University of Oklahoma College of Law

From the SelectedWorks of Randall Coyne

Spring 2003

Shooting the Wounded: First Degree Murder and Second Class Victims

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Available at: https://works.bepress.com/randall_coyne/12/
The first shots in the Victims’ Rights Revolution were fired more than thirty years ago. According to a Justice Department report, “[d]uring the 1970’s, many individuals in the criminal justice system became concerned about the harmful effects of the insensitive treatment of victims and witnesses by police officers, prosecutors, and judges.”

During the past quarter century in particular, the victims’ rights movement has attracted important allies and has profoundly changed the nature of the American criminal justice system. In 1980, Wisconsin became the first state to enact a bill of rights for victims of crimes. That same year, California became the first state to enact statewide funding for general support for victims’ services.

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3. Tomz & McGillis, supra note 1, at 3.
The growing impetus and recognition of victims’ rights captured the attention of federal policymakers as well. In April, 1981, President Ronald Reagan issued a proclamation commemorating “Victims’ Rights Week.” According to President Reagan:

For too long, the victims of crime have been the forgotten persons of our criminal justice system. Rarely do we give victims the help they need or the attention they deserve. Yet the protection of our citizens... is the primary purpose of our penal laws. Thus, each new victim personally represents an instance in which our system has failed to prevent crime. Lack of concern for victims compounds that failure.  

Responding to enhanced public awareness of the need to provide services to crime victims, President Reagan created the Presidential Task Force on Victims of Crime (Task Force) in 1982. That same year, the Task Force issued its report, charging federal, state, and local officials with the work of addressing the needs of victims. Congress immediately responded to the Task Force’s challenge by passing the Victim Witness and Protection Act of 1982. Two years later, Congress acted again, passing the Victims of Crime Act of 1984, which provided incentives to states to enact support programs for victims and created victim compensation funds. Congress’ passage of the Victims of Crime Act of 1984, following the previously mentioned pioneering examples set four years earlier by the state legislatures of Wisconsin and California, inspired other state legislatures to take action.

Due to heightened awareness of and concern about the role of victims in our criminal justice system and the system’s impact on victims, the formal legal concept of victims’ rights has been enshrined in the laws of all fifty states and the federal government. Presently, thirty-

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two states have amended their constitutions to provide for victims’ rights, and every state has a victims’ bill of rights.8

In 1987, dissenting from the Supreme Court’s short-lived decision prohibiting victim impact evidence during the sentencing stage of capital cases, Justice Scalia echoed President Reagan’s accusation that the criminal justice system fails victims through apathy and indifference.9 Justice Scalia warned that silencing victims fuels perceptions that criminal trials are “one-sided” and “unjust.” Scalia explained:

Recent years have seen an outpouring of popular concern for what has come to be known as “victims’ rights”—a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant’s moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced. . . . Perhaps these sentiments do not sufficiently temper justice with mercy, but that is a question to be decided through the democratic processes of a free people, and not by the decrees of this Court.

To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted.10

Although victims’ rights advocates have made significant progress in reforming the criminal justice system to better serve the needs of some victims, these reforms have completely ignored important voices in the

10. Id. at 520 (Scalia, J., dissenting).
victims’ rights community, relegating to second class victimhood those who refuse to support the prosecution’s agenda in favorem mortis. Although the Court’s 1991 Payne v. Tennessee\(^{11}\) decision permits pro-death penalty victims to provide testimony designed to convince juries to return death sentences, the voices of anti-death penalty victims’ remain muted.\(^{12}\)

II. OKLAHOMA CITY BOMBING AND THE FALSE ASSUMPTION THAT ALL VICTIMS DEMAND THE DEATH PENALTY

The federal landscape of victims’ rights and victims’ services was forever altered in the aftermath of the April 19, 1995, bombing of the Murrah Federal Building in Oklahoma City. Up to that point the most lethal terrorist attack on domestic soil, the Murrah bombing killed 167 victims directly, including 19 children. Another victim, registered nurse Rebecca Anderson, died while assisting in the rescue efforts after being struck by debris.

The impact of the bomb was far-reaching. Thirty children were orphaned. Two hundred nineteen children lost a parent. An estimated 7,000 people were left without a workplace—the bomb damaged 324 buildings, including 25 with major damage, causing $652 million in property damage. An estimated forty-one percent of the surviving victims were believed to have


\(^{12}\) One court’s refusal to apply Payne provoked a prompt legislative response. In State v. Carter, 888 P.2d 629 (Utah 1994), the Utah Supreme Court held that victim impact evidence was inadmissible under Utah’s capital sentencing scheme and specifically rejected the Payne majority’s rationale:

We find that victim impact evidence simply has no probative force in the sentencing context. Such evidence does not make it more or less likely that a defendant deserves the death penalty. In our society, individuals are of equal value and must be treated that way. We will not tempt sentencing authorities to distinguish among victims—to find one person’s death more or less deserving of retribution merely because he or she was held in higher or lower regard by family or peers. Such a scheme draws lines in our society that we think should not be drawn. The worth of a human life is inestimable, and we do not condemn those who take life more or less harshly because of the perceived value or quality of the life taken.

