

1999

What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings

Rachel King
1@1.com

Katherine Norgard
2@2.com

Follow this and additional works at: <http://ir.law.fsu.edu/lr>

 Part of the [Law Commons](#)

Recommended Citation

Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 Fla. St. U. L. Rev. 1119 (2017) .
<http://ir.law.fsu.edu/lr/vol26/iss4/10>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

FLORIDA STATE UNIVERSITY LAW REVIEW



WHAT ABOUT OUR FAMILIES?
USING THE IMPACT ON DEATH ROW DEFENDANTS' FAMILY
MEMBERS AS A MITIGATING FACTOR IN
DEATH PENALTY SENTENCING HEARINGS

Rachel King & Katherine Norgard

VOLUME 26

SUMMER 1999

NUMBER 4

Recommended citation: Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 FLA. ST. U. L. REV. 1119 (1999).

WHAT ABOUT OUR FAMILIES? USING THE IMPACT ON DEATH ROW DEFENDANTS' FAMILY MEMBERS AS A MITIGATING FACTOR IN DEATH PENALTY SENTENCING HEARINGS

RACHEL KING* AND KATHERINE NORGARD**

I. INTRODUCTION.....	1121
II. SURVEY METHOD.....	1126
III. THE DEATH PENALTY IN THE UNITED STATES	1127
A. <i>Historical Overview of the Death Penalty</i>	1127
B. <i>Post-Furman Evolution of Death Penalty Jurisprudence</i>	1130
C. <i>The Political and Legal Evolution of the Use of Victim Impact Statements in Capital Cases</i>	1133
D. <i>The Impact of the Death Penalty on the Defendant's Family</i>	1138
1. <i>Stigmatization</i>	1138
2. <i>Social Isolation</i>	1139
3. <i>Depression and Chronic Grief</i>	1141
(a) <i>Depression</i>	1141
(b) <i>Chronic Grief</i>	1141
IV. LEGAL PRECEDENT IN SUPPORT OF ADMITTING DEFENDANT FAMILY IMPACT EVIDENCE AS A MITIGATING FACTOR IN CAPITAL CASES	1143
A. <i>Mitigating Evidence: What the Eighth Amendment Requires</i>	1143
B. <i>Legal Precedent from State Courts</i>	1147
1. <i>Oregon</i>	1147
2. <i>California</i>	1150
3. <i>Arizona</i>	1151
4. <i>One Family's Experience</i>	1152
C. <i>Defendant Family Impact Evidence Is Relevant and Admissible in Noncapital Sentencing Hearings</i>	1152
V. POLICY ARGUMENTS SUPPORTING THE USE OF DEFENDANT FAMILY IMPACT EVIDENCE.....	1155
A. <i>Family Impact Evidence Is Relevant to Traditional Sentencing Goals</i>	1155
B. <i>The Need to Balance the Bias from Victim Impact Evidence</i>	1161
C. <i>Victim Family Members Support Participation of Defendant Family Members at Sentencing</i>	1162
VI. A CASE IN POINT—HOW DEFENDANT FAMILY IMPACT EVIDENCE MAY HAVE SAVED THE LIFE OF A TEXAS MAN	1166
VII. KEEPING THE STATUS QUO OR SOMETHING DIFFERENT: CAN RESTORATIVE JUSTICE BE APPLIED IN DEATH PENALTY CASES?	1169
VIII. CONCLUSION	1173

* Legislative Counsel, American Civil Liberties Union, Washington, D.C., National Office; Honorable Abraham L. Freedman Fellow and Lecturer-in-Law, Temple University School of Law, 1996-98. A.B., Smith College, 1985; J.D., Northeastern University School of Law, 1990; LL.M., Temple University School of Law, 1998. I would like to thank the following people for their insightful comments and suggestions on earlier drafts: Richard Greenstein, James Shellenberger, Louis Natali, and Steven Hawkins. I would also like to thank my Temple Law School research assistants, Chuck Bowser and Rakesh Patel, and my ACLU intern, Angie Welbourne.

** Katherine Norgard is a practicing psychologist and adjunct professor at the University of Arizona at Tucson.

The courtroom was set up for a lynching, divided by race, the defendant's family (all black) on the right, the victim's family (all white) on the left. Court-appointed sheriff's deputies even protecting the victim's family. People don't consider us as individuals anymore, now we are the sisters and brothers of a murderer or a person who killed a white man. Father stopped taking his insulin after brother [was] put on death row, and he died a few months later. My sister was ten years old when it happened. Lost her brother and father at the same time. Yet our family has stuck together.

The press wanted to know if we were reared in the projects. Were we beaten? Were we drug addicts? During the trial, they treated us like we were all murderers. All of us feel *dead*, but we keep on breathing, dreading every day as the possible execution day.

—Martina Correia believes that her brother, Troy Anthony Davis, who is on death row in Georgia, is innocent.

I got a fast education in criminal justice. It was my first experience with anything like this. To the prosecution, the victim's family, we might as well have had the same disease, they wouldn't even get on the same elevator with me and my mother and my daughter. Course they set on one side behind the prosecution, I sat behind the defense. They treated us like we were dirt. When the jury came back with the verdict [for the death penalty,] the judge had warned against any outbursts, but somebody screamed, like the scream when someone makes a touchdown. I still wake up nights with the horrible nightmare, hearing that scream.

—Arlene Farris, whose son, Troy Dale Farris, is on death row in Texas for a murder she claims he did not commit.

Very bad. I mean, it was awful. It was something I wouldn't wish on my worst enemy. It was terrible. It was so negative. It was very clear that they weren't concerned about details, just the crime, not how it came about. How did it get from step one to step ten? They weren't interested in any of that. There were times when I felt like I would look in the mirror and ask if I did something wrong. They made me feel like we had lost our human citizenship, period. Yes everybody, the whole system.

—Pam Crawford, sister of Ed Horseley, Jr., a black man executed in Alabama for the kidnapping and killing of a fifteen-year-old white girl.

We testified at sentencing phase. It was so unnerving you can't even imagine. My mind stopped, brain shut down. I was trying to think, but I was furious. I remember that rage I kept wanting to scream, "If these people are victims, what are we?" We had to listen to the supposed victims and listen to why it was so horrible. I was enraged, that is the main thing I remember. Which was not a good thing. I wanted to scream at them. This is my son, he didn't kill anyone, but you don't care. You want someone else to suffer. That was the main thing. I have since got over that.

—Barbara Longworth, whose son, Richard Longworth, was sentenced to death for being an accomplice in the murder of a theater employee in South Carolina.

My experience with the court system couldn't have been more negative. I had always believed that trials were fair and folks were treated equally, but what I discovered is how political the system is. It depends a lot on the victims—who they are—and the defendant's attorney—how good he is and how much time he puts in, et cetera—and on the prosecutor's office—whether or not they decide to ask for the death penalty—and on and on.

I learned that there is a lot of pressure for judges to give a death penalty if they want to stay in the system and move up the judicial ladder. I learned that many defense attorneys are marginal at best. Public defenders and appointed attorneys may be overworked or incompetent.

I am appalled at how politicized and flawed the whole thing is. It turns my stomach to learn what happens to the average defendant and his family who may not have the educational or personal resources or support that we did to deal with the death penalty. You almost need to be a legal expert to understand the death penalty process because it is so complicated and multi-layered. Most people don't have any idea. And, before this, I was like the general public and had simplified the whole thing.

—Kathy Norgard, whose son was on death row after killing an elderly couple in Arizona.¹

I. INTRODUCTION

These are the voices of people who have, or have had, loved ones on death row in the United States, speaking about their experiences with the criminal justice system. Today the victims of violent crimes receive a great deal of political and media attention.² The "victims'

1. At a new sentencing hearing, Norgard's son received a life sentence and is no longer on death row.

2. The term "victim" is used here, as it is in most criminal justice statutes, to include either the victim of a crime or a family member representing the victim in the case of a homicide. Most state statutes that allow victim impact evidence in homicide cases interpret

rights movement” has made incredible strides in reshaping the criminal justice laws in most states.³ Many positive developments have come from the victims’ rights movement.⁴ Allowing victims to have input into the process can promote healing and help restore a sense of control over their lives.⁵ The extent of victim involvement varies from state to state. Some states allow victims to have input in each phase of the prosecution of a criminal case, from plea bargaining to sentencing.⁶ Some states, like Colorado, require that the prosecution consult with the victim.⁷

Unfortunately, the expanded rights of victims have come at the cost of restricted rights for criminal defendants.⁸ For example, allowing victims to participate in the criminal justice system may inject an element of emotionalism into the process. Defendants may be unable to get bail when judges listen to the wishes of victims hoping to keep the defendant incarcerated, and prosecutors may be unwilling to enter into plea agreements because of pressure from victims. While the authors believe that society has a responsibility to support and assist victims of crimes in receiving the help they need to heal from the tragedies they have suffered, the rights of victims must not come at the loss of defendants’ rights to dignity, fair treatment, and due process.

One area in which the increase in victims’ rights has had a profound impact is in the use of victim impact statements. Most states allow victims’ family members to give statements describing the losses they suffered as a result of violent crime.⁹ There are many reasons why the use of victim impact statements should not be allowed in death penalty cases. First, the details of what happened to a family as a result of the crime and their opinions about what should happen to a defendant are not legally relevant. When first asked to

the term “victim” in this manner. See, e.g., N.H. REV. STAT. ANN. § 651:4-a (1996) (providing rights to the “victim of the offense, or the victim’s next of kin if the victim has died”).

3. See Carrie L. Mulholland, Note, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MO. L. REV. 731, 734 (1995) (tracing the victims’ rights movement to the claims of the women’s rights movement that the criminal justice system mistreated rape victims).

4. For a more detailed description of the evolution of victims’ rights legislation, see Ashley Paige Dugger, Note, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375 (1996).

5. See Ellen Yaroshefsky, *Balancing Victim’s Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 141-42 (1990).

6. See *infra* note 84 and accompanying text.

7. See COLO. REV. STAT. § 24-4.1-302.5(1)(e) (1998) (granting victims the right to consult with the prosecution at any time after the defendant is charged, prior to any disposition of the case, or prior to any trial of the case).

8. See Alice Koskela, Casenote & Comment, *Victim’s Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 158 (1997).

9. See Mulholland, *supra* note 3, at 732.

rule on the constitutionality of victim impact statements, the United States Supreme Court in *Booth v. Maryland*¹⁰ noted:

[D]efendants rarely select their victims based on whether the murder will have an impact on anyone other than the person murdered. Allowing the jury to rely on a [victim impact statement] therefore 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.¹¹

Second, victim impact statements do not fulfill any of the traditional sentencing goals of deterrence, incapacitation, or rehabilitation, and are only marginally relevant in supporting the goal of retribution.¹²

The use of victim impact evidence sets up a hierarchy of victims.¹³ It results in the most articulate persons getting the "best" results. Not surprisingly, the victim's family members often feel pressure to speak persuasively in favor of killing the defendant. As Reverend Bernice King, daughter of Dr. Martin Luther King, Jr., describes, this process harms the victim's family by turning them into killers:

The need for revenge, and the anger that accompanies it, are sicknesses of the soul that ultimately destroy the one who harbors them.

... Not until I learned to love those who killed my relatives did I begin to heal the anger that was eating away at me inside. Anger festers, debilitates, cripples and paralyzes.¹⁴

Interestingly, for many victims' family members, the initial zeal to seek the death penalty often dissipates over time. Reverend King interviewed many victims' family members who initially supported the death penalty but eventually came to oppose it.¹⁵ Perhaps this

10. 482 U.S. 496 (1987).

11. *Id.* at 504-05 (footnote omitted).

12. See Dugger, *supra* note 4, at 399-400.

13. One commentator posits that a victim's interests are adversely affected by that victim's participation at sentencing.

For example, in Texas, before imposing a sentence upon a man convicted of murdering two men, one judge considered the characteristics of the victims and refused to impose a life sentence. The judge's reason for refusing to impose a stiff sentence was that the victims were homosexuals. However, the judge did not restrict his disdain to homosexuals; he also stated that he would not sentence a murderer to life imprisonment for killing a prostitute.

Michael Ira Oberlander, Note, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621, 1652 (1992) (citing Lisa Belkin, *Texas Judge Eases Sentence for Killer of Two Homosexuals*, N.Y. TIMES, Dec. 17, 1988, at A8).

14. Bernice King, *Cutting the Chain of Violence*, ORGANIZING THE RELIGIOUS COMMUNITY AGAINST THE DEATH PENALTY: VISION '98, (American Friends Service Committee, Philadelphia, Pa.), 1998, at 3.

15. See Bernice A. King, *Uprooting the Seeds of Violence*, THE OTHER SIDE, Sept.-Dec. 1997, at 34, 36. (describing her process of reconciliation with the people who murdered her father and grandmother).

opposition is due to the possibility that if a victim's family member were to testify at sentencing or be part of the decision to seek the death penalty, that person may ultimately regret testifying and may be left carrying the moral burden of having helped send a person to death.

Ironically, the focus on victims' rights overlooks the reality that the death penalty creates another layer of victims—the family and friends of the person condemned to death. Strangely absent from the current dialogue at sentencing is input from the families of those defendants who are facing a possible death sentence. These families suffer severely, either because they are stigmatized or because they are invisible in the process. They usually do not have the support of the community and often suffer “chronic grief.”¹⁶ The judge and jury rarely hear testimony about what has happened to the defendants' families' lives as a result of the crime, or what happens when a family's loved one is sentenced to death and ultimately executed.¹⁷

In many ways it would be preferable to eliminate the use of victim impact statements at death penalty sentencing hearings, but that is unlikely given the current political climate. Politicians use the “tough on crime” slogan incorporating the death penalty and try to expedite the death penalty. It would be perceived as political suicide for politicians to suggest anything that might be interpreted as a loss of “rights” for victims.¹⁸

To balance the influence of victim impact statements, we propose the use of defendants' family impact statements during the sentencing phases of capital trials. Judges and juries in death penalty cases should be allowed to hear from the family members and friends of those on trial for their lives. Juries should hear about the impact an execution will have on the children of the defendant. The jury should hear what has happened to the defendant's spouse, mother, brother, grandchildren, and other loved ones since the defendant was charged with a capital crime. The system should realize that the innocent family members of the defendant are also victimized by the process and that the impact of their loved one's death sentence on their lives is significant.

16. Chronic grief is a prolonged grief reaction that does not come to a satisfactory conclusion. It is easily diagnosed because the mourner is quite aware that she is not getting through the period of grief. See J. WILLIAM WORDEN, *GRIEF COUNSELING AND GRIEF THERAPY: A HANDBOOK FOR THE MENTAL HEALTH PRACTITIONER* 59 (1982).

17. See *infra* Part V.A.

18. James Monen, a candidate for the Nebraska Legislature in 1994, described a proposed constitutional amendment providing special rights for crime victims as “silly.” Brashear voted for the amendment anyway because he “didn't have the courage to vote against something called a victim's rights amendment.” *Kermit Brashear Is Well-Qualified*, OMAHA WORLD-HERALD, Oct. 29, 1994, at 50.

We wish to state at the outset that we are unequivocally opposed to the death penalty. We contend that the death penalty should be abolished in the United States.¹⁹ The death penalty simply does not work. No evidence supports the proposition that it deters future crime any more so than does long-term incarceration.²⁰ It is applied in a capricious and racist manner;²¹ it is a significant human rights violation;²² it drains governmental resources;²³ and it is killing the American soul by using violence to solve violence and by purporting to implement a simple solution to complex problems. However, because the abolition of the death penalty is anything but imminent, this Article suggests changes within the system to make the death penalty process a little more fair.

