HAS REVENGE BECOME A JUSTIFICATION TO LEGITIMIZE THE DEATH PENALTY?

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INTRODUCTION

Revenge has played a role in criminal justice systems for thousands of years. From the Code of Hammurabi, to the Bible, to modern Supreme Court jurisprudence, revenge, or "getting even," has been a consideration in how wrongdoers are punished, especially with respect to the imposition of the death penalty. Historically, revenge has not been viewed as a legitimate justification for punishment under American legal principles. However, in the past year, both the United States Supreme Court and the Department of Justice have signaled that revenge may well have a legitimate role in justifying the death penalty.

This Note will explore the development of revenge as a justification for punishment in the American criminal justice system. It will begin by showing that recent remarks from the bench and the Department of Justice signal a willingness to consider the effects of revenge on crime victims. It will then analyze the concept of revenge as part of a criminal justice system and discuss the United States Supreme Court's historical views on revenge as a justification for the death penalty. Next, this Note will investigate revenge's role in the Victims' Rights Movement, specifically how revenge factors into victim impact statements. Finally, this Note ultimately asserts that revenge is not and should not be a goal of the criminal justice system given the public policy implications.

I. MOVE TOWARDS REVENGE?

The Supreme Court has well-developed jurisprudence on the death penalty, specifically the Eighth Amendment's prohibition on cruel and unusual punishment. However, not until 2019 has revenge been implied

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as an acceptable purpose of capital punishment. In *Bucklew v. Precythe*,[1] the Court arguably acknowledged the appropriateness of the offender's suffering (i.e., revenge) in the administration of the death penalty.[2] In 1997, Bucklew was convicted of murder and rape in Missouri and sentenced to death by lethal injection.[3] Bucklew claimed to suffer from a medical condition which would cause him tremendous pain if the lethal injection was administered.[4] After a series of state and federal appeals, the case came before the Supreme Court.[5]

On April 1, 2019, Justice Gorsuch, writing for a five member majority, rejected Bucklew's claims, holding that when a convict who is sentenced to death challenges the state's method of execution on Eighth Amendment grounds, he or she must demonstrate that alternative, less painful methods of execution are viable.[6] In so ruling, Justice Gorsuch remarked that the Eighth Amendment "does not guarantee a prisoner a painless death—something that isn't guaranteed to many people, *including most victims of capital crimes*."[7]

It is difficult to argue that Justice Gorsuch was not acknowledging the proportionality of suffering between a capital crime victim and a person convicted of that offense. In fact, Justice Gorsuch appears to justify the pain which may be suffered by the wrongdoer in the course of carrying out the death penalty because of the pain inflicted on the victim. The opinion has been widely criticized by death penalty opponents.[8]

The implication that revenge is an acceptable justification for capital punishment did not stop with the Supreme Court. On July 25, 2019, United States Attorney General William Barr announced that the Trump Administration, after a sixteen year federal hiatus, would

1. Bucklew v. Precythe, 139 S. Ct. 1112 (2019).
2. *Id*.
3. *Id.* at 1119.
4. *Id.* at 1120.
5. *Id.* at 1122.
6. *Id.* at 1123.
7. *Id.* at 1124 (emphasis added). Justice Gorsuch also addressed the impact of delays in the imposition of Bucklew's sentence on the victims' families: "The people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better." 139 S. Ct. at 1133.
8. *See, e.g.*, John D. Bessler, Bucklew v. Precythe*: The Supreme Court's Tortured Death Penalty Jurisprudence*, GEO. WASH. L. REV. (Apr. 17, 2019), https://www.gwlr.org/bucklew-v-precythe-the-supreme-courts-tortured-death-penalty-jurisprudence/ (arguing that the Court ignores modern understandings of torture in its holding.); Elie Mystal, *Neil Gorsuch Just Made Death Worse*, THE NATION, (Apr. 3, 2019), https://www.thenation.com/article/archive/neil-gorsuch-death-penalty-bucklew/.