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diagnosable mental health conditions. As many as twenty percent of the more than twelve thousand rescue workers and volunteers who participated at the site were believed to need mental health care. An estimated 360,000 people know someone who was killed or injured.\(^\text{13}\)

Although the Oklahoma City bombing was one of the most devastating terrorist acts in American history, it provoked the criminal justice system into providing a comprehensive array of victims’ services and inspired an unflagging focus on victims’ rights. On the day of the explosion, the Justice Department’s Office of Crime (OVC) cooperated with a private group, the National Organization for Victim Assistance, to dispatch the first of three crisis response teams to assist with notifications, debriefings of thousands of secondary victims, such as emergency responders, clergy, and school children, and trainings for mental health practitioners. Extraordinary steps were taken to educate surviving family members and victims about their rights and available services. Regular briefings were set up by the U.S. Attorney’s Office prosecuting the case to keep victims informed of the status of the investigation and later the prosecution. When the trial was moved to Denver, Colorado, for the first time in a federal case, a closed circuit television link was established to enable victims in Oklahoma City to watch the proceedings. A safe haven was organized in Denver so that victims had a place to go for counseling and repose. A massive organizational effort ensured that as many victims as possible attended the proceedings on a rotating basis. The federal government paid for their transportation. Finally, OVC worked closely with the American Red Cross, the Federal Emergency Management Agency, and the Executive Office for United States Attorneys to develop a Memorandum of Understanding to ensure mutual cooperation and information-sharing during future large-scale crimes. The Oklahoma City bombing, while one of the worst terrorist acts in our nation’s history, brought out the best in the criminal justice system in terms of victims’ rights and

services. Never had the federal system responded to the needs of crime victims in such a comprehensive way.\textsuperscript{14}

From the moment in 1995 when Attorney General Janet Reno pledged to seek the death penalty for the killers just hours after the bombing, to the trial in 1997 when thirty-eight witnesses and survivors testified during the sentencing phase in support of the prosecution’s demand that convicted bomber Timothy McVeigh be executed, which resulted in McVeigh’s ritualistic death by lethal injection on June 11, 2001, the victims and survivors have been portrayed as “monolithic, all bent on the ultimate punishment.”\textsuperscript{15} But victims and survivors of the Oklahoma City bombing, like many victims and survivors in other less-publicized cases, were not unanimously in favor of executing those responsible.

Bud Welch, whose only daughter, Julie Marie, perished in the bombing, became perhaps the most outspoken opponent to McVeigh’s execution within the victim community. Welch’s spiritual journey began with extreme enmity toward his daughter’s murderer, and in time, led to empathy and compassion for Bill McVeigh, father of condemned bomber Timothy McVeigh.

I was opposed to the death penalty all of my life until my daughter Julie Marie was killed in the Oklahoma City bombing. For many months after the bombing I could have killed Timothy McVeigh myself. Temporary insanity is real, and I lived it. You can’t think of enough adjectives to describe the rage, revenge, and hate I felt. But after time, I was able to examine my conscience, and I realized that if McVeigh is put to death, it won’t help me in the healing process. People talk about execution bringing “closure.” But how can there be “closure” when my little girl is never coming back? I finally realized that the death penalty is all about revenge and hate, and revenge and hate are why Julie Marie and 167 others are dead.\textsuperscript{16}

\textsuperscript{14} Id.
\textsuperscript{15} Sara Rimer, Victims Not of One Voice on Execution of McVeigh, N.Y. TIMES, Apr. 25, 2001, at 1.
\textsuperscript{16} BARBARA HOOD & RACHEL KING, NOT IN OUR NAME: MURDER VICTIMS’ FAMILIES SPEAK OUT AGAINST THE DEATH PENALTY 71 (Susannah Sheffer et al eds., 4th ed. 2003) [hereinafter HOOD & KING].
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In the months following his daughter’s murder, Bud Welch evolved from strongly supporting the death penalty for bomber Timothy McVeigh to speaking out publicly against it as a spokesperson for Murder Victims’ Families for Reconciliation (MVFR). Welch’s transformation was inspired in part by Julie Marie herself.

Once, while listening to a radio account of an execution in Texas, she had turned to him and said, “Dad, that makes me sick. All those Texans are doing is teaching all the children down there to hate. The murderer did wrong, but now the government has stooped to his level.”

Over time, Bud Welch came to understand that just as the Oklahoma City bombing had deprived him of his only daughter, Timothy McVeigh’s actions would soon deprive McVeigh’s father, Bill, of his only son. Welch made arrangements to meet with Bill McVeigh and later recalled: “I saw a deep pain in a father’s eye, but also an incredible love for his son. I was able to tell him that I truly understood the pain that he was going through, and that he—as I—was a victim of what had happened in Oklahoma City.”

III. The Federal Constitution and the Admissibility of Victim Impact Evidence in Capital Sentencing Proceedings

A. The MVFR Report

In August, 2002, Murder Victims’ Families for Reconciliation (MVFR) published an important report which cogently demonstrated

17. Id.
18. Id.
19. MVFR, a remarkable coalition of persons opposed to the death penalty who have lost family members through murder or legal execution, was founded in 1976. According to MVFR’s mission statement:

MVFR is a national organization of family members of victims of both homicide and state killings who oppose the death penalty in all cases. Our mission is to abolish the death penalty. We advocate for programs and policies that reduce the rate of homicide and promote crime prevention and alternatives to violence. We support programs that address the needs of victims of violence, enabling them to heal and to rebuild their lives.

More information on MVFR can be obtained through their website. See Murder Victims’ Families for Reconciliation, at http://www.mvfr.org.
that notwithstanding the victims' rights revolution, all members of the victim community are not treated equally. Dignity Denied: The Experience of Murder Victims' Family Members Who Oppose the Death Penalty,\(^ {20} \) chronicles the indifference, discrimination, and in some instances, abuse that the criminal justice system metes out to the family members of murder victims whose opposition to capital punishment makes them at best useless—and at worst dangerous—to prosecutors committed to persuading jurors that killers should be sentenced to death.

Part of the blame, of course, rests with the portion of Booth v. Maryland—prohibiting the victim impact evidence that characterizes the defendant or conveys opinions as to appropriate sentence—which survives Payne.\(^ {21} \) This prohibition made sense in the context of a total ban on victim impact evidence during capital sentencing proceedings. Standing alone, however, the ban on victim testimony or evidence as to an appropriate sentence has the perverse effect of silencing only one segment of the victim community: those family members of murder victims who oppose the imposition of a death sentence.