This Article presents the death penalty sentencing process as it currently exists in the United States and suggests ways to expand the process to include the family members of defendants facing the death penalty. Three legal arguments support introduction of this evidence. First, defendant family impact evidence reflects on the character of the defendant. How a defendant's family members have been or will be impacted by a death sentence reflects on the defendant's character and is therefore relevant and admissible. Next, because judges who impose sentences hear from the victims' family

19. Rachel King, a former assistant public defender, observed first hand the vagaries and injustices of the "justice system." She left her position with the Alaska Public Defender Agency to work full-time on a campaign to oppose reinstatement of the death penalty in the state of Alaska. Katherine Norgard's adopted son was convicted of a capital crime and sentenced to death in the state of Arizona. Her family experienced a veritable nightmare until his sentence was reversed and a life sentence was imposed. Norgard, a practicing psychologist and university adjunct professor, was instrumental in founding the Arizona Coalition to Abolish the Death Penalty. Both authors are active in efforts to abolish the use of the death penalty throughout the United States.

20. See Jonathan S. Abernethy, *The Methodology of Death: Reexamining the Deterrence Rationale*, 27 COLUM. HUM. RTS. L. REV. 379, 379 n.4 (1996); Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 108 & n.185 (1992).

21. See *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring); see also *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1603, 1605 n.11 (1988) (stating that most studies indicate at least some sentencing disparity based on the race of the victim); Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 520 (1995) (stating that the death penalty is administered in a racially discriminatory manner). *But see McCleskey v. Kemp*, 481 U.S. 279, 292-98 (1986) (holding that a study indicating a disparity in the imposition of the death sentence in Georgia based on the races of the defendant and the victim was insufficient to show that any decision maker in the case acted with discriminatory intent).

22. See Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman*, 24 COLUM. HUM. RTS. L. REV. 395, 422 n.149 (1993) (stating that the abolition of the death penalty has increasingly become the subject of international human rights agreements).

23. See Stephen B. Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive and Corrupting*, 35 SANTA CLARA L. REV. 1211, 1233 (1995) (arguing that the death penalty actually promotes crime by draining millions of dollars from more promising efforts to restore safety to society).

members, they should also hear from the defendants' family members. Lastly, defendant family impact evidence is admitted in many states in noncapital felony sentencing hearings and should be admissible in capital cases as well.

Policy reasons also support introduction of defendant family impact evidence. First, defendant family impact evidence will humanize the defendant so that the jury will have a more balanced understanding of the impact of its decision to impose death. Second, the evidence will humanize the defendant's family in the eyes of the victim's family. If the victim's family is able to see the defendant as a person who has a family and people who love him,²⁴ the humanization process could begin a healing between the two families and facilitate reconciliation, restoration, and ultimately healing for all. The kind of forgiveness that is possible through healing promotes the sentencing goal of rehabilitation. Third, to the extent punishment is thought necessary to heal the harm a crime has caused society, this concrete healing seems more effective than a theory of healing through punishment.

II. SURVEY METHOD

For purposes of this Article, the authors interviewed twenty-eight people.²⁵ Each of these people has a family member who is either currently awaiting execution, has been executed, or, in one case, was sentenced to die but, thereafter, was resentenced to life in prison. The authors used a standard series of questions to elicit the subjects' experiences within the criminal justice system and to determine how these experiences affected their lives.²⁶ Some of the questions were open-ended to allow participants to elaborate on their experiences. Individuals' stories provide anecdotal information to supplement this Article and should not be taken as firm scientific conclusions.

Some general observations can be made from the information. All but one person has experienced some form of shame or ostracism from friends, family, or society in general. None of the participants are currently in favor of the death penalty; although, many were be-

24. We are using "him" instead of a more gender-neutral term for the sake of convenience. Of the 467 people executed between the 1976 reinstatement of capital punishment and July 1, 1998, only three, or 0.64%, were women. See Memorandum from Tonya D. McClary, Research Director, NAACP Legal Defense & Educational Fund, to the National Coalition to Abolish the Death Penalty National Leadership Summit 3 (Sept. 30, 1998). Also, of all the defendant family members we interviewed in our survey, only one of the related defendants was a woman.

25. The authors do not represent this survey as statistically sound because we did not use a random sample. However, the authors asked each participant the same series of questions that were developed by the authors. The Article attempts to give voice to the participants' experiences within the criminal justice system.

26. See *infra* Appendix.

fore their loved one became involved in a capital case. All interviewees continue to maintain a relationship with the person on death row, through either letters or visits. All participants believe that their loved ones had not received adequate legal representation initially; although, some now believe that their family member has competent counsel. Seven survey participants believe that their loved one is innocent.

Most family members have experienced some type of stress-related health problem. Two subjects claimed that family members had died as a direct result of stress-related health problems: one contracted cancer, the other was a severe diabetic who stopped taking his insulin and died. Many family members have experienced symptoms that are typical of depression: three described themselves as feeling "devastated," three were treated for depression, some claimed to be "totally lost" and filled with "despair," and others suffered strokes and heart disease.

Many interviewees have experienced a profound loss of faith in the criminal justice system. They had previously believed in "the system," but now they feel that it is unfair. This is especially difficult for the family members who believe that their loved ones were wrongfully convicted and are innocent.

III. THE DEATH PENALTY IN THE UNITED STATES

A. *Historical Overview of the Death Penalty*

We have executed one another since antiquity.²⁷ During antiquity, violence was face to face, and the entire community was involved either as spectators or as executioners in the communal stonings.²⁸ Historically, in both England and the United States, executions were arranged and carried out as a sort of public ritual for the benefit of hundreds, even thousands, of spectators.²⁹ This ritual often "began with the arrival of the condemned person in the custody of the sheriff and ended with the corpse being carted off to ignominious burial in some potter's field."³⁰ The last public execution in the United States took place roughly sixty-two years ago on May 21, 1937.³¹

Today, most executions are carried out in a semi-private fashion with the warden in charge of the execution exercising considerable

27. See ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 4 (1990).

28. See *id.*

29. See *Background and Developments*, in *THE DEATH PENALTY IN AMERICA* 3, 12 (Hugo Adam Bedau ed., 3d ed. 1982).

30. *Id.*

31. See *id.* at 13.

discretion in deciding who may witness the proceedings.³² Executions are still conducted in a ritualized manner,³³ but “[t]he condemned prisoner dies in a surgical environment out of view, although it is the public who ultimately sanctions his death.”³⁴ Some theories on why executions are no longer public are that they are “grisly and traumatic event[s] for viewers” and the government fears that public executions would fuel the fight against the death penalty by those traumatized by witnessing the event.³⁵

John D. Bessler has argued that public executions actually increased the incidence of crime by “arous[ing] the bloody instincts” of the criminally inclined.³⁶ The laws prohibiting public executions physically removed the public presence from executions and, perhaps more significantly, completely removed the death penalty from public consciousness.³⁷

The earliest recorded lawful execution of a person of European descent in what would eventually become the United States took place in 1622 when Daniel Frank was hanged in the Colony of Virginia.³⁸ Since that time, 18,000 to 20,000 men, women, and children have been executed in America.³⁹ Today, thirty-eight states use the death penalty, as do the federal government and the United States military.

In 1972 the Supreme Court ruled in *Furman v. Georgia*⁴⁰ that the death penalty was cruel and unusual punishment in violation of the Eighth Amendment to the Constitution.⁴¹ The vote was five-to-four, and each Justice wrote a separate opinion.⁴² Justice Potter Stewart compared the irrationality of the death penalty to being struck by lightning,⁴³ and Justice William O. Douglas observed that its application was “pregnant with [racial] discrimination.”⁴⁴ The immediate result of *Furman* was that all prisoners then living under a sentence of

32. See Roderick C. Patrick, *Hiding Death*, 18 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 117, 118 (1992) (citing *Background and Developments*, *supra* note 29, at 14).

33. *See id.*

34. *Id.* at 118-19.

35. *See id.* at 136.

36. JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 29 (1997) (quoting the mid-19th-century anti-death penalty advocate Marvin Bovee).

37. *See id.* at 78-79 (noting that the passage of laws requiring private executions helped bring an end to a mid-19th-century movement aimed at abolishing capital punishment by removing gory execution scenes from public view).

38. *See Background and Developments*, *supra* note 29, at 3.

39. *See id.*

40. 408 U.S. 238 (1972).

41. *See id.* at 240.

42. *See id.* at 239-470. This opinion has the unique distinction of being the longest Supreme Court opinion in our judicial history to date.

43. *See id.* at 309 (Stewart, J., concurring).

44. *Id.* at 257 (Douglas, J., concurring).

death had their sentences commuted to life imprisonment.⁴⁵

In 1976, however, Florida reinstated its death penalty consistent with the Supreme Court's holding in *Furman*. Florida's statute provided for guided discretion, specifically listing aggravating and mitigating circumstances to guide the judge and jury in their sentencing decisions.⁴⁶ The Supreme Court sustained the constitutionality of this new system of capital punishment in *Gregg v. Georgia*,⁴⁷ with allied cases from Florida and Texas.⁴⁸ Under these statutes, the death penalty was no longer considered arbitrary.⁴⁹ Executions resumed in 1977 when Gary Gilmore was executed in Utah by a firing squad.⁵⁰

Capital punishment became a worldwide trend by the 1970s.⁵¹ In his book documenting the historical use of the death penalty, Peter Linebaugh draws the connection between the growth in capital and the increase in capital punishment:

The intensification of capital punishment has become a worldwide trend since . . . capital, reacting to the prior period of colonial emancipation, unprecedented wage demands and cultural revolutions, gained a new lease on life. Considering five of the countries that have utilized it most frequently or broadened its application, we find that South Africa has executed more than a hundred a year since 1980; that Iran since 1979 has tripled the annual number of executions, now measured in the thousands; that Nigeria between 1974 and 1977 extended the death penalty to include crimes against money; that large numbers have been executed in China since 1980; and that in the United States, following an unofficial ten-year moratorium, the execution of the death penalty was resumed in 1977. All told, according to Amnesty International, there have been about a thousand executions a year since 1985, a figure that excludes unofficial deaths that governments have nevertheless acquiesced in—the “disappeared”, the assassinations, the victims of death squads. Thus, the tendency to capital

45. See Michael L. Radelet, *Introduction and Overview*, in *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* 3, 4 (Michael L. Radelet ed., 1989).

46. See FLA. STAT. § 921.141 (1977).

47. 428 U.S. 153, 222-26 (1976).

48. See *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976); see also *Background and Developments*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 3, 16 (Hugo Adam Bedau ed., 1997).

49. See *Jurek*, 428 U.S. at 276; *Proffitt*, 428 U.S. at 259-60.

50. See *MIKAL GILMORE, SHOT IN THE HEART* 349 (1994). Mikal Gilmore is the brother of Gary Gilmore. His book is a powerful memoir of their family life and discusses the impact on his family after Gary's decision to drop his appeals and “volunteer” to be executed.

51. See PETER LINEBAUGH, *THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY* at xv (1992).

punishment has been clear, alarming and specific to a historical period that has been reactionary in every sense.⁵²

At the same time that capital punishment has been growing in use, so has opposition to its use. The United Nations has called for worldwide abolition of capital punishment on the basis that "every human has an inherent right to life."⁵³ The American Bar Association has called for a moratorium on the use of the death penalty until jurisdictions implement policies addressing death penalty concerns.⁵⁴ Canada abolished the death penalty in 1976.⁵⁵ South Africa abolished the death penalty in 1995.⁵⁶ Sweden, Denmark, Finland, and Portugal have not allowed capital punishment for decades.⁵⁷ Britain's parliament has voted several times not to reinstate the death penalty, which was abolished there in 1965.⁵⁸

In February 1987 the USSR, as part of *glasnost*, announced its intention to restrict the death penalty, and a public debate about the abolition of capital punishment began. The German Democratic Republic abolished the death penalty on July 17, 1987. In December 1988 Prime Minister Benazir Bhutto, whose father was hanged in April 1979, commuted over 2,000 death sentences in Pakistan. In March 1988 Colonel Gaddafi of Libya called for the abolition of the death penalty, and in June he intervened to commute all existing death sentences.⁵⁹

Although over eighty countries have abolished the death penalty,⁶⁰ the United States is not one of them.

B. *Post-Furman Evolution of Death Penalty Jurisprudence*

Supreme Court jurisprudence on the death penalty has been anything but consistent. In a series of five death penalty cases decided in

52. *Id.*

53. See Carol Wekesser, *Introduction*, in *THE DEATH PENALTY: OPPOSING VIEWPOINTS* 12, 13 (Carol Wekesser ed., 1991).

54. See Joseph J. Roszkowski, *ABA Votes on Death Penalty Moratorium, OKs Roger Williams Law School*, R.I. B.J., May 1997, at 23, 23.

55. See Wekesser, *supra* note 53, at 13.

56. In June 1995, the Constitutional Court ruled that the death penalty for murder was contrary to South Africa's interim constitution. On May 8, 1996, the Constitutional Assembly adopted a final constitution that retained the wording of the interim constitution guaranteeing the right to life. See AMNESTY INT'L, *THE DEATH PENALTY WORLDWIDE: DEVELOPMENTS IN 1996* at 2 (June 1997).

57. See Sonia Rosen & Stephen Journey, *Abolition of the Death Penalty: An Emerging Norm of International Law*, 14 *HAMLIN J. PUB. L. & POL'Y* 163, 165 (1993) (explaining that 19 states in 1992 ratified an international resolution to abolish the death penalty (citing AMNESTY INTERNATIONAL REPORT 345 (1993))).

58. See Wekesser, *supra* note 53, at 13.

59. LINEBAUGH, *supra* note 51, at xv-xvi n.1 (citing AMNESTY INT'L, *WHEN THE STATE KILLS . . . THE DEATH PENALTY: A HUMAN RIGHTS ISSUE* 223 (1989)).

60. See *id.*

1976,⁶¹ two basic principles emerged that must be considered in death penalty sentencing: (1) death penalty statutes must provide individualized sentencing discretion by a jury that may consider any mitigating evidence; and (2) the jury must be given adequate guidance to identify and evaluate those factors.⁶² These two principles have created tension within the jurisprudence, narrowing the discretion of the jury (or judge) to determine who is eligible to receive the death penalty, while also giving broad discretion to the decision maker to give mercy and spare the life of the accused.

In *Gregg v. Georgia*,⁶³ the Georgia Legislature narrowed the class of persons eligible for the death penalty by specifying ten aggravating circumstances, one of which must be found before the jury can consider imposing death.⁶⁴ The Georgia Legislature also established a bifurcated trial in which the guilt phase was separate from the determination of the appropriate punishment.⁶⁵ These two characteristics—bifurcated trial and delineation of particular aggravating factors—established the prototype for future death penalty statutes.

The individualized sentencing requirement was first articulated in *Woodson v. North Carolina*,⁶⁶ in which the Court held that “in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”⁶⁷ The scope of this right was elucidated two years later in *Lockett v. Ohio*,⁶⁸ in which the Court struck down an Ohio death penalty statute that limited the mitigating factors a jury could consider in imposing death.⁶⁹

In 1994, the conflict between the constitutional requirement to narrow the pool of death eligible defendants and the requirement

61. The five cases known as the 1976 cases are *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Gregg v. Georgia*, 428 U.S. 153 (1976).

