

# CAPITAL PUNISHMENT AS "CLOSURE": THE LIMITS OF A VICTIM-CENTERED JURISPRUDENCE

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## INTRODUCTION

In the poetic context, literary critic Barbara Herrnstein Smith defines closure as "a sense of appropriate cessation. It announces and justifies the absence of further development; it reinforces the feeling of finality, completion, and composure . . . ."<sup>1</sup> Life, unlike literature, often denies us "the sense of an ending;" this can be profoundly unsatisfying.<sup>2</sup> Perhaps nothing expresses the impossibility of closure more dramatically than the death penalty. Although capital punishment represents an attempt at complete closure, a death sentence in the United States is not a clear articulation of finality but rather is a constant deferral of the last word. For the death row inmate, the death penalty really means several years in prison with an indeterminate chance of release through reversal or commutation, and with the possibility of execution sometime in the future. For a murder victim's family, the indeterminacy of the process can be a per-

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1. BARBARA HERRNSTEIN SMITH, POETIC CLOSURE: A STUDY OF HOW POEMS END 35-36 (1968).

2. FRANK KERMODE, THE SENSE OF AN ENDING: STUDIES IN THE THEORY OF FICTION 23 (1967) ("We cannot . . . be denied an end; it is one of the great charms of books that they have to end."). For a scholarly analysis of the role of endings and the effect of unsatisfying conclusions in modern life, see RUSSELL REISING, LOOSE ENDS: CLOSURE AND CRISIS IN THE AMERICAN SOCIAL TEXT (1996).

sistent source of frustration and anxiety. The murder victim's surviving family members ("secondary victims") enter a legal and symbolic system that amplifies their sentiments and magnifies their resentments. At the same time, their individual grieving processes are interrupted and displaced by entrenched moral debates on how best to achieve fairness and finality through the criminal justice system. Of course, a literal finality obtains if the offender is eventually killed. Nonetheless, the ostensible finality of the execution itself is invested with such extraordinary anticipation—a yearning for the irretrievable, a desire for the unimaginable—that it could invite the most undesirable consequences. It is precisely the "run-on" character of death sentences in the United States that makes the idea of closure seem attractive and valuable. The social value of closure has been a relatively neglected dimension of the death penalty debate. Yet in our time, the cultural production of a feeling of closure for the secondary victims has become, at least implicitly, an independent justification for the retention and enforcement of the death penalty in the United States.<sup>3</sup> The emergence of a discourse of closure naturally accompanies the rise of a victim-centered jurisprudence. Indeed, closure has become the central trope of the growing victim-centered jurisprudence.

In this essay, I consider the relationship between the specific meaning of closure to the Victims' Rights Movement and the broader cultural meaning of closure as achieved through mercy, execution, and life imprisonment. Although I discuss the concept of closure in various senses, contexts, and meanings, I focus on criticizing its use as a justification for the death penalty.<sup>4</sup> Part I of this essay takes as a point of departure a parable drawn from the headlines—the trial of the killers of Matthew Shepard. This story dramatizes an interesting limit-case where secondary victims seek closure not through pursuing the death penalty but through designing victim-centered measures that teeter uncomfortably on the fulcrum between vengeance and mercy. In Part II, I examine the historical context of the waxing and waning of victims' rights and remedies. In doing so, I will describe how, over the last forty years, public outrage coalesced into an influential mainstream reform effort: the Victims' Rights Movement. I will particularly consider two outcomes of this movement: victim impact statements and a proposed Victims' Rights Amendment to the Constitution. In

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3. See, e.g., Governor Mario M. Cuomo, *The Crime Victim in a System of Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 1, 20 (1992) (concluding that one goal of criminal justice system should be to bring closure to victims' feelings of violation).

4. I suppose moral philosophers and criminologists could view the issue of closure merely as the recasting of a more familiar justification for punishment—retribution. See generally PHILOSOPHY OF LAW 635–731 (Joel Feinberg & Hyman Gross, eds., 4th ed. 1991) (providing excerpts of classic philosophical literature on the nature of punishment). I argue that "closure" is not coterminous with retribution and has independent properties. First, it attends more closely to the victims' subjective desires than to society as a whole. Moreover, as I will show in this paper, closure is not merely retributive. It can be used variously as a justification for the death penalty, a justification for mercy, a reason to let victims' families view an execution, and a reason to avoid stays and delays in an execution.

Parts III and IV, I outline the two routes to closure that a victim-centered discourse offers, which I call "mercy-as-closure" and "vengeance-as-closure." In Part V, I describe how a will to achieve closure through the criminal justice system is connected to the expressive function of law and punishment.<sup>5</sup> While law and punishment are always to some extent expressive, the rhetorical landscape of the death penalty seems to be tilting toward the primacy of the secondary victim and victim-centered notions of closure. This suggests that the production of a victim-centered jurisprudence poses a challenge to settled norms of sovereignty over life and death and marks the loss of an important line of mediation between public prosecution and private expression, a loss which would render the criminal justice system recursively vulnerable to forms of anguish and intimacy historically held at bay. Taken together, the various parts of this essay offer some evidence that the criminal justice system's pursuit of "satisfaction" or "closure" on the behalf of victims could impose severe costs on our society's institutional arrangements and constitutional values.

# I.

## GHOST STORIES & PASSION PLAYS

*The killer of order is killed, to bring torn edges together, and in so doing tears open other edges along which all that (says) makes-up the story of the executed circulates forever, displaying the impossibility of being, at any instant, that story. The literal ending, the matter (is) over, carried to the grave, is just the start of a bigger process predicated on the query: tell me what really happened: ghost stories . . . . "It is this insistence and consequential repetition that continually fails to fill the void, to stop the flow, to bridge the gap. No matter how much is said, no story can ever satisfy; the said is forever another beginning."*<sup>6</sup>

*I would like nothing better than to see you die, Mr. McKinney. However, this is the time to begin the healing process, to show mercy to*

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5. See JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98 (1970) (claiming punishments have the quality of expressing "attitudes of resentment and indignation, and of judgments of disapproval and reprobation"); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (supporting the contention that laws and legal penalties express social meanings). The "expressive" function can also be extended to the context of "shaming penalties." These penalties involve the public stigmatization of offenders through such means as forcing them to wear signs such as "I am a convicted child molester" or requiring juvenile offenders to perform contrition ceremonies like apologizing while on their knees. See George F. Will, *Restore the Sting of Shame*, *NEWS AND OBSERVER* (Raleigh, NC) Feb. 1, 1996, at A13, available at LEXIS, News Library, Nwsobv File.

6. Linda Marie Walker, *coup de grâce*, in *600,000 HOURS (MORTALITY)* (Experimental Art Foundation, Adelaide, South Australia, 1994) (quoting MAURICE BLANCHOT, *THE MADNESS OF THE DAY 18* (Lydia Davis, trans., 1981)) available at <http://www.va.com.au/parallel/x1/journal/lmw/coup.html>.

*someone who refused to show any mercy, to use this as the first step in my own closure about losing Matt.*<sup>7</sup>

The 1998 torture and murder of gay college student Matthew Shepard in Laramie, Wyoming is by now a well-known story. From the headlines of national newspapers<sup>8</sup> to the recent off-Broadway play *The Laramie Project*,<sup>9</sup> the story of the infamous hate crime has been told and re-told until it has been transfigured into a kind of Passion Play. Homophobic thugs crucified him, the media resurrected him, and a massive social movement martyred him; Shepard's violent death has become a rallying symbol for the discourse around hate crimes in the United States.

In the "documentary theatre" production *The Laramie Project*, members of a performance collaborative transcribed and edited 200 interviews with residents of Laramie and compiled a performance directly off the pages of the transcripts. Because of the depth of its authors' research, the play raises complicated questions about victimization and retribution. Rather than coming off as cold and archival, the narrative sustains an almost religious quality, a tone that draws heavily on symbolic meanings widely ascribed to the victim's "crucifixion." The climactic scene of the play takes place at the sentencing hearing of Aaron McKinney, one of Matthew Shepard's murderers.<sup>10</sup> Dennis Shepard, Matthew's father, reads a prepared statement "on behalf" of McKinney.<sup>11</sup> We learn that while he the father "would like nothing better" than for McKinney to have the death penalty, perhaps Matthew would not.<sup>12</sup> Though Matthew the victim was not morally opposed to the death penalty, sparing McKinney's life

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7. *Excerpts From Statement by Father*, N.Y. TIMES, Nov. 5, 1999, at A22. For more information on the context of Mr. Shepard's statement, see Michael Janofsky, *Parents of Gay Obtain Mercy for His Killer*, N.Y. TIMES, Nov. 5, 1999, at A1.

8. The Associated Press reported that "[a] gay University of Wyoming student was beaten, burned and tied to a wooden ranch fence like a scarecrow until a passerby found him a half-day later, near death." E.N. Smith, *Gay Man Attacked in Wyoming*, AP ONLINE, Oct. 9, 1998, available at 1998 WL 21170396. See also Tom Kenworthy, *Gay Man Near Death after Beating, Burning*, WASH. POST, Oct. 10, 1998, at A1 (reporting the events leading to Shepard's beating and how the police were investigating the incident as a "hate crime").

9. MOISÉS KAUFMAN AND THE MEMBERS OF TECTONIC THEATER PROJECT, *THE LARAMIE PROJECT* (2001) [hereinafter *THE LARAMIE PROJECT*]. *The Laramie Project* ran at the Union Square Theatre over the summer of 2000. Artistic Director Moisés Kaufman and the members of the Tectonic Theater Project traveled to Laramie, Wyoming barely a month after the murder to interview members of the town about Shepard's murder, the subsequent media coverage of the murder, and the trial of Shepard's killers. *Id.* at vii. Anna Deveare Smith innovated this "documentary" genre of performance in *Twilight: Los Angeles*, a work documenting the Los Angeles riots. ANNA DEVEARE SMITH, *TWILIGHT: LOS ANGELES*, 1992 (1994).

10. *THE LARAMIE PROJECT*, *supra* note 9, at 95-96.

11. *THE LARAMIE PROJECT*, *supra* note 9, at 95 (explaining that McKinney's defense attorneys approached Matthew Shepard's parents and requested their participation in the sentencing hearing).

12. Matthew Shepard Online Resources, Mr. Shepard's Statement to the Court-11/4/99, at <http://www.wiredstrategies.com/mrshep.htm> (last visited Apr. 20, 2002) (on file with the Review of Law & Social Change). See also Janofsky, *supra* note 7, at A1.

would be a testament to his memory, and to values of tolerance that he embodied.<sup>13</sup> Thus, the vengeful father would cede to the grace of his son; he would save McKinney and symbolically restore Matthew's voice as a public actor. Moreover, Dennis Shepard makes clear that mercy is self-serving: "[T]his is the time to begin the healing process, . . . to use this as the first step in my own closure about losing Matt."<sup>14</sup> This scene, directly preceded by an enactment of McKinney's confession and explication of the night he killed Matthew, transforms Shepard into a messianic symbol. Matthew's father says that "every Christmas" McKinney should remember he was given his life in Matthew's name. With these words, the audience is invited to conjure an image of the Evil McKinney remembering the Good Shepard on the day Christ was born, praying for forgiveness.<sup>15</sup>

Despite its aspiration to serve as a "documentary" account, *The Laramie Project* manages to unleash the familiar tropes of a passion play or martyr-drama; it dramatizes an unrelieved clash between evil and innocence in stark symbolic terms. The play probably overstates the miraculous effect of Matthew Shepard's sentiments but, like every case that involves the threat of state killing, the McKinney case certainly was enveloped in a larger Manichean struggle over symbols. In sparing McKinney, Matthew Shepard's family was concerned with *which* story would capture our imaginations—would it be the Passion Play of Matthew Shepard or would it be the ghost story of an executed McKinney haunting the public discourse for years to come? Dennis Shepard's statement dramatizes a commonly expressed desire for closure, at "bringing the torn edges together."<sup>16</sup> Importantly, Shepard said that he and his wife supported the plea agreement because it foreclosed a prolonged appeals process or the possibility of a lighter sentence; moreover, it prevented McKinney from becoming a symbol.<sup>17</sup>

13. See Robert W. Black, *Defendant Gets Life in Gay Killing Plea Deal*, ATLANTA CONST., Nov. 5, 1999, at A3 (reporting that "[p]rosecutor Cal Rerucha said he didn't want the deal at first, but Shepard's family wanted to show tolerance because their son believed in it").

14. *Excerpts from Statement by Father*, *supra* note 7.

15. To be sure, the emphasis on Christmas was among the quasi-theological resonances I identified in my own viewing of the play. Both the published script of the play and the Associated Press reported these words as follows: "Every time you celebrate Christmas, a birthday, the 4th of July, remember that Matt isn't. Every time you wake up in your prison cell, remember you had the opportunity and the ability to stop your actions that night." THE LARAMIE PROJECT, *supra* note 9, at 96; *Deal Spares Life of Gay Man's Killer*, CHI. TRIB., Nov. 5, 1999, at 3. However, Dennis Shepard explicitly encouraged the theme of martyrdom: "Matt became a symbol, some say a martyr . . . . That's fine with me . . . ." *Excerpts from Statement by Father*, *supra* note 7. Others, such as playwright and gay rights activist Tony Kushner, went even further along these lines, speaking of Matthew's "passion" and "crucifixion" in quasi-religious terms: "[M]ay you think about this crucified man, and may you mourn, and may you burn with a moral citizen's shame." Tony Kushner, *Matthew's Passion*, THE NATION, Nov. 9, 1998, at 4, 6.