It is true, in a formal sense, that murder victims' family members who support the imposition of a death sentence are prevented by Payne from bluntly sharing this preference with jurors while testifying. Consistent with Payne, family members of victims may not be asked, nor may they offer, their opinions as to the sentence they believe the defendant deserves. And yet even when this rule is scrupulously observed, and no such testimony is sought or offered, the very appearance of murder victims' family members as prosecution witnesses during capital sentencing hearings in which the prosecution is seeking death leaves precious little room to doubt just what their opinion might be. If they did not want the defendant killed in retribution for the loss of their murdered family member, they would have stayed home perhaps, or at least refused to testify.

Thus, Payne permits prosecutors to perpetuate the cruel charade that pro-death murder victim family members who testify as prosecution witnesses are not lending their voices in support of the prosecution's goal of seeking the defendant's death.

Dignity Denied emphasizes the importance of all victims being "informed of, present, and heard at critical stages of the criminal justice

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process” and condemns the practices of victim’s advocacy offices, controlled by prosecutors, that “silence[ ], marginalize[ ], and abandon[ ] . . . family members who oppose the death penalty.”22 Robert Renny Cushing, MVFR’s executive director whose father was murdered, recounts being told by one Victim Witness Coordinator that Cushing’s opposition to the death penalty prevented victims from healing.23 This presumption—that universal support for a death sentence is necessary to promote victim healing—ignores the reality that for some families, executing a murderer only adds to their pain and superimposes an additional trauma which, far from helping restore some sense of peace and security, actually revictimizes these victims. Worse, failing to recognize the needs and heed the voices of anti-death penalty victims exiles a significant number of victims from the community of support services which the federal government and most states have mandated for all victims, regardless of their views on capital punishment. The baleful result, according to Cushing, goes beyond the politically expedient but nonetheless callous deprivation of support services to anti-death penalty victims. The more pernicious effect, perhaps, is to cast doubt on the legitimacy of suffering endured by these victims. As Cushing, borrowing from Sojourner Truth, cogently frames the issue, “‘Ain’t I a victim?’ Even though I oppose the death penalty and would not find resolution in another killing, am I not a victim as well, with a loss as piercing as the losses of victims who do support the death penalty?”24

There does not appear to be even “a single protocol in the office of any prosecutor in the United States that alerts victim assistants to the possibility that some family members of murder victims may oppose the death penalty” and that admonishes these same assistants that these family members “are entitled to the same assistance as those who support” capital punishment.25 Similarly, there appear to be no “laws or policies prohibiting discrimination against victims who oppose the death penalty, or mandating that services intended for survivors of homicide victims be provided equally to those who support the death penalty and those who oppose it.”26 Thus, the pattern and practice of widespread

22. DIGNITY DENIED, supra note 20, at 6 (emphasis added).
23. Id.
24. Id. at 7.
25. Id.
26. Id.
silencing and discrimination against anti-death penalty victims should surprise no one.

According to *Dignity Denied*, victims’ family members who oppose the death penalty seek “from prosecutors, judges, police officers, policymakers, and the victim services community” two things: (1) awareness of their perspective; and (2) “recognition that victims who oppose the death penalty are as deserving of respect and dignity as those who support it.” Examples of cases in which family members of murder victims were denied both follow.

1. Silencing Victims

In 1986, James Bernard Campbell broke into the home of the Reverend Bill Bosler and attacked him and his twenty-four-year-old daughter, SueZann. SueZann watched as her father—a strong opponent of the death penalty—died; she survived only by holding her breath and pretending to be dead.

SueZann decided to honor her father’s opposition to the death penalty by attempting to present his perspective during her testimony as a penalty phase witness at Campbell’s third and final capital murder trial. Her efforts were squelched by the trial judge who interrupted her and threatened to file criminal charges against her. The judge said, “There will be no discussion about the death penalty, period, and I’m advising you right now that if you violate my order, you will be in direct criminal contempt, and you face six months in county jail and a $500 fine.” SueZann broke down on the stand and replied, “I don’t know what to say. I feel like if I say one word I’m going to go to jail. I don’t want to go to jail. That’s not my purpose here.”

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27. *Id.* It perhaps goes without saying that family members who oppose the death penalty are every bit as deserving of the support services rendered by victims’ assistance programs to those who support the death penalty.

28. *Id.* at 11.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*
Although the judge's decision was probably correct as a matter of law, SueZann was left "wondering who was a criminal in that courtroom. They were treating me like I was the bad one."  

2. Shunning Victims

SueZann Bosler contrasted her treatment during this proceeding with the solicitous attention she received from the victim witness advocate before her opposition to the death penalty was revealed. During the two prior trials of her father's murderer, the victim witness advocate "held [her] hand, got coffee for [her]. . . [but] on the third trial, when [she] wasn't doing what [the district attorney's office] wanted, they wouldn't talk to [her] or sit next to [her] or look at [her]. They wouldn't have anything to do with [her]." Thus, SueZann Bosler's experience demonstrates that a victim's opposition to the death penalty can cause assistance and advocacy to be withdrawn.

Jeanette Popp likewise encountered discrimination following the 1988 rape and murder of her twenty-year-old daughter Nancy DePriest in a Pizza Hut in Austin, Texas. Two suspects were arrested, convicted, and sentenced to life in prison. Twelve years later, after it was revealed that one of the convicted men had been threatened with the death penalty, coerced into confessing, and forced to falsely implicate his roommate in the crime, the men were declared innocent and released.

For several years, another man, serving a life sentence for an unrelated crime, had been sending authorities letters confessing to Nancy DePriest’s murder. Ultimately, DNA tests confirmed the veracity of this confession.