62. See Joshua N. Sondheim, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 415-17 (1990).

63. 428 U.S. 153 (1976).

64. See *id.* at 164-65 (citing GA. LAWS ANN. § 27-2503 (Supp. 1975)).

65. See *id.* at 163-64.

66. 428 U.S. 280 (1976).

67. *Id.* at 304.

68. 438 U.S. 586 (1978).

69. See *id.* at 608. The statute allowed the sentencing judge to consider only the following mitigating factors: (1) whether the victim of the offense induced or facilitated it; (2) whether it was unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; or (3) whether the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition was insufficient to establish the defense of insanity. See OHIO REV. CODE ANN. § 2929.04(B) (Anderson 1975).

that broad discretion be given to the sentencer in imposing the death penalty finally proved to be too much for Justice Harry A. Blackmun. In *Callins v. Collins*,⁷⁰ Justice Blackmun, a long time supporter of the death penalty (at least in his judicial capacity), wrote that confining the sentencer's discretion in determining death while simultaneously giving unlimited discretion to the sentencer to extend mercy to the defendant, could no longer be reconciled.⁷¹ Dissenting to a denial of a writ of certiorari, Justice Blackmun wrote:

[T]he proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.⁷²

In spite of Blackmun's pronouncement, the ABA moratorium, the censure of much of the international community, and the disturbing vagaries of capital punishment law in the United States, the national trend is an increasing use of the death penalty. Today all but one of the death penalty states recognize statutorily specified aggravating and/or mitigating factors for the jury to use in determining whether to impose death.⁷³ Most states use a process of weighing aggravating versus mitigating factors.⁷⁴ Some states have specific, enumerated aggravating factors, but not mitigating ones.⁷⁵ Although most states use specifically enumerated aggravating factors, Virginia limits the aggravating factors to "'future dangerousness' and 'vileness.'"⁷⁶

Texas and Oregon also use slightly different procedures. In these states the law requires the jury to answer a series of questions regarding the culpability and future dangerousness of the defendant.⁷⁷

70. 510 U.S. 1141 (1994).

71. See *id.* at 1155 (Blackmun, J., dissenting).

72. *Id.* at 1157 (Blackmun, J., dissenting).

73. See TEX. CRIM. P. CODE ANN. art. 37.071 (West 1999) (listing no aggravating factors and defining mitigating factors as those "that a juror might regard as reducing the defendant's moral blameworthiness").

74. See, e.g., FLA. STAT. § 921.141(2) (1998) (requiring the jury to render an advisory sentence to the court based on whether mitigating circumstances exist that outweigh any existing aggravating circumstances).

75. See GA. CODE ANN. § 17-10-30 (1998); IDAHO CODE § 19-2515 (1998); KANS. STAT. ANN. § 21-4625 (1998); OKLA. STAT. tit. 21, § 701.12 (1999); S.D. CODIFIED LAWS § 23A-27A-1 (Michie 1998).

76. *Yeatts v. Commonwealth*, 410 S.E.2d 254, 265 (Va. 1991) (construing VA. CODE ANN. § 19.2-264.2 (Michie 1989)).

77. See OR. REV. STAT. § 163.150(1)(b) (1998); TEX. CODE CRIM. P. ANN. art. 37.071(2)(b), (e) (West 1999). The Oregon statute provides:

Upon the conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

In Oregon, if the jury unanimously answers "yes" to all the questions, the court must sentence the defendant to death.⁷⁸ In Texas, the court first poses two questions to the jury about the defendant's culpability and future dangerousness.⁷⁹ If the jury unanimously answers "yes" to both questions, the jury is then asked a more general question:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.⁸⁰

With these exceptions, all other states have enumerated aggravating and mitigating factors that the fact finder must consider. Some states also have a catchall category that allows the fact finder to consider any other mitigating evidence.⁸¹

C. The Political and Legal Evolution of the Use of Victim Impact Statements in Capital Cases

On April 23, 1982, President Ronald Reagan established the Task Force on Victims of Crime to study the experience of victims within the criminal justice system and to improve their treatment.⁸² One of the outgrowths of the victims' rights movement was the introduction

(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and

(D) Whether the defendant should receive a death sentence.

OR. REV. STAT. § 163.150(1)(b).

The Texas statute provides:

On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

TEX. CODE CRIM. P. ANN. art. 37.071(2)(b) (West 1999).

78. See OR. REV. STAT. § 163.150(1)(f) (1998).

79. See TEX. CODE CRIM. P. ANN. art. 37.071(2)(b).

80. *Id.* art. 37.071(2)(e).

81. See ARIZ. REV. STAT. § 13-703(G) (1997); DEL. CODE ANN. tit. 11, § 4209(c)(1) (1997); LA. CODE CRIM. PROC. ANN. art. 905.5(h) (West 1998); N.M. STAT. ANN. § 31-20A-6 (Michie 1998); N.C. GEN. STAT. § 15A-2000(f)(9) (1997); S.D. CODIFIED LAWS § 23A-27A-1 (Michie 1998); UTAH CODE ANN. § 76-3-207(2)(a)(iv) (1998).

82. See Exec. Order No. 12,360, 47 Fed. Reg. 17,975 (1982).

of state and federal legislation seeking to give crime victims more input into the criminal justice process.⁸³ Some states have comprehensive victims' rights laws that allow victims to have input into the prosecution's decision-making process, such as consultation with the district attorney in decisions about entering into plea agreements or seeking the death penalty.⁸⁴ At least twenty-nine states have passed constitutional amendments that guarantee protection of victims' rights.⁸⁵ Proponents of victims' rights amendments, with some bipartisan support, are hoping to pass a federal constitutional amendment.⁸⁶

The victims' rights movement has served to increase the inherent divisiveness in the criminal justice system. As one commentator noted, our criminal justice system evolved historically away from a system that varied the punishment according to the worth of the victim:

In medieval times, this variance was explicitly acknowledged. Homicides were avenged by "blood feuds," and the price to be paid

83. See James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87, 88-89 (1987).

84. See ARIZ. REV. STAT. § 13-4419 (1998) (allowing victims to confer with the prosecution "about a decision not to proceed with a criminal prosecution, dismissal, plea or sentence negotiations"); COLO. REV. STAT. § 24-4.1-302.5 (1998) (allowing victims to be present at all critical stages of the criminal justice process and "to be heard at any court proceeding which involves a bond reduction or modification, the acceptance of a negotiated plea agreement, or . . . sentencing"); CONN. GEN. STAT. § 54-91c (1994) (allowing victims "to appear before the court for the purpose of making a statement for the record" in support of or in opposition to any plea agreement); IDAHO CODE § 19-5306 (1998) (allowing victims to be "[h]eard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration, placing on probation or release of the defendant"); KAN. STAT. ANN. § 74-7333 (1997) (allowing victims whose personal interests are affected to bring their views or concerns to the attention of the court when appropriate and consistent with criminal law and procedure); LA. REV. STAT. ANN. § 46:1844 (West 1999) (granting victims the right to retain counsel to confer with law enforcement and the right to be present at the execution); N.H. REV. STAT. ANN. § 21-M:8-k (1998) (allowing victims to consult with prosecutors regarding plea bargaining and to offer victim impact statements during sentencing proceedings); N.M. STAT. ANN. § 31-26-4 (Michie 1998) (allowing victims to confer with the prosecution and to make a statement to the court at sentencing and at any post-sentencing hearing); N.C. GEN. STAT. § 15A-825 (1997) (requiring that victims receive pretrial notification if the prosecutor plans to offer a plea bargain); S.D. CODIFIED LAWS § 23A-28C-1 (Michie 1998) (allowing victims "[t]o offer written input into whether plea bargaining or sentencing bargaining agreements should be entered into").

85. See Koskela, *supra* note 8, at 159, 165 (citing ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. XV, § 15; MD. CONST. art. XLVII; MICH. CONST. art. I, § 24; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8(2); N.J. CONST. art. I, ¶ 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10A; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; and WIS. CONST. art. I, § 9m).

86. See generally S.J. Res. 3, 106th Cong. (1999) (proposing a constitutional amendment to protect the rights of crime victims).

by the murderer and his family depended upon the value of the victim's life, determined by complex class-based rules. One murder might require the expropriation of assets or even the taking of several lives. The United States inherited this tradition of varying punishment with the perceived value of the victim's life. This variation of punishment does not disappear in the context of capital punishment; in fact, it increases.⁸⁷

Participation in the criminal justice system has been the most sought after consideration of victims' rights advocates. However, according to some commentators, victim participation is adverse to the accomplishment of penological purposes.⁸⁸ On the other hand, one could make a passionate argument that the capital criminal should face the damage he has caused through his murdering,⁸⁹ which may explain the explosive popularity of victim statements within the last twenty years.

Because of the severe emotional trauma victims have suffered, they are usually not the best people to decide what happens in a criminal case. In her testimony before Congress, Elisabeth A. Semel warned that a proposed federal victims' rights amendment would allow "untrained laypersons suffering emotional trauma . . . to second-guess and effectively dictate the policy decisions" of state prosecutors.⁹⁰

Victim impact evidence is difficult to effectively confront. Although the Sixth Amendment guarantees the defendant the right to cross-examine victim impact evidence, practically speaking, it is very difficult to do. A defendant risks alienating the jury by bringing forth unsavory aspects of the victim or the victim's family members. Randall Coyne pointed out that "however appealing this 'son-of-a-bitch needed killing' defense may be in theory, in practice the prospect of a freshly convicted murderer casting aspersions on his victim would likely alienate the jury."⁹¹

87. Amy K. Phillips, Note, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 101 (1997) (footnotes omitted).

88. See Robert C. Black, *Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing*, 39 AM. J. JURIS. 225, 230-37 (1994) (examining traditional justifications used in making sentencing decisions, such as retribution, rehabilitation, incapacitation, and deterrence, and making compelling arguments as to how participation of victims in the sentencing process does not fulfill these goals); Dugger, *supra* note 4, at 398-403 (arguing that victim impact evidence does not advance traditional sentencing goals of retribution, deterrence, incapacitation, and rehabilitation).

89. See Dugger, *supra* note 4, at 400.

90. *Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearing on H.J. Res. 173 and H.J. Res 174 Before the House Comm. on the Judiciary*, 104th Cong. 88 (1996) (statement of Elisabeth A. Semel, on behalf of the National Association of Criminal Defense Lawyers).

91. Randall Coyne, *Inflicting Payne on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589, 595 (1992).

These policy concerns were the basis of the Supreme Court's initial holding that the Eighth Amendment prohibited the use of victim impact evidence.⁹² In *Booth v. Maryland*,⁹³ a slim five-to-four majority of the Court struck down the use of such statements on the grounds that they diverted the jury's attention away from the defendant and to the victim.⁹⁴

The Court also noted, as others have, that it is difficult for the defendant to respond to victim impact evidence.⁹⁵ If the defendant chooses to attack the character of the victim, it could backfire on him. The Court pointed out the tactical difficulties capital defendants would face in trying to rebut victim evidence as well as the risk of having a mini-trial on the victim's character.⁹⁶

The following year, the Supreme Court denied certiorari in *Mann v. Oklahoma*,⁹⁷ in which the prosecution used photographs of the victim's body during sentencing.⁹⁸ The defense challenged this as a violation of *Booth*, reasoning that the photographs could have the same effect as impermissible victim impact testimony.⁹⁹ Justice Marshall, joined by Justice Brennan, dissented to the denial of certiorari on the grounds that this case presented an apparent *Booth* violation,¹⁰⁰ but three other justices who had been in the *Booth* majority—Blackmun, Powell and Stevens—voted to deny certiorari.¹⁰¹

In 1989 the Court heard *South Carolina v. Gathers*.¹⁰² Gathers and three companions were convicted of raping and murdering a man in a public park.¹⁰³ The victim was known to proselytize, and the prosecution introduced papers that were found on his body, including a prayer and a voter identification card.¹⁰⁴ During the sentencing phase, the prosecution repeatedly referred to the prayer and the card as an indication of the victim's character.¹⁰⁵ The Supreme Court of South Carolina reversed in part and remanded on the grounds that the "extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime."¹⁰⁶ The U.S. Supreme Court affirmed; again the vote was five-

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

93. 482 U.S. 496 (1987).

94. See *id.* at 508-09.

95. See *id.*

96. See *id.* at 507.

97. 488 U.S. 877 (1988).

98. See *Mann v. State*, 749 P.2d 1151, 1156 (Okla. Crim. App. 1988).

99. See *Mann*, 488 U.S. at 878 (Marshall, J., dissenting).

100. See *id.* at 877-78 (Marshall, J., dissenting, joined by Brennan, J.).

101. See *id.* at 877.

102. 490 U.S. 805 (1989).

103. See *id.* at 806-07.

104. See *id.* at 807-09.

105. See *id.* at 808-10.

106. *State v. Gathers*, 369 S.E.2d 140, 144 (S.C. 1988).

to-four.¹⁰⁷

By 1991 the composition of the Court had changed, and with that change came a complete turnabout in the law on victim impact evidence. In *Payne v. Tennessee*,¹⁰⁸ the Court skirted the doctrine of stare decisis and allowed the introduction of victim impact evidence.¹⁰⁹ In this case, the impact evidence was the condition of a young boy left for dead after the defendant stabbed the boy's mother and sister to death.¹¹⁰ This time the vote was six-to-three, the majority including Justices Kennedy, O'Connor, Rehnquist, Scalia, Souter, and White, with Justices Marshall, Stevens, and Blackmun dissenting.¹¹¹ In the four years since *Booth*, the Court's jurisprudence had changed 180 degrees, drastically impacting the fates of death penalty defendants.

Justice Rehnquist expressed the rationale of the Court:

The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. 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. . . .

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."¹¹²

At least thirty-two states have begun using victim impact statements in their capital sentencing proceedings since *Payne*.¹¹³ Five

107. See *Gathers*, 490 U.S. at 812.

108. 501 U.S. 808 (1991).

109. See *id.* at 827-28.

110. See *id.* at 814-16.

111. See *id.* at 810.

112. *Id.* at 824-25 (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J., dissenting)).

113. See Phillips, *supra* note 87, at 99-100. The 32 states that use victim impact evidence are Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington. See *id.* at 100 n.56.

states have statutes that appear to contain inconsistencies or ambiguities, with the further disadvantage that interpretive case law is thus far absent.¹¹⁴ For example, in New Hampshire, one statute allows victim impact evidence to be presented in capital cases specifically to the sentencing judge,¹¹⁵ while another statute delegates capital sentencing exclusively to juries.¹¹⁶ Only Indiana specifically excludes victim impact evidence from death penalty hearings, and even that exclusion is limited to situations in which the evidence is not relevant to the Indiana death penalty statute's aggravating and mitigating circumstances.¹¹⁷

D. The Impact of the Death Penalty on the Defendant's Family

1. Stigmatization

The results of our interviews show that defendants' families suffer serious social stigmatization. Martina Correia described the assault on her self-esteem and her loss of identity in these words: "People don't consider us [my family] as individuals anymore. . . . The press wanted to know if we were reared in the projects. Were we beaten? Were we drug addicts? During the trial, they treated us like we were all murderers."¹¹⁸

Defendants' family members lose their individual identities when society views them only as the relatives of murderers. They often feel that they have been found guilty by association. They may lose self-esteem and actually begin to wonder whether they have done something wrong.

