left untouched.¹¹⁴

Justice Scalia, in his dissenting opinion in *Booth*, opposed the prohibition of all VISs because it did not make sense to allow only those on one side of the issue to be heard:

To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted. If that penalty is constitutional, as we have repeatedly said it is, it seems to me not remotely unconstitutional to permit both the pros and the cons in the particular case to be heard.¹¹⁵

Following this line of thinking, a prohibition on Opposition VISs fails the victim in a capital case. Although in a criminal case the State acts in the name of a victim, the interests represented are to be those of the State.¹¹⁶ By prohibiting an Opposition VIS, the victim's point of view is "muted" not against the defendant's, but against the prosecutor's. While the goal of our criminal justice system is for "justice [to] be done,"¹¹⁷ that goal is hindered by the political motivations of a prosecutor in deciding to seek the death penalty. While admitting an Opposition VIS at sentencing would not cure the defects in the

113. *See supra* INTRODUCTION. While it is not uncommon for prosecutors to consult with families of victims when determining whether or not to pursue the death penalty, in such situations where the prosecutor is pressured to seek the death penalty and the victim's family opposes death, the majority of prosecutors reject the family's conflicting viewpoint in making the ultimate decision. Wayne A. Logan, *Victims, Survivors, and the Decision to Seek and Impose Death, in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* 161, 171 n.8 and accompanying text (James R. Acker & David R. Karp eds., 2006).

114. *See Payne*, 501 U.S. at 823.

115. *Booth v. Maryland*, 428 U.S. 496, 520–21 (1987) (Scalia, J., dissenting).

116. *See supra* notes 106 and accompanying text.

117. *Berger v. United States*, 295 U.S. 78, 88 (1935).

relationship between a prosecutor's representation of the State's interests and political and media pressures, it would aid the ultimate goal of justice by balancing any underlying political pressures to pursue the death penalty against the opinions of those who were directly affected by the crime—the victim's family.

IV. FIXING THE PROBLEMS LEFT BY *BOOTH*, *PAYNE*, AND *BOSSE*

A. *Proposed Solution*

The problems left behind by the *Booth–Payne–Bosse* prohibition on “characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence”¹¹⁸ could be solved by the Court adopting an asymmetrical approach that creates two distinct categories for VISs that support the death penalty and those that oppose it (“Support VISs” and “Opposition VISs,” respectively). The Court should create a rule that allows Opposition VISs to be introduced at sentencing yet still bans the use of Support VISs. Allowing this testimony at sentencing would not violate the Eighth Amendment, because, if anything, the evidence would encourage the exact opposite of “cruel and unusual punishment[],”¹¹⁹ would support the central theme that has been repeated throughout many of the Court's death penalty decisions that death is a fundamentally different punishment,¹²⁰ and could counter underlying political pressures motivating a prosecutor to pursue the death penalty by letting the victim's family be heard.¹²¹ Regarding cases in which a prosecutor feels political or media pressure to pursue the death penalty in a case where they otherwise may not, a rule similar to this one would protect against a determination that one person deserves the death penalty for the exact same crime as another, simply because of who the victim was and how much the media cares about her death.¹²²

Opposition VISs could also be introduced at sentencing if the Court reconsidered the definition of “mitigating circumstances” addressed in *Lockett*, expanding that definition to include these types of statements. *Lockett* requires that the sentencing authority in a capital case “not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than

118. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam).

119. U.S. CONST. amend. VIII; *see discussion supra* Section III.A.

120. *See discussion supra* Section III.B.

121. *See discussion supra* Section III.C.

122. *See discussion supra* Section III.C.

death.”¹²³ A plain reading of the holding could include Opposition VISs as “any circumstance of the offense” if they were offered by the defendant during sentencing, though subsequent case law has interpreted this requirement more narrowly.¹²⁴ Although VISs in general usually do not provide any type of insight relevant to the defendant’s culpability, allowing Opposition VISs on behalf of the defendant would allow the victim’s family’s opinions to be considered as a mitigating factor to be balanced against any aggravating factors, and it would still remain up to the sentencing authority to determine how much weight to give the Opposition VIS.¹²⁵

B. Criticisms of the Proposed Rule

i. Fairness to Those in Support of the Death Penalty

Critics of the proposed rule to allow Opposition VISs may argue that, on its face, the rule still does not allow all victims’ families to be heard.¹²⁶ While a family’s opinion against the death penalty would be admissible, one requesting the death penalty would remain prohibited. An asymmetrical rule like this one, though, can be justified by the fact that one of these opinions still violates the Eighth Amendment, while an Opposition VIS does not.¹²⁷ The rule gains more support because it follows the ideals of *Furman* and the Supreme Court’s treatment of the death penalty since the *Furman* decision, that death is different, and an asymmetrical rule like this would further this moral by continuing to limit the number of defendants who are sentenced to death.¹²⁸

Additionally, this rule is not as fundamentally unfair as it first appears because in a capital case where a victim’s family supports the death penalty, their position is already being advocated for by the

123. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

124. *See Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (recognizing that all mitigating factors must be considered so that the sentencer could focus “on the characteristics of the person who committed the crime”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 197 (1976)). “‘Mitigating circumstances’ are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.” *Mitigating Circumstances*, BLACK’S LAW DICTIONARY (2d ed. 1910).