Before trial, but after the truth about the identity of her daughter’s murderer was established, Jeanette Popp visited him in prison. She informed the murderer and his attorney that she and her daughter had always opposed the death penalty, and that if it were sought she would make her opposition known. Once the district attorney’s office learned

33. See supra notes 11-12 and accompanying text (noting how Booth's prohibition against victim testimony regarding opinions as to appropriate sentence survives the Payne decision).
34. DIGNITY DENIED, supra note 20, at 11.
35. Id. at 13.
36. Id. at 11-12.
37. Id. at 12.
38. Id.
39. Id.
that Jeanette Popp opposed executing this defendant—and in direct
defiance of Jeanette’s “right to be informed of relevant court
proceedings” guaranteed by the Bill of Rights for Texas Crime
Victims—the district attorneys began withholding information from
Jeanette and her family about upcoming court hearings. Consequently,
she found herself relying on the defense attorney for information about
upcoming court dates.40

The experiences of Felicia Floyd and Chris Kellett—children of
Linda Gilreath who was murdered in Georgia in 1979 by her former
husband Fred Gilreath—are consistent with the mistreatment and neglect
endured by SueZann Bosler and Jeanette Popp. When Fred Gilreath filed
a request for clemency just prior to his 2001 execution date, Felicia and
Chris decided to testify before the pardon and parole board to urge that
Gilreath’s death sentence be commuted to life imprisonment without the
possibility of parole.41

Just three years earlier, Georgia’s Board of Pardons and Paroles had
established the “Office of Victims’ Advocacy,” to “further empower
citizens and crime victims with a slate of services and programs designed
to simplify communication with the agency.”42 And yet, as Ms. Floyd
and Mr. Kellett prepared to appear before the Board, the Office of
Victims’ Advocacy failed to contact them. Services to which they were
both entitled, and were wrongfully denied, included an explanation of
procedures the board was to follow, as well as assistance in preparing
their testimony. Although a representative from the Office of Victims’
Advocacy was present at the hearing, she did not sit with the family or
offer assistance or support. Instead, this “advocate” completely
dissociated herself from this particular set of victims. MVFR
representatives sought to fill the void created by the advocate’s
dereliction of duty by acting as unofficial advocates for the surviving
family of Linda Gilreath.43

In a far more notorious case, Rusty Yates, whose wife Andrea was
tried and convicted of killing their five small children, was joined by
several other family members in opposition to Texas prosecutors’ goal of
sentencing Andrea to death by lethal injection. Mr. Yates and his
family—clearly “victims” under Texas law—were totally ignored by the
victim assistant’s office and, as a result of their estrangement, no seats

40. Id.
41. Id. at 14.
42. Id.
43. Id.
were reserved for them in the packed courtroom. The right to be present in the courtroom during trial proceedings is a staple in the bundle of rights victims have won in recent years. In addition, it falls to the victim advocate to ensure that this right is granted to all victims. That the Texas victim advocate saw no need to safeguard the rights of the Yates family (who, after all, refused to join the prosecution’s team) is just one of countless examples of selective and discriminatory enforcement of victim rights that demeans, humiliates, and re-victimizes a group already struggling to stay afloat in a turbulent sea of grief and anger. The reasons for this mistreatment were not lost on Mr. Yates. “Can you imagine the family of the victims having to worry about getting a seat at a huge trial like this?” he asked. “That’s the last thing we need to worry about. I can’t help but think that if we supported the prosecution we’d have a front-row-center seat.”

B. Disregarding Victims Who Witness Executions

Increasingly, front-row-center seats are made available to victims’ family members who are interested in witnessing executions—provided, of course, those victims’ family members support capital punishment. It is true that for some pro-death penalty victims, the defendant’s execution may provide a sense of relief. For other victims, regardless of their views on the death penalty,

[the defendant’s execution] may also throw them into a new state of crisis because they realize that the case is closed in the justice system, but they have not yet dealt with their grief or losses. If the sentence is not perceived as just, victims may once again confront issues of fairness and equity. Death penalty cases and the execution of offenders can be particularly troubling. Many victims are deeply concerned by the concept of the death penalty, even when they are still angry with the offenders or feel that a sentence of death is deserved. They struggle with moral and spiritual issues and may need ongoing support in resolving these issues or coming to grips with the reality of the sentence and its execution.45

44. Id.
Following a national conference held to discuss the issues raised by victim attendance at executions, a written protocol emerged to guide victim assistants in providing support to victims before and after an execution. In the introduction to the protocol, John Stein, deputy director of the National Organization for Victim Assistance, noted that "[u]nquestionably, the execution itself has[a]s a great potential in bringing crisis upon the victims, and the help of a victim advocate could make a major difference in whether the experience was positive or negative." Although the protocol recognizes that the execution itself is likely to evoke a strong emotional response from victims, it treats anti-death penalty victims much the same as victim advocates generally treat them throughout the entire criminal justice process: as if they do not exist. The unstated assumption appears to be that the defendant's death is universally welcomed by surviving family members.

Perhaps the protocol's single-minded focus on providing critical emotional support to pro-death penalty victims flows from the equally flawed assumption that even if victims did exist who opposed the state's goal of killing a killer, these victims would have no reason for wanting to witness the condemned person's execution. Dignity Denied demonstrates that there are circumstances in which victims who oppose an execution have perfectly valid reasons for wanting to witness it. For example, the family members of murder victims are sometimes related not only to the deceased victim but also to the murderer. Accordingly, intrafamilial murders can thus leave in their wakes survivors with dual allegiances to the victim and to the person sentenced to death. For example, Chris Kellett, the son both of murder victim Linda Gilreath and her murderer, Fred Gilreath, wanted to witness his father's execution, even though he did not want it to take place. Chris was denied the right to attend.