The seating arrangements in courtrooms exacerbate this problem—defendant's family on one side, victim's family on the other. A law enforcement officer may be assigned to protect the victim's family, leaving the impression that the presence of the defendant's family makes the courtroom a dangerous place. Any contact between the families of the defendant and the victim is generally quite hostile.

Stigmatization occurs because the resources offered by the state are concentrated on the victim's family members to the exclusion of the family members of the accused. Murder victims' family members recounted some of the services offered them during the criminal process. For example, Sue Norton's family members attended the trial

114. These states are Connecticut, New Hampshire, New Mexico, New York, and Wyoming. *See id.*

115. *See id.* (citing N.H. REV. STAT. ANN. § 651:4-a (1998)).

116. *See id.* (citing N.H. REV. STAT. ANN. § 630:5(V) (1998)).

117. *See id.*; *see also* *Bivins v. State*, 642 N.E.2d 928, 956-57 (Ind. 1994).

118. Interview with Martina Correia (Dec. 7, 1997) (interview notes on file with Rachel King).

at the expense of the state.¹¹⁹ Sally Senior and her daughter received psychotherapy at a cost of \$50,000 each, paid for by the State of California.¹²⁰ Kathy Dillon, whose father, a police officer, was murdered, attends an annual conference at public expense held to support and honor the family members of police officers killed in the line of duty.¹²¹ In contrast, none of the defendants' family members received any type of support or services from the state.

During the sentencing phase of capital trials, the victims' family members are permitted to testify about the impact of the crime on their lives while the defendants' family members sit in the courtroom, prevented from speaking about the impact the prosecution of their loved one has on them. The defendants' family members are limited to offering explanations of childhood traumas that might explain why the defendant committed the crime. Recounting these problems often places the defendants' families in situations where they feel responsible for having caused the defendants' violence. The combination of these factors, whether intentional or not, excludes the defendants' families. The exclusion of defendants' families also leads third parties to observe that the criminal justice system views the victims' families as good—they get positive attention—and the defendants' families as bad.

2. *Social Isolation*

A death sentence creates a new category of spiritual, emotional, and psychological distress. There are no support groups for family members of those condemned to die. Given that there are approximately 20,000 homicides in any given year in the United States,¹²² and that, since the mid-1990s, only about 300 of those convicted for these crimes are sentenced to death,¹²³ family members of these criminals are small in number and are spread across the thirty-eight states that currently impose the death penalty as well as the twelve that do not. California has the most individuals on death row,¹²⁴ but

119. Interview with Sue Norton (Oct. 13, 1997) (interview notes on file with Rachel King).

120. Interview with Sally Senior (Sep. 2, 1997) (interview notes on file with Rachel King).

121. Interview with Kathy Dillon (Oct. 1, 1997) (interview notes on file with Rachel King).

122. See Taylor Young Hong, Book Review, 29 COLUM. HUM. RTS. L. REV. 787, 789 (1998) (reviewing JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* (1997)).

123. See HUGO ADAM BEDAU, *THE CASE AGAINST THE DEATH PENALTY* 6 (3d ed. 1998).

124. See Death Penalty Information Center, *State by State Death Penalty Information—California*, (visited Mar. 23, 1999) <<http://www.essential.org/dpic/california.html>>.

Texas has executed the most people—171 since 1976.¹²⁵ However, no state-provided treatment options exist for families of the condemned. Further, the sentencing courts provide no support options, nor do prisons, victims' programs, or social service agencies. Moreover, family members of those sentenced to death typically find one another only if they meet by chance while visiting their loved one on death row.

Cecilia McWee has met a number of other family members while visiting her son on death row. Ms. McWee lives in Atlanta, Georgia, and travels weekly to visit her son in South Carolina. The only support group Ms. McWee could find was located in Georgia and was organized for families who have an incarcerated relative. "He committed the crime in 1991, and I found the support group in 1995."¹²⁶ Interviews conducted for this Article revealed that death row family members found their primary support in their extended families and occasionally in their churches. Support for the family members of the condemned is in short supply.

Family members of the condemned do not speak of the unspeakable. When a friend, a new acquaintance, or another parent casually asks the death row family member for details of her family, such as where they live or what they do, a death row mother is left in a painfully awkward situation. Should she respond, "Oh, my son lives in prison and is under a death sentence. We are waiting for his execution?" If there were a contest for conversation stoppers, such a reply would win the award. Instead, family members often isolate themselves, cloaking themselves in shame and living with the stigma that has been cast not only on their loved one, but on the family as well.

Family members are innocent. They have committed no crime, and there should be no stigma in continuing to find value in and love for their condemned family member. Family members who choose to stand by their condemned relative are relegated to silence, usually feeling powerless to stop the machinery of death that operates to kill their loved one. Their powerlessness starts at the trial level, where most of them are ignored and unheard in the guilt or sentencing phase of the trial.

125. See Death Penalty Information Center, *Number of Executions by State Since 1976*, (visited Mar. 23, 1999) <<http://www.essential.org/dpic/dpicreg.html>>.

126. Interview with Cecelia McWee (Dec. 7, 1997) (interview notes on file with Rachel King).

3. *Depression and Chronic Grief*

(a) *Depression*

The majority of the family members interviewed in this project used the words “I was devastated” or “I was in a state of despair” to describe their feelings after their loved one was sentenced to death. Three people said they were treated for depression following the sentencing of their relative.

One survey participant expressed her feelings this way: “I had no belief in anything. The anger continued to grow for a good many years. I experimented with alcohol, drugs to suppress the feelings and depression which wreaked havoc in my soul. Nothing could change the hopeless outlook I had on life. I cut my wrists.”¹²⁷

Depression is more than the occasional sadness that each of us occasionally feels. It is a debilitating illness that visits people in varying ways.¹²⁸ Depression tends to be a chronic recurring illness, and although a particular episode may be treatable, most sufferers will experience episodes throughout their lives.¹²⁹ The American Psychiatric Association reports that 80 to 90 percent of patients with depression can be treated effectively.¹³⁰ The common treatments for depression are psychotherapy, medication, or a combination of the two.¹³¹

(b) *Chronic Grief*

The injury suffered when a family member is condemned to die may well be beyond repair and can develop into a state of chronic grief unless or until the sentence is overturned.

We contend that despair, devastation, and depression brought about by the death penalty lead to a condition we call “chronic grief.” Theories exist about how universal grief “goes wrong,”¹³² about “delayed grief reactions,”¹³³ and “exaggerated grief reactions.”¹³⁴ The concept of “chronic sorrow” has long been recognized as a condition

127. Interview with Trevor Dicks (Aug. 28, 1997) (interview notes on file with Rachel King).

128. See Liora Nordberg, *Dealing with the Depths of Depression*, FDA CONSUMER, July-Aug. 1998, at 26, 27.

129. See *id.* at 28.

130. See *id.*

131. See *id.* at 28-29. The Food and Drug Administration has approved several medications that it finds effective in treating depression. See *id.* at 27-28.

132. WORDEN, *supra* note 16, at 58.

133. *Id.* at 59.

134. *Id.* at 60. Such reactions are prolonged, excessive in duration, and never permanently cease. See *id.*

experienced by parents of the mentally challenged.¹³⁵ Following an initial period of grieving, there are recurring occasions of intense grief associated with a variety of developmental milestones and crises.¹³⁶ These episodes are cyclical, intense, and apparently very common.¹³⁷ The following reactions have also been identified as common for these same parents: loss of self-esteem; shame and social withdrawal in anticipation of social rejection; ambivalent feelings toward the child to a greater extent than is normally felt by parents; defensiveness and hypersensitivity to criticism; and other destructive feelings related to both individual and family functioning.¹³⁸

We found no books or articles on the library shelves to aid us in understanding the chronic grief of family members of the condemned. These families must attempt to peel away the stigma; increase their diminished self-esteem; emerge from the chaos, despair, and devastation; and push back the emerging and ever-present chronic grief they deal with every day of their lives. They must do this alone, without assistance from the literature and, for the most part, from the community. "Chronic grief" is a construct created for and experienced by the families of those condemned to die in our execution chambers across the country.

Parents of children with chronic illnesses come close to sharing the same feelings that are described by family members interviewed for this project. They feel uncertain about the future, identify with the illness and the sick role, sometimes take negative risks, feel different from others, and have independence/dependence conflicts.¹³⁹ However, parents of a child with a chronic illness, although waiting and preparing for the death of their child, are not awaiting the homicide of their child to be committed by the state in the name of the community.

The death penalty creates another layer of victims. Defendants' family members not only have to live with the reality of the crime their loved one committed, but are rendered powerless and speechless within the very justice system that was created to defend their rights and to protect their person. Those who believe their family member is innocent, or wrongfully convicted of a capital crime, suffer the burden of feeling powerless to save their loved one from a cruel

135. Lynn Wikler et al., *Chronic Sorrow Revisited: Parent vs. Professional Depiction of the Adjustment of Parents of Mentally Retarded Children*, 51 AM. J. ORTHOPSYCHIATRY 63, 64 (1981).

136. *See id.*

137. *See id.* at 64-70.

138. *See* Margaret A. Steinberg, *A Message to Special Education from Mothers of Disabled Children*, THE EXCEPTIONAL CHILD, Nov. 1980, at 177, 177-78.

139. *See* ILENE MOROF LUBKIN, CHRONIC ILLNESS: IMPACT AND INTERVENTIONS 9 (1986).

and unjust fate.

IV. LEGAL PRECEDENT IN SUPPORT OF ADMITTING DEFENDANT FAMILY IMPACT EVIDENCE AS A MITIGATING FACTOR IN CAPITAL CASES

A. *Mitigating Evidence: What the Eighth Amendment Requires*

After reinstatement of the death penalty, the first case to consider the scope and breadth of mitigating evidence was *Lockett v. Ohio*.¹⁴⁰ Lockett was convicted of felony murder as an accomplice to the robbery of a pawnshop during which the owner was killed.¹⁴¹ Lockett was not present at the store during the robbery and was offered a series of plea agreements by the prosecution that would have reduced her charge from a capital murder offense.¹⁴² Lockett refused all offers and took her chances at trial.¹⁴³ She was convicted and sentenced to death.¹⁴⁴ At sentencing, Lockett submitted evidence from a psychologist who stated that she had a favorable prognosis for rehabilitation: she was only twenty-one years old at the time of the offense and had committed no other major offenses.¹⁴⁵ After reviewing the report of the psychologist and hearing argument on the issue of sentencing, the court concluded that because none of the statutory mitigating factors were satisfied, it was obligated to impose the death penalty.¹⁴⁶

Under Ohio law, as it existed in 1978, once the jury convicted Lockett of aggravated murder based on at least one of seven aggravating circumstances, the sentencing judge was required to impose the death penalty unless one of the following three mitigating factors was established:

- (1) The victim of the offense induced or facilitated [the offense].
- (2) It [was] unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

140. 438 U.S. 586 (1978).

141. *See id.* at 589-90.

142. *See id.* at 590-92. The best offer was made two weeks before trial when the "prosecutor offered to permit her to plead guilty to voluntary manslaughter and aggravated robbery (offenses which each carried a maximum penalty of 25 years imprisonment . . .)." *Id.* at 591.

143. *See id.* at 590-92.

144. *See id.* 593-94.

145. *See id.* at 594.

146. *See id.*

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.¹⁴⁷

In overturning *Lockett's* sentence, the Supreme Court held that Ohio's statute violated the Eighth Amendment to the U.S. Constitution because it unduly limited the range of mitigating factors a jury could consider.¹⁴⁸ The Court noted that the Ohio statute prevented the jury from considering the defendant's age or her minor role in the offense as mitigating factors.¹⁴⁹ Further, the statute mandated that the lack of proof of the defendant's criminal intent could be considered mitigating only to the extent it implicated one of the three listed mitigating factors.¹⁵⁰

In deciding *Lockett*, the Court admitted that its opinion in *Furman* had "engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment."¹⁵¹ The Court recalled that in *Furman* three justices had believed that even though the death penalty was not per se unconstitutional, allowing juries sentencing discretion without legislative guidance violated the Eighth Amendment.¹⁵² This was so, the three opined, because such discretionary sentencing was "pregnant with discrimination,' . . . because it permitted the death penalty to be 'wantonly' and 'freakishly' imposed, . . . and because it imposed the death penalty with 'great infrequency' and afforded 'no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not.'"¹⁵³

In *Woodson v. North Carolina*,¹⁵⁴ the Court held that a mandatory death sentence was unconstitutional.¹⁵⁵ Thus, the Court forced states to provide enough specific guidance to meet the requirements of *Furman* without imposing a mandatory structure that would violate *Woodson*. The Court, in *Lockett*, stated explicitly that the Eighth Amendment requires individualized sentencing in death penalty cases:

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,

147. *Id.* at 607 (citation omitted). As the law is presently written, there are seven mitigating factors to be considered. See OHIO REV. CODE ANN. § 2929.04(B) (Anderson Supp. 1997).

148. See *Lockett*, 438 U.S. at 608.

149. See *id.*

150. See *id.*

151. *Id.* at 599.

152. See *id.*

153. *Id.* (citations omitted).

154. 428 U.S. 280 (1976).

155. See *id.* at 304-05.

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. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.¹⁵⁶

Any state statute “that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation” creates an unacceptable risk that a sentence less than death would not properly be considered and, thus, violates the Eighth and Fourteenth Amendments.¹⁵⁷

In *Eddings v. Oklahoma*,¹⁵⁸ the Court had an opportunity to put *Lockett* to the test. This case involved a sixteen-year-old defendant who was convicted of killing a police officer.¹⁵⁹ At his sentencing hearing, Eddings offered evidence of his troubled childhood, including the fact that his parents had divorced when he was five years old, leaving him to live a life without discipline.¹⁶⁰ In addition, Eddings' mother, rumored to be a prostitute, let the boy run wild, and when she could no longer control him, she sent him to live with his father, who used physical abuse to discipline him.¹⁶¹ Further evidence showed that Eddings' mental and emotional development lagged several years behind his age.¹⁶²

In imposing a sentence of death, the trial court found three ag-

156. *Lockett*, 438 U.S. at 604-05 (footnotes omitted).

157. *Id.* at 605.

158. 455 U.S. 104 (1982).

159. *See id.* at 105-06.

160. *See id.* at 107.

161. *See id.*

162. *See id.*

gravating factors and one mitigating factor, Eddings' youth.¹⁶³ The court stated that it was deeply moved by the evidence of the defendant's family history but believed that it was not legally allowed to consider it.¹⁶⁴ On appeal to the Supreme Court, the majority concluded that the sentencing judge had improperly limited consideration of mitigating factors.¹⁶⁵ The Court stated that the sentencing judge erred by considering only the evidence that would support a legal excuse from criminal liability instead of considering "any relevant mitigating evidence,"¹⁶⁶ which the majority held was the standard under *Lockett*:

By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," the rule in *Lockett* recognizes that "justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.¹⁶⁷

Justice O'Connor interpreted *Lockett's* requirements even more broadly. In her concurring opinion, she explained why the lower court should be reversed: "*Lockett* . . . requires the trial court to consider and weigh all of the mitigating evidence concerning the petitioner's family background and personal history."¹⁶⁸

Almost a decade after *Eddings*, the Court returned to the question of individualized sentencing in *Penry v. Lynaugh*.¹⁶⁹ Johnny Paul Penry, a mentally disabled young man, was convicted and sentenced to death for the rape and stabbing death of Pamela Carpenter.¹⁷⁰ There was undisputed evidence that Penry had a low IQ.¹⁷¹ Expert testimony established that he had the mental age and abilities of a six and one-half year old and that he suffered from organic brain damage that left him unable to conform his conduct to the law.¹⁷² The trial court refused to give an instruction specifying that the jury could consider the evidence of Penry's low IQ and brain

163. *See id.* at 108-09.