resume federal executions.[9] In a press release announcing the policy decision, Attorney General Barr stated that, "the Justice Department upholds the rule of law—and we owe it to the victims and their families to carry forward the sentence imposed by the justice system."[10] Attorney General Barr directed the Bureau of Prisons to adopt a proposed Addendum to the Federal Execution Protocol authorizing the executions of five individuals to proceed.[11]

Attorney General Barr's actions were swiftly met with litigation by death penalty opponents challenging the reinstatement of the federal death penalty. Courts have expressed a general reluctance to agree with the Justice Department's policy shift. In October 2019, the United States Court of Appeals for the Ninth Circuit blocked the execution of one of the convicts scheduled to be put to death pursuant to the new Execution Protocol.[12] On November 20, 2019, Judge Chutkan of the United States District Court for the District of Columbia issued an injunction effectively prohibiting the executions of the remaining four individuals.[13]

In response to Judge Chutkan's decision, Attorney General Barr claimed that he would, if necessary, appeal to the Supreme Court to effectuate the Administration's decision to reimpose the death penalty.[14] In a November 21, 2019 interview with the Associated Press,

9. Press Release, U.S. DEP'T OF JUSTICE, Federal Government to Resume Capital Punishment After Nearly Two Decades Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse [hereinafter DOJ Press Release]. The federal death penalty was reinstated in 1988 for a narrow class of offenses. 18 U.S.C. § 111(a) (1988) (amended 1994). The Federal Death Penalty Act was enacted in 1994 and greatly expanded the number of death penalty eligible offenses under federal law. 18 U.S.C. § 3591 (1994). Since 1988, only 3 federal inmates have been executed: Timothy McVeigh, the Oklahoma City bomber, executed in 2001; Juan Gurza, convicted of murder and drug trafficking, executed in 2001; and Louis Jones Jr., convicted of the rape and murder of a fellow Army Pvt., executed in 2003. There are currently 62 federal death row inmates. DEATH PENALTY INFORMATION CTR., http://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners (last visited Dec. 8, 2019).

10. *See* DOJ Press Release, *supra* note 9.

11. *Id.*

12. Mitchell v. United States, No. 18–17031, slip op. at 3 (9th Cir. Oct. 4, 2019).

13. Federal Bureau of Prisons' Execution Protocol Cases *ex rel.* Roane v. Barr, No. 19-mc-145, slip op. at 1 (D.D.C. Nov. 20, 2019); *see also* Katie Benner, *Judge Blocks Scheduled Executions of Federal Death Row Inmates*, N.Y. TIMES (Nov. 21, 2019), https://www.nytimes.com/2019/11/21/us/politics/justice-department-death-penalty-barr.html (summarizing the opinion's reason for decision: that executions would prevent inmates from challenging the use of legal injection in the courts.).

14. Michael Balsamo & Colleen Long, *AP Exclusive: The DOJ Would Take Halted Executions to High Court*, ASSOCIATED PRESS (Nov. 21, 2019), https://apnews.com/d0ddb30f2b214bc19da9a03305ac44de. Attorney General Barr followed through on his promise of appealing the decision to the Supreme Court after the United States Court of Appeals for the District of

Attorney General Barr confirmed that the decision to proceed with the executions was motivated by concerns for the victims of crimes. Attorney General Barr stated, "[t]here are people who would say these kinds of delays are not fair to the victims."[15]

The Justice Department's decision to resume executions may well have been a rational and apolitical decision. At worst, it can be viewed as the result of a politicized Justice Department utilizing the death penalty to invigorate potential populous support. But to see the nation's highest court invoking such language is cause for greater concern. Together these statements seem to suggest that revenge has become a legitimate justification for the death penalty in America.

II. THE CONCEPT OF REVENGE

Much has been written about the role of revenge in the evolution and administration of what societies consider "justice."[16] Webster's Dictionary defines "revenge" as "to inflict damage, injury, or punishment in return for (an injury, insult, etc.)."[17] Revenge has alternatively been defined as "openly inflicting on the wrongdoer the same kind of harm he inflicted (because he wronged the victim in that way)."[18] Interestingly, revenge is not defined in Black's Law Dictionary.

This historical concept of revenge has generally imposed a proportionality requirement. In Exodus, the Bible teaches that "you are to take life for life, eye for eye, tooth for tooth . . . ."[19] This proportionality requirement gave rise to the ancient law of *lex*

Columbia Circuit refused to vacate Judge Chutkan's injunction. On Dec. 6, 2019, the Supreme Court also declined to vacate the District Court. However, Justices Alito, Gorsuch, and Kavanaugh expressed the opinion that the Administration would ultimately prevail on the issue of reimposing the federal death penalty. Barr v. Roane, 140 S. Ct. 353 (2019).

15. Balsamo & Long, *supra* note 14.

16. *See, e.g.*, SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 139 (1983) (considering the role of psychology in the criminal justice process, specifically emotional responses which fuel a desire to seek an equitable outcome). *See generally* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985) (exploring the impact and rationales for the development of victims' rights programs).

17. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1245 (Coll. Ed. 1964).

18. Michael Davis, *Revenge, Victim's Rights and Criminal Justice*, 14 INT'L J. OF APPLIED PHIL. 119, 123 n. 1 (2000).

19. *Exodus* 21:23-25 (New International Version).

talionis,[20] a system of justice "under which punishment should be in kind—an eye for an eye, a tooth for a tooth, and so on—but no more."[21]

Understood as a proportional payback for wrongs done to another, revenge finds no place in modern theories of punishment. There are two basic theories advanced for the justification of punishment, both of which ultimately reject revenge as legitimizing criminal penalties. One fundamental theory of punishment is utilitarianism, which asserts that punishment is justified only if it furthers the forward-looking societal goals of: (1) rehabilitating the criminal; (2) deterring the criminal (specific deterrence) or others (general deterrence) from engaging in similiar criminal behavior; or (3) incapacitating the criminal in order to protect society from his future, wrongful conduct.[22] According to utilitarian theory, only punishment which furthers these goals is legitimate. Because it does not further these societal goals, utilitarians reject revenge and *lex talionis* as a basis for punishment, even if its imposition would promote proportionality.[23]

The second fundamental theory justifying punishment is retribution, which rejects the exclusivity of societal goods of punishment, concluding instead that wrongdoers must be punished because a wrong was committed.[24] Retributionists also generally reject the notion of revenge as a basis for punishment, concluding that the wrong was committed against society and that it is society's, rather than the injured individual's, obligation to administer punishment.[25] Professor George Fletcher described the distinction between retribution and revenge in a pointed manner: retribution "is not to be identified with vengeance or revenge, any more than love is to be

20. BLACK'S LAW DICTIONARY (10th ed. 2014) (translating *lex talionis* as "[t]he law of retaliation").

21. BLACK'S LAW DICTIONARY (10th ed. 2014). In *Payne v. Tennessee*, the Supreme Court recognized the *lex talionis* doctrine as meaning "an eye for an eye, a tooth for a tooth." 501 U.S. 808, 819 (1991). Justice Gorsuch's assertion that, because capital crime victims often do not suffer painless deaths, those convicted of their murders should suffer too, leads to the virtually inescapable conclusion that Justice Gorsuch was referring to revenge in the *Bucklew* opinion. Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

22. *See* Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115 (2005) (recognizing rehabilitation, deterrence and incapacitation were the social changes that criminal punishment was intended to effectuate).

23. *Id.*

24. *See* Karsten J. Struhl, *Retributive Punishment and Revenge*, *in* WHEN YOUNG PEOPLE BREAK THE LAW: DEBATING ISSUES ON PUNISHMENT FOR JUVENILES 104, 108-10 (Karsten J. Struhl & Kimora, 2015).

25. *Id*.

identified with lust."[26] Stated in less colorful terms, retribution is often aligned with "justice" and revenge is seen as an impulsive act of retaliating that is not necessarily motivated by justice.[27] With revenge, someone is taking pleasure in the suffering of the subject person whereas with retribution, satisfaction is being experienced solely from the fact that justice is being served.[28]

Therefore, revenge, in the context of criminal punishment, was widely seen as unjust and rejected as a legitimate reason for the imposition of penalties. In a frequently cited article, Dr. Leon Seltzer describes five reasons why revenge does not correspond with justice:

> (1) Revenge is predominantly emotional while justice predominantly rational. Justice is about righting a wrong while revenge is about getting even or experiencing pleasure in the suffering of others.
>
> (2) Revenge is personal while justice is impersonal and impartial. Revenge is little more than the carryout of a private vendetta while justice involves a search for moral correctness in situations where societal standards have been violated.
>
> (3) Revenge is an act of vindictiveness. Justice seeks vindication. Justice assumes a foundation in honor, fairness and virtue. With revenge comes ever-present "two wrongs don't make a right."
>
> (4) Revenge can lead to never ending and ever-increasing cycles of violence. Justice seeks closure.
>
> (5) Revenge is nothing more than an expression of hatred, rage and spite. Justice is restorative and seeks to find the preexisting balance of equity between the wrongdoer and society.[29]

Author Xarissa Holdaway argues that "justice does not require revenge."[30] She invokes the views of John Locke for the proposition that "punishment should only go so far as calm reason and conscience

26. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 417 (Oxford Univ. Press 2000).

27. Struhl, *supra* note 24, at 112.

28. *See* Jonathon Jacobs, *The Retributive Theory of Punishment*, *in* WHEN YOUNG PEOPLE BREAK THE LAW: DEBATING ISSUES ON PUNISHMENT FOR JUVENILES 53, 53-54 (Karsten J. Struhl & Kimora, 2015).

29. Leon F. Seltzer, *Don't Confuse Revenge with Justice: Five Key Differences*, PSYCHOLOGY TODAY, Feb. 6, 2014, https://www.psychologytoday.com/us/blog/evolution-the-self/201402/don-t-confuse-revenge-justice-five-key-differences.

30. Xarissa Holdaway, *Justice v. Revenge: The Question Beneath the Question of Prison Reform*, RELIGIOUS DISPATCHES, July 23, 2015, https://religiondispatches.org/justice-v-revenge-the-question-beneath-the-question-of-prison-reform/ (internal quotation marks omitted).

dictates[]" and notes that "Locke leaves little room for hot blooded vengeance."[31]

Some consider the role revenge plays in honoring those who have been lost. This may well have been the point being made by Attorney General Barr in commenting upon what we "owe" to the victims of capital crimes.[32] In other words, revenge may act as a means through which those on Earth may pursue the victim's cause on their behalf. Michael Igantieff, a leading human rights commentator, states that "[r]evenge is a profound moral desire to keep faith with the dead, to honor their memory by taking up their cause where they left off."[33]

Those opposed to the concept of revenge having any role in criminal justice go so far as to declare it sinful. Opponents of revenge cite to the New Testament passage that "God declares, Dearly beloved, avenge not yourselves, but rather give place unto wrath: for it is written vengeance is mine: I will repay so it's the Lord."[34] Therefore, only God and those acting on his behalf—such as kings reigning under the divine-right theory—have a moral right to impose any form of punishment.

Perhaps Sir Francis Bacon summarized best the view that revenge is immoral and has no place in the law:

> Revenge is a kind of wild justice; which the more man's nature runs to the more ought law to weed it out. For as far as the first wrong, it doth but offend the law; but the revenge of that wrong putteth the law out of office. Certainly, in taking revenge, a man is but even with his enemy; but in passing it over, he is superior for it is a prince's part to pardon.[35]

It is impossible to harmonize the views of Francis Bacon with those expressed by Justice Gorsuch or Attorney General Barr. For Bacon, revenge "doth but offend the law."[36] In the opinions of Justice Gorsuch and Attorney General Barr, the perpetrators of capital crimes deserve

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31. *Id.*

32. *See* DOJ Press Release, *supra* note 9 ("The Justice Department upholds the rule of law – and we owe it to the victims and their families to carry forward the sentence imposed by our justice system.").

33. Brandon Hamber & Richard A. Wilson, *Symbolic Closure Through Memory, Reparation, and Revenge in Post-Conflict Societies*, 1 J. OF HUM. RTS. 35 (2002). This notion is consistent with Attorney General Barr's stated motivation for reinstituting the death penalty: to be take up the cause of victims to exact revenge for wrongs committed.

34. *Romans* 12:19.

35. Francis Bacon, *Of Revenge, Essays or Counsels* (1625), https://www.gutenberg.org/files/575/575-h/575-h.htm#link2H_4_0004.

36. *Id.*

to suffer for the pain they inflicted on their victims, and society owes it to the victims and their families to see that this "justice" is done.

III. REVENGE WITHIN THE UNITED STATES CRIMINAL JUSTICE SYSTEM

A. The Supreme Court Weighs the Role of Revenge with Respect to the Death Penalty

Given the rejection of revenge by both the utilitarian and retributive schools, it is not surprising that the Supreme Court historically has taken a dim view on the role of revenge in death penalty cases. This perspective came to light in the landmark 1972 case of *Furman v. Georgia*.[37] In *Furman*, the Supreme Court considered three consolidated death penalty cases.[38] The sole question considered by the Court was whether "the imposition and carrying out of the death penalty in these cases constitute[s] cruel and unusual punishment in violation of the Eighth[39] and Fourteenth[40] Amendments[.]"[41]

In a one paragraph *per curiam* opinion, the Court ruled 5-4 that the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[42] Every Justice wrote a separate opinion. Justices Douglas, Stewart, and White found that the death penalty was unconstitutional, but not unredeemably so.[43] The balance of the majority, Justices Marshall and Brennan, declared the death penalty to be unconstitutional in all cases.[44]

Both Justices Marshall and Brennan addressed what they saw as the illegitimacy of revenge playing a role in the imposition of the death penalty. Justice Marshall concluded that "retaliation, vengeance and retribution have been roundly condemned as intolerable aspirations

37. Furman v. Georgia, 408 U.S. 238 (1972).

38. *Id*. at 240.

39. The Eighth Amendment to the U.S. Constitution provides that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

40. The Fourteenth Amendment to the U.S. Constitution makes applicable to the States the prohibition against cruel and unusual punishment. *Furman*, 408 U.S. at 241; U.S. CONST. amend. XIV.

41. *Furman*, 408 U.S. at 239–40.

42. *Id.* at 240.

43. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

44. *Id.* at 314 (Marshall, J., concurring); *id.* at 257 (Brennan, J., concurring).

for a government in a free society."[45] Considering revenge and retribution as identical,[46] Justice Marshall declared that retribution "for its own sake is improper"[47] and that "no one has ever seriously advanced retribution as a legitimate goal of our society."[48] Concluding that retribution and revenge are immoral as justifications for the imposition of the death penalty, Justice Marshall opined: "I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional."[49]

Justice Brennan similarly condemned the concepts of retribution or vengeance as justifications for the death penalty:

> In the United States, as in other nations in the western world, the struggle about this punishment [(i.e., the death penalty)] has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance, on the one hand, and on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century.[50]

Justice Brennan concluded, "[a]s the history of the punishment of death in this country shows, our society wishes to prevent crimes; we have no desire to kill criminals simply to get even with them."[51]

The practical effect of the Court's decision in *Furman* was to impose a *de facto* moratorium on all death sentences pending as of the

45. *Id.* at 343.

46. Unlike Justice Marshall, many commentators have distinguished between revenge, which is the pursuit of vindicating what is perceived as a private wrong, from retribution, which is generally recognized as the carrying out by the government of a lawfully imposed penalty. *See, e.g.*, Eisenstat, *supra* note 22, at 1162 ("[Retributivists] justify punishment upon society's right to demand that wrongdoers be punished, not because of an inherent right of victims to see their victimizers punished. Thus, most advocates of retributive theory are careful to distinguish their beliefs from the 'wicked' emotion of revenge."). However, this distinction has been criticized as the very concept of revenge or "payback" is the root of the meaning of retribution. The etymology of the term is from the Latin "*re*" and "*tribno*" which means to pay back. MERRIAM-WEBSTER UNABRIDGED DICTIONARY, http://www.merriam webster.com/dictionary/retribution (last visited Feb. 25, 2020).

47. *Furman*, 408 U.S at 345.

48. *Id.* at 363.

49. *Id.*

50. *Id.* at 296.

51. *Id.* at 305.

date of the decision. Death sentences were effectively reduced to sentences of life imprisonments.[52]

However, the moratorium on the death penalty was short-lived. A substantial segment of the American people were fundamentally opposed to the Supreme Court's elimination of the death penalty.[53] Consequently, following the Court's decision in *Furman*, a number of states amended their death penalty statutes in an effort to comply with the guidelines laid down by the Court and reinstate capital punishment in their respective jurisdictions.[54] Defendants in five of these states were convicted of murder, sentenced to death, and had their convictions and sentences upheld by the respective state supreme courts.[55] Each petitioned the Supreme Court requesting that the death penalty be deemed a violation of the Eighth and Fourteenth Amendments, and therefore unconstitutional for all purposes.[56]

These cases were consolidated for appeal in *Gregg v. Georgia*, in which the Court expressly recognized the constitutionality of the death penalty.[57] Of significance to the Court's conclusion was its finding that no fewer than thirty-five states and the United States Congress had revised their death penalty statutes to comply with the dictates of *Furman*.[58] The Court took these actions as an "indication of society's endorsement of the death penalty for murder."[59]

Justice Stewart, in delivering the opinion of the Court, expressly recognized the legitimacy of societal retribution. He observed:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or is unable to impose upon criminal offenders the

52. Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1245 (1974).

53. *Id.* at 1249–50.

54. *Id.* at 1249.

55. *See* Gregg v. Georgia, 428 U.S. 153, 161 (1976) ("The Supreme Court of Georgia affirmed the convictions . . . .").

56. *Id*.

57. *Id*. at 207.

58. *Id.* at 179–80. The Court in *Gregg* expressly pointed out that new state statutes attempted to address specific concerns of the Court in *Furman*, namely the specification of factors to be weighed and the procedures to be followed when deciding the applicability of a capital sentence, and making the death penalty required for certain crimes. *Id.* at 180.

59. *Id*.

> punishment, they "deserve" then there are sown the seeds of anarchy of self-help vigilante justice and lynch law.[60]

Thus, the Court moved in two years from Justice Brennan's statement in *Furman* that Americans have no desire to impose the death penalty in order to "get even," to Justice Stewart's majority opinion that, for the good of an organized society, criminal offenders must get the punishment they deserve, including the death penalty.[61]

Another potential cause underlying the legislative response to *Furman* cited by the *Gregg* majority is the view that the American criminal justice system needed to place a renewed and sharpened focus on victims' rights. Victims of crime in America felt disrespected, powerless, marginalized, and generally humiliated.[62] Their state legislators—and ultimately the Supreme Court in *Gregg*—reflected this frustration.

There are a number of reasons why victims of crimes in America continue to believe they are neglected. First, key decisions are made by the prosecutor, including the exercise of discretion to forego prosecution entirely without the victim's consent or input.[63] Second, law enforcement and prosecutorial officials may make errors that result in a dismissal of charges, an unreasonable delay in the administration of justice, or even an acquittal that leaves a victim feeling helpless and unsatisfied.[64] Third, the victim cannot control how the case against the offender is pursued.[65] Fourth, the prosecutor has virtually unlimited discretion to enter into a plea deal, which likely results in the defendant receiving a lesser penalty, and which may be seen by the victim as disproportional to his or her suffering.[66] Finally, the victim has no real voice in the sentencing process.[67]

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60. *Id.* at 183.

61. The concept of exacting collective revenge (i.e., giving defendants the punishment "they deserve") has also been framed in terms of morality. As Graeme Newman, a leading criminal justice scholar, observed, "[p]unishment may or may not teach right and wrong. The important fact is that it supports the morality of social order." GRAEME R. NEWMAN, THE PUNISHMENT RESPONSE 290 (2d ed. 1978).

62. *See* Eisenstat, *supra* note 22, at 1144–48 (summarizing cases in which crime victims were marginalized by the criminal justice system).

63. *See* Eisenstat, *supra* note 22, at 1144 ("Decisions made by the district attorney's office . . . are binding up on the victim.").

64. *See id.* ("Errors made by law enforcement officers which cause incriminating evidence to be excluded from trial . . . are similarly binding upon the victim.").

65. *See id.* ("[Victims] had no control over choosing who their agent will be, no do they have any power to control how their 'agent' pursues 'their' case.").

66. *See id.* ([Victims] cannot appeal the decision, nor can they file their own criminal suit.").

67. *See id.* ("The fact that the victim is not a party to the criminal suit, and thus has no

There are two examples of cases demonstrating the well-grounded frustration felt by victims. In *Linda R.S. v. Richard D.*,[68] the Supreme Court held that a crime victim does not have standing to enjoin a prosecutor's refusal to enforce a statute criminalizing the non-payment of child support.[69] The Court recognized that a victim of a crime cannot compel a prosecution because "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another."[70]

The decision of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Hagen* further exemplifies the issue of victim frustration with the criminal justice system.[71] In 1987, James Kelly was convicted of several serious offenses, including the rape, assault, and battery of Debra Hagen.[72] In April 1988, Kelly was sentenced to two concurrent ten-year sentences for the rape conviction and one concurrent five-year sentence for the assault and battery conviction.[73] Kelly then filed a motion to stay the execution of his sentence pending disposition of his motion for a new trial on the basis of ineffective assistance of counsel.[74] The motion to stay his sentence was granted in 1988.[75]

Through a series of court delays, Kelly's motion for a new trial was denied, but not until four years later, in May 1992.[76] Kelly appealed that decision.[77] Through yet another series of delays, his appeal remained pending eight years later. Consequently, though thirteen years had passed since his conviction, Kelly had yet to serve time for his crimes. In May 2001, Hagen, the rape victim, filed a motion to lift the stay of execution of Kelly's sentence.[78] The trial court dismissed her motion.[79] On appeal, the Supreme Judicial Court of Massachusetts held that as a

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standing to question rulings of law, or pronouncement of sentences, has far reaching implications for the victim."). With the advent of victim impact statements, victims gained a voice in the sentencing process. *See infra* Section III.B.

68. 410 U.S. 614 (1973).
69. *Id.* at 619.
70. *Id.*
71. Hagen v. Commonwealth, 772 N.E.2d 32 (Mass. 2002).
72. *Id.* at 34.
73. *Id.*
74. *Id.*
75. *Id.* at 34–35.
76. *Id.*
77. *Id.*
78. *Id.* at 33.
79. *Id.* at 34.

victim of the crime, Hagen did not have standing to move for the revocation of Kelly's stay of his sentence.[80]

Many experts believe that by denying victims an outlet for their anger, frustration, and resentment, courts deprive victims of the ameliorative and positive benefits which may be experienced when revenge is imposed. As observed by criminologist Charles Barton, victims experience a sense of relief and unburdening of feelings of humiliation, resentment, and anger when permitted to exact revenge.[81] Moreover, if the victim is permitted to experience some sense of revenge, he or she is likely to regain self-worth, a feeling often lost upon being victimized.[82]

It is also imperative that no one be seen by victims as above the law, especially the wrongdoer. Society must make every effort to avoid the evil of *impunidad*: the phenomenon of offenders getting away with their crimes.[83] The balance of power must be meaningfully restored to those wronged by the criminal acts of another.

B. The Victims' Rights Movement

The national recognition that the rights of victims were either being ignored or undervalued has led to what is generally described as the "victims' rights movement."[84] Currently, every state and the federal government has passed laws which afford victims of crimes certain rights and protections as well as some participatory role