16. Walker, *supra* note 6.

17. Dennis Shepard announced:

[Y]our agreement to life without parole has taken yourself out of the spotlight and out of the public eye. It means no drawn-out appeals process, chance of walking away free due to a technicality and no chance of a lighter sentence due to a "merciful" jury. Best

The extent to which the Shepards influenced the plea bargain process illustrates another facet of the victim-centered jurisprudence—the increased deference to victims as controlling the terms of litigation, creating a kind of “outsider jurisprudence” where victims effectively shape the legal consequences for offenders. Shepard asserts in his statement to the court: “At no time did [prosecutor Cal Rerucha] make any decision on the outcome of this case without the permission of Judy and me. It was our decision to accept [McKinney’s] plea bargain . . . and the earlier plea bargain of [co-defendant] Henderson.”<sup>18</sup> Judy Shepard, Matthew’s mother, convinced Dennis Shepard and prosecutor Rerucha to agree to a plea and sentencing arrangement before the jury could consider McKinney’s punishment.<sup>19</sup> Under the arrangement, McKinney was sentenced to two consecutive life terms in the state penitentiary,<sup>20</sup> with no possibility of appeal or parole, with a “gag order” on both McKinney and his lawyers from talking to the media about the case.<sup>21</sup> One commentator noted that “[t]he agreement was hailed by editorial writers throughout the country as an example of parental mercy triumphing over vengeance.”<sup>22</sup> Other reports documented the unusual amount of involvement of the victim’s family in decisions that would have otherwise been left to the prosecution.<sup>23</sup>

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of all, you won’t be a symbol. No years of publicity, no chance of commutation, no nothing—just a miserable future and a more miserable end. It works for me.

*Excerpts From Statement by Father, supra note 7.*

18. Dave Cullen, *A Dramatic Moment Of Mercy: The Shepard Family Spares the Life Of their Son’s Killer*, (Nov. 5, 1999), SALON.COM, at <http://www.salon.com/news/feature/1999/11/05/shepard/> (reporting that Rerucha claimed the decision to accept the agreement was ultimately his, but that he did not even enter the room where the Shepards’ negotiated McKinney’s sentencing agreement) (on file with Review of Law & Social Change); see Julie Cart, *Killer of Gay Student Is Spared Death Penalty*, L.A. TIMES, Nov. 5, 1999, at A1 (reporting that “Rerucha stated that he had reservations about the plea bargain, but that Matthew’s mother prevailed upon him to agree to it”); see also Michael Bronski, *Justice Is Blind and Gagged*, Z MAGAZINE, Jan. 2000, at 17 (reporting that “Rerucha worked closely with the Shepards in crafting the plea bargain and sentencing agreement. Rerucha claimed that he was mandated to do so under Wyoming law—an example of the expansive ‘victim’s rights’ laws that have been increasingly implemented over the past decade”), available at [www.zmag.org/zmag/articles/jan2000bronski.htm](http://www.zmag.org/zmag/articles/jan2000bronski.htm).

19. Matthew Shepard’s father has declared that he has not forgiven McKinney. See Mr. Shepard’s Statement to the Court—11/4/99, *supra* note 12 (telling McKinney, “You robbed me of something very precious, and I will never forgive you for that”). Matthew’s mother’s motivation for accepting the plea, however, was reportedly forgiveness. See Cart, *supra* note 18, at A1. Prosecutor Cal Rerucha said that he “will never get over Judy Shepard’s capacity to forgive.” *Id.*

20. Janofsky, *supra* note 7, at A1.

21. Bronski, *supra* note 18, at 18. Commentators like Bronski and Rick Halperin, among others, have noted that the plea agreement appears to be virtually unenforceable against McKinney, because he is already serving two life sentences and any additional punishment would be meaningless. See *Id.*; Rick Halperin, *Death Penalty News: Wyoming: McKinney Agreement*, ABOLISH, Nov. 19, 1999, at <http://venus.soci.niu.edu/~archives/ABOLISH/dec99/0365.html> (last visited on April 20, 2002) (on file with Review of Law & Social Change).

22. Phil Curtis, *More than a Verdict*, THE ADVOCATE, Jan. 18, 2000, at 35, 36.

23. Some of the same commentators who hypothesized that the gag order may be unenforceable recognize that such a gag order, and moreover victim participation, can nonetheless represent a dangerous new trend in plea agreements. See Bronski, *supra* note 18, at 18; Halperin,

Another striking example of "outsider jurisprudence" in this story was the entrance of a network of national lesbian, gay, bisexual and transgender (LGBT) rights organizations that joined the struggle over symbols when prosecutor Cal Rerucha indicated that he would seek the death penalty for McKinney and Henderson. In February 1999, after a contentious internal debate, a group of eleven LGBT rights organizations, including the National Gay and Lesbian Task Force and Lambda Legal Defense and Education Fund, issued a statement condemning the death penalty in the Shepard case.<sup>24</sup> Rather than Matthew speaking from beyond the grave, it was likely the voices in this statement that convinced the Shepards to stop supporting the death penalty for Matthew's killers. In the end, Mr. Rerucha indicated that he and the Albany County Attorney's office had little or nothing to do with the terms of the plea agreement,<sup>25</sup> which instead can be credited to the Shepards, the LGBT rights movement, or the State of Wyoming's victim's rights statute.

The Matthew Shepard story presents a parable about closure. We can understand Dennis and Judy Shepard as prototypical of a new kind of victim empowered by an emergent discourse combining popular sentiment and private justice. This power allowed Dennis Shepard's heroic attempt at closure, at "bringing the torn edges together." In particular, the gag order imposed on McKinney, preventing him from ever discussing the case again, should be understood as an extraordinary triumph of the victim's will. When a surviving family pushes for the death penalty, among the desires it might express is to silence the voice of the condemned. The resulting silence freezes the story of the murder at the point of sentencing, a narrative that decidedly favors the victim. It also places the voice of the condemned on an equal plane with the primary victim: both can no longer speak. Here, Dennis Shepard seems to acknowledge that putting the condemned on death row only heightens the public's interest in that story. A sharply divided public is drawn to ghost stories and death dramas, even as the victim's family bears the burden of countering the death row inmate's own victim-talk. This extension of the story of the crime, with the defendant elevated to protagonist, is the bind of using capital punishment as closure. Empowered by a broader victims' rights agenda, however, Dennis Shepard was given more latitude to express his desires. Moreover, by personally shaping the plea and sentencing agreements, he was seemingly given the *de facto* power to impose a life sentence, and this resonated in the double meaning of his performative utterances of "I'm going to grant you life" and "I give you life."<sup>26</sup> Here a power

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*supra* note 21.

24. Curtis, *supra* note 22, at 36.

25. See sources cited *supra* note 19.

26. See Janofsky, *supra* note 7, at A1 (quoting Dennis Shepard: "Mr. McKinney, I'm going to grant you life, as hard as it is for me to do so, because of Matthew. . . . I give you life in the memory of one who no longer lives. May you have a long life and may you thank Matthew every day for it."). Though according to Dave Cullen, *supra* note 18, McKinney's fate had been ironed out behind closed doors the night before, Shepard's statement was delivered as if it was itself

previously only in the hands of the state or the sovereign, is symbolically handed "back" to victims—an act equipoised on the fulcrum of vengeance and forgiveness, of mercy and damnation.

Despite the element of mercy in Shepards' sentence, this story raises the concern that victim-centered proposals for punishment could favor unacceptable outcomes, even if they exclude the death penalty. It is interesting that a victim's family member, given almost unlimited leeway in exercising personal will on the criminal process through extraordinary publicity, an active social movement, and a relatively passive prosecutor, would choose a form of punishment gaining acceptance as the most popular alternative to the death penalty: life without parole. Although no sentence or punishment may actually provide complete closure, the discourse of Victims' Rights seems to suggest that a victim with unlimited power, whether or not accompanied with a retributive spirit, would be attracted to a kind of total incapacitation or "enclosure," a zone where sovereignty is exercised over a "life that does not deserve to be lived."<sup>27</sup> A victim's family's "will to closure" could invite forms of "enclosure" virtually equivalent to death, and this possibility should be a cause for moral and ethical concern. In this sense, the kind of "enclosure" achieved in the Shepard story, life without parole or appeals and with a gag order silencing the prisoner, is for the moment the ultimate triumph of victim-centered jurisprudence. In the following section, I will explore how this apparent shift in power has become possible and discuss the broad policy implications and dangers of a certain quality of sovereignty passing into the hands of primary and secondary victims.

## II.

### CONTESTS OF CLOSURE: THE VICTIMS' RIGHTS MOVEMENT

#### *A. Victims' Rights, Remedies, & Rage*

Admittedly, the Shepards' experience is anything but the standard story about the assertion of "Victims' Rights" in this country. While this social movement is often considered sympathetic to the retention and enforcement of the death penalty, the movement expresses enough diversity that it also created the conditions of possibility for the Shepards' "act of mercy." A later part of this essay will take up the relative roles of "vengeance" and "mercy" in victim-centered jurisprudence. For now, it is sufficient to understand that the phrase

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performative. Performative speech is speech that is consequential, speech that "does things." See generally J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J.O. Urmson & Marina Sabisà, eds., 2d Ed. 1975); see also JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* (1997).

27. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 8, 137 (Daniel Heller-Roazen, trans., 1998). Italian philosopher Agamben revives the classical Greek distinction between *bios* ("political life") and *zoe* ("bare life"). The latter entails a state of subhuman abandonment, such as that in a concentration camp. I use Agamben's terms here to provoke a somewhat hyperbolic thought experiment, suggesting the ethical danger of allowing victims to condition life without parole until it resembles a state of total enclosure, and therefore "bare life."



"Victims' Rights Movement" refers to a more or less organized social movement that advocates changes in criminal law and procedure designed to provide crime victims, collectively and individually, more satisfaction within the legal system.<sup>28</sup> In historical context, these demands for satisfaction have been characterized by demands for compensation, participation, and closure. Through the efforts of this movement, the rhetorical landscape of the debate over the death penalty seems to be subtly tilting toward the primacy of the secondary victim,<sup>29</sup> though the assertion of rights for victims still remains a highly contested matter. Recently expressing his support for a proposed Victims' Rights Amendment to the U.S. Constitution, Professor Laurence Tribe nonetheless acknowledged that the proposed amendment would "take effect against the background of a legal culture in which the very notion of 'victims' rights' has traditionally been dismissed either as a vague metaphor or as an atavistic throwback to a primitive era of private justice."<sup>30</sup> Justice Dolliver of the Washington State Supreme Court, an opponent of the same amendment, puts it more forcefully: "By constitutionally emphasizing the conflict between the victim and the accused and placing the victim in the role of a quasi-prosecutor or co-counsel, the victims' rights amendment represents a dangerous return to the private blood feud mentality."<sup>31</sup>

Tribe and Dolliver are both referring to a history in many societies of private vengeance or private prosecution, where murder was in some form or another avenged by the victim's family. Throughout the history of criminal justice, there are examples of systems of private grievance being displaced by public prosecution.<sup>32</sup> One common primitive form of grievance was "blood feuding," where an offender's clan was expected to provide "satisfaction" to a victim's clan in the form of an equitable restitution for the offense.<sup>33</sup> If left unsatisfied,

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28. See Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 951 (1985) (stating "'victim's rights' may be viewed as a populist movement responding to perceived injustices in the criminal process"); see also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 9 (2001) (noting that "[t]he feelings of the victim, or the victim's family, or a fearful, outraged public are now routinely invoked in support of new laws and penal policies"). See generally JEFFRIE G. MURPHY, *Getting Even: The Role of the Victim*, in *RETRIBUTION RECONSIDERED: MORE ESSAYS IN THE PHILOSOPHY OF LAW* (1992).

29. The primacy of the discourse of "victimization" has been noted in works such as JOSEPH A. AMATO, *VICTIMS AND VALUES: A HISTORY AND A THEORY OF SUFFERING* xix (1990) (noting that "[c]laims of suffering have invaded and, in measure, overwhelmed contemporary conscience and political rhetoric"). The focus on "secondary victims" seems a concomitant of death penalty discourse in particular, because the primary victim is typically deceased and therefore more an object than subject of discourse.

30. Letter from Laurence H. Tribe, Professor, Harvard Law School, to Dianne Feinstein, Senator, U.S. Congress (Apr. 27, 2000) (on file with the Review of Law and Social Change), available at <http://www.nvcan.org/docs/tribe0400.htm> [hereinafter Letter from Laurence Tribe].

31. James M. Dolliver, *Victims' Rights Constitutional Amendment: A Bad Idea Whose Time Should Not Come*, 34 WAYNE L. REV. 87, 90 (1987).

32. See John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 317-18 (1973).

33. Eric Schlosser, *A Grief Like No Other*, ATLANTIC MONTHLY, Sept. 1997, at 37, 45, available at <http://www.theatlantic.com/issues/97sep/grief.htm> (last visited April 20, 2002).

the latter would hold a vendetta against the offender and his family, which might last for generations.<sup>34</sup> Family feuds evolved into systems of communal justice, where disputing sides would be pressed into settlement by the community at large.<sup>35</sup> Under Anglo-Saxon law, a system developed where a murderer was compelled to pay a compensatory fine to the victim's family.<sup>36</sup> If a murderer failed to pay this fine, he or she was deemed an outlaw and abandoned by the community. Denied the protections of communal law, the offender could be killed with impunity. In addition to paying the victim's family, the murderer had to pay a separate fine to the King.<sup>37</sup> Eventually, under feudalism, the King started to take the murderer's entire compensatory payment, and murder became considered a breach of "the King's peace."<sup>38</sup> As such, the victim's family lost the burdens and benefits of the blood feud, including the right to satisfaction, which usually consisted of monetary compensation or the determination of the murderer's punishment.

The Norman invasion of England in 1066 again introduced a system of private prosecution. The "appeal," as the new system was called, involved a private accusation made by the victim or victim's family against the suspect.<sup>39</sup> The appeal placed the entire burden of proving an accusation on primary or secondary victims.<sup>40</sup> Public prosecution only became feasible with the centralization of the modern state and legal system,<sup>41</sup> which involved both a loss and gain for the victims. When the task of private prosecution was lifted from victims and kin, the burden of resource allocation shifted to the state in vindicating the wrong. An element of personal involvement and satisfaction was also sacrificed as victims were relegated to the status of passive participants in the process.