164. *See id.* at 109.

165. *See id.* at 114-16.

166. *Id.* at 114.

167. *Id.* at 112 (quoting *Gregg v. Georgia*, 428 U.S. 153, 197 (1976); and *Pennsylvania v. Ashe*, 302 U.S. 51, 55, 58 (1937)).

168. *Id.* at 117 (O'Connor, J., concurring).

169. 492 U.S. 302 (1989).

170. *See id.* at 307.

171. *See id.* at 307-08.

172. *See id.* at 308-09.

damage as mitigating evidence.¹⁷³ The Supreme Court reversed Penry's death sentence on the ground that the jury had not been allowed to consider the "defendant's character or record or the circumstances of the offense."¹⁷⁴ This catch phrase has become the test by which subsequent courts have determined whether death penalty statutes provide sufficient opportunity for the defendant to present mitigating evidence.

Lockett, *Eddings*, and *Penry* provide the constitutional basis for admitting defendant's family impact evidence. Interpreted literally, these cases stand for the idea that any relevant evidence in support of mitigation is constitutionally required. What is relevant? In the capital sentencing context, it should be *any* evidence relative to the defendant's character or record or any circumstance of the offense that the defendant proffers as the basis for a sentence less than death.¹⁷⁵ Evidence of childhood deprivation is always considered relevant as mitigating evidence; why not evidence that the defendant's daughter will be deprived of a crucial bond necessary for her development if her daddy is killed by the state? If the idea behind mitigation evidence is to allow the jury to get a complete picture of the defendant, surely the way that he has impacted the people in his life is a relevant consideration to whether he deserves to live or die.

B. Legal Precedent from State Courts

Under *Lockett*, the Court established the principle that any relevant mitigating evidence should be considered at the sentencing phase of a capital trial.¹⁷⁶ However, the use of the defendant's family impact evidence as relevant mitigating evidence has not been extensively litigated. What follows is the limited jurisprudence to date.

1. Oregon

In *State v. Stevens*,¹⁷⁷ the Oregon Supreme Court reversed a death penalty because the trial court had refused to admit evidence that executing the defendant would adversely affect his daughter.¹⁷⁸ The trial court ruled that such evidence could not be categorized as mitigating within Oregon's statutory framework.¹⁷⁹ The Oregon Supreme Court overruled, holding that such evidence should have been prop-

173. See *id.* at 320.

174. *Id.* at 328.

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

176. See *id.* at 609.

177. 879 P.2d 162 (Or. 1994).

178. See *id.* at 162-63, 168.

179. See *id.* at 165.

erly admitted as a mitigating factor.¹⁸⁰

Oregon's death penalty statute is similar to that of Texas in that the jury must unanimously answer "yes" to a series of questions before imposing a death sentence.¹⁸¹ At issue in *Stevens* was the scope of the fourth general question and the extent to which mitigating evidence could be admitted under it. The questions were:

(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and

(D) Whether the defendant should receive a death sentence.¹⁸²

The Oregon statute further provided that in determining the issue in the fourth question:

[T]he court shall instruct the jury to answer the question "no" if one or more of the jurors find there is any aspect of the defendant's character or background, or any circumstances of the offense, that one or more of the jurors believe would justify a sentence less than death.¹⁸³

The *Stevens* court examined the legislative history of Oregon's death penalty statute¹⁸⁴ and determined that the fourth general question was intended to be read broadly so as to comply with the Supreme Court's decision in *Penry*.¹⁸⁵ The Oregon Supreme Court concluded that the purpose of the fourth general question was to allow a broad range of mitigating evidence to be presented to the fact finder:

180. See *id.* at 168.

181. See *id.* at 165-69; see also *supra* notes 77-80 and accompanying text.

182. *Id.* at 163 n.4 (quoting OR. REV. STAT. § 163.150(1)(b) (1994)).

183. *Id.* (quoting OR. REV. STAT. § 163.150(1)(c)(B) (1994)). This statutory definition was, in its original form, taken directly from *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), and *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). However, the wording of the statute has subsequently been amended as follows:

The court shall instruct the jury to answer the question . . . "no" if, after considering any aggravating evidence and any mitigating evidence concerning any aspect of the defendant's character or background, or any circumstances of the offense and any victim impact evidence . . . , one or more of the jurors believe that the defendant should not receive a death sentence.

OR. REV. STAT. § 163.150(1)(c)(B) (1998).

184. See *Stevens*, 879 P.2d at 165-67.

185. See *id.* at 166-67.

While the witness's testimony may not offer any direct evidence about [the] defendant's character or background, it does offer circumstantial evidence. A rational juror could infer from the witness's testimony that she believed that her daughter would be affected adversely by [the] defendant's execution because of something positive about his relationship with his daughter and because of something positive about [the] defendant's character or background. Put differently, a rational juror could infer that there are positive aspects about [the] defendant's relationship with his daughter that demonstrate that [the] defendant has the capacity to be of emotional value to others. In that inference, a juror could find an aspect of [the] defendant's character or background that could justify a sentence of less than death.¹⁸⁶

The Oregon Supreme Court held that the defendant's family impact evidence was relevant to the fourth statutory mitigating factor,¹⁸⁷ which dealt with "the defendant's character or background, or any circumstances of the offense."¹⁸⁸ The court's statute-based decision to allow the introduction of the testimony about the impact of the defendant's execution on his daughter is consistent with the Supreme Court's Eighth Amendment jurisprudence, which permits a broad variety of mitigating evidence to be presented on behalf of the defendant.

Surely the language from *Lockett* and *Eddings* is broad enough to permit defendant family impact evidence. At issue in *Lockett* was the fact that the jury had not been permitted to hear evidence about the defendant's character, prior record, age, lack of specific intent to cause death, and her relatively minor role in the crime.¹⁸⁹ What if *Lockett* had also been a mother? Why should the jury not have heard about her life as a mother and how difficult it would have been for her children if she were executed? As the *Eddings* Court stated, "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency."¹⁹⁰

The evidence at issue in *Eddings* was the defendant's family history and the fact that the defendant had suffered from severe psychological and emotional disorders.¹⁹¹ Who better to testify about psychological and emotional disorders than the defendant's family? Why not also let the jury hear about the impact of the crime on the

186. *Id.* at 168.

187. *See id.* at 168.

188. OR. REV. STAT. § 163.150(1)(c)(B) (1994).

189. *See Lockett v. Ohio*, 438 U.S. 586, 597 (1978).

190. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

191. *See id.* at 109.

defendant's family and what will happen to them if their child/sibling/parent is executed? What we are suggesting is not far-fetched; a person's character should be measured, at least in part, by how that person's death will affect his family.

By deciding the case on the basis of state law, the Oregon court in *Stevens* avoided a potential reversal on federal grounds.¹⁹² However, the Oregon Supreme Court's holding used the exact language of *Lockett* in ruling that evidence of the impact on the defendant's daughter was an aspect of the defendant's character, prior record, and the circumstances of his offense.¹⁹³

2. California

Without deciding questions of relevance, the California Supreme Court has permitted the introduction of the defendant's family impact evidence. In *People v. Fierro*,¹⁹⁴ the defendant, David Fierro, appealed his conviction on a robbery and murder charge.¹⁹⁵ At the sentencing hearing, six family members were permitted to testify about Fierro's participation in Little League and school plays and about his loving relationships with his siblings, wife, and children.¹⁹⁶ During summation, defense counsel tried to elicit sympathy for the defendant's family by arguing the following:

[The] defendant's family was "just as innocent as the Allenties [murder victim's family]" and that contrary to the prosecutor's assertion, "you do have a right to consider the consequences that this will have on all the innocent victims." Defense counsel referred repeatedly to defendant's family, observing: "[H]e's still a human being. He's still the father of three lovely children. He still has a wife. . . . He has a family that love [sic] him and he loves them. He has children who know him as their father. And I'm sure that he will always be their father." In concluding, counsel returned to the theme of family, stating: "And I think that his family does need him and his children do need him."¹⁹⁷

However, the prosecutor countered this appeal by arguing that "the only relevant consideration was 'sympathy for the defendant,' 'not sympathy for Mrs. Fierro, his mother, not sympathy for his children or his aunt, but sympathy for the defendant.'"¹⁹⁸

One of Fierro's grounds for appeal was that the prosecutor's comments during closing argument had improperly influenced the jury

192. See *Stevens*, 879 P.2d at 168.

193. See *id.*

194. 821 P.2d 1302 (Cal. 1991).

195. See *id.* at 1308-09.

196. See *id.* at 1311.

197. *Id.* at 1337.

198. *Id.*

to disregard the defendant's family impact evidence.¹⁹⁹ Specifically, Fierro took exception to the prosecutor's statement that the jury was supposed to consider sympathy only for the defendant and not for his family.²⁰⁰ Without specifically ruling on whether the defendant's family impact evidence was relevant, the California Supreme Court denied the claim.²⁰¹ The court pointed out that the jury had been instructed to consider "any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial."²⁰² Contrary to the defendant's assertions, the court found that the prosecutor's remarks had not prejudiced the defendant, holding that the jury had been specifically instructed to consider family impact evidence.²⁰³

Fierro is not a precedent-setting case like *Stevens*. First, the defense attorney did not introduce actual impact evidence, such as evidence of psychological damage to the defendant's children if their father were to be executed. The attorney merely made the argument that the defendant's children might be harmed if he were to be executed. Second, the court did not directly decide whether this type of mitigation evidence was relevant. However, the defense was permitted to introduce evidence and argue that the jury should consider how an execution would impact the defendant's family.²⁰⁴

3. Arizona

In *State v. Day*,²⁰⁵ the trial judge considered a type of family impact evidence in sentencing the defendant to life imprisonment instead of death.²⁰⁶ The court found a nonstatutory mitigating factor in the testimony that "the Defendant has the love and support of his family."²⁰⁷ This order was not published and gave no specific details about the types of evidence upon which the judge relied in making his ruling. Although not precisely defendant family impact evidence, the consideration of the love and support of the defendant's family is a broad interpretation of the *Lockett* holding.

199. *See id.*

200. *See id.*

201. *See id.* at 1338.

202. *Id.* at 1338 (quoting the trial court's jury instructions).

203. *See id.*

204. *See id.*

205. No. CR-20265 (Super. Ct. Ariz. Jul. 15, 1996).

206. *See id.* at 3-4.

207. *Id.* at 3.

4. *One Family's Experience*

Coauthor Kathy Norgard and her family have firsthand experience with the death penalty and the use of defendant family impact evidence. Norgard's adopted son, John Patrick Eastlack, was convicted of a double homicide and sentenced to death. Very little mitigating evidence was presented at the first sentencing hearing. After securing new counsel, the family was able to obtain a sentencing rehearing on the grounds that substantial mitigating evidence existed that should have been admitted. For example, the court should have considered that, as an infant, Eastlack suffered from fetal alcohol syndrome. It should also have considered that, during the first four years of his life, Eastlack had been moved among so many foster placements that he had been unable to form any emotional attachments.

At the sentencing rehearing Norgard, her husband, and her daughter all testified about how the murders and convictions affected their lives and how emotionally devastating it was to have a family member on death row. The judge ruled that he would not consider this testimony about the impact on their lives as a nonstatutory mitigating factor. However, upon resentencing, Eastlack received the lesser sentence of life. Even though the defendant's family impact evidence did not directly impact the outcome of the case, it was important and healing for Norgard and her family to speak about their experiences and to express the devastation they felt by what their family member had done and by what society was contemplating doing to him.

Providing support to the defendant's family is not a traditional sentencing goal, but then again, neither is providing support to the victim's family. Given the negative feelings that many people have towards the criminal justice system, satisfying the participants of the criminal justice system is a positive policy goal.

C. *Defendant Family Impact Evidence Is Relevant and Admissible in Noncapital Sentencing Hearings*

In recent years, the general trend has been to eliminate or reduce judicial discretion in sentencing.²⁰⁸ Most states have passed determinate sentencing statutes designed to achieve this goal.²⁰⁹

A comparison of the noncapital sentencing statutes with the death sentencing statutes in death penalty states reveals some interesting dichotomies. Many death penalty states have mitigating factors in

208. See Christopher M. Alexander, Note, *Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 S. CAL. L. REV. 1717, 1720 (1997).

209. See *id.*

their noncapital penalty sentencing statutes that explicitly permit the judge to consider the impact of incarceration on the defendant's family before making a decision about sentencing. For example, Illinois has a mitigating factor that allows the judge to consider whether imprisonment would entail excessive hardship to dependents.²¹⁰ Illinois courts have broadly interpreted this provision beyond consideration of only economic factors.²¹¹

Indiana has a mitigating factor similar to the Illinois statute that allows the judge to consider whether prison would result in undue hardship to the person or dependents of the person.²¹² Montana allows the sentencer to consider whether "imprisonment of the offender would create an excessive hardship on the offender or the offender's family."²¹³

New Jersey law allows the sentencer to consider whether "[t]he imprisonment of the defendant would entail excessive hardship to himself or his dependents."²¹⁴ The New Jersey Supreme Court and lower appellate courts have interpreted this provision broadly, allowing a sentencing court to consider that the defendant had a close relationship with someone who was dependent on him, such as a quadriplegic,²¹⁵ or that the defendant was a mother of two children.²¹⁶

North Carolina has an interesting provision that allows the court to consider whether or not the defendant provides support to his family. If he does, that fact is considered a mitigating factor, if he does not, the court may consider it an aggravating factor.²¹⁷ Under North Carolina law, the judge may also consider whether the defen-

210. See 720 ILL. COMP. STAT. § 5/5-5-3.1(11) (1997).

211. See *People v. Young*, 619 N.E.2d 851, 855 (Ill. App. Ct. 1993) (noting that the trial court permitted the defendant's wife to testify that her husband was a caretaker for her two children and that her son was upset about the possibility of the defendant returning to prison); *People v. Tarala*, 505 N.E.2d 1284, 1287 (Ill. App. Ct. 1987) (admitting evidence showing that the defendant had provided emotional support to a friend's children by "acting like a father" after she and her husband had separated).

212. See, e.g., IND. CODE § 35-38-1-7.1(c)(10) (1997); see also *Battles v. State*, 688 N.E.2d 1230, 1237 (Ind. 1997) (noting that "[d]ependent children are properly considered a mitigating factor under [Indiana law]"); *Geralds v. State*, 647 N.E.2d 369, 375 (Ind. Ct. App. 1995) (permitting the defendant's daughter and her psychologist to testify about the impact on the daughter of the defendant's return to prison and the defendant's ability to function well with a probationary sentence).

213. MONT. CODE ANN. § 46-18-225(10) (1997). Note that this provision is a consideration in the sentencing of nonviolent offenders. We were unable to locate any published opinions involving this provision except in the context of financial hardship.