125. *See Eddings*, 455 U.S. at 114–15 (“The sentencer . . . may determine the weight to be given relevant mitigating evidence.”).

126. *See Logan*, *supra* note 113, at 172 (arguing that an asymmetrical rule values the view of some survivors (or in this case, family members) over others and ignores the wishes of those most directly affected by a crime only when it suits its own purpose).

127. *See* discussion *supra* Section III.A.

128. *See* discussion *supra* Section III.B.

prosecutor.¹²⁹ In this situation, there is already someone who is speaking not explicitly *for* those who support it, but *with* them. By allowing an Opposition VIS, in instances where there are multiple victims or family members with different opinions, while those supporting the death penalty's position is being advocated by the prosecutor, those opposing the death penalty can make their differing opinions heard to the sentencer as well.

In multiple-homicide cases, for instance, there may even be differing opinions amongst the various victims' families. In January 2017, Dylann Roof was sentenced to death after the racially motivated murders of nine African-Americans in their church in Charleston, South Carolina.¹³⁰ The brother of Cynthia Hurd, one of Roof's victims, stated that he was satisfied with the death penalty decision, saying: "How do you justify saving one life when you took nine, and in such a brutal fashion?"¹³¹ Although justice seemed to be served in the eyes of one of those impacted most by the killings, this was not the consensual viewpoint of all of the victims' family members.¹³² Esther Lance, daughter of victim Ethel Lee Lance, admitted that she wanted Roof to die at first, but changed her mind after realizing that it was not what her mother would have wanted.¹³³ Esther was certainly not the first loved one of a murder victim that opposed the death penalty for the murderer.¹³⁴

129. See discussion *supra* Section III.C.

130. Alan Binder & Kevin Sack, *Dylann Roof Is Sentenced to Death in Charleston Church Massacre*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/dylann-roof-trial-charleston.html> [<https://perma.cc/89FV-9BYT>].

131. *Id.*

132. Elliott C. McLaughlin, *They May Not Forgive Dylann Roof, But They Don't Want Him Dead*, CNN (Jan. 12, 2017, 5:03 PM), <http://www.cnn.com/2017/01/12/us/dylann-roof-victims-oppose-death-penalty/index.html> [<https://perma.cc/9JZB-R9JB>].

133. *Id.*

134. See, e.g., Tammy Vigil, *Families of Murder Victims Rally Against Death Penalty*, KDVR (Jan. 8, 2014, 7:40 PM), <http://kdvr.com/2014/01/08/families-of-murder-victims-rally-against-death-penalty/> [<https://perma.cc/DE65-6PG6>] (detailing three families protesting together against the death penalty for the murderers of their loved ones); *Families of Murder Victims Speak out Against the Death Penalty*, ACLU NORTHERN CAL., <https://www.aclunc.org/article/families-murder-victims-speak-out-against-death-penalty> [<https://perma.cc/H8SV-5KZV>] (last visited Mar. 14, 2018) (describing murder victims' families coming together to form a publication entitled "Voices from California Crime Victims for Alternatives to the Death Penalty"); Nicole Flatow, *Why These Victims' Parents Don't Want the Death Penalty for the Boston Bomber*, THINKPROGRESS (Apr. 17, 2015, 5:41 PM), <https://thinkprogress.org/why-these-victims-parents-dont-want-the-death-penalty-for-the-boston-bomber-c2e66f153092/> [<https://perma.cc/89FV-9BYT>].

ii. The State Is the Other Party in a Criminal Case, Not the Victim

Another potential criticism of the proposed rule is that in criminal cases, the State is the party that brings suit against the defendant on behalf of the victim; it is not itself a victim. Thus, a VIS opposing the death penalty could undermine the prosecutor's determination of the appropriate sentence. Although the State is the other party, it is not the State's life that was taken, nor, in most cases, does the State have to live with the emotional consequences. Since the victim's life was taken and the victim's families are the ones who must deal with the emotional aftermath, it makes sense that, in cases not motivated by revenge or hatred, the victims and their families should have their opinions heard about what happens to a person that committed a crime against them, especially when factoring in the point that many times the prosecutor's decision to pursue the death penalty has been influenced by political and media pressures.¹³⁵ Although the victim is not the defendant in the party, the law has recognized the right for victims to be heard and most of the time that right extends to family members in death penalty cases.¹³⁶

iii. Would Allowing Opposition VISs Risk the Arbitrary Sentencing that *Furman* Prohibits?