The American colonies imported their traditions from English common law and repeated the same general pattern as the earlier Anglo-Norman systems, shifting from private to public prosecutions as the governments of the colonies became more organized.<sup>42</sup> By the founding of the republic, separate rights for victims were not given the force of law in the Bill of Rights or elsewhere.<sup>43</sup> Once again, the power to enforce the law shifted from ordinary citizens to professionals in an organized juridical field. Only the state or federal govern-

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34. *Id.*

35. See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 4 (3d ed. 1990).

36. See Henderson, *supra* note 28, at 939.

37. Schlosser, *supra* note 33, at 45.

38. *Id.*

39. Janelle Greenberg, *The Victim in Historical Perspective: Some Aspects of the English Experience*, 40 J. SOC. ISSUES 77, 80 (1984).

40. *Id.*

41. See BAKER, *supra* note 35, at 571-75 (describing the centralization of criminal prosecution in early modern England).

42. Thad H. Westbrook, *At Least Treat Us Like Criminals!: South Carolina Responds to Victims' Pleas for Equal Rights*, 49 S.C. L. Rev. 575, 578 (1998).

43. See U.S. CONST. amends. I-X.

ment had standing in a criminal action and the state generally collected any fines. Crime victims were relegated to the sidelines and valued mainly for their testimony in court. While modes of private vengeance still existed in organized vigilante movements, including lynching, and in the ritualized violence of duels, these were emphatically extra-legal forms relegated to the margins of society.<sup>44</sup> Considering this ignominious genealogy, it is not surprising that some consider the modern invocation of "victims' rights" (along with "outsider jurisprudence") to be a sinister throwback to darker times. Others, however, cast it as another positive development alongside all social movements for the inclusion and empowerment of oppressed groups.<sup>45</sup>

The transition from private justice to public prosecution has been a recurrent and powerful pattern in modern legal systems. Even the most successful counter-movement is unlikely to substantially reverse this process. Yet, as dramatized by the Shepard case, the modern Victims' Rights Movement at least poses a serious challenge to these settled norms. In a modern criminal case, a prosecutor, not the crime victim, initiates and controls the case. This method of beginning the case contrasts with civil cases where the injured party initiates the court action. If the prosecutor is viewed as nothing more than a stand-in for the community injured by a crime, then it may appear, in a historical context, that the prosecutor is merely surrogating the functions of the victim's kin. Yet unlike earlier legal systems, the modern prosecutor acts as a surrogate for the community at large, and not simply for the primary or secondary victims. The prosecutor typically may file or refuse to file criminal charges without a victim's approval. This element of discretion and independence from the will of particular members of the community mark the boundaries of the modern power of prosecution. This power is precisely what the Victims' Rights discourse threatens to erode.

Although it may not always be useful to discuss the so-called Victims' Rights Movement as a single unified historical development, I will do so here for heuristic purposes by drawing on major developments and common tendencies. The movement's genealogy is not so simple. Compensation schemes for crime victims have been revived as a feature of common law systems since the 1950s, when the English penal reformer Margaret Fry proposed these schemes in England, New Zealand, and California.<sup>46</sup> Around the same time, a new school of criminology, called victimology, was developed to focus on the behaviors of victims in studies of crime.<sup>47</sup> This emerged as the first distinctively "victim-centered" discourse, but tended toward a "blame the victim" approach rejected

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44. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 177-87 (1993) (describing history of vigilantism and duels and deciding that both were exercises in lawlessness).

45. See generally Schlosser, *supra* note 33.

46. Henderson, *supra* note 28, at 944 n.36.

47. See Robert Elias, *The Symbolic Politics of Victim Compensation*, 8 *VICTIMOLOGY* 213, 213 (1983) (noting that victim compensation schemes began in the late 1960's as "[p]art of the resurgent concern for crime victims in American criminal justice").

by the later Victims' Rights Movement.<sup>48</sup> As a grassroots political movement, the emergence of the Victims' Rights Movement in the early 1970s can be ascribed to a confluence of historical forces. Some have described the rise of the Victims' Rights Movement as a response to the abolition and procedural rights campaigns launched by the NAACP Legal Defense and Educational Fund in the mid-1960s, which initially succeeded in securing enhanced procedural protections for capital and other criminal defendants.<sup>49</sup> In this context, the movement is an expression of popular resentment towards Supreme Court decisions that extended constitutional rights of criminally accused and while holding that victims have no "judicially cognizable interest in the prosecution . . . of another."<sup>50</sup> Others trace the Victims' Rights Movement to the efforts of women's groups in the early 1970s "to inform the public about the problems that rape victims encounter in the criminal justice system", eventually broadening to include address the treatment of crime victims in general.<sup>51</sup> In time, the broader movement that grew out of grassroots feminist practice and "law and order" rhetoric of the political Right in the 1980s converged on a common language, which translated forms of "rage" into formal remedies and rights. In 1982, President Ronald Reagan appointed a Task Force on Victims of Crime that published a report concluding that "innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds—personal, emotional, and financial—have gone unattended" and recommended ratification of a constitutional amendment to guarantee the protection of victims' rights.<sup>52</sup> In 1984, Congress passed the Victims of Crime Act, which redirected revenues from bail forfeitures and criminal fines to help fund state victim assistance programs.<sup>53</sup> While at least twenty-nine states have amended their constitutions

48. Ezzat A. Fattah, *Some Recent Theoretical Developments in Victimology*, 4 VICTIMOLOGY 198 (1979).

49. See MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 60–72 (1973) (describing the litigation strategy of the NAACP Legal Defense and Education fund).

50. Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973). For a concise discussion of the marginalized role of the victim in the American legal system, see Sue Anna Moss Cellini, *The Proposed Victims' Right Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 849–56 (1997).

51. Keith D. Nicholson, *Would You Like More Salt With That Wound? Post-Sentence Victim Allocation in Texas*, 26 ST. MARY'S L.J. 1103, 1111–12 (1995).

52. See PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, at ii (Dec. 1982).

53. Victims of Crime Act of 1984, 42 U.S.C. §§ 10601–10604 (1994). Congress has passed numerous other laws referring to victims' rights, including the Victim and Witness Protection Act of 1982, the Victims' Rights and Restitution Act, 1990, the "Victims' Bill of Rights" provisions of the 1994 Omnibus Crime bill, and mandatory restitution as part of the Antiterrorism and Effective Death Penalty Act of 1996. See Cellini, *supra* note 50, at 854–55. Finally, Congress adopted the Victim Rights Clarification Act especially to overturn the trial judge's sequestration order of victim-witnesses in the Oklahoma City bombing case. See 18 U.S.C. § 3510 (1994 & supp. IV 1998).

to protect victims' rights,<sup>54</sup> efforts at amending the U.S. Constitution have met with considerably more caution and resistance.

The main obstacle to the "rights" aspect of the movement is the concern that these would conflict with or trump defendants' rights. In recent years, however, the popularity of Victims' Rights has caught up culturally, though not legally, with defendants' rights. The Victims' Rights Movement's recent accomplishments include the drafting of victims' bills of rights, several international Victims' Rights conferences, and numerous victim assistance programs.<sup>55</sup> Despite a continuing association with right wing politics, Victims' Rights has also entered the mainstream political agenda. The studiously centrist Clinton administration made this presence obvious through its support for the Victims' Rights agenda. Under that administration, the Justice Department doubled its victims assistance budget to \$400 million, and President Clinton supported the movement by insisting that "the only way to give victims equal and due consideration" is to amend the Constitution."<sup>56</sup> Though the current Bush administration has not yet stated a position on the Victims' Rights agenda, it seems unlikely that they will be any less enthusiastic.<sup>57</sup>

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54. *Twenty-Nine States Amend Constitutions to Benefit Victims*, ST.-FED. JUD. OBSERVER, April 1997, at 6. See also ALA. CONST. amend. 557 ("Basic Rights for Crime Victims"); ALASKA CONST. art. I, § 24 ("Rights of Crime Victims"); ARIZ. CONST. art. II, § 2.1 ("Victims' Bill of Rights"); CAL. CONST. art. I, § 28 ("Legislative Findings and Determinations; Rights of Victims"); COLO. CONST. art. II, § 16a ("Rights of Crime Victims"); CONN. CONST. art. I, § 8, pt. b ("Rights of Victims of Crime"); FLA. CONST. art. I, § 16 ("Rights of Accused and of Victims"); IDAHO CONST. art. I, § 22 ("Rights of Crime Victims"); ILL. CONST. art. I, § 8.1 ("Crime Victim's Rights"); IND. CONST. art. I, § 13, pt. b ("Victims of crime, as defined by law, shall have the right . . ."); KAN. CONST. art. XV, § 15 ("Victims' Rights"); MD. CONST., DECL. OF RTS, art. XLVII ("Rights of Victim of Crime"); MICH. CONST. art. I, § 24 ("Rights of Crime Victims"); MO. CONST. art. I, § 32 ("Crime Victims' Rights"); NEB. CONST. art. I, § 28 ("Crime Victims; Rights Enumerated"); NEV. CONST. art. I, § 8, pt. 2 ("Rights of Victims of Crime"); N.J. CONST. art. I, ¶ 22 ("Rights of Victims of Crimes"); N.M. CONST. art. II, § 24 ("Victim's Rights"); N.C. CONST. art. I, § 37 ("Rights of Victims of Crime"); OHIO CONST. art. I, § 10a ("Rights of victims of crimes"); OKLA. CONST. art. II, § 34 ("Rights of Victims"); OR. CONST. art. I, § 42 ("Rights of victim in criminal prosecutions and juvenile court delinquency proceedings"); R.I. CONST. art. I, § 23 ("Rights of victims of crime"); S.C. CONST., art. I, § 24 ("Victims' Bill of Rights"); TEX. CONST. art. I, § 30 ("Rights of crime victims"); UTAH CONST. art. I, § 28 ("Declaration of the rights of crime victims"); VA. CONST. art. I, § 8-A ("Rights of victims of crime"); WASH. CONST. art. I, § 35 ("Victims of Crimes - Rights"); WIS. CONST. art. I, § 9m ("Victims of Crime").

55. Nicholson, *supra* note 51, at 1112.

56. Bruce Shapiro, *Victims & Vengeance: Why the Victims' Rights Amendment is a Bad Idea*, THE NATION, Feb. 10, 1997, at 11, 12, available at <http://past.thenation.com/issue/970120/0210shap.htm> (last visited April 20, 2002). See also Robert P. Mosteller, *Victims' Rights and the Constitution: Moving From Guaranteeing Participatory Rights To Benefiting The Prosecution*, 29 ST. MARY'S L. J. 1053, 1053 (1998) (noting that Clinton made this statement during an election year).

57. At least symbolically, the new administration has already indicated some friendliness to the Victims' Rights cause. On April 9, 2001, George W. Bush proclaimed the week of April 22 though April 28, 2001, as National Crime Victims' Rights Week. In his proclamation, Bush stated:

The campaign to win rights for victims parallels other grassroots movements in our Nation's history. These crusades most frequently began as small local movements led

If a common agenda can be ascribed to the Victims' Rights Movement, its main objectives include compensation, participation, and closure. Compensation usually refers to material restitution that is intended to restore victims roughly to their positions before the harm. Participation is more complicated and might include, for example, the right to be notified in advance of any court hearing in a case, the right to be consulted before a plea bargain, the right prior to sentencing to give statements about the crime's impact, and the right to be notified of a criminal's parole hearing, release date, or escape from prison.<sup>58</sup> Typically, proponents of Victims' Rights emphasize its modest goals (such as participation as "notification" or as "adding voices without subtracting any") while opponents emphasize its potentially far-reaching consequences. For example, according to Professor Paul Cassell, a supporter of Victims' Rights, crime victims have a right to be present during proceedings and their presence would incur minimal costs.<sup>59</sup> On the other hand, Victims' Rights opponent Bruce Shapiro refers to one aspect of the movement as a "vengeance-rights lobby," and sees the proposed victims' rights amendment as "upend[ing] the historic purpose of the Bill of Rights" to protect the disadvantaged.<sup>60</sup> The third demand of closure, the most subjective and elusive goal, often goes beyond mere participation and relies on the result of a case.

It is important to note that Victims' Rights discourse, as it relates to murder victims (and therefore often the death penalty), has distinctive characteristics not shared by the Victims' Rights Movement as a whole. First, the emphasis on restoration and material compensation to the families is less pronounced in death penalty discourse because a murder victim's family cannot be restored their lost loved-one or fully compensated by monetary means. Where it is proposed, compensation is merged with the penalty itself as an additional punitive measure rather than as a means to do away with the bad consequences of the offense. Otherwise, it takes the form of other conditions on a sentence, such as an apology.

Secondly, in murder and death penalty cases, participation is seen as a valuable means to influence the sentencing. In these cases, the persons claiming the

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by groups of passionate individuals who spoke out in protest when they saw inequities. During this week, let us join in the effort to establish fair legal rights and services for crime victims.

Press release, George W. Bush, President of the United States of America, National Crime Victims' Rights Week 2001 (April 10, 2001) (on file with the Review of Law and Social Change), available at <http://www.whitehouse.gov/news/releases/2001/04/20010410-3.html>.

58. The proposed constitutional amendment that was introduced in the Senate included all of these elements. See *The Proposed Constitutional Amendment: Senate Joint Resolution 6*, ST.-FED. JUD. OBSERVER, Apr. 1997, at 1.

59. Paul G. Cassell, *Victims' Rights Amendment Not a Threat to Defendant's Rights*, ST.-FED. JUD. OBSERVER, Apr. 1997, at 3.