214. N.J. STAT. ANN. § 2C:44-1(b)(11) (West 1998).

215. See *State v. Johnson*, 570 A.2d 395, 400 (N.J. 1990).

216. See *State v. Mirakaj*, 632 A.2d 850, 851 (N.J. Super. Ct. App. Div. 1993).

217. See N.C. GEN. STAT. §15A-1340.16(e)(17) (1997) (mitigating factor); *id.* § 15A-1340.16(d)(18) (aggravating factor).

dant has a support system in the community.²¹⁸

Utah law allows the court to consider whether incest offenders have strong supportive family relationships.²¹⁹ Tennessee law allows consideration of whether “[t]he defendant was motivated by a desire to provide necessities for the defendant’s family or the defendant’s self.”²²⁰ This factor relates primarily to providing economic necessities.²²¹

If state law permits the sentencer to consider defendant family impact evidence in noncapital cases, it seems logical, given the law’s generally heightened protections for capital defendants,²²² that the law should also permit such evidence in capital cases. Moreover, if a state permits defendant family impact testimony in noncapital cases, but not in capital cases, it seems possible that the state is violating due process and the Eighth Amendment. The Supreme Court has emphatically held that “death is qualitatively different from a sentence of imprisonment, however long,” and that “[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”²²³ Because of this difference, the Supreme Court has consistently recognized that the imposition of the death penalty requires a kind of super due process beyond what is required in regular criminal cases.²²⁴ These due process protections extend to the sentencing phase in capital cases.²²⁵

Fundamental fairness in sentencing is also protected by the Eighth Amendment because of the “special need for reliability in the determination that death is the appropriate punishment.”²²⁶ As the Court explained in *Mills v. Maryland*:²²⁷

The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the

218. See *id.* §15A-1340.16(e)(18); see also *State v. Teague*, 300 S.E.2d 7, 7 (N.C. App. 1983) (discussing the court’s authority to consider that the defendant had a supportive and stable family in considering his term of imprisonment).

219. See UTAH CODE ANN. app. D, form 2 (1995) (listing mitigating circumstances associated with mandatory sentences).

220. TENN. CODE ANN. § 40-35-113(7) (1997).

221. See *State v. Bellew*, No. 02C01-9510-CC-00324, 1997 WL 81656, at *3 (Tenn. Crim. App. Feb. 27, 1997).

222. See *infra* notes 223-24 and accompanying text.

223. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

224. See *id.*; see also *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O’Connor, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

225. See *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

226. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988).

227. 486 U.S. 367 (1988).

determination that death is the appropriate penalty in a particular case.²²⁸

Because the protections available to a capital defendant are more stringent than those available for a noncapital defendant, any mitigation evidence admitted at a noncapital criminal sentencing hearing must logically be admissible in capital sentencing hearings.

V. POLICY ARGUMENTS SUPPORTING THE USE OF DEFENDANT FAMILY IMPACT EVIDENCE

A. *Family Impact Evidence Is Relevant to Traditional Sentencing Goals*

Aside from the apparent constitutional requirements for admitting family impact evidence, there are strong policy arguments favoring the admission of such evidence. Family impact evidence is relevant to the traditional sentencing goals of rehabilitation and incapacitation. Evidence about a defendant's relationship with his family is relevant in determining the likelihood of his rehabilitation. It is also relevant in determining whether and to what extent he should be isolated from the community. Detailed information about the defendant's history and relationship with his family would likely help the sentencing authority understand which types of punishment would be most effective in rehabilitating the defendant. Information about the defendant's family and support structure would also inform the sentencer as to what punishment is most likely to deter the defendant from committing future crimes.

Evidence providing the details of a defendant's life is routinely introduced at the sentencing stage. Courts frequently call family members to attest to traumatic events in the defendant's life that might explain and mitigate the crime and to attest to positive aspects of the defendant's character that might show why his life should be spared. Similarly, a complete picture of the defendant's life requires admission of testimony from his family members about what has happened to them as a result of their loved one being charged with a capital crime.

The following are examples of the types of evidence that juries should have been allowed to consider during the sentencing phase of particular trials:

Darlie Routier, the wife of Darin Routier, is on death row in Texas for allegedly killing her two sons. Darin, who was in the house at the time of the slaying, claims that an intruder entered the home and

228. *Id.* at 383-84.

killed his sons while they slept on the living room couch. Darlie was seriously injured at the time the police arrived at the scene, which is consistent with Darlie's statement that she was attacked by an intruder and adds credibility to her strong claim of innocence. Prior to this prosecution, Darlie had never been in trouble with the law and had been a caring and loving mother. Darlie's arrest, conviction, and death sentence have devastated her surviving son and husband. The jury should have been allowed to hear about the impact of the death penalty legal process on her family and what her death would mean to them. Mr. Routier spoke about the impact that the crime and ensuing judicial process had on him:

I went on antidepressants, just went off of them. I lost 35 pounds. I didn't eat for eleven days and got sick from that. All in all, I don't trust shrinks, I don't trust counselors, everything you say to them somebody is going to get their hands on. I've talked a little bit to psychiatrists. It is impossible to grieve this until we get this resolved. It's kind of one of these philosophies, we either live or we die.

Darlie's biggest fear is to die thinking that people will believe she did this. I'm not scared for her because I know the truth. I know that, thank God, we have appeals. We are just going to get older and grayer. We miss each other a whole lot. The one suffering the most is Drake; I can't replace Darlie completely. I can give him twice as much love but there is no replacement to a mother for a child. He knows his mommy and he does get to see her. But it is painful for Darlie to want to hold him and she can't. You can only imagine what she is feeling.²²⁹

Richard Longwood, son of Barbara Longwood, was sentenced to death as an accessory in the murder of a movie theater attendant. Ms. Longwood described the effect the death penalty legal process has had on her family:

The family almost ceases. I would say only by the grace of God are we still a family. I had a young child who was only eleven at the time. You have to maintain some semblance of normalcy for a young child and my two little grandchildren.

Death would have been so easy. It would have been horrible had Richard been the one killed, but it would have been over and some sort of healing would have started. This pain, there is no way to describe it. I don't know how to put it into words. The family dies. We went into hibernation, a stand still. Everything is going on but it isn't. Everything shuts down. Everything totally shuts down. Feelings shut down, everything does. Definitely shock. You just got to go through the motions, in a zombie like state.

229. Interview with Darin Routier (Dec. 19, 1997) (interview notes on file with Rachel King).

My marriage is still intact and we are making it work. There have been a lot of health problems. My husband has suffered a bout with cancer I have had to fight depression, we all have. We've all been on anti-depressants from time to time.²³⁰

Sonda Donovan's brother, John Patrick Eastlack was initially sentenced to death, then was resentenced to life in prison. Ms. Donovan recounted some of the experiences of having a family member accused of a capital crime and what it was like to live with an impending execution.

One thing that happened for me is that people don't always know [that I had a brother on death row]. It is not the easiest thing for me to tell people. If someone is going to be my friend, it is something they need to know about.

I am not proud of him for what he did. My mom, in particular, was absolutely devastated, which I understand a little better.²³¹ Parents do anything they can to take care of their kids. She couldn't do anything to take care of him. She felt horrible about what he did. It turned all our lives upside down. My biological father, John's adoptive father, was in denial about the whole thing. He wasn't involved at all. Don, my stepfather, was very sad and mad and confused. He stuck by John the whole time but it impacted him as well.²³²

Conny Hudgin's seventeen-year-old son, Joseph, was sentenced to death for the murder of a police officer in South Carolina. Ms. Hudgin claims that Joseph was an unwilling accomplice to the crime and that he falsely confessed to the crime believing that, as a juvenile, there would be less serious consequences for him than for his friend who had shot the officer. Joseph's friend refused to admit to the crime and, instead, agreed with the state to testify against Joseph. In return for his testimony, the friend received a prison sentence of thirty years with eligibility for parole in seven years. Joseph was sentenced to death. His father describes what the experience has been like for him:

It devastated us, we still are. I never in a trillion years thought I would have anyone in my family in jail, let alone death row. I've lived in this town all my life. It is unbelievable to us that this could have ever happened. My life has never been the same. None of our lives will be. I'll never rest until he is home. If they ever should execute Joseph it would probably kill me. I doubt if I could take that. I'm a pretty strong person. This is one of the worst

230. Interview with Barbara Longwood (Nov. 3, 1997) (interview notes on file with Rachel King).

231. Sonda Donovan's mother is co-author Kathy Norgard.

232. Interview with Sonda Donovan (Nov. 19, 1997) (interview notes on file with Rachel King).

things that has ever happened to me in my life, this thing with Joseph.

You just have to go through it to really know there isn't a moment of the day that I don't think about Joseph and his case. It's there when I wake up in the morning and the last thought before I go to sleep at night. Every moment I might be thinking of stuff, but still it enters my mind.

You think about the negative stuff that has been going against us. It is very devastating. It has impacted my health. I was in intensive coronary last year. I have days when I am more depressed than others. I don't have to take medicine for my depression. I like to be by myself to cope with it. I live for the time when Joseph calls me or I go to visit him. He insists that I should take vacations and lead a normal life, but I am not living a normal life. There is no normalcy here.²³³

Using defendant family impact evidence at a sentencing hearing differs in one obvious way from using victim impact evidence. By the time of the sentencing hearing, the victim's family has already experienced the worst of the impact of the crime—the death of their loved one. The victim's family can describe what the loss has been like for them and the impact it has had on them. However, with defendant family impact evidence, the experience of being involved in a capital case is just beginning at the point of sentencing. Family members have to endure the societal stigma of having a family member accused of a capital crime and can testify about the impact of the crime on their lives up to that point. However, a court can only speculate as to the ultimate long-term impact on a defendant's family of having a loved one living on death row and losing that loved one to execution.

Courts routinely admit this type of speculative evidence at sentencing hearings in noncapital cases.²³⁴ Defendant family members may testify about the impact that sending their loved one to jail will have on the family. In one sense, this impact is necessarily speculative because no one can know what the future holds. Yet, people make predictions all the time based on past and present experiences. Judges make sentencing decisions while trying to predict the future conduct of the defendants based on the past conduct of defendants.

233. Interview with Conny Hudgins (Oct. 7, 1997) (interview notes on file with Rachel King).

234. See, e.g., N.J. STAT. ANN. § 2C:44-1(b)(11) (West 1998) (allowing the court to consider as a mitigating circumstance whether "[t]he imprisonment of the defendant would entail excessive hardship to [the defendant] or his dependents"); see also ALASKA R. CRIM. PROC. 32.1(b) (requiring submission to judge of presentence report containing "such information about the defendant's characteristics, financial condition, and the circumstances affecting the defendant's behavior as may be helpful in imposing sentence"); OR. REV. STAT. § 137.090(1)(c) (1998) (requiring a sentencing court to consider "[a]ny other evidence relevant to aggravation or mitigation that the court finds trustworthy and reliable").

Sentencing is not an exact science, and speculation is part of the process.

Another possible way to use defendant family impact evidence is by having family members who have experienced an execution to testify about the impact on their lives. As the use of the death penalty continues to grow in the United States, increasing numbers of people will experience the loss of family members to executions. They can provide valuable testimony as to what happens to a family after an execution or after the imposition of the death penalty.

The following two persons experienced profound impacts on their lives: Renee Womack-Keels lost her father to an execution when she was an infant, and Trevor Dicks' brother was sentenced to death when he was eleven years old. They describe a bit of their lives in the following passages.

After her father's execution, Ms. Womack-Keels went to live with her grandparents. She describes her grandmother's grief:

My grandmother drank, my mother I don't think so. My grandmother, I went to live with my grandmother in 1954, I was eight years old. I went to live with her because my grandmother threatened to take me from my mother legally. I look back and I have had conversations with my mother about that. She talked about being young and having a child and thought it was the best thing to do. It is not unusual in the African-American community for grandmothers to raise grandchildren. Her second son was missing in the Korean War, so by the time she was fifty-one years old, she had no children around.

Similar to my grandmother, none of my children are close to me. I'm going to write a book about the parallels between my life and my grandmother's. Her oldest son dead, her second son announced missing in action. It was almost like she never had any children. My father died at age twenty-two. My uncle was born in '27 and missing in '51. By the time '54 rolled around, she had been living from 1946 to '51 with all of this pain of the loss of her two children bottled up inside of her.

I wouldn't call her an alcoholic but she was one of those closet women who secretly drank. Emotionally, I believe my grandmother was stressed and had days when she was borderline suicidal.²³⁵

Ms. Womack-Keels explains further about the shame her grandmother felt at her inability to save her son's life and the eerie parallels with her own life. Ms. Womack-Keels's adult son is now serving a sentence of life without parole in Massachusetts, a state without the death penalty.

235. Interview with Renee Womack-Keels (Dec. 21, 1997) (interview notes on file with Rachel King).

She [my grandmother] did talk about being poor and being unable to have the resources necessary for a more adequate defense, I'm giving you the words of someone who has a more sophisticated language. My grandmother's language was a language of feeling like how it felt not to have the money it took to defend her son.

I have a copy of the bill (for her father's defense) for \$800 for the entire defense, including mileage. How she was not able to talk about it, not having any of her family members come to her aid, she said people just did not know how to talk to her or with her. They stayed away. She talked about being ashamed, just how painful it was not to be able to do anything, not being able to stop this, not being able to find the proper resources or the proper language to save her son.

The real horror and drama for me in all this is I seem to be re-living my grandmother's life. My oldest son is in prison with a life sentence for murder. I was forty-six when it happened. My grandmother was forty-six when my father was executed. This mirroring of my grandmother's life, for me, this is about breaking this intergenerational curse.²³⁶

Trevor Dicks was eleven years old when his older brother, Jeff, was sentenced to death. Mr. Dicks describes what happened to him as a result of that experience:

I was eleven years old when I heard the judge pronounce the death sentence on my brother by electrocution until he was "dead, dead, dead." I learned that the state and the law and authority figures have the right to take someone and rip them away for no more reason because of their skin color and lack of wealth. They no longer care about what is right and wrong. They want a conviction under their belt. The more they get, the better their career is.

At that time, I didn't know when it would be carried out. I had an eleven-year-old imagination of electrocution. Those nightmares have haunted me for nineteen years now. I couldn't find anyone to express my feelings to. I was also condemned.

My lifelong friends were told they couldn't play with me because I had a brother on death row accused of murder. I can remember my best friend Travis telling me he wasn't going to be allowed to play with me anymore. We snuck over to the bushes to hug and talk. Losing friends, feeling like an outcast to society. My friends were not allowed to socialize with me anymore. School was getting real tough.

I was forced to drop out of school in the fourth grade. I went on the road to try to raise money to get my brother a new trial. My mom and my brother's new daughter, Maria, we traveled for numerous years. My two sisters stayed in North Carolina. One got a job; the other stayed with my father who was a full-blown alcoholic by now. My parents separated and my sister went to New York with my dad and I went with my mom.

The years started rolling by. I was always looked at as an outsider. My self-esteem dropped. My anger started growing. The fear that they could take away any person that I loved at any time increased. I feared my mother would be taken to the electric chair. I had no belief in anything, the churches, God. I felt we were outcasts from God. It crushed all my self-esteem and faith. I was lost for a good many years.²³⁷

B. The Need to Balance the Bias from Victim Impact Evidence

The decision to permit victim impact evidence is a difficult one fraught with many conflicting societal interests. We believe that the current use of victim impact evidence in capital cases has tipped an already precariously unfair system to an unacceptable level of prejudice against capital defendants. States should not follow the *Payne* decision; states should prohibit the introduction of victim impact evidence in capital cases. However, in today's political climate, turning back the clock to the days before victim impact evidence is unlikely. The victim's rights movement has enjoyed increased popularity, and this popularity has come at the expense of the rights of criminal defendants. As Ellen Yaroshefsky noted:

Although some may claim that the victim's rights movement is not anti-defendant, many of the reforms, in fact, have had a negative impact upon the rights of the defendant. Most particularly, laws regarding pretrial release have had a negative impact upon defendants. Experience with victim impact statements demonstrates the same. Significantly, those in the forefront of the victim's rights movement believe in greater restrictions upon defendants, more prisons, and greater punishment as the method of crime control.