On rare occasions, family members of murder victims may not only come to forgive their loved one's murderer, but may also come to establish relationships with the condemned prisoner. To illustrate this

47. Id. at 15.
48. Id.
49. See generally id. at 15-16.
50. Id. at 15.
51. Id. See supra notes 41-42 and accompanying text (discussing the denial of victim support services to Chris Kellett and his sister Felicia Floyd when they prepared to testify on their father's behalf before the Georgia Board of Pardons and Paroles).
point, Sue Norton, whose adoptive father and step-mother were shot dead in their farmhouse in northern Oklahoma in 1990, has stated publicly that she has forgiven her parents’ killer, Robert Wesley Knighton, and has campaigned against his execution.\(^{52}\) During Knighton’s twelve years on death row, Sue Norton has been in constant communication with him through personal visits and letters.\(^{53}\)

Even when murder victims’ family members are permitted to attend executions they oppose, they are denied the basic services provided to family members who support the death penalty. The murder of seven-year-old Katherine Ann Busch, whose lifeless body was recovered in a dumpster behind a Wal-Mart in Oklahoma, and the execution of her murderer, Floyd Medlock, bitterly divided Katherine’s grandmothers, Judy Busch and Johnnie Carter.\(^{54}\) Both grandmothers channeled their grief and anger into advocacy. Judy Busch became an outspoken proponent of capital punishment generally, and victims’ rights in particular. She founded the Survivors of Homicide Support Group, an organization that regularly holds pro-death penalty vigils outside the Oklahoma State Penitentiary in McAlester while executions take place within the prison’s walls. Additionally, Judy Busch has vigorously opposed proposals to declare a moratorium on executions.\(^{55}\)

Katherine’s other grandmother, Johnnie Carter, followed a very different path, one that led her to oppose Medlock’s execution. She eventually served as chairperson of the Oklahoma Coalition Against the Death Penalty and campaigned for a moratorium on executions within Oklahoma.\(^{56}\)

Johnnie Carter accepted Floyd Medlock’s invitation to witness his execution and was present when he was lethally injected on January 16, 2001. She was forced to sit on Medlock’s side of the witness room, apart from Kathy’s family members who supported the execution. She

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54. Id.
55. Id.
56. Id. Johnnie Carter has explained her opposition to the execution of her granddaughter’s killer: “I’ve forgiven him and I’ve gone on, but I don’t condone what he did. . . . There’ll never be closure, because Kathy’s not here. Executing him is not going to close this thing. What does it accomplish? All you’re doing is making another family suffer grief.” Id. at 83-84 (citation omitted).
received no victim support services. Following the execution, which mental health professionals uniformly consider to be a "traumatic event," Kathy’s family members who embraced Medlock’s execution were escorted to a special room for debriefing and psychological support.\textsuperscript{57} Johnnie Carter was immediately escorted off the prison grounds.\textsuperscript{58}

Like Johnnie Carter, Ron Carlson, whose sister Deborah Thornton was stabbed to death in Texas, opposed the execution of Deborah’s murderer, Karla Faye Tucker.\textsuperscript{59} And like Johnnie Carter, Ron Carlson accepted Tucker’s invitation to attend her execution.\textsuperscript{60} Despite the existence of a Texas Department of Criminal Justice protocol that emphasizes the necessity of providing psychological counseling and support to victim-witnesses in the immediate aftermath of an execution,\textsuperscript{61} Ron Carlson, like Johnnie Carter, was provided no support or post-trauma services whatsoever.\textsuperscript{62} If, as almost universally agreed, witnessing an execution is a traumatic event requiring debriefing and psychological support, why are these critical services deliberately denied to those who need them most? If watching state officials put to death a condemned inmate traumatizes those victims who strongly support the execution, it defies reality to suggest that those victims who oppose it somehow magically escape trauma.

Trevor Dicks, a New Hampshire resident whose uncle was murdered and whose brother was sentenced to death, is well-positioned to understand the deeply conflicting emotions experienced by those who are related both to a murder victim and a murderer.\textsuperscript{63} According to Mr. Dicks:

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\textsuperscript{57} The Victim Services Division of the Texas Department of Criminal Justice has development guidelines for victim advocates assisting those who view executions. According to Texas’ protocol:

After viewing, the witnesses are escorted back to another room so we can hold an informal “debriefing session” in a confidential setting. The chaplain or prison psychologist, who were also in the support room, attend the debriefing since they are part of the agency’s post-trauma team. We believe the witnesses should not leave [the prison] without having the opportunity to “vent” because viewing an execution is considered a traumatic event.

\textbf{DIGNITY DENIED, supra} note 20, at 1.

\textsuperscript{58} \textit{Id.} at 15.

\textsuperscript{59} \textit{Id.} at 16.

\textsuperscript{60} \textit{Id.} at 17.

\textsuperscript{61} \textit{See id.} at 16-17.

\textsuperscript{62} \textit{Id.} at 17.

\textsuperscript{63} \textsc{Barbara Hood \& Rackel King, Not in Our Name: Murder Victims' Families Speak Out Against the Death Penalty} 19 (3d. 2001).
When someone is murdered, grieving family members have the comfort of knowing that society condemns the killing. But when someone [you love] is sentenced to die or is executed, grieving family members must face a society that not only embraces the killing but shuns them. The pain and loss we feel is dismissed or ignored. This is hypocritical and cruel.64

Dissenting in Payne v. Tennessee, Justice Stevens refuted the majority’s assertion that fairness requires that the state be allowed to counter mitigating evidence offered by the defendant with similar evidence about the victim.65 Because “[t]he victim is not on trial[,] her character, whether good or bad, cannot . . . constitute either an aggravating or mitigating circumstance.”66

The Payne majority’s fairness argument, in Justice Stevens’ view, was nothing more than a “classic non sequitur.”67