60. Shapiro, *supra* note 56, at 13, 16. Shapiro also suggests that the Victims' Rights Movement's efforts to restore the role of victims to its prevalence in "the colonial days of private prosecution" might lead to inequities in the system of prosecution generally. *Id.* at 17.

victims' rights are secondary victims. In non-death penalty cases, the insertion of primary victims into the criminal process does not have an assuredly positive valence because their experience may replicate the trauma of the crime, requiring them to "relive their victimization." Secondary victims, on the other hand, most often experience victimization as grief and loss, rather than violence.<sup>61</sup> In the murder context, then, any ambivalence about victim participation dissipates because secondary victim participation is perceived not as repeated victimization but as a therapeutic means to deal with grief and achieve closure.

In tailoring the Victims' Rights discourse to the families of murder victims, the focus shifts away from compensation and meaningful participation, although both elements are present, and moves toward closure. Demands for participation and compensation of victims, rather than being given value in themselves, are invested in obtaining punishments that are thought to provide closure: capital punishment or life without parole. In seeking closure, victims' families and their supporters typically lobby for swifter executions or longer prison terms.<sup>62</sup> Facilitating closure can certainly include elements of compensation, such as an apology, or participation, such as victims' impact statements or the viewing of executions, but these are subordinated to what has become the primary focus of "closure" discourse—punishment.<sup>63</sup>

Sociologist David Garland suggests that we should give attention to the "cultural role" of punishment, to how forms of punishment "create social meaning and thus shape social worlds."<sup>64</sup> Others have called this the "expressive function" of law and punishment.<sup>65</sup> Penal scholar Joseph E. Kennedy claims that "the public's attitudes toward issues of punishment are driven more by symbolic concerns about values than by instrumental concerns such as the actual reduction of crime," and thus claims support for the death penalty is "rooted in the symbolism of society's willingness to provide the ultimate punishment for

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61. There are exceptions when the murder victim's surviving relatives and loved ones were also involved in the murder. Their involvement could be as eyewitnesses, primary victims in the same criminal enterprise, or even as the criminal defendants (a class of surviving victims that is inherently puzzling to the dominant Victims' Rights discourse).

62. It is not realistically within victims' families power to lobby for more painful executions or harsher prison conditions, since these are somehow less acceptable to propose—tantamount to torture—and certainly outside their power, but they are allowed and sometimes encouraged to "vent" such feelings in and out of court.

63. For discussion of the "rights" aspect of Victims' Rights discourse, see *infra* Part III.B.

64. David Garland, *Punishment and Culture: The Symbolic Dimensions of Criminal Justice*, 11 *STUD. L. POL. & SOC'Y* 191, 191 (1991). Punishment, Garland tells us, "help[s] shape the overarching culture and contributes to the generation and regeneration of its terms." *Id.* at 193. See generally Austin Sarat, *Capital Punishment as a Legal, Political, and Cultural Fact: An Introduction*, in *THE KILLING STATE* 3 (Austin Sarat ed., 1999); LOUIS P. MASUR, *RIES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865* (1989); JOHN M. SLOOP, *THE CULTURAL PRISON: DISCOURSE, PRISONERS, AND PUNISHMENT* (1996).

65. See FEINBERG, *supra* note 5; Sunstein, *supra* note 5.

the most serious crimes.”<sup>66</sup> According to Garland, punishment can be understood as a set of signifying practices that “teaches, clarifies, dramatizes and authoritatively enacts some of the most basic moral-political categories and distinctions which help shape our symbolic universe.”<sup>67</sup> What I refer to here as the “expressive” role of law is more generally the translation of emotions into cognizable rights and remedies. Martha Nussbaum has said:

In appealing to emotion, we are appealing to especially deeply rooted judgments about what is worthwhile. . . . [I]f social institutions are not altogether corrupt, there is reason to hope that emotions will contain an accurate record of a citizen’s deepest attachments and commitments . . . . So there is reason to think that appealing to emotions might conduce to good reasoning rather than the reverse.<sup>68</sup>

The expression of “rage” accompanied by rights-consciousness has helped the Victims’ Rights Movement cross uneasily into articulating rights and remedies in the juridical field. According to John Bringham:

Rage, as an ideological form, calls attention to the roots of a system; thus rage is counterhegemonic. It counters the claim of sovereign institutions to command obedience, substituting its own form of meaning for others, whether of a conventional sort or imposed with force.<sup>69</sup>

What then is the value of rage in the transformation of our legal institutions? The question here is not whether the expression of rage is generally legitimate or maladaptive within the legal system,<sup>70</sup> but how it can be catalytic of rights and remedies. Rage can be seen as an originary moment in the mobilization of interests and sentiments, which are later articulated in the demands for remedies and rights. In its level of rhetorical sophistication, the Victims’ Rights Movement has moved beyond rage toward the articulation of remedies, but has not yet gained many formal constitutionally guaranteed rights. This could indicate that the movement is still at an early stage of communicating their rage in “rights talk.” Martha Minow has said that the consciousness that leads to rights-talk “is not simply awareness of those rights that have been granted in the past, but also knowledge of the process by which hurts that once were whispered or unheard

66. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 836 (2000).

67. Garland, *supra* note 64, at 195.

68. Martha C. Nussbaum, *Comments*, 66 CHI.-KENT L. REV. 213, 234 (1990).

69. John Bringham, *The Constitution of Interests: Institutionalism, CLS, and New Approaches to Sociolegal Studies*, 10 YALE J.L. & HUMAN. 421, 445 (1998); see generally John Bringham, *Right, Rage, and Remedy: Forms of Law in Political Discourse*, in 2 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 303 (Karen Orren & Stephen Skowronek, eds., 1987).

70. For a generally positive view of the value of rage, see generally MURPHY, *supra* note 28. For a more negative account, see generally WILLARD GAYLIN, M.D., *THE RAGE WITHIN: ANGER IN MODERN LIFE* (1984) (arguing that modern life is suffused with rage that could lead to unrestrained violence if left unchecked).



have become claims, and claims that once were unsuccessful, have persuaded others and transformed social life."<sup>71</sup> For the Victims' Rights Movement, the task at hand is the transformation of rage into a quest for remedial measures at the state and federal levels, and finally for constitutional rights.

The issue of whether "victims" can be considered a viable rights-claiming constituency turns on whether they can actually be identified as a group and granted generalized rights and remedies. The threshold question for any generalized remedy for victims is, "Who counts as a victim?" Even primary victims, where they survive, do not have "standing" in a criminal prosecution. Standing is a considerably greater obstacle for secondary victims. Thus, as we will discuss in terms of victim impact statements and the proposed Victims' Rights Amendment, persistent questions arise of what relationship a secondary victim must have to the decedent in a murder case. The legal definition of "victim" is merely the first of a number of questions that demand an answer about the identification of victims.

While the existing Victims' Rights Movement faces an uphill battle in trying to articulate coherent standards for "victim identity" within the juridical field, it has already had some success in leading (and misleading) broader cultural notions of victim identity. On one hand, victimization may serve as a catch-all "politicized" identity to mobilize political participation and activism for legal rights. At the same time, cultural images propagated by the Victim Rights Movement tend to obscure important truths about the facts of victimization in this country. In important ways, the movement has managed to reconstitute the public face of victimization. For example, the categories "victim" and "perpetrator" overlap much more than we are led to believe by the Victims' Rights Movement and its expressivity in legal remedies. According to David Garland, not only do those people who are statistically most likely to be victimized by crime fit the same demographics as those who are most likely to be convicted of crimes, but convicted offenders have often actually been crime victims themselves.<sup>72</sup> The public face of the Victims' Rights Movement hides the most severely affected victims of violent crime, sexism and racism (e.g., prostitutes or teenage black males in the juvenile justice system) who are implicitly disqualified as "genuine" victims in Victims' Rights rhetoric. Therefore, laws are named after prominent sentimentalized victims—white female children as in "Megan's Law"<sup>73</sup>—who constitute the public's preferred image of a "victim"

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71. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. J. 1860, 1867 (1987).

72. Professor Garland expounded these views on victim-criminal overlap during a Faculty-in-Residence seminar I attended at NYU School of Law in Spring 2001. David Garland, Professor of Law and Sociology, NYU, Thinking About Law and Society 6: The Sociology of Criminal Law (April 4, 2001). On the demographic overlap between offenders and victims, see MARCUS FELSON, CRIME AND EVERYDAY LIFE, 21, 72–73 (2d ed. 1998) (citing EZZAT A. FATAH, UNDERSTANDING CRIMINAL VICTIMIZATION (1991)).

73. Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW

and consequently determine the expressive function of this victim-centered legislation. Thus the movement's construction of the "ideal community" of victims has a false face. Unlike other politicized identifications, participation in the Victims' Rights Movement does not necessitate the experience of victimization on a routine and systematic basis. Since we are all potential victims, the Movement promises an "all-purpose form of oppression for many whose contact with crime will be mainly through the media."<sup>74</sup> Unfortunately, this insulates the Movement from the race, gender, and class-based realities of repeat victims of petty and violent crime. For this reason, the movement can actually channel its demands for security and vengeance against some of these same groups based merely on media images of crime. This means that cultural images of victimization can be essentialized, skewed and only then translated into "rights." The Victims' Rights Movement's simultaneous "gentrification of the victim" and discourse of closure also interacts with a kind of "gentrification of revenge." Elayne Rapping says:

For in the Victims' Rights Movement's model, revenge is no longer associated with the disreputable "vulgarity of young lower-class males," but with the most respectable, middle- and upper-class segments of our population; those who see themselves as "victims," more often than not, of today's version of "vulgar, lower class youth"—usually poor inner-city blacks, the most demonized figures in media treatments of crime today.<sup>75</sup>

The Victims' Rights Movement seems poised to give meaning to "victimization" and to convert group rage into rights and remedies.

Claiming victimization and claiming rights are gestures constitutive of participation in legal expressivity. However, access to the expressive function of law, to vindication of emotions and entitlements through the law, is necessarily limited to persons with legal standing. The modern Victims' Rights movement has concentrated on winning standing, and therefore gaining access to the expressive function of law, in two areas: a proposed Victims' Rights Amendment and victim impact statements.

### *B. The Victims' Rights Amendment*

As socio-legal scholar Jonathon Simon has recently reminded us:

[C]rime is not necessarily a wedge issue. Almost all demographic segments of the population, and both political parties, supported [Victims' Rights] measures. On the other hand, one may fear that they

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& SOC. INQUIRY 1111, 1136–37 (2000) (describing the analytical effects of naming victims' rights legislation after Megan Kanka).

74. *Id.* at 1132.

75. Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 668 (2000).

produce a kind of false unity around narratives whose compelling facts provide potent political mobilization but little mandate to govern.<sup>76</sup>

Certainly, the popular sympathy for crime victims is so prevalent that there might eventually be sufficient political mobilization to secure the passage of a measure like S.J. Resolution 6, the proposed Victims' Rights Amendment to the Constitution of the United States. This resolution was first introduced in the 105th Congress on January 21, 1997 by Senators Dianne Feinstein (D-Cal) and Jon Kyl (R-Ariz), but it has been stalled ever since despite wide support from members of both parties. According to the language of the proposed amendment, individuals who are victims of a crime for which the defendant can be imprisoned for a period longer than one year or crimes that involves violence would have the following rights:

- (1) "to notice of, and not to be excluded from, all public proceedings relating to the crime;"
- (2) "[t]o be heard, if present, and to submit a written statement at a public pretrial or trial proceeding to determine a release from custody, an acceptance of a negotiated plea, or a sentence;"
- (3) "[t]o the rights described in the preceding portions of this section at a public parole proceeding, or at a nonpublic parole proceeding to the extent they are afforded to the convicted offender;"
- (4) "[t]o notice of a release pursuant to a public or parole proceeding or an escape;"
- (5) "[t]o final disposition of the proceedings relating to the crime free from unreasonable delay;"
- (6) "[t]o an order of restitution from the convicted offender;"
- (7) "[t]o consideration for the safety of the victim in determining any release from custody;" and
- (8) "[t]o notice of the rights established by this article."<sup>77</sup>

The debate around this amendment centers on the questions of how these aspirational "rights" can be enforced as law and what enforcing them would do to our criminal justice system. How would the amendment interact with other constitutional principles such as protecting individual rights and making the system more politically responsive? On one hand, the Constitution has never provided affirmative entitlements to one class of citizens from the government and over other citizens—least of all to a class of citizens who are as politically powerful as "crime victims" under current state statutes and constitutional amendments. On the other hand, an amendment might pose little danger since the "rights" listed above merely provide a laundry list of the kinds of protections

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76. Simon, *supra* note 73, at 1133.

77. See S.J. Res. 6, 105th Cong. § 1 (1997) (numbering added). See also *The Proposed Constitutional Amendment: Senate Joint Resolution 6*, ST.-FED. JUD. OBSERVER, Apr. 1997, at 1.

already provided in state statutes and amendments.<sup>78</sup> In addition, since none of the rights delineated actually pertain to the fact-finding portion of a case, they may have little effect on the accuracy of criminal trials.

Looking carefully at the rights of a victim delineated in the amendment language itself, the remedies outlined do not truly ask the state to redistribute its protections for one group at the expense of another. As a constitutional matter, opposing the category "victims' rights" to "defendant's rights" makes a degree of sense. Nevertheless, this is not a zero-sum opposition. For example, the defendant's rights are not reduced where the victim is simply given the same right as the defendant to know when the case comes before the court and when the offender is once again on the street. The defendant's constitutional rights could also be protected where the victim has the right to address the court only after the offender has been found guilty. These kinds of demands do not necessarily subtract from procedural fairness. However, particular sections of the proposed amendment do seem to conflict with existing constitutional values. For example, the proposed victim's right to have the defendant's trial free from unreasonable delay is not necessarily compatible with a defendant's own right to a fair and speedy trial. This is especially true if the question of what is "unreasonable" no longer refers merely to delays that might prejudice the defendant's right to a fair trial, but also those delays that might frustrate a victim's interest in closure. The fairness of a trial could be compromised if the timeliness of a trial is determined by conflicting standards. To avoid infringing on defendants' rights, the various rights to victim participation in the amendment should not be read to imply more substantive entitlements, such as determining the content of a negotiated plea or a sentence.

Years of grassroots mobilization have helped overcome some of the awkwardness of defining "victims" as a viable political constituency, but they still make little sense as a constitutionally protected category. Regarding the question of who is a victim, the group Murder Victims' Families for Reconciliation has asked:

Would a battered woman convicted of assaulting her batterer be required to provide financial compensation to the batterer? Would the surviving family members of a murder victim be considered victims? If so, which family members? . . . What about cases where victims of the same convicted offender disagree on sentencing or release issues?<sup>79</sup>

The threshold questions involve victim identity (i.e., "Who is a victim?" "Which victims count?").<sup>80</sup> The proposed amendment treats the term "victim"

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78. See statutes cited *supra* note 54.

79. Statement by Murder Victims Families for Reconciliation on the Proposed Victims' Rights Constitutional Amendment, Aug. 30, 1996 (with regard to language in draft of S.J. Res. 6) (on file with the Review of Law and Social Change), available at [www.geocities.com/citizensftv/victimsfamilies83096.html](http://www.geocities.com/citizensftv/victimsfamilies83096.html) (last visited April 21, 2002).

80. Elisabeth Semel, *Victims' Rights Amendment's Ambiguity Would Encourage Litigation*,

as self-defining. To be sure, a high level of specificity would be unusual for a constitutional amendment, but it would seem that the amendment is both unenforceable and indeterminate without such a definition. Since constitutional entitlements hinge on the term "victim," we could expect a near-constant stream of litigation seeking to define this status for its attendant entitlements. The amendment might properly cover living primary victims but still be entirely unenforceable by secondary victims. Yet the rhetoric of the national Victims' Rights Movement historically has included murder victims' families without addressing this dilemma. Do secondary victims include close friends of the victim, live-in partners, estranged grandparents, abusive spouses, long-lost cousins, illegitimate children, secret admirers, or close relatives with severe Alzheimer's who remember little of the primary victim? As far as legal relevance goes, it is hard to justify any of these people playing more of a role in the proceedings than interested witnesses. Even in the clearest cases of loss of consortium, such measures are still objectionable because they privilege participation and emotional well-being of crime victims over other purposes of the criminal trial.<sup>81</sup> This is the kind of expressivity that is best left to discrete statutes and experimentation by the "laboratories" of state law. The constitutional amendment process should be reserved for the enduring expression of values, not appeals to emotion or momentary social panics. Because of the difficulty of the process of amendment and re-amendment, the Constitution cannot be used merely for the vindication of the emotional harms of an ill-defined class of persons.<sup>82</sup> The Victims Rights Amendment so far has failed to get beyond a favorable report in the Senate Judiciary Committee.<sup>83</sup>

### C. Victim Impact Statements

Some of the conceptual problems that would arise in any Victims' Rights Amendment are already playing themselves out in the context of victim impact statements. Victim impact statements are statements given before a sentence is pronounced, allowing the victim greater participation in the disposition of the case and often seeking to contrast the innocence of victims with the guilt of the offender. Prior to 1991, victim impact evidence was not allowed in capital murder trials. In the 1987 case *Booth v. Maryland*, the United States Supreme Court

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ST.-FED. JUD. OBSERVER, Apr. 1997, at 3 (discussing the difficulty in determining standing for purposes of bringing victims' claims).

81. See *Summary of Arguments For and Against a Victims' Rights Constitutional Amendment*, ST.-FED. JUD. OBSERVER, Apr. 1997, at 3 (noting that proponents of victim's rights want participation and an opportunity for psychological healing, while opponents believe that is in conflict with criminal defendants' due process rights).

82. See Philip B. Heymann, *A Proposed Victims' Rights Constitutional Amendment: Against an Amendment*, ST.-FED. JUD. OBSERVER, Apr. 1997, at 1.

83. See Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. R. 3, 31 (1999) (noting that the amendment received a favorable report from the Senate Judiciary Committee in July 1998).

held that the use of victim impact statements, describing a victim's personal characteristics, the impact of the crime on the victim's family, and the family members' opinions and characterizations of the crime, "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."<sup>84</sup> In 1991, in *Payne v. Tennessee*, the Court reversed direction and permitted the use of victim impact statements in the sentencing stage of capital cases accepting them as simply another form of relevant information.<sup>85</sup> In this case, however, the Court held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar."<sup>86</sup> In *Payne*, the Court overruled *Booth* to the extent that *Booth* prohibited the use of victim impact evidence describing the personal characteristics of victims and the emotional impact of the crimes on victims' families.<sup>87</sup>

Accepting the *Payne* decision in *Weeks v. Commonwealth*, the Supreme Court of Virginia affirmed the trial court's admission of victim impact evidence and rejected Weeks's argument that the testimony was not relevant to the jury's sentencing decision.<sup>88</sup> Citing *Payne*, the court held that "victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia."<sup>89</sup> But while *Weeks* seemed to hold that all such evidence would be admissible and relevant, in *Beck v. Commonwealth*, the same court held that such testimony is admissible provided it is relevant.<sup>90</sup> The court explained, "[T]he statutes do not limit evidence of victim impact to that received from the victim's family members. Rather, the circumstances of the individual case will dictate what evidence will be necessary and relevant, and from what sources it may be drawn."<sup>91</sup> The test for admissibility remains relevance; this does not provide automatic access for secondary victims and it is certainly not an amorphous appeal to closure. In a capital murder trial, as in any other criminal proceeding,

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84. *Booth v. Maryland*, 482 U.S. 496, 503 (1987).

85. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's [sentencing] decision . . . . There is no reason to treat such evidence differently than other relevant evidence is treated."). For extended scholarly commentary on this line of cases, see José Felipé Anderson, *Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing*, 28 RUTGERS L.J. 367 (1997); Ashley Paige Dugger, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375 (1996); Patrick M. Fahey, *Payne v. Tennessee: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205 (1992); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993).

86. *Payne*, 501 U.S. at 827.

87. *Id.* at 830 & 830 n.2.

88. *Weeks v. Commonwealth*, 450 S.E.2d 379, 389 (Va. 1994).

89. *Id.* (citing *Payne*, 501 U.S. at 808).

90. *Beck v. Commonwealth*, 484 S.E.2d 898, 904 (Va. 1997) (holding that admissibility of victim impact evidence "is limited only by the relevance of such evidence to show the impact of the defendant's actions").

91. *Id.* at 905.

the determination of the admissibility of relevant evidence is within the sound discretion of the trial court subject to the test of abuse of that discretion.

In criminal proceedings, the expressive capacity of victims of crime and their families is extended through the use of victim impact evidence. This evidence is designed to play out the way Shepard's statement did—as a ghost story, resurrecting the voice of the dead. Austin Sarat describes victim impact evidence as moving the victim "[f]rom anonymity to embodiment, from absence to presence[;] . . . [it] becomes a vehicle for resurrecting the dead and allowing them to speak as their killers are being judged."<sup>92</sup> The problem with victim impact statements is that they could create an overemotional expression in trial procedures that is driven by imperatives of closure and satisfaction for the victim.<sup>93</sup> As we have seen, opponents of victim impact statements and the Victims' Rights Amendment trace the genealogy of such victim participation to an earlier era of "individual retaliation and vigilante justice."<sup>94</sup> Proponents claim these rights and remedies "restore victims to their traditional role in the criminal justice system."<sup>95</sup> What is "restored" depends a great deal on what was lost in the first place. Indeed, when the state took over prosecutions, an element of personal involvement was sacrificed. Charitably, it can be called a "return" to participation ("voice" or "inclusion"). In more Nietzschean terms, though, it must be recognized that, in the transition to public prosecution, victims and survivors were forced to sacrifice a more positive pleasure, a "will to power" or "will to closure" over the voice of the criminal accused, or in the rawest connotation of the word—*satisfaction*.

### III.

#### VENGEANCE-AS-CLOSURE

The previous sections should provide an adequate legal- historical context for the following analysis of "a will to closure" or "satisfaction." Here, I take a more interdisciplinary approach to the question of closure. Just as in blood feuds, where "demanding satisfaction" was a formalization and rationalization of secondary victims' cathartic needs, so today is the demand for "closure." "Closure" and "satisfaction" are twin notions of catharsis that are reflected differently in the familiar markers of our culture.<sup>96</sup> Of these two notions of

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92. AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 52 (2001).

93. Melissa Deckman Fallon, *Victim Impact Statements: Do They Help or Hinder?* ST.-FED. JUD. OBSERVER, Apr. 1997, at 4.

94. Angela P. Harris, *The Jurisprudence of Victimhood*, SUP. CT. REV. 77, 92–93 (1991). On the significance of victim impact statements, see Austin Sarat, *Vengeance, Victims and the Identities of Law*, 6 SOC. & LEGAL STUDIES 163 (1997).

95. Westbrook, *supra* note 42, at 576–77.

96. "Closure" and "satisfaction" are cathartic in an Aristotelian sense: "purging" emotions of pity and fear. See ARISTOTLE, *THE COMPLETE WORKS OF ARISTOTLE*, VOL. II 2320 (Jonathan Barnes, ed., 1984). See also JENNIFER BOTHAMLEY, *DICTIONARY OF THEORIES* 80 (1993).

catharsis, the term "satisfaction" is today a poor relation to closure, the crazy cousin hidden in the attic. In political discourse, such as the debate over the Victims' Rights Amendment, "closure" is somehow presented as a rational and dispassionate matter of political concern, emptied of its emotional underpinnings and distanced from the viscosity of "satisfaction." The tenuous distinction between "closure" and "satisfaction" tracks the similarly unsound distinction between "retribution" and "vengeance." In each case, the former is a sanitized version of the latter. The idea of "closure" for victims has been explored in the therapeutic context (grief and finality) and "satisfaction" has been whispered in the context of punishment (vengeance and finality), but as victims move to the center of the criminal trial, the lines are again blurring between the two concepts.<sup>97</sup> It is not that raw emotional retributivism never finds its way into our legal and political discourse; it is simply that it is often disguised or displaced into other precincts of culture. Unlike "closure," which has a solemn and temperate ring to it, "satisfaction" seems a vulgar yearning, perhaps even libidinally-structured, like a young Mick Jagger swaggering and posturing and screaming his frustration, "I can't get no Satisfaction!"<sup>98</sup> This is obviously not an ontological statement about the impossibility of closure, but a personal and individualized expression of emotion. It suggests a visceral craving, like the insatiable desire for gratification or a "fix." Such expressions of emotional intensity—whether in the form of lust, grief, disgust, shame, or yearning—are regularly disqualified from legal discourse.<sup>99</sup> Yet achieving satisfaction, reaching the threshold of appropriate catharsis and expiation, dramatizes the individualized "need" for closure expressed by many victims. Other glimpses of popular culture suggest the visceral nature of satisfaction. Elayne Rapping analyzed her experience viewing the movie *Death Wish* upon its theatrical release in 1974.<sup>100</sup> The narrative of the film centers around the protagonist seeking revenge after the brutal murder of his family. Rapping linked the gratification of the audience with the impulses that led to the burgeoning Victims' Rights Movement:

The audience cheered more loudly at each burst of vengeful gunfire . . . . [It represented] the beginning of a slow but insidious trend in national consciousness and criminal justice policy away from the

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97. For an overview of a turn towards "therapeutic jurisprudence" see Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997). See also Dennis P. Stolle, David B. Wexler, Bruce J. Winick, & Edward A. Dauer, *Integrating Preventative Law And Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 17 (1997) ("Therapeutic jurisprudence is an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects.").

98. THE ROLLING STONES, *(I Can't Get No) Satisfaction*, on THE ROLLING STONES: THE LONDON YEARS. (ABKCO 1989).

99. See generally WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997).

100. Rapping, *supra* note 75, at 665.



liberal policies of the Warren Court, with its concerns for the rights of defendants to be protected from possible abuses by the engines of the state.<sup>101</sup>

Others have noted the incongruence between the celebration of retribution in popular culture and the muffling of retribution in legal culture. For instance, legal theorist William Ian Miller produced a substantial study on Clint Eastwood vigilante films, describing revenge as a style of doing justice.<sup>102</sup> Although disqualified from the juridical field, vengeance is still one of the guilty pleasures of popular narratives like movies. It provides a visceral satisfaction and narrative closure; it can excite and edify. In life and in law, however, remedies aimed at closure often partition off the emotional content that drives them: rage, vengeance, and satisfaction. More recently, however, the term "satisfaction" is again gaining respectability in legal discourse, resonating with utilitarian theories (i.e., those directed toward the maximization of pleasure and minimization of pain), and merging with the relatively solemn and quasi-clinical term "closure." As "closure," catharsis is not viewed as a Nietzschean "will to power," but perceived as necessary for victims' recovery process. "Satisfaction" re-enters legal discourse as the state finds itself setting up performances for and through victims. Achieving the efficacious experience of emotional satisfaction is presumed to be the goal of these performances: when victims view an execution, when victims make statements before and after sentencing, statements after a conviction approving the punishment, and when victims sometimes address convicted criminals after sentencing. These maneuvers are widely seen as valuable because they appear to address victims' desire for closure, although their actual therapeutic value remains debatable.

Two related dilemmas emerge as the rhetorical landscape of the death penalty shifts toward the primacy of the secondary victim and toward victim-centered notions of closure. Firstly, Victims' Rights discourse often slips between addressing the expressive needs of individual victims and the expressive goals of the larger "community." Secondly, individual requirements for "closure" are so personal that it would be difficult to conceive of any generalized remedy that could be properly tailored to this purpose. On the level of a social movement, the "rage" expressed by the Victims Rights Movement is not that of individual cases, but a collective rage over the disparity between rights available to defendants and victims. On another level, this discourse is often concerned with ways to "individualize" the victim's satisfaction in a given criminal case. Because the "felt" harms of victimization are so individual and subjective, the victims' satisfaction cannot be determined in advance by ready-

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101. *Id.*

102. William Ian Miller, *Clint Eastwood and Equity: Popular Culture's Theory of Revenge*, in *LAW IN THE DOMAINS OF CULTURE* 161, 202 (Austin Sarat & Thomas R. Kearns eds., 1998) ("Above all, stories of revenge are meant to give us a chance at experiencing the delicious sense of satisfaction of justice, true justice, being done.").

made legal procedures, but can only be achieved by expressing individual desires and inserting these into the process.

These same dilemmas can be recast in philosophical terms. Retributive and utilitarian theories of punishment seem to support the idea that providing "satisfaction" is a worthy goal of punishment. In his book, *Justifying Legal Punishment*, Igor Primoratz explains: "Any pain, any evil inflicted on the offender can be a source of [vindictive] *satisfaction*, first for the victim, and then for all those who, for whatever reason, feel indignation at the offense committed and want its perpetrator punished."<sup>103</sup> However, such theories of punishment merely restate the dilemma between "individualizing" and "collectivizing" satisfaction in the apparent contrast between individual vengeance and social retribution.<sup>104</sup> According to retributivist Paul Boudreaux, individual vengeance is the "desire to punish a criminal because the individual gains satisfaction from seeing or knowing that the person receives punishment."<sup>105</sup> This is the kind of satisfaction that a victim is supposed to experience when she is allowed to view an execution or influence a sentence. Boudreaux also claims that social retribution is merely an aggregation of individual desires, which ultimately provide the justification for punishments.<sup>106</sup> In my view, the demands of individual vengeance and social retribution cannot be so easily reconciled. Just as individual desires are vastly different from each other, "social retribution" cannot merely reflect one set of individual desires. Indeed, under a properly utilitarian analysis, the evils produced by victim-centered measures must be weighed against their benefits to society as a whole. Whatever the actual merits and psychological benefits of individualization of victims' experience of the process (e.g., "right to view" statutes or "post-sentence victim allocation"),<sup>107</sup> the social costs of an aggressively victim-centered discourse should be clear: it takes the focus off blameworthiness and individualization of the criminal accused, and attends to contingent and unstable emotions.

Though victim-centered proposals seem to flow from retributivist and utilitarian theories of punishment, these theories do not automatically endorse providing victims with closure or satisfaction. Although the accepted motivation behind punishment is society's need for satisfying its retributive impulse, the expressivity of punishment can always be rationalized by a formula that suggests its necessity and proportionality, such as the ancient *jus talionis* ("an eye for an

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103. IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 22 (1989). See also, Robert S. Gerstein, *Capital Punishment—"Cruel and Unusual"?: A Retributivist Response*, 85 ETHICS 75, 76 (1975) (arguing that retributivism posits that rational "passion for vengeance" should be included as "part of any just system of laws").

104. Paul Boudreaux, *Booth v. Maryland and the Individual Vengeance Rationale for Criminal Punishment*, 80 J. CRIM. L. & CRIMINOLOGY 177, 184 (1989).

105. *Id.*

106. *Id.* at 188-89.

107. Nicholson, *supra* note 51, at 1134-36 (discussing possible psychological benefits of post-sentence victim allocation).

eye") or the more recent "just desert" theory. Indeed, even some of the leading jurisprudential defenders of a "turn to emotion" insist emotions are valuable in law only insofar as they can guide our ability to reason. Martha Nussbaum has said reasoning can be aided by emotions because emotions "contain an accurate record of a citizen's deepest attachments and commitments."<sup>108</sup> In the context of punishment, Robert Gerstein has referred to a "kernel of rationality . . . found in the passion for vengeance."<sup>109</sup>

Assuming it is possible, should we individualize the delivery of closure? Even if the notion of victim satisfaction can be a legitimate consequence of punishment, what kind of satisfaction should we aim to produce? Should we aim to provide emotional closure associated with the cessation of grief, or should we seek to achieve immediate and efficacious satisfaction to individuals who associate their need for closure with feelings of vengeance and retribution?

If closure is directed at grief, then it is unlikely that legal and procedural remedies can even begin to address this powerful emotion. Countless journalistic treatments have followed the human interest stories of victims seeking closure. Among the best of these is Eric Schlosser's celebrated article in the *Atlantic Monthly*, which tracks the stories of murder victims' families and finds that grief unfolds for each person without a foreseeable course.<sup>110</sup> The patterns of mourning following a homicide are complicated because grief "may be prolonged by the legal system, the attitudes of society, the nature of the crime, and the final disposition of the case."<sup>111</sup>

After a murder the criminal-justice system usually delays and disrupts the grieving of the victim's loved ones. If the murderer is never found, the death lacks a sense of closure; if the murderer is apprehended, the victim's family may face years of legal proceedings and a resolution that is disappointing. Insufficient evidence may lead the prosecution to drop charges or to reduce them from murder to manslaughter. Co-defendants may be given a lesser punishment, despite a role in the murder, in order to obtain their cooperation. Each new hearing may stir up feelings that were seemingly laid to rest.<sup>112</sup>

One secondary victim explained: "You never bury a loved one who's been murdered, because the justice system keeps digging them up."<sup>113</sup> The untidy heap of emotions that occurs is nearly impossible to pull apart; grief and the desire for vengeance mix uncomfortably with shock and numbness.<sup>114</sup> In this

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108. Nussbaum, *supra* note 68, at 234.

109. Gerstein, *supra* note 103, at 76.

110. Schlosser, *supra* note 33.

111. *Id.* at 50-52.

112. *Id.* at 52.

113. *Id.*

114. *Id.* at 50-55 (describing the complicated grieving process that murder victims' families endure).

context, the requirements of closure and satisfaction are difficult to identify, let alone achieve, though a judicial process competent only to charge, prosecute, and sentence the offender whose crime caused the secondary victim's grief. Courts cannot bring about the ultimate moment of cessation in an infinitely more complicated process of grieving.

Still, courts and legislators, propelled by the Victims' Rights Movement, have formulated ever more elaborate ways to deliver closure to victims. One of the most common of which is the viewing of executions. Looking at the reactions of secondary victims in prominent murder cases, however, it becomes all the more apparent that individual reactions to a crime and the success of punishment in creating conditions of closure vary widely. Considering some reported expressions of grief and closure, it appears that the mere fact of an execution does not necessarily produce the desired feeling of closure that the system seems to want to deliver. On one side we have statements that suggest the impossibility or at least the difficulty of achieving closure, which range from disappointment over unchanging grief and confusion<sup>115</sup> to a lack of visceral satisfaction. Some of victims who are the most invested in having a killer executed and/or witnessing the execution, report this latter experience. A typical statement is that of Elizabeth Harvey, one of the first relatives to view an execution under Louisiana's "right to view" statute, who stated: "[The prisoner's] death was not near what my daughter went through. He had his last meal, his friends all around."<sup>116</sup>

Michael Radelet, a sociologist who has written several books on the death penalty indicated that the focus on closure discourse merely invites a cruel exploitation of grieving families: "The families get used and co-opted . . . I don't even know what the term 'closure' means. Someone kills your child, there is no closure."<sup>117</sup> As far as visceral satisfaction goes, another expert has said, "We're talking about revenge, and it's not clear to me that revenge changes one's long-term ability to deal with loss."<sup>118</sup>

Nor is it clear what actually would deliver visceral satisfaction in the short term. At a meeting of the New Orleans Chapter of Parents of Murdered Children, a man stated: "I got to witness the son of a b[itch] fry who killed our daughter. The chair is too quick. I hope he's burning in hell."<sup>119</sup> Sometimes it

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115. Ken Zapinski, *Victims' Families Find No Peace and Dahmer's Kin are Quiet About His Death*, PLAIN DEALER (Cleveland, OH), Nov. 29, 1994, at 6A (learning of Jeffrey Dahmer's death, parents of one of his victims said, "It will never be over because we lost our son"), available at 1994 WL 10766093.

116. Jennifer Liebrum, *Group Pushes Right to View Execution/Victims Advocates Want Families to Have a Say*, HOUS. CHRON., Oct. 15, 1994, at 29, available at 1994 WL 4596754.

117. Louis Romano, *With Death, Hope That Life Goes On; On the Eve of an Execution, Victims Yearn for Peace at Last*, WASH. POST, Aug. 8, 1996, at A1, available at 1996 WL 10725156.

118. Leyla Kokmen & Janan Hanna, *Executions Become More Public*, CHI. TRIB., Nov. 21, 1995, § 2 at 1.

119. Helen Prejean, *Crime Victims on the Anvil of Pain*, ST. PETERSBURG TIMES (St.

even seems that perhaps satisfaction can only be delivered through extra-legal means. Upon hearing of the murder of Jeffrey Dahmer in prison, Janie Hagen, the sister of one of Dahmer's victims, decided to send a thank you to the culprit; she told reporters, "I'd like to know him and get to talk to him . . . . He's my hero."<sup>120</sup> On the other hand, it is notable that so many of the statements expressing enthusiasm about the process being able to deliver closure are taken from or published or expressed or said *before* the actual execution, in anticipation of closure. Nine years after two men killed his parents, Brooks Douglass, an Oklahoma state legislator, expressed his need for closure in an editorial in *USA TODAY*: "[I want] closure on an era of my life into which I never chose to enter. Closure of years of anger and hate. . . . I believe I will find closure with [one of my parents' killers] watching him die."<sup>121</sup> Even the victims most expectant of gaining closure or satisfaction through participation in a trial and execution are often left emotionally hollow. Despite common expressions of relief and jubilation immediately following an execution, close attention to the long term impact of executions on victims' families would probably confirm that viewing them does not do much one way or the other for victims' families.<sup>122</sup>

Consider how in an individual victim, several conflicting emotional responses can quickly chase and overwhelm one another. Take for example Linda Kelley, the mother of two children who were brutally murdered, and the first secondary victim to view an execution in Texas under the Parole Board's new policy. Before the execution of killer Leo Jenkins, Kelley stated, "Other people have witnessed executions, and they find it's like a closure. It has to help."<sup>123</sup> After the execution, she used language of rejoicing appropriate to a closure-optimist: "I'm glad it's over and I'm glad it's done and I'm glad he's off this earth."<sup>124</sup> She also reported feeling anger and some misgivings about his last words, but she still expressed overall approval of the process: "I was angry. I was angry at him when he died. . . . I don't want remorse. 'I'm sorry' just doesn't get it . . . . The best thing he could do for me and my family is to go through with this, to die."<sup>125</sup> During a news conference, she reportedly "grew angry as she described her feelings."<sup>126</sup> She expressed ambivalence that Jenkins was "getting out of this" and "will have no more pain."<sup>127</sup> She eventually

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Petersburg, FL), May 15, 1988, at 1D, *available at* 1988 WL 2579874.

120. Rebecca Carr & Maureen O'Donnell, *Clash of Emotions for Dahmer Victims' Families*, CHI. SUN-TIMES, Nov. 29, 1994, at 6, *available at* 1994 WL 5586658.

121. Brooks Douglass, *Why I Want to Watch a Killer Die*, USA TODAY, Apr. 15, 1996, at 19A, *available at* 1996 WL 2051198.

122. Cf. Prejean, *supra* note 119, at 1D (arguing that executions "don't do much for victims' families").

123. Lee Hancock, *Victims' Relatives Watch Execution in First for Texas*, DALLAS MORNING NEWS, Feb. 10, 1996, at 1A.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

questioned whether her earlier sense of closure was real or meaningful: "I'm trying to make myself realize that even when I'm back home . . . and [the execution] is all over, [my children] are still gone and we still have to live with this."<sup>128</sup> This is not to say that Kelley changed her mind or regretted viewing the execution, but it is understandable if the closure that the viewing statute provided her was momentary and illusory.

Considering confusion in a single victim and the diversity of reactions among different victims in their individual circumstances, one can imagine the cacophony of emotions emerging from victims of an act of mass violence, such as the Oklahoma City bombing or Colin Ferguson's Long Island train massacre. In such cases, the public's attention, the victims' wrenching testimony, and calls for retribution are greatly multiplied, as is the difficulty of individualizing the victims' satisfaction. If the expression of individual victim desires in murder cases would lead to widely different outcomes and open the door to dangers of the inherent inconsistency in the way we deal with the rights and issues for similarly situated people,<sup>129</sup> the aim of "individualization" faces a different kind of difficulty when applied to a case of mass violence. With multiple victims of a single crime by a single defendant, the subjective requirements for closure can be complicated and often conflicting.

In an act of violence of a large scale, another possible response comes to the fore: the desire to extend forgiveness or mercy. This was the eventual response from some of the secondary victims of Timothy McVeigh's bombing of the Alfred P. Murrah building in Oklahoma City, where 168 people died.<sup>130</sup> After months of wanting vengeance, of wanting to see McVeigh "fry," Bud Welch, a primary victim's father, concluded, "I'm not going to find any healing by taking Tim McVeigh out of his cage to kill him. It will not bring my little girl back."<sup>131</sup>

128. *Id.*

129. I will not discuss here the phenomenon of "death row waivers," whereby prisoners elect the option of death, but it is worth contrasting the state's reluctance to cede death decisions to death row inmates with the emerging willingness to respect the wishes of victims. On the topic of waivers generally, see Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853 (1987). See also Peter Goldman, *Death Wish*, NEWSWEEK, Nov. 29, 1976, at 26; Julie Levinsohn Milner, *Dignity or Death Row: Are Death Row Rights to Die Diminished? A Comparison of The Right to Die For The Terminally Ill And The Terminally Sentenced*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279 (1998).

130. Bruce Shapiro, *Victims' Rights—and Wrongs*, SALON.COM (June 13, 1997) (describing how victims who sought to participate had to "pass a death-penalty 'loyalty test' in order to be accepted"), at <http://www.salon.com/june97/news/news970613.html> (on file with the Review of Law and Social Change). Bruce Shapiro reports:

In the New Yorker and on ABC, former prosecutor Jeffrey Toobin extolled the role of victims' rights advocates in the case; in the New York Times, Professor Lawrence [sic] Tribe of Harvard Law School attacked Judge Matsch for suggesting that some of the emotion might be "inflammatory." "Closure" for Oklahoma City's victims became the watchword of television news anchors.

*Id.*

131. *Some Oklahoma City Bombing Families Fight for McVeigh's Life*, CNN.COM (May 4, 2001), at <http://www.cnn.com/2001/US/05/04/mcveigh.families/index.html>.

Welch joined a number of Oklahoma bombing victims' families who lobbied to stop McVeigh's execution, but the jury never heard their stories.<sup>132</sup> In perhaps the most widely watched case involving the mass vocalizations of victim-impact testimony, exactly which victims' stories would count was determined by a prosecutorial strategy aimed at an execution.<sup>133</sup> This effectively barred victims who were opposed to execution from seeking closure by bearing witness in the legal record.

With the public use of victim impact statements at trial, and with over 240 survivors viewing the execution live or on closed circuit television, the McVeigh case has been hailed as a triumph of the Victims' Rights Movement. However, this case also reveals important fissures and counter-voices in this movement. There seems to be a fundamental hypocrisy in the movement's universalistic goals of providing "rights" and individual closure to all victims, and its exclusionary gestures toward particular victims: the Victims' Rights Movement's calls for empathy and procedural fairness are eviscerated when diverse views on punishment are disallowed. While evidence of primary victim impact can be distinguished from evidence of the opinion of a victim's family member that the death penalty should not be imposed, there is in practice no real distinction between families demanding execution so they can have closure and families demanding a different sentence so they can have closure. To be sure, contests between vengeance and mercy as routes to closure should not distract from the fact that this is still the prosecutors' case, not the victims'.

The inclusion of secondary victims is objectionable at many levels, not merely because it makes executions more likely. Thus, all of my aforementioned objections to the relevance of victim impact evidence should apply also to pleas for mercy. The inconsistency in determinations of relevance between victim testimony that calls for retribution and victim testimony in favor of mercy relevant is nonetheless clearly unacceptable in itself. As I will try to make clear in the next section of this essay, questions of mercy and forgiveness are potentially as central to any victim-centered jurisprudence as those of vengeance and satisfaction.

#### IV.

#### MERCY-AS-CLOSURE

*An act of mercy is a very high and concentrated expression of power, for it presupposes condemnation.*<sup>134</sup>

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132. See Shapiro, *supra* note 130 (noting that victims who opposed the death penalty were unfairly excluded from McVeigh's sentencing).

133. *Id.* (noting that "the prosecution wanted an execution" and chose victims to participate accordingly).

134. ELIAS CANETTI, CROWDS AND POWER 298 (Carol Stewart trans., Continuum Publishing Corp. 1981) (1960).

*When I saw his hands cuffed behind him and the noose around his neck and everyone was waiting for my order, I thought that first of all if this boy is dead, it will not bring back my son.*<sup>135</sup>

Mercy is the other side of closure. An interesting counter-point to the Shepard story is that of Iranian father Ali Mohebbi who, under Iranian law, was able to forgive his son's killer—seventeen-year-old Morteza Amini Moqaddam—and give this decision the force of law.<sup>136</sup> Mohebbi forgave Moqaddam minutes before he was to be hanged in a public square in Iran. Here, the extreme of power and performance that is mostly imagined in Dennis Shepard's statement to Aaron McKinney ("I give you life") is fully realized. As the late writer Elias Canetti detected in the context of sovereign mercy:

The supreme manifestation of power is the granting of a pardon at the last moment. When the execution of the death sentence is imminent, on the gallows, or in front of the firing squad, a pardon has the appearance of new life. The limitation of power is its inability to bring the dead back to life; in acts of mercy long withheld, the mighty can imagine themselves as having overcome this limitation.<sup>137</sup>

The private power of mercy evokes an ancient kind of sovereignty, a power over the life and death of the convicted murderer. In our own legal system, it is precisely the power of effective mercy that is supposed to be surrendered to the sovereign and not left in the hands of private citizens. At first glance, the Mohebbi-Moquaddam situation may seem precisely parallel to the Shepard-McKinney case. Both fathers claimed to have "spared" the killer in the name of a higher cause. Mohebbi's act of mercy was reportedly a way to convey the symbolic values of his faith. Shepard may have been expressing the values of "tolerance," which seemed to take into consideration both a section of the LGBT movement's disapproval of the death penalty and the apparently merciful sentiments of his son. Yet in the end, Shepard's power to grant mercy might be seen as merely illusory. In Jeffrie Murphy's terms, a murder victim's family only has "standing" to forgive, but that forgiveness does not have the legal authority of mercy. Only the state has the authority to punish the murderer or to grant that murderer mercy, but the state does not necessarily have the moral standing to forgive.<sup>138</sup> Murphy writes:

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135. Paige McThenia, *The Role of Forgiveness in Capital Murder Cases*, 12 CAP. DEF. J. 325, 325 (2000).

136. *Id.* See also Afshin Valenejad, *Iranian Victim's Dad Spares Life of Teen Killer*, CHI. SUN-TIMES, Jan. 3, 2000, at 18, available at 2000 WL 6663045.

137. CANETTI, *supra* note 134, at 299.

138. Murphy and Hampton write:

Mercy, though related to forgiveness, is clearly different in at least these two respects. First, to be merciful to a person requires not merely that one change how one feels about that person but also a specific kind of action (or omission)—namely, treating that person less harshly than, in the absence of mercy, one would have treated him. Second, it is not a requirement of my showing mercy that I be an injured party. All that is



Forgiveness is primarily a matter of how I feel about you (not how I treat you), and thus I may forgive you in my heart of hearts or after you are dead . . . . I may think I have forgiven you; but, when old resentments rise up again, I may say, "I was wrong—I really have not forgiven you after all." But if I have shown you mercy, it is not necessary that I—in showing it—must be the one wronged or injured by your wrongful conduct. (It is not even necessary that anyone be wronged.) All that is required is that you stand under certain rules and that I have authority to treat you in a certain harsh way because of those rules. But the matter is different with forgiveness. To use a legal term, I do not have *standing* to resent or forgive you unless I have myself been the victim of your wrongdoing.<sup>139</sup>

Yet peculiarly, Shepard's posture was one of mercy without forgiveness. Shepard told McKinney he was "showing mercy to someone who refused to show any mercy," but also said "I will never forgive you." Beyond mercy, Shepard also cited prudential reasons of convenience ("no years of publicity, no chance of commutation") and retribution ("just a miserable future and a more miserable end"). Taken together, these sentiments introduce a far less familiar symbolic universe, one which does not simply resurrect or borrow ancient or comparative systems of private prosecution and sovereign mercy. Whether or not Shepard officially had the power of mercy, there can be little doubt that without the Shepards' approval of McKinney's sentencing agreement, his jury would have considered capital punishment.

While Mohebbi's forgiveness triggered an automatic grant of mercy from the state, the family of the victim has no such official power in the United States. The United States most closely approaches this point where secondary victims can decisively effect whether the criminal accused will receive the death penalty or an alternative penalty. Despite continuing ambiguity as to the permissible scope of victim impact statements, such statements delivered before sentencing are well-timed for this kind of intervention and this display of power. Yet, as in

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required is that I stand in a certain relation to the potential beneficiary of mercy. This relation—typically established by legal or other institutional rules—makes it appropriate that I impose some hardship upon the potential beneficiary of mercy.

JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 167 (1988), *quoted in* McThenia, *supra* note 135, at 330–31.

139. MURPHY & HAMPTON, *supra* note 138, at 20–21, *quoted in* McThenia, *supra* note 135, at 331 n.36. For more discussion on the analytical differences between mercy and forgiveness, see: Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORD. URB. L.J. 1353 (2000); Linda Ross Meyer, *Forgiveness and the Public Trust*, 27 FORD. URB. L.J. 1515 (2000); Minow, *supra* note 85, at 1435 ("If victims' stories premised on subjective experience are all we have, then counterclaims of victimhood obtain as much authority without enabling any possible evaluation of the relative scale or seriousness of competing claims to entitlement, deference, or blame."); Jeffrie G. Murphy, *Forgiveness, Reconciliation and Responding to Evil: A Philosophical Overview*, 27 FORD. URB. L.J. 1353 (2000); Everett L. Worthington, Jr., *Is There a Place for Forgiveness in the Justice System?*, 27 FORD. URB. L.J. 1721 (2000).

the case of the Oklahoma City bombing, the rhetorics of Victims' Rights, participation and closure, are asymmetrically being extended to victims who support the death penalty and denied to others.

In light of the rhetoric of individualization of victims' desires for closure that permeates the Victims' Rights Movement, it is hypocritical to deny mercy pleas from similarly situated secondary victims who would be able to enter a statement if they supported death. Evidence of a family member's opposition to the death penalty has been disallowed in capital cases in a number of jurisdictions. In *Robison v. Maynard*,<sup>140</sup> the Tenth Circuit considered whether, under *Payne v. Tennessee*,<sup>141</sup> testimony from a victim's relative that she did not want the jury to impose the death penalty was proper mitigating evidence and admissible at the penalty phase hearing. The court held that *Payne* did not make such evidence proper or admissible.<sup>142</sup> The *Robison* court read *Payne* as allowing only evidence "that related to the victim and the impact of the victim's death on the members of the victim's family."<sup>143</sup> The court held that *Payne* did not "broaden the scope of relevant mitigating evidence to include the opinion of a victim's family member that the death penalty should not be invoked."<sup>144</sup> If this rule were consistently applied, it would justify excluding all victims' opinions about the appropriate punishment. Yet courts are all too ready to assume that pleas for death or heightened punishment are relevant.<sup>145</sup> Ultimately, the realization that allowing only views in favor of the death penalty is hypocritical does not provide sufficient reason to consider mercy pleas from secondary victims to be any more relevant than pleas for death. The same problems of indeterminacy of which secondary victims should be allowed to participate in the process plagues mercy pleas. Thus, pleas for mercy should be treated similarly as other victim impact statements, whether under a broad or narrow reading of *Payne*. The rhetoric of individualization that caters to victims' desires for closure is dangerous, but it is such inconsistency that is most detrimental to the administration of justice.

Finally, understanding the Shepards' involvement in the McKinney case as an outgrowth of the Victims' Rights Movement requires looking at more recent developments beyond the causes of vengeance and inclusion, where victim-talk has been used to advance the cause of mercy. The movement's concern with

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140. 943 F.2d 1216 (10th Cir. 1991).

141. 501 U.S. 808 (1991).

142. *Robison*, 943 F.2d at 1217-18.

143. *Id.* at 1217.

144. *Id.* Alabama courts have also concluded that victim's requests for sentences other than death should be excluded from the jury's consideration. See *Barbour v. State*, 673 So.2d 461, 468-69 (Ala. Cr. App. 1994), *aff'd*, *Ex Parte Barbour*, 673 So.2d 473 (Ala. 1995).

145. As we have seen with the Shepards, what is problematic about mercy without forgiveness is the crafting of conditional punishments. It could be argued that a prosecutor should be equally (if not more) moved to mercy by a plea for mercy based in forgiveness than a plea for mercy based in a desire for finality.

"mercy-as-closure" belies the assumption in our political culture that the procedural rights of criminal offenders and victims' protections have a necessary zero-sum relationship. This assumption does not fully account for the ambivalence and diversity in the movement. It would also be incorrect to align the Victims' Rights Movement fully with the causes of retention or abolition of the death penalty. Over the past several years, the "voices" of murder victims have both promoted and opposed the death penalty with equal force. The abolitionist group Murder Victims' Families for Reconciliation<sup>146</sup> competes for discursive space with Parents of Murdered Children,<sup>147</sup> who advocate use of the death penalty.

Heather Gert imagines the ironic case in which someone who is opposed to the death penalty is murdered, and whose murderer is subsequently executed.<sup>148</sup> Gert contends that people opposed to the death penalty should be allowed to register their opposition in advance (similar to organ donation or living wills) and that this should be considered in sentencing decisions.<sup>149</sup> Others have imagined this same possibility outside of the academic context. For example, in the early 1990s, Sister Camille D'Arienzo of the Sisters of Mercy Convent in Brooklyn, New York began circulating a "Declaration of Life," a document to be signed by death penalty abolitionists declaring that, in the case they are murdered, the government should not impose capital punishment in their names.<sup>150</sup> The declaration reads in part:

I hereby declare that should I die as a result of a violent crime, I request that the person or persons found guilty of homicide for my killing not be subject to or put in jeopardy of the death penalty under any circumstances, no matter how heinous their crime or how much I may have suffered.

I believe it is morally wrong for my death to be the reason for the killing of another human being.

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146. See Murder Victims Families for Reconciliation, at <http://www.mvfr.org> (last modified Jan. 26, 2002).

147. See National Organization of Parents of Murdered Children, Inc., at <http://www.pomc.com> (last modified Feb. 10, 2002).

148. Heather Gert, *The Death Penalty and Victims' Rights: Legal Advance Directives*, 33 J. VALUE INQUIRY 457, 457 (1999).

149. *Id.* at 460-72.

150. This movement has been met with some success:

Since becoming available in the early 1990s, at least 10,000 individuals worldwide have signed declarations, including actors Susan Sarandon, Mike Farrell and Martin Sheen; Sister Helen Prejean (portrayed in the Academy Award-winning film *Dead Man Walking*); former New York Governor Mario Cuomo; and U.S. Congresswoman Carolyn McCarthy, whose husband was killed during Colin Ferguson's murderous rampage on a Long Island Railroad train.

Wayne A. Logan, *Declaring Life at the Crossroads of Death: Victims' Anti-Death Penalty Views and Prosecutors' Charging Decisions*, 10 CRIM. JUST. ETHICS 41, 41 (1999).

I request that the Prosecutor or District Attorney having the jurisdiction of [*sic*] the person or persons alleged to have committed my homicide not file or prosecute an action for capital punishment as a result of my homicide.

I request the Court to allow this Declaration to be admissible as a statement of the victim at the sentencing of the person or persons charged and convicted of my homicide; and, to pass sentence in accordance with my wishes.

This Declaration is not meant to be, and should not be taken as, a statement that the person or persons who have committed my homicide should go unpunished.

I request that my family and friends take whatever actions are necessary to carry out the intent and purpose of this Declaration; and, I further request them to take no action contrary to this Declaration.<sup>151</sup>

The "Declaration of Life" movement is a grassroots effort that distinguishes itself within the broader Victims' Rights Movement as an attempt not only to disarm zealous prosecutors but also vengeful families.<sup>152</sup> Here the primary victims of a crime pre-empt the victim-claiming of their own kin. Considering the primary victim's own declaration at sentencing would seem the ultimate act of victim "inclusion," but it prevents the courts from having to take complicated steps to provide closure for secondary victims. The language of the declaration could strategically undercut even relevant victim impact statements' calls for vengeance based on suffering or the heinousness of the crime. Ironically, this ultimate act of inclusion is perhaps the only way to get away from the problems of the current centrality of secondary victims, from indeterminacy of standing to ambiguous standards of relevance for victim impact statements urging either mercy or vengeance. Of course, no issue as to the admissibility of the "Declaration of Life" has yet arisen in an actual case. Perhaps, under the current climate, the re-entry of the voice of the primary victim could be seen as an encouraging development, and one that bears more direct relevance to a capital trial. On the other hand, any such considerations seem attenuated from the blameworthiness of the defendant and society's interest in a proper prosecution, conviction, or acquittal. In any case, the full ethical and constitutional implications of this recent development have yet to be explored.

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151. *Id.* at 42-43.

152. See Deans, *Murder Most Foul, But Vengeance Kills the Soul*, SAN JOSE MERCURY NEWS, July 17, 1983, at 4C (describing anti-death penalty efforts of one particular survivor whose brother-in-law was murdered); Margery Eagan, *Murder Victims' Kin Make Strong Case for Compassion*, Boston Herald, March 16, 1999, at 17 (describing lobbying efforts by murder victims' survivors against reinstatement of death penalty in Massachusetts), available at 1999 WL 3392939; David Wallechinsky, "He Killed My Child But I Don't Want Him to Die," PARADE, Jan. 18, 1998, at 4 (discussing emotional and spiritual conflicts among murder victims' survivors who oppose the death penalty).

In his remarks at a recent symposium on "The Role of Forgiveness in the Law," David Lerman, an Assistant District Attorney in Wisconsin, stated:

I believe, first, that forgiveness should be seen as flowing from the victim (or a surrogate victim or a victim's representative) or from the neighborhood most affected by a particular crime. To the extent that a prosecutor takes on the mantle of the community to effect justice, then I as a prosecutor may engage in forgiveness.

Otherwise, I think that what I engage in plea bargaining or lowering a sentence is compassion or mercy. . . .

Prosecutors are the hub of the system. We control so much of what goes on in the criminal justice system; therefore, I think we play an absolutely vital role in advancing the notion of forgiveness in criminal justice processes. How should we do that? We should allow for practices which advance the possibility of forgiveness. This is what is most helpful to victims, I believe.<sup>153</sup>

This statement muddies the proper division of powers between prosecutors and victims. The prosecutor, through institutional mediations, holds the legal power of mercy, and affected victims may hold the ethical ability to forgive, but neither holds both. It may be valid for a prosecutor, such as Lerman, to view his grants of mercy as flowing from particular victims, compulsory legislative expressions to the same effect, such as the one that guided Cal Rerucha in the McKinney case, seem unacceptable. In such a case, the prosecutor cannot merely act as proxy for the community's interests as a whole; he is particularly beholden to individual victims and what they believe they need out of the process. As I will discuss in the following section, such notions of the prosecutor's proxy function seriously misunderstand the essential quality of "mediation" in the juridical field.

## V.

### EXPRESSIVITY AND THE JURIDICAL FIELD

The relevant emerging discourse in legal theory has not yet been named, but might be called "Law and Emotion." Prominent scholarship in this area includes Susan Bandes's work on "empathy," William Ian Miller's work on "humiliation" and "disgust," Martha Nussbaum and Dan Kahan's work on "shame," and Richard Posner's dabbling in related topics.<sup>154</sup> I have sprinkled this essay with various references to "expressivity" and the "expressive function of law," which I define as the translation of sentiments and emotional appeals into cognizable rights and remedies. This is simply to give a name to what is by now a well-accepted description of one of the law's variegated functions. Drawing on

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153. Symposium, *The Role of Forgiveness in the Law*, 27 *FORDHAM URB. L.J.* 1347, 1373 (2000) (remarks of David M. Lerman on "Forgiveness in the Criminal Law").

154. For an overview of this kind of work, including work by the authors mentioned, see *THE PASSIONS OF LAW* (Susan Bandes ed., 1999).

Nussbaum, among others, D. Don Welch has said, "Heeding one's emotions can, in general, be a good guide to remaining in harmony with the fundamental commitments that result from one's considered judgment, and thus, it is important to assess specific affective responses by how well they are integrated with one's larger moral purposes or emotional commitments."<sup>155</sup> The most common critique of such a position is that allowing for emotions expressed through law opens up the dangers of irrationalism.

It is not my view that emotionally derived commitments are any more irrational than any other commitments, values, or sentiments expressed through the law. The problem of expressivity is not irrationalism, but rather indeterminacy. A skepticism towards determinacy is valuable insofar as it does not allow concepts to be self-defining. An unreflective acceptance of creeping expressivity avoids a decision about why any of these values should be reflected in our laws, and why other choices should be rejected. Emotions are not irrational, *per se*, but they are self-justifying. Thus, instances of what I have called in this essay the "expressive function of law" or "legal expressivity" should be treated empirically, and not as a general problem to be purged.

My own analysis of the Victims' Rights Movement's crafting of remedies based on sentimentality is also an effort to pose questions about a kind of sovereignty and its limits. Michel Foucault notes:

Besides its immediate victim, the crime attacks the sovereign: it attacks him personally, since the law represents the will of the sovereign; it attacks him physically, since the force of the law is the force of the prince. . . . Punishment, therefore, cannot be identified with or even measured by the redress of injury; in punishment, there must always be a portion that belongs to the prince, and, even when it is combined with the redress laid down, it constitutes the most important element in the penal liquidation of the crime.<sup>156</sup>

In this essay I have worked from this generally accepted description of sovereignty, a monopoly of the political decision in the hands of the state, and the proper delegation of its functions to the courts and prosecutors.<sup>157</sup> Never-

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155. D. Don Welch, *Ruling With The Heart: Emotion-Based Public Policy*, 6 S. CAL. INTERDIS. L.J. 55, 85-86 (1997); Nussbaum *supra* note 68, at 234.

156. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 47-48 (Alan Sheridan, trans., 2d ed., Vintage Books 1995) (1975).

157. On the other hand, the victim may be a more primal figure in the definition of sovereignty. It is important to note that victimization is a longstanding strategy of power. In his study of baroque German tragic plays, Walter Benjamin makes an interesting point about dramaturgical representations of sovereignty that I think helps to explain sovereignty in its juridical form. Benjamin claims that images of sovereignty can be represented by two faces—"the tyrant" and "the martyr." Whereas the tyrant's power emanates through fear, the martyr's power derives from pity. See WALTER BENJAMIN, THE ORIGINS OF GERMAN TRAGIC DRAMA 69 (John Osborne, trans., Verso 1998) (1963). I believe representations of victimization, as in martyr-dramas or passion plays, still provide stark symbols for a potential sovereignty. This is evident in *The Laramie Project* and the martyring of Matthew Shepard. Through Victims Rights discourse, victims of

theless, perhaps rather than identifying either the courts or the prosecutor as "the state" it is more useful to see both as part of what Pierre Bourdieu calls the "juridical field." According to Bourdieu:

The juridical field is a social space organized around the conversion of direct conflict between directly concerned parties into juridically regulated debate between professionals acting by proxy. It is also the space in which such debate functions. These professionals have in common their knowledge and their acceptance of the rules of the legal game, that is, the written and unwritten laws of the field itself, even those required to achieve victory over the letter of the law . . . . [T]he jurist has most often been defined as a "third person mediator." In this definition, the essential idea is *mediation*, not decision.<sup>158</sup>

Thus, the juridical form of sovereignty (mediation) is already a weaker form than the political form (decision). It relies almost entirely on the acceptance of the proxy function of legal professionals and the renunciation of direct violence by the "directly concerned parties." To liken the loss of sovereignty resulting from a victim-centered jurisprudence to the rabble cutting off the heads of the king's officers to seize the ultimate power of the sovereign<sup>159</sup> is probably too hyperbolic an image and too simplistic a notion of the state and the legal system. Certainly, though, the demand for increased accountability to victims has put new constraints on courts, prosecutors, and parole boards, among other juridical actors, and it attacks the very *raison d'être* of the juridical field.

The juridical field normally defines the parameters of the victims' involvement in a trial. Yet it is through a proper participation in the political field that the Victims' Rights Movement attempts to overturn the institutional ground rules of the juridical field. There is a double movement in the Victims' Rights Movement's expressivity; it conjures up rage in the political field (by way of its policy demands), so that particular victims can better express themselves in the juridical field (through increased participation in the process). Yet even the "end" of participation is merely an intermediate "means" to yet another end: to intervene in a defendant's life chances. The expression of rage accompanied by rights-consciousness has helped the Victims' Rights Movement cross disconcertingly into articulating rights and remedies that would restructure the juridical field. Thus, it is increasingly through the laws, and not despite them that victims can attempt to exercise sovereign powers of mercy and punishment.

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violent crime are becoming asserted as martyrs and as quasi-sovereign, in exercising the powers of mercy.

158. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 831 (1987).

159. Regina Janes, *Beheadings*, in DEATH AND REPRESENTATION 242, 245 (Sarah Webster Goodwin & Elisabeth Bronfen, eds., 1993) ("When the rabble cut off the heads of the king's officers, they have redefined themselves as the sovereign people. Literally and physically, they have seized the ultimate power of the sovereign.").

As a matter of definition, the basis for legal punishment is always juridical and never political, always mediated and never personal. Igor Primoratz argues that:

The victim of the offense, or a relative or a friend, can take revenge on the offender; the mob can lynch him; but neither will be punishment. One can be punished only by a judge, or a jailer, or an executioner; for only these are *authorized* to so do by the legal order against which he has offended.<sup>160</sup>

What we have here is not "an atavistic throwback to private vengeance,"<sup>161</sup> but something that might be more troubling. The earnest desire for inclusion may have the effect of hastening the point at which the sovereign expression enters into a zone of indistinction with private expressivity.<sup>162</sup> Finally, we should not limit this discussion to the death penalty, but consider broader realignments in sovereign powers to punish. We should be reminded that whether a victim recommends death or life imprisonment, the imposition of punishment "interferes with a person, it involves a restriction of his freedom, it lays certain restraints upon him, it limits his range of choice"<sup>163</sup> and is traditionally left entirely to the state. Rigorous inquiries along legal, policy, and philosophical dimensions should ask whether these developments, taken together, constitute a dispersal or realignment of the power of mercy and potentially the power to kill.

#### CONCLUSION: THE SENSE OF AN ENDING

In this paper, I have argued that the Victims' Rights Movement operates at the fulcrum of vengeance and inclusion. In joining death penalty discourse, victims' families find themselves on a terrain involving death and pain, in a battle over sympathies, sentiments and resentments. The Victims' Rights Movement features a respect for "individualization" of closure—a focus on the subjective experiences and feelings of victims and for their need to tell their own stories—but at the same time it is plagued by the indeterminacy of "victimization" and divisive contests over the meaning of "closure." The debate over the death penalty is one identifiable disruption in the unity of Victims' Rights discourse. Victims' Rights discourse has long embraced its potential to

160. PRIMORATZ, *supra* note 103, at 4.

161. Letter from Laurence H. Tribe, *supra* note 30.

162. For competing notions of sovereignty, see GEORGES BATAILLE, *THE ACCURSED SHARE: AN ESSAY ON GENERAL ECONOMY*, VOL. III SOVEREIGNTY (Robert Hurley, trans., Zone Books 1991) (1976); WALTER BENJAMIN, *Critique of Violence*, in *ONE-WAY STREET AND OTHER WRITINGS* 132 (Edmund Jephcott & Kingsley Shorter, trans., 1978); Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3 (Mary Quaintance, trans., Drucilla Cornell, Michel Rosenfeld, & David Gray Carlson eds., 1992); FOUCAULT, *supra* note 156; NIKOLAS ROSE, *POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT* (1999); CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab, trans., MIT Press 1985) (1922).

163. JOHN KLEINIG, *PUNISHMENT AND DESERT* 23 (1973).



interject testimony by the victim's family in an effort to persuade the sentencer to impose a more stringent penalty. However, there is a co-equal power that emerges from the movement, which can be called "mercy," which is itself a concept that must be further problematized.

This paper has not been a sustained exercise in constitutional interpretation, but it should not be surprising that I believe a victim-centered jurisprudence, as it increases the participation of secondary victims, would tend towards results that are inherently arbitrary and capricious. Also, if secondary victims are allowed more latitude to shape the sentencing, such penalties must face rigorous Equal Protection and Due Process hurdles. My approach has been more an interdisciplinary meditation on the possible interactions between particular institutions and emotions. Insofar as the remedies generated by the Victims Rights Movement (including victim impact statements) attempt to influence the sentence by reference to the desires of the secondary victim, they are essentially subjective. Victims' responses about how to achieve closure and deal with grief vary so widely that the institutional integrity of the juridical field could degenerate if expected to tirelessly chase and deliver this closure. We also should not become too comfortable with the possibilities of "mercy-as-closure," since it is as subjective a route to closure as vengeance. Thus, I end this paper not with a sense of closure or satisfaction, but with the desire to revisit these questions with a renewed sense of urgency and precision. I will deny us for now the "sense of an ending" so we can make it our task to begin again.