One cannot ignore that, concomitant with the advances in victim's rights, there has been a judicial retreat in the rights of defendants. This retreat includes the decreasing protection provided by the law of search and seizure, limitations on appellate review of convictions, and harsher sentencing standards. This resulted, in part, from the inaccurate perception that criminology and the courts have emphasized the rights of defendants to the detriment of victims. To the extent that there ever was strong support for the rights of defendants, the pendulum has swung too far against defendant's rights, and unfortunately, it is the victims who are, in large part, on the other side of that pendulum.²³⁸

Since 1976 courts have ostensibly attempted to make the process more equitable in practice. In spite of the courts' attempts, some data

237. Interview with Trevor Dicks (Aug. 28, 1997) (interview notes on file with Rachel King).

238. Yaroshefsky, *supra* note 5, at 143-44.

indicates that capital jurors are still swayed by impermissible factors such as the race of the victim, the defendant, or both.²³⁹ Allowing one-sided victim impact evidence into the penalty phase of a capital trial promotes jury reliance on subjective factors.²⁴⁰ A victim's testimony as to the harm caused by the crime has the potential to inflame the jury and to be unduly prejudicial.²⁴¹

To counter-balance this prejudice, we suggest that the definition of victim impact be expanded to include the family of the defendant. The family members of those facing death at the hands of the state are as "innocent" as the family members of those who were murdered. Fairness requires that a capital jury hearing of the decedent's family impact should also hear from the defendant's family.

C. Victim Family Members Support Participation of Defendant Family Members at Sentencing

Concurrent with the research on death row family members, co-author Rachel King has been interviewing family members of murder victims. Most of these participants are members of an organization called Murder Victims Family Members for Reconciliation (MVFR).²⁴² MVFR is a national organization of family members who have lost relatives to murder or execution by the state. MVFR opposes the death penalty in all cases and works for alternatives to the death penalty. MVFR promotes policies to prevent violent crime and programs that help victims heal and rebuild their lives. As one of their publications states: "We know too well the horrible effects of killing, and how important it is that the cycle of killing in this country be broken. We can't stop all violence, but we can work to stop the violence carried out by a government that kills in our names."²⁴³

One question asked of the participants was whether the victims' family members should be part of the decision to seek the death pen-

239. The Baldus study showed that a defendant, Caucasian or African-American, was more likely to receive the death penalty when the victim was Caucasian than when the victim was African-American. The apparent reason behind this victim-based discrimination seems to be the juries' views of victim worth. Juries are more likely to hand down a capital sentence when they view the victim as being much like themselves. See Dugger, *supra* note 4, at 384; see also Aida Alaka, Note, *Victim Impact Evidence, Arbitrariness, and the Death Penalty: The Supreme Court Flipflops in Payne v. Tennessee*, 23 LOY. U. CHI. L.J. 581, 613 (1992).

240. See Alaka, *supra* note 239, at 614.

241. Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 209 (1988).

242. Admittedly, the survey sample is not random. Victims' Family Members who have joined MVFR are against the death penalty at this point in their lives. Many of them, however, initially supported the use of the death penalty, and their involvement with the criminal justice system, in part, led to their change of heart.

243. MURDER VICTIMS FAMILIES FOR RECONCILIATION, NOT IN OUR NAME: MURDER VICTIMS FAMILIES SPEAK OUT AGAINST THE DEATH PENALTY 1 (2d ed. 1998).

alty, and if so, whether they should have input into whether the death penalty is imposed. The next question asked was whether the defendant's family should have similar input. Significantly, victims' family members surveyed were consistent in their answers to these questions. If they favored murder victim participation, they also believed the defendant's family should participate. Conversely, if they did not favor victim family participation, they did not support defendant family participation. The participants believed that if one family was allowed input into the sentencing decision, the other family should also be allowed.

Here is a selected sampling of the answers given to the questions, "Should victim family members be involved and should defendant family members be involved in death penalty sentencing hearings?"

Celeste Dixon on involving victims' family members:

If you talk to a person after they have had someone murdered, they are not in a position to make a decision as important as whether or not somebody should die. There are a few people who might be able to say, "No, this person shouldn't die." Most of us, if you asked us right after they caught the person, certainly almost every person would probably say "yes." Eventually, if you work through the natural process of grieving and get over the anger, you might later change your mind. I don't think family members should be able to make that decision in the beginning. Even without the expectation from the prosecutor's office, our natural response is revenge.²⁴⁴

Celeste Dixon on involving defendants' family members:

I don't know. I'm sure that they would probably be inclined to say, "Don't kill him." If you are talking about the decision of whether or not to impose capital punishment they should have input into talking about what kind of person that particular person is. Part of the problem with our justice system is that we are too focused on punishing people and not looking at the causes of crime. I think if they really wanted to be fair they would try to take everything into consideration about this person before they try to make the decision about how this person should be punished.²⁴⁵

Phil Callen on involving murder victims' family and defendants' family:

I don't know that we should. Everyone would agree that, clearly, the family's loss is much greater than society as a whole. How-

244. Interview with Celeste Dixon (Dec. 18, 1997) (interview notes on file with Rachel King). Ms. Dixon's mother, Marguerite Dixon, was brutally raped and murdered in her home in Hockley, Texas, on August 18, 1986.

245. *Id.*

ever, I don't think we should place the family's loss above society's loss, especially if we are going to argue that the death penalty is an appropriate form of punishment or a deterrent. In other words, if the family's wishes are to be taken into consideration whether to seek the death penalty, we should acknowledge the only reason why we are seeking the death penalty is for revenge.

I guess if we are going to argue that we should involve the murder victim's family on the one hand, we certainly should do it on the other hand for the one who is going to be killed.²⁴⁶

Kristi Smith on involving victims' family members:

Well, I think they should be. I think they might find out that more people are against it than they realize. I think that I honestly believe that most people, if they are a part of that decision-making process would say, "No, don't execute them," because they don't want that on their shoulders. I wouldn't want to be a part of anything that would cause a person to lose their life. I think how they feel about it is important, although that just opens it up for people who do believe in the death penalty to speak their minds, too.²⁴⁷

Kristi Smith on participation by defendants' family members:

I'm not sure about families of defendants. The reason I say that is because very recently I have seen situations where the family of the offender is in denial about what the person has done. I'm not sure they can, although I feel like they have the right to speak. If families of victims are going to have the right to speak, I think they (families of defendants) should be able to, also.²⁴⁸

Aba Gayle on participation of victims' family members:

I think that victims should not have any part in the criminal justice system whatsoever. When they are in that place they are not of sound mind. Things you say and do you may regret later on. The justice system should be regulated by the rules and the laws and not on people's emotions. We all want a more just society. I don't think that putting up slobbering crying people saying things like, "My son is never coming home again," is a way to run a system.²⁴⁹

Catherine Emerson on participation by victims' family members

246. Interview with Phil Callen (Dec. 11, 1997) (interview notes on file with Rachel King). Mr. Callen's grandmother, Leona Callen, was murdered in her Cayahoooga Falls, Ohio, home in 1993.

247. Interview with Kristi Smith (Dec. 8, 1997) (interview notes on file with Rachel King). Kristi Smith's father, James K. Edwards, was killed behind a grocery store in Wichita, Kansas, when he intervened to assist an older gentleman who was being robbed.

248. *Id.*

249. Interview with Aba Gayle (Sept. 29, 1997) (interview notes on file with Rachel King). Ms. Gayle's daughter, Catherine, was murdered in her home by an acquaintance on September 29, 1980.

and defendants' family members:

Well, you know, I think they (victims' family members) should be listened to, but basically it is a crime against society and not just an individual. But I think the defendant's family should be listened to, also. If there are extenuating circumstances I say, "Yeah, go for it."²⁵⁰

Carol Drieling on participation by victims' family members:

I [think] victim impact statements are really important. I think victims' family members should have input at the sentencing, too. Emotionally, the D.A. could use the statements to get the death penalty. I have seen it locally where they have used the victim's pain to get the death penalty, and I think it is really manipulative. Sometimes you are not in a place where you can talk about it because you are so numb. How devastating murder can be on the family. You lose work; you need to restructure the family. We are going to feel the effects for generations; we have ten nieces and nephews who will never know their grandparents.²⁵¹

Carol Drieling, when asked if defendants' family members should be allowed to participate, responded, "I don't know about that. Some families, yes."²⁵²

Some victim family members opposed participation by the victim family members on the grounds that it sets up differential treatment between the victims. Those who support the death penalty are treated better than those who oppose it. For example, some victims are not allowed to testify against the death penalty. One interview subject, Marie Deans, referred to a homicide survivor who wanted to testify against the death penalty at sentencing.²⁵³ The survivor was threatened with a contempt citation by the judge if she mentioned her opposition to the death penalty.²⁵⁴ In *Robinson v. Maynard*,²⁵⁵ the defendant unsuccessfully sought permission to introduce evidence that the victim was opposed to the death penalty, but the trial court and each successive appellate court reviewing the decision upheld the decision.²⁵⁶ Victim impact evidence, clearly a sword in the hands

250. Interview with Catherine Emerson (Dec. 2, 1997) (interview notes on file with Rachel King). Ms. Emerson's niece was murdered in the desert outside of Tucson, Arizona.

251. Interview with Carol Drieling (Dec. 4, 1997) (interview notes on file with Rachel King). Two escaped convicts murdered Ms. Drieling's parents in their home on December 3, 1975. Drieling was visiting her parents for the Thanksgiving holiday. One of the men attacked her and took her hostage. He held her at gunpoint and forced her to drive him in an escape attempt. Ultimately, the man released her and was killed by the police.

252. *Id.*

253. See Interview with Marie Deans (Oct. 9, 1997) (interview notes on file with Rachel King).

254. See *id.*

255. 829 F.2d 1501 (10th Cir. 1987).

256. See *id.* at 1504.

of the prosecutor, is not allowed to be a shield in the hands of the defense.²⁵⁷

Marie Deans articulated this concern:

The reason victim family members should not be involved is because of Suezanne Bozler.²⁵⁸ It becomes this issue of the good victim/bad victim. If we are for the death penalty, that's great. If we oppose the death penalty, they threaten to throw you in prison.

I worked very early on in the '70s, 1971-1979, with a victim's family involved in a capital case. I went to visit them. They had agreed with the death penalty and they told me that the prosecutor had told them that if they didn't agree with the death penalty the guy was going to come out of jail in three years and murder them.

They said the death penalty was against their faith. They asked me to call the prosecutor for them. I called the prosecutor and before I could tell him what I wanted, he said, "It is wonderful you can be a liaison for them." I finally said, "You're making an incorrect assumption. They are asking me to tell you that they do not want the death penalty." The prosecutor then said, "This crime is not against them, it was against society."

So prosecutors exclude victims if they feel like we do. They urge them if they don't. I think the fact that victims' family members can be allowed is why prosecutors work them so. The last thing a victim's family needs is to be worked politically.²⁵⁹

VI. A CASE IN POINT—HOW DEFENDANT FAMILY IMPACT EVIDENCE MAY HAVE SAVED THE LIFE OF A TEXAS MAN

Dave Herman was executed in Huntsville, Texas on April 2, 1997.²⁶⁰ Dave was thirty-nine years old at the time of the execution.²⁶¹ He had been a beloved member of his community. He was married and had a young daughter. He had just completed the licensing process to become a stockbroker, and he had never had any problems with the law.²⁶² The following is his mother, Ester Herman's, description of the crime:

257. See Megan M. Wallace, *The Ethical Considerations of Defense Strategies When Confronted with a Victim-Impact Statement—Give Us Dirty Laundry?!*, 13 T.M. COOLEY L. REV. 991, 1009 (1996).

258. Suezanne Bozler survived an attempted murder attack and watched as her father was stabbed to death by an intruder in their Florida home. She tried to testify in front of the sentencing jury to spare the defendant's life because her father, a Church of the Brethren minister, would not have wanted his killer to receive the death penalty. The judge threatened to throw her in jail for contempt of court.

259. Interview with Marie Deans, *supra* note 253. Ms. Deans' mother-in-law and neighbor, Penny Deans, was murdered in her home by an intruder in 1972.

260. See Interview with Ester Herman (Dec. 16, 1997) (interview notes on file with Rachel King). Dave Herman was Ms. Herman's son.

261. See *id.*

262. See *id.*

He was totally broke, and his mother-in-law had come here from Idaho for the holiday, and there was a promise that his wife and daughter would be going back to Idaho with her.

He robbed a bar which he had managed several years before. They owed him money. He shot three people, one died. It was horrible. He had tied people up and secured them with coat hangers. It was as bad as a drive-by shooting. Any kind of murder is horrible.

It was a total shock to the entire community. It was out of personality context for Dave who was a high-spirited, sweet person. Nobody could imagine that he perpetrated this crime, no one.

I thankfully did not experience any of the community ostracism or anything like that. I am in a very public business, a nail salon. Most of my clients knew Dave from there. I wasn't thrown out of church. I wasn't dropped from people's lives. It was very much of a rally for Dave. Friends of Dave's did not walk away. He was a very good person²⁶³

Ms. Herman believes that her son was influenced by personal problems to act in a way that was terribly out of character.²⁶⁴ She explained that her son was very worried about money and had been trying unsuccessfully to build a business. Ms. Herman believes that Dave did not want to burden her with his problems, as she was busy taking care of her parents and brother. Her mother was a diabetic and had a broken hip, and her brother was dying of cancer.²⁶⁵ Ms. Herman states:

Every weekend Dave brought his little girl (to visit his grandparents). He was the grandchild that offered assistance to mother and dad. He was real good friends to Uncle Bob who was confined to a wheelchair. Dave was overloaded. He chose not to come to me with his problems. I'd say, "How're you doing?" and he'd say, "Fine" and give me a hug.

I really encouraged him to get out of the bar management. Those elements don't impress me whatsoever. He went to stockbroker school. He was a very brilliant person and got his license about four months before the crash. He just simply could not earn a living for his family. He was very determined, not lazy. He was artistically talented.²⁶⁶

Of course, these are the musings of a mother about her son. However, Ms. Herman was not at all apologetic about her son's crime.²⁶⁷ She believed that he should have received a life sentence, but she opposed the death penalty. She believed that her son had much he

263. *Id.*

264. *See id.*

265. *See id.*

266. *Id.*

267. *See id.*

could still contribute, even while in jail.²⁶⁸ Again, Ms. Herman's words:

He did an enormous amount of good in prison. I would be glad to talk to you about letters I have received from other inmates as to the kind of strength that Dave had for other people there. The day he died, we were given preferential treatment because of his conduct as an inmate. Some of the guards cried.²⁶⁹

Dave was very remorseful about his crime.²⁷⁰ He desperately wanted the forgiveness of the victim's family. Ms. Herman recounts an event that occurred right before Dave's execution:

In the hotel room the afternoon of Dave's execution, after we had seen him for the last time, the victim's sister found us and came up to me and hugged me several times, and she repeatedly told me how sorry she was. Our minister was Dave's spiritual advisor. I asked him to please go back to Dave and let him know. He wanted desperately to know that there was some forgiveness in the family. Our minister said that Dave cried and laughed at the same time and said, "Thank God!"²⁷¹

The jury that sentenced Dave to death did not hear any of this evidence.²⁷² His mother testified at the sentencing hearing, but was limited to talking about his childhood, his home life, and his relationship with his father. She did not testify about the impact that Dave's crime, incarceration, and possible death sentence had, and would have, on her and the community. She was not questioned about these things, probably because it is not a traditional area of inquiry in death sentencing hearings.²⁷³

Under the *Stevens* decision, family members would have been permitted to testify about the impact of Dave's execution on their lives.²⁷⁴ His grandparents and uncle could have testified about the importance of his support for them. His mother could have testified about how helpful he was as a son. His sister could have testified about the depression she had experienced since the arrest and the stress of having a brother charged with a capital crime. His father, a retired Marine Corps officer, could also have testified about how difficult it would be for him if his son were to be executed. Had the Texas jury heard such evidence, perhaps they would have spared his life.