Allowing Opposition VISs to be considered at sentencing potentially raises the same risk that the Court in *Furman* guarded against: allowing a sentencer to decide whether or not to impose the death penalty based on matters other than the evidence.¹³⁷ But this concern is based on too broad an interpretation of the Court's holding in *Furman*. In *Furman*, Justice Douglas indicated that the death penalty would violate the Eighth Amendment as being "'unusual' if it discriminates against [a defendant] by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."¹³⁸ He continued by stating that the death penalty statutes at issue were unconstitutional

perma.cc/6CCL-FL3L]; *Some Oklahoma City Bombing Families Fight for McVeigh's Life*, CNN (May 4, 2001, 11:21 AM), <http://www.cnn.com/2001/US/05/04/mcveigh.families/index.html> [<https://perma.cc/X8UG-4MJA>].

135. See discussion *supra* Section III.C.

136. See Logan, *supra* note 59, at 153–54.

137. See Logan, *supra* note 113, at 169.

138. *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); see also *id.* at 364–66 (Marshall, J., concurring) (noting that statistics at the time of the decision showed evidence of racial discrimination in executions, along with disproportionate imposition of the death penalty for men, the poor, the ignorant, and the underprivileged members of society).

because “no standards govern[ed] the selection of the penalty. People live or die, dependent on the whim of one man or of 12.”¹³⁹ The arbitrariness at issue in *Furman* related to the potential of discrimination. This is further supported by the holdings in *Lockett* and *Eddings*, requiring that sentencers take into consideration “as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”¹⁴⁰ That type of individualized sentencing determination, combined with the Court’s continual limitations on the death penalty’s application, demonstrates the Court’s recognition that death is an inherently different kind of punishment than other criminal punishments. As such, all relevant factors should be considered as to whether death is an appropriate punishment in each particular case.

iv. Motivations for Opposing the Death Penalty

A final criticism is the fact that some VIS that oppose the death penalty may be simply for the fact that the family members want their loved one’s killer to have to think about what he did and not get the “easy way out.” Although there has been long-standing debate about whether life in prison or capital punishment is a more severe sanction, the Court has continually held that death is the ultimate punishment.¹⁴¹ If a victim’s family requests a sentence lesser than death, with the intention that this is the more severe sentence, then there is no violation of the Eighth Amendment because of the Court’s holding that life in prison is not a crueler punishment than the death penalty.¹⁴²

139. *Id.* at 253 (Douglas, J., concurring).

140. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

141. *See Furman*, 408 U.S. at 345–46 (Marshall, J., concurring) (expressing his view that death is “the ultimate sanction”).

142. *See id.* at 289 (Brennan, J., concurring) (“The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.”). Justice Brennan later compares the death penalty with a life prison sentence, noting:

The contrast [of the death penalty] with the plight of a person punished by imprisonment is evident. An individual in prison does not lose “the right to have rights.” A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a “person” for purposes of due process of law and the equal protection of the laws His punishment is not irrevocable An executed person has indeed “lost the right to have rights.”

Id. at 290.

V. CONCLUSION

States have ordinarily considered their own interests when deciding whether to seek the death penalty. Because of the holdings in *Booth*, *Payne*, and *Bosse*, though, the family members of victims in many circumstances have no legal way of expressing to the jury any reasons why they would not want the death penalty to be implemented. In this situation, the State's motivations are the only thing considered, and those who were impacted most by the crime and have to continue to live with the aftermath are not given a chance to share their opinions on what should happen to the person who changed their lives so drastically. By reconsidering the question of Opposition VIS admissibility in capital sentencing, the Court should create a rule allowing those who could submit Opposition VISs do so for the jury's consideration. The rule need not be one barring the possibility of the death penalty if the family members do not want it but simply one that allows for a statement for the jury to take into account in their sentencing determination. Although it may seem one-sided that a victim's family would potentially only be able to be heard if they did not support the death penalty, and not those who did, those supporting the death penalty have their position advocated for by the prosecutor. As many prosecutors are influenced by outside political and media pressures to seek the death penalty, an asymmetrical rule allowing Opposition VISs would not solve this problem but could potentially counterbalance the effects. The most support for the proposed rule comes from the Supreme Court themselves, mentioned in *Furman* and in numerous cases since then, that death is a fundamentally different punishment and should be treated as such.¹⁴³

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143. See discussion *supra* Section III.B.

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