Capital defendants stand accused of murder and, while imprisoned, watch the state marshal an impressive array of resources in order to extinguish their lives. The family members of murder victims suffer inestimable losses and, while grieving, arouse compassion that stirs the better angels of human nature to offer comfort so that their lives, though profoundly and permanently altered, might return to some sense of normalcy. Logic dictates that a search for equivalence between murder defendants and murder victims’ family members is predestined to fail.68

Conversely, murder victims’ family members who support the death penalty and those who oppose the death penalty stand in para materia. Both groups suffer intense grief, experience profound feelings of powerlessness, and are separated only by their views as to how the criminal justice system should redress the harm caused by the capital defendant. Insisting on the moral imperative that our criminal justice system consider and treat as equals all family members of murder

64. Id.
66. Id. at 859.
67. Id.
68. To those who demand, “Why is the person accused of murder entitled to all these rights? What about the rights of the victim?,” I offer this cold comfort: murder victims’ family members who find themselves accused of capital murder are entitled to the full panoply of due process rights, by virtue of their status as murder defendants. Similarly, even convicted capital murderers whose relatives are murdered should be entitled, to the extent practicable, to the complete complement of victims’ rights, by virtue of their status as murder victims’ family members.
victims, regardless of their views on capital punishment, suffers none of the defects which doom the quest to equate the rights entitlements of capital defendants and murder victims’ family members.

Under current Anglo-American legal doctrine, the role of victim forgiveness in capital murder proceedings is easily and succinctly described: non-existent. Although American courts are overwhelmingly deaf to the voices of murder victims’ family members who oppose the death penalty, murder victim family member opposition to the death penalty is determinative in some other legal cultures. For example, under Iran’s Islamic legal system, murder victims’ family members decide whether or not a convicted murderer should be put to death. Islam’s holy book, the Qur’an, states:

The recompense for an injury
Is an injury equal thereto
(In degree): but if a person
Forgives and makes reconciliation,
His reward is due
From Allah.

To paraphrase a famous quote uttered by Justice Cardozo nearly seventy years ago, “[b]ut justice, though due to [murder victim family members who support the death penalty], is due [murder victim family members who oppose the death penalty] also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”

One obvious way to avoid altogether the bitterness and division occasioned by following Payne’s license to permit victim impact testimony from pro-death penalty murder victim family members while simultaneously muzzling anti-death penalty murder victim family

70. Id. at 325 (describing how an Iranian father whose son was murdered forgave his son’s condemned killer seconds before the killer was to be hung; the noose was removed and the reprieved prisoner was returned to prison to face resentencing in an ambulance that had been summoned to take his body to the morgue). The original source of this account is Afshin Valenejad, Iranian Victim’s Dad Spares Life of Teen Killer, Chi. Sun-Times, Jan. 3, 2000, at 18, available at 2000 WL 6663045.
71. Methenia, supra note 69, at 325 (quoting THE QUR’AN, ASH-SH RA 42:40).
72. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934). The original quote, of course, reads: “But justice, though due to the accused, is due the accuser also.”
members is to simply reject Payne as inconsistent with state constitutional provisions that provide more protections for criminal defendants than are required by the federal Constitution.

C. The Contours of Equal Protection and First Amendment Challenges to the Denial of Victim Status

The Nebraska Supreme Court, in 2001, ducked an invitation to examine the intersection of victims' rights and victim opposition to the death penalty. Randolph K. Reeves was sentenced to die in Nebraska's electric chair for the murders of Janet Mesner and Victoria Zessin Lamm. According to the evidence presented at trial, Reeves and fellow construction workers, unable to work due to inclement weather, began drinking at a bar at approximately 9:00 a.m. on March 28, 1980. Reeves continued drinking throughout the day, first at a friend’s house and later at a party where he augmented his alcoholic binge with two or three buttons of peyote, a hallucinatory drug. Around 1:30 the following morning, Reeves left the party in a stupor and made his way to a Religious Society of Friends meetinghouse, where he stabbed to death Janet Mesner, the live-in caretaker, and her close friend, Victoria Lamm. Before she died, Janet Mesner told police that she had been raped and stabbed by her cousin, Randy Reeves.

Reeves was arrested within an hour of the attacks. The arresting officer noticed that Reeves' eyes were red, that he had blood on his hands and his clothes, and that his fly was open and his penis was exposed. Tests would later show that blood found on Reeves’ body, including his penis and his clothes, matched Janet Mesner’s blood-type. Reeves’ blood-alcohol content was measured nearly three hours after the attacks (and two hours after his arrest) and registered .149%.

74. State v. Reeves, 344 N.W.2d 433, 438 (Neb. 1984). Mrs. Lamm’s two-year-old daughter, though present when the murders took place, was unharmed. Id.
75. Id. at 438.
76. Id.
77. Id. at 438-39.
78. Reeves’ adoptive parents were related to the Mesner family, and several members of both families practiced the Quaker religious faith. Id. at 439.
79. Id.
80. Id.
81. Id. One expert witness testified that given Reeves’ metabolic rate, his blood alcohol level could have been .20 or greater at the time of the murders. The fact that Reeves’ judgment or reasoning was impaired at the time of the murders is supported by
Reeves defended against two counts of felony murder by asserting that he was unable to form the requisite intent to commit either first degree sexual assault or first degree attempted sexual assault, the predicate felonies. Reeves maintained that he had no memory of the killings, which he claimed were committed during a blackout. Alternatively, in the event the jury found that Reeves could entertain the intent necessary to commit the predicate felonies, he argued that he should be found not guilty by reason of insanity. The jury rejected both defenses and found Reeves guilty of both counts of felony murder.

Per Nebraska law, Reeves’ sentencing proceeding took place before a three-judge panel. To help prove that Victoria Lamm’s murder was “especially heinous, atrocious, cruel, or manifested exceptional depravity,” the prosecution relied in part on expert testimony that Victoria Lamm was pregnant when murdered. After finding multiple aggravating factors and inadequate mitigating evidence, the panel sentenced Reeves to death on both counts.

It is a remarkable testament to the human capacity for forgiveness that grieving family members who have lost beloved relatives to senseless murders can muster the courage to express their opposition to capital punishment. This is precisely what happened in early 1999, when the Nebraska Board of Pardons met to consider holding a hearing about the evidence Reeves left behind at the crime scene (his underwear, wallet and a sock), and the fact that he did nothing to conceal himself after the murders, but was arrested a short time later, walking down a public street with his pants unzipped and his clothing covered in blood. State v. Reeves, 476 N.W.2d 829, 849 (Neb. 1991).

82. State v. Reeves, 344 N.W.2d at 440.
83. Id.
84. NEB. REV. STAT. § 29-2520 (reissue 1989). This section grants the trial judge discretion in determining whether a three-judge panel will be convened in a capital sentencing proceeding. Reeves’ challenge to this provision, as constitutionally infirm under the Eighth and Fourteenth Amendments, was rejected by the Nebraska Supreme Court. See State v. Reeves, 453 N.W.2d 359, 378 (Neb. 1990).
85. NEB. REV. STAT. § 29-2523(1)(d).
86. State v Reeves, 344 N.W.2d 433, 445 (Neb. 1984).
87. State v. Reeves, 453 N.W.2d 359, 364-65 (Neb. 1990). The Nebraska Supreme Court appears to have taken into consideration that the fact because Reeves was distantly related to victim Janet Mesner, the heinousness of his crime was greatly exacerbated. Although perhaps everyone would agree with the court that Reeves’ murders of Mesner and Victoria Lamm were senseless and brutal, the court’s conclusion that these crimes were made “more [senseless and brutal] by the fact that he was a relative and friend of Mesner’s” is curious and suggests that some judges may consider inter-familial killings to be per se aggravated.
the possibility of commuting Randy Reeves' death sentence. Three members of Victoria Lamm's family tried to present testimony to the Board of Pardons. Only one family member, Victoria Lamm's sister who opposed granting a reprieve to Reeves, was allowed to have her views read into the record of the meeting. Victoria's husband Gus and her daughter Audrey, both of whom opposed Reeves' execution, were neither permitted to testify nor to have their views read into the record.\footnote{DIGNITY DENIED, supra note 20, at 9.}

After Gus and Audrey Lamm were denied the right to speak or present written testimony, they filed suit seeking a writ of mandamus directing the Nebraska Board of Pardons to allow them to make an oral or written statement at Reeves' commutation proceeding. They alleged that they had suffered discrimination, contending that they had an equal right to address the Pardon Board, and that they had been denied that right because of their opposition to the death penalty.\footnote{Id.} The Nebraska state district court embraced a remarkably parsimonious view of who qualifies as a victim for purposes of the Nebraska Victim Rights Amendment, denied relief and dismissed the Lamm's petition.\footnote{State ex rel. Lamm v. Neb. Bd. of Pardons, 620 N.W.2d 763, 766 (Neb. 2001). Although the district court ultimately based its decision on its conclusion that it lacked subject matter jurisdiction, it also held that the Lamms were not entitled to relief because the court found that they are not victims as defined by Nebraska law. Id. at 767.}

In an amicus brief, MVFR urged the Nebraska Supreme Court to put an end to the practice of discriminating against surviving family members of murder victims who oppose capital punishment by the Nebraska Board of Pardons.\footnote{Brief of Amicus Curiae Murder Victims' Family for Reconciliation at 6, State ex rel. Lamm v. Neb. Bd. of Pardons, (No. S-99-0251) [hereinafter MVFR's Amicus Brief]. MVFR alleged that its membership includes citizens of Nebraska as well as residents of other states who are survivors of persons who were murdered in Nebraska. Id. Also, MVFR noted that the outcome of the Lamm case would impact the rights and interests of present and future members of MVFR. Id. at 7. The Nebraska Supreme Court granted MVFR's motion for leave to file an amicus curiae brief on November 22, 2000. Id.}

As noted in MVFR's amicus brief, murder victims' family members who oppose the death penalty constitute a distinct subgroup of all crime victims—"those who have lost someone to murder and who are opposed to the state killing their loved one[s] murderer."\footnote{Id. at 9.} And, as the Supreme Court in Payne v. Tennessee\footnote{501 U.S. 808, 824-25 (1991).} recognized, survivors of a homicide victim are also "victims." They therefore have valuable information to

\begin{footnotes}
\item[88.] DIGNITY DENIED, supra note 20, at 9.
\item[89.] Id.
\item[90.] Id.
\item[91.] Id.
\item[92.] Id. at 9.
\item[93.] Id. at 7.
\end{footnotes}
contribute to the determination of punishment and, presumably, the appropriateness of executive clemency.94

Following the Supreme Court’s mandate in Payne, the Nebraska State Constitution, like the constitutions of thirty-two other states, had been amended to provide rights to victims, including the right to “be informed of, present at, and make an oral or written statement at sentencing, parole, pardon, commutation, and conditional release proceedings.”95

Moreover, Gus Lamm and Audrey Lamm—the husband and daughter of Randolph Reeves’ victim, Victoria Lamm—fall squarely within the plain meaning of the word “victim” as defined by a Nebraska statute. According to Neb. Rev. Stat. 29-119(2), “[i]n the cases of a homicide, victim shall mean at least one family representative but shall not include the alleged perpetrator of the homicide.”96 Designating Victoria Lamm’s pro-execution sister as the sole “family representative,” while simultaneously rejecting Victoria’s husband and daughter, was a shameless, transparent effort to skew the clemency proceedings against Randolph Reeves and in favor of the state. Worse, when the court ruled to deny victim status to anti-death penalty relatives, it perpetuated the hurtful inference that family members who do not join the state in its quest to have a loved one’s murderer executed are not suffering loss as deeply as those who wish to see the killer killed. The cruel assumption appears to be that anti-death penalty victims somehow must not have loved the homicide victim as much as those who demand a death sentence.

Gus and Audrey Lamm’s legal challenge to the Pardon and Parole Board’s attempt to muzzle them was a battle fought on three fronts. First, they sought the rights and protections guaranteed to all victims by the Constitution and Nebraska’s statutes. Second, they sought to remove the stigmatizing inferences raised by their discriminatory denial of victim status. And, perhaps most important, they sought the respect and dignity which our criminal justice system owes to victims, regardless of their personal views on capital punishment.

Before the Lamms’ appeal reached the Nebraska Supreme Court, that court vacated Reeves’ death sentence on other grounds.97 And

94. Id.
95. See supra note 8 and accompanying text.
96. NEB. CONST. art. I, § 28(1).
98. State v. Reeves, 604 N.W.2d 151 (Neb. 2000).
because Reeves had not yet been resentenced, the Nebraska Supreme Court held that the Lamms' appeal was moot.99

Ultimately, Reeves avoided a death penalty upon resentencing.100 Nonetheless, it is worth briefly exploring the contours of the Lamms' legal challenge to help illustrate for future courts how the discriminatory treatment of anti-death penalty victims unfairly skews the clemency processes.

MVFR’s amicus brief submitted to the Nebraska Supreme Court in *State ex rel. Lamm v. Nebraska Board of Pardons* raised several claims. First, MVFR argued that equal protection guarantees of both the United States and Nebraska Constitutions require that surviving family members of homicide victims must be treated equally, whether those family members support or oppose capital punishment.101 Second, MVFR urged the Nebraska Supreme Court to hold that the Nebraska Board of Paroles hearing was a limited public forum in which the Lamms had a First Amendment right to participate.102 Finally, MVFR contended that the parole board’s decision to deny Gus and Audrey the right to present their views, while simultaneously welcoming the pro-death penalty views of Victoria Lamm’s sister, amounted to discrimination between speakers based on the content of their speech.103

The United States Supreme Court has long recognized the right of prosecutors to engage in “death qualification” of potential jurors in capital cases.104 That is, prosecutors may remove for cause from capital juries any person whose views on capital punishment would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”105 In other words, jurors whose opposition to the death penalty would impede their ability to vote in favor of a death sentence in an appropriate case are considered to be biased against the state and are not entitled to serve as capital jurors.

100. HOOD & KING, supra note 16, at 44.
101. MVFR’s Amicus Brief, supra note 91, at 5 (citing NEB. CONST. art. 1, § 3; U.S. CONST. amend. XIV).
Clemency proceedings, however, are completely different from capital sentencing proceedings. Clemency provides executive officials—usually a governor, a state's pardon and parole board or the president—with the quasi-judicial authority to provide a final review of a case in which factors ordinarily not considered by the courts may be taken into account. Victim impact evidence of the type prohibited in court by *Payne v. Tennessee*—the opinions of murder victims' family members as to whether a particular murderer should be put to death—is precisely the type of factor that executive officials (but not courts) are empowered to consider. To consider during a clemency proceeding the testimony or written statements of only those murder victims' family members who favor the condemned inmate's execution inflicts several irremediable harms. First, anti-death penalty victims suffer the indignity of being made to feel not only that their voices and opinions are unwelcome, but that they themselves are somehow freakish or unloving because of their opposition to the condemned prisoner's execution. This cruel assault on the integrity of victims is only aggravated by being forced to remain silent while family members are permitted to argue—often in extremely emotional terms—against granting clemency.

Second, completely muzzling anti-death penalty victims prevents the clemency authority from even considering the very real possibility that these victims will be re-victimized by a subsequent execution. Even victims who crave a murderer's execution often complain that the ritualistic killing of the despised prisoner failed to provide them with the "closure" they had sometimes been promised. As Peggy Broxterman, whose son Paul was killed in the Oklahoma City bombing observed, "You close on a house. You don’t close on a death."

Third, the uniquely one-sided presentation of information robs the process of any semblance of fairness by keeping from the decisionmaker relevant, powerful evidence. Just as capital jurors must confront their "awesome responsibility" to determine whether a convicted prisoner should be executed, by listening to both aggravating and mitigating evidence, so too should a clemency authority be forced to hear from both

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sides of the victim community with respect to its decision as to whether to grant mercy to an otherwise soon-to-be-executed prisoner.

Finally, silencing anti-death penalty victims during clemency proceedings deprives condemned prisoners of their only opportunity to demonstrate that their eventual executions are not unanimously sought by victims.

IV. CONCLUSION

During the past thirty years, victims' rights advocates have made significant progress in reforming the criminal justice system in order to better serve the needs of some—but only some—victims. In capital cases, victims who oppose the government's goal of sentencing a convicted murderer to die are shunned, ignored, and in some instances by judicial fiat, stripped of their very identities as legitimate victims. Often, victims who oppose the death penalty face hostility from the victims' advocates who are expected to provide them with services supposedly available to all victims.

Frequently, those who do not join the prosecution in demanding that a particular killer be killed discover that their love for their murdered family member is questioned. Thus, at the very point in their lives when they are most in need of comfort, support, guidance, and information about what to expect from the criminal justice system, they find themselves ostracized, cast aside, and at times forced to depend on the defendant's lawyer for the information they desperately crave.

This creation of an underclass of victims—those whose consciences cannot tolerate responding to an unlawful murder with a state-sanctioned killing—is the result of a particularly crass, result-oriented viewpoint discrimination and should not be tolerated. Apart from inflicting new and profound psychological wounds on persons already victimized, consigning anti-death penalty victims to second class status (thereby denying them the rights and benefits enjoyed by those victims who support the death penalty) utterly undermines the stated goal of the victims' rights movement: to provide all victims with the help they need and the attention they deserve.