268. *See id.*

269. *Id.*

270. *See id.*

271. *Id.*

272. *See id.*

273. *See id.*

274. *See State v. Stevens*, 879 P.2d 162, 168 (Or. 1994).

The Oregon death penalty statute is similar to the Texas statute. Under *Stevens*, the definition of “character” includes how the defendant impacted the people in his life.²⁷⁵ The *Stevens* court interpreted character as meaning the following:

[A] rational juror could infer that there are positive aspects about [the] defendant’s relationship with his daughter that demonstrate that [the] defendant has the capacity to be of emotional value to others. In that inference, a juror could find an aspect of [the] defendant’s character or background that could justify a sentence of less than death.²⁷⁶

Dave Herman had such support from his community, from his family, and from the jailers that supervised him.²⁷⁷ Applying the *Stevens* court’s interpretation of “character,” Dave’s jury could have inferred that he had a special character that was not in keeping with the image of a depraved, hateful person who deserves the death penalty. Such evidence could have made the difference between death and life for Dave Herman.

VII. KEEPING THE STATUS QUO OR SOMETHING DIFFERENT: CAN RESTORATIVE JUSTICE BE APPLIED IN DEATH PENALTY CASES?

From a psychological standpoint, we believe that having the defendant families participate in the sentencing process will encourage reconciliation between the victims and the defendants. Reconciliation between the two families might lead to reconciliation between the defendant and the victim’s family, restoring a sense of peace and balance to the community. Many victims’ family members have reported the experience of initially supporting the death penalty and then later changing their mind.²⁷⁸ Often, this change of heart came from having contact with the defendant or someone in his family. A person will have difficulty dehumanizing a defendant and wanting him to die if the person has seen the pain in the defendant’s mother’s eyes or the desperation of the defendant’s children. Ultimately, reconciliation leads to healing, which can be the greatest source of comfort for the murder victim’s family.²⁷⁹

Many victims’ family members interviewed reported that their perspective on the death penalty, the crime, and the system changed as a result of having contact with the defendant’s family members.

275. See *id.* at 171-72.

276. *Id.* at 168.

277. See Interview with Ester Herman, *supra* note 260.

278. Many of the survey participants changed their positions on the death penalty. These include Aba Gayle, Carol Drieling, Celeste Dixon, and Bill Pelke. (interview notes on file with Rachel King).

279. See King, *supra* note 15, at 36.

Many defendants' family members expressed the desire to speak with and offer condolences to the victim's family, but were usually advised by their attorneys not to have any contact. Victims' family members report feeling confused and angry that the defendant never apologized, without knowing that defendants are advised by their attorneys not to have any contact because of the possibility that they may say something that would jeopardize their legal position.

We believe that bringing the family members together at the sentencing phase may promote reconciliation.²⁸⁰ There has been a movement during the past twenty years, both within the United States and around the world, to bring the idea of restorative justice to the criminal justice system.²⁸¹ One such program is the Victim Offender Reconciliation Program (VORP). This program originated in Canada and was brought to the United States through a joint effort of Prisoners and Community Together (PACT) and the Mennonite Church.²⁸² The VORP program combines conflict resolution and restitution.²⁸³ It brings together victims and offenders, offering a rare opportunity for victims to receive from offenders the answers to nagging questions, helping them to better understand the victim experience.²⁸⁴

In short, the traumatic experience of being a victim can be processed more fully. Fears and anxieties can be dealt with. Stereotypes about offenders may be laid to rest, resulting not only in greater understanding of the offender but also reduced anxiety and suspicion for the victim. In place of the feelings of powerlessness and vulnerability which are often part of the victim experience, victims are empowered to participate in the solution to this offense. Most importantly, the experience can be brought to closure rather than left to fester.²⁸⁵

The sense of closure is not a one-way process. Some crime victim needs are best met through direct contact with offenders.²⁸⁶ When confronted by the victim, the offender sees that person's humanity and has a chance to ask for forgiveness, which may help provide clo-

280. One commentator suggests that contact between the victim's family and the defense counsel may help to neutralize rage. See Robert P. Mosteller, *The Effect of Victim-Impact Evidence on the Defense*, 8 CRIM. JUST. 24, 29 (1993).

281. See Howard Zehr, *Restoring Justice: Envisioning a Justice Process Focused on Healing, Not Punishment*, OTHER SIDE, Sept.-Dec. 1997, at 22, 26.

282. See Howard Zehr & Mark Umbreit, *Victim Offender Reconciliation: An Incarceration Substitute?*, FED. PROBATION, Dec. 1982, at 63, 66.

283. See *id.*

284. See *id.*

285. *Id.*

286. See Mike Niemeyer & David Shichor, *A Preliminary Study of a Large Victim/Offender Reconciliation Program*, FED. PROBATION, Sept. 1996, at 30, 34.

sure for the offender.²⁸⁷ According to Robert Black, “Self-reform presupposes self-forgiveness,’ . . . but self-forgiveness comes more swiftly and certainly after forgiveness by the victim.”²⁸⁸ Thus contact between the victim and offender and their families may encourage closure.

Interwoven throughout this Article are a number of contradictory themes that draw attention to the authors’ ambivalence about this subject. We started with the assumption that the use of victim impact evidence has been a negative development in capital litigation. As a former defense attorney, coauthor Rachel King is inclined to oppose the erosion of the adversarial process and the protections it, at least ostensibly, provides criminal defendants. To a certain extent, Ms. King believes that the best response to the trend of increasing victim participation in capital cases is to go back to the “good old days” and eliminate the use of victim impact evidence from the sentencing phase of capital trials. Realistically, however, this response is unlikely to happen given the current state of criminal jurisprudence.

On the other side of the coin, there may be advantages to opening the sentencing process even more. There are some advantages to permitting the use of victim impact evidence, and there could be advantages to allowing defendants’ families a similar forum. Allowing victims’ family members to make impact statements accomplishes many important goals. It affirms for the victims that “the system” cares about what happened to them and wants to hear from them, and it can provide victims with a chance to tell their story, which often brings healing and a sense of regaining control of their lives. These policy considerations are very important.²⁸⁹ Further, the “good old days” were never really that good, at least not in the context of capital litigation. We have never had a system of justice in this country that is fair to capital defendants or victims. Perhaps it is time to try something different.

By suggesting that we open the capital sentencing process even

287. See *id.*

288. Robert C. Black, *Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing*, 39 AM. J. JURIS. 225, 233 (1994) (quoting NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 56 (1974)).

289. Dr. Deborah P. Kelly offers four answers to the question, “Why Listen to Victims?”: “(1) [t]o promote satisfaction and cooperation with the criminal justice system; . . . (2) [t]o minimize the victim’s trauma and sense of loss; . . . (3) [b]ecause victim participation does not necessarily lead to harsher ‘penalties, retribution, obstruction, and delay,’ . . . and (4) [b]ecause victim participation does not necessarily violate a defendant’s rights.” *Id.* at 229 (quoting Deborah P. Kelly, *Victims’ Perceptions of Criminal Justice*, 11 PEPP. L. REV. 15, 20-22 (1984)). Robert Black points out that the last two reasons are not really affirmative reasons for allowing victim participation, but, instead, are possible responses to arguments against victim participation. See *id.*

further, to include the defendant's family members, we are taking this healing to another level. Just as the victims' family members have suffered tremendously, so have the defendant's family members. Allowing both sides to tell their stories may promote reconciliation between the parties. It may heal the "us and them" attitude that is fueling the war on crime. It may help us all to see that criminal defendants, in spite of the mistakes they have made, are human beings with families and people who love them. It may help us to recognize that defendants deserve to be treated with respect and dignity, regardless of how horrible their behavior.

One alternative that would address the concern about opening the sentencing process to such subjective testimony is to have a separate public allocution hearing that takes place apart from the formal sentencing process. Both victims' families and defendants' families could speak about their experiences to the jury, judge, attorneys, and spectators, but the forum would be outside the traditional court format. Any comments victims' or defendants' family members made would not influence the decision maker. A separate forum would encourage the therapeutic process of talking about one's own experience, but it would take it outside of the formal legal context and eliminate the risk of passion and prejudice contributing to an increased imposition of the death penalty.

There is precedent for this type of process from other countries. Traditional Native Canadian practices have used "sentencing circles." Everyone involved in a case sits in a circle and has a chance to voice their feelings about the crime. Sentencing circles give these individuals an opportunity to express their opinion on how best to address the needs of the victim and to help reintegrate the offender into the community.²⁹⁰ A similar practice exists in New Zealand with "Family Group Conferences," where victims and their supporters, offenders and their families, and representatives of the police and the legal system, gather together to decide by consensus the best outcome.²⁹¹

This practice obviously seeks a much different goal than the decision of whether to put someone to death. But the real issue we as a society need to resolve is whether the death penalty is working. Does it deter violent crime? Is the criminal justice system fair? Is it helping miscreants to better adapt themselves into life within the larger community? How much money are we as a society willing to spend to

290. See Troy Chalifoux, *A Need for Change: Cross-Cultural Sensitization of Lawyers*, 32 ALBERTA L. REV. 762, 778-79 (1994).

291. See Mark Umbreit & Howard Zehr, *Restorative Family Group Conferences: Differing Models and Guidelines for Practice*, FED. PROBATION, Sept. 1996, at 24, 24.

continue locking up and executing greater numbers of our citizens?²⁹² Answering these questions is beyond the scope of this Article. We do not pretend to have these answers; nonetheless, we hope that the reader will join us in wrestling with the questions.

VIII. CONCLUSION

In spite of the United States Supreme Court's attempt to articulate a set of guiding principles to ensure fairness in death penalty cases, the data shows that juries continue to be swayed by impermissible, subjective factors—most notably the victim's race.²⁹³ This data and the fact that forty percent of prisoners on death row are black,²⁹⁴ gives us pause to consider just how effective the judicial system has been at overseeing the death system in the United States. However, given the current political climate, the death penalty is a reality in American jurisprudence and will be for some time. The current criminal justice system is also not likely to experience any major reforms immediately.

Given that reality, every possible procedure should be implemented to ensure fairness for the criminal defendant and respect for the victim's and defendant's family members. Supreme Court precedent requires broad acceptance of mitigating evidence in capital cases and also allows the admission of victim impact statements. At least one state supreme court has held that admission of defendant

292. One commentator writes about the growing trend in America to allocate ever greater resources to combating crime by attacking the problem only after the criminals have committed their crimes. He notes the limited effect such a strategy has on the amount of crime in society:

In a series of highly publicized reports on crime and justice, The Sentencing Project has detailed the dramatic effects of expansion of the criminal justice apparatus in the United States: a tripling of Americans behind bars has resulted in an incarceration rate that is significantly higher than that of any country in the world; disproportionate effects of criminal justice policies result in one in four young black men being on probation or parole, or in jail or prison, at a rate almost five times greater than that of young black men in South Africa; and incarceration costs that exceed twenty billion dollars a year. Get tough crime policies since the 1970's have fueled such expansion, including enforcement targeting such as the drug war, mandatory minimum incarcerative sentences, and restrictions on parole. Further, these reports argue that despite the unparalleled growth and general punitiveness of the criminal justice system, and the manifold policies that animate its excesses, crime rates have not decreased appreciably, nor are citizens safer or more secure. Massive increases in arrests, prosecution and incarceration, for example, have apparently not resulted in reduced drug abuse.

Harry Mika, *The Practice and Prospect of Victim-Offender Programs*, 46 SMU L. REV. 2191, 2193-94 (1993) (citations omitted).

293. See Alaka, *supra* note 239, at 614.

294. See *40% on Death Row Are Black People, New Figures Show*, N.Y. TIMES, Sept. 30, 1991, at A12.

family impact evidence is statutorily required in capital cases.²⁹⁵ In noncapital cases, many states permit introduction of defendant family evidence at sentencing. Even some victims' family members support allowing defendant families to take a more active part in the sentencing process.²⁹⁶ Permitting this type of testimony is only fair. If we must have a death penalty and if a murder victim's family members are allowed to be heard, then so should family members of the defendants.

295. See *State v. Stevens*, 879 P.2d 162, 168 (Or. 1994).

296. See discussion *supra* Part V.C.

APPENDIX

QUESTIONS FOR THE DEATH ROW PROJECT

1. Who is your family member who was sentenced to death?
2. What was your relationship with that person like when they went to death row?
3. When and where did the murder occur?
4. What were the circumstances under which the murder occurred?
5. Were you involved in the trial or sentencing phase?
6. If yes, how?
 - Did you testify as a witness?
 - Write a letter to the judge?
 - Speak with the prosecutor?
 - Speak with the defense attorney?
7. If you weren't involved, why not?
8. Was the experience of being part of the criminal justice system positive, negative, or neutral?
 - How did this process affect your family?
 - How were you treated by the police and prosecutors?
 - How were you treated by the court system?
 - How were you treated by defense counsel?
 - Do you have recommendations to people in the justice system for improving the process?
 - Did you or another family member experience any health problems resulting from the stress surrounding this experience?
9. Did your family member receive adequate legal representation in your opinion?
10. Were you referred to or approached by any support groups after the murder or any point in the process?
11. Did you seek any outside assistance or support during or after the trial?
 - What services or support were provided?
 - Was it helpful? What was most helpful?
 - What was least helpful?
 - What, if any, discussions did they have with you about the death penalty?
12. Have you visited your family member on death row and/or continued to maintain your relationship in another way?

13. If you have not, why?
14. Have you experienced any ostracism from friends, family or acquaintances as a result of the death sentence?
15. Did the conviction affect your ability to continue prior activities such as work, community involvement, family roles?
—What about for other family members?
16. What effects, if any, did the conviction and sentence have on relationships between family members? (family dynamics)
17. Do you support the death penalty? If yes, why? If no, why?
18. Was your position on the death penalty changed as a result of this experience?
19. Was your loved one executed? If your loved one is still alive and involved in the appeal process, what are you doing to prepare yourself for the possibility of his/her execution?
20. If your loved one has been executed, do you think it is possible to heal from these wounds? Have you been able to heal? What recommendations would you make to others in your situation?
21. Has there been a reconciliation between the offender and the victim's family? If not, is this reconciliation possible or likely?
22. Have you forgiven the offender?
—The state?
—Is there anyone you are unable to forgive?
23. Should family members of victims be part of the process to decide whether to seek the death penalty or part of the death penalty sentence hearing? How do you believe you should be involved in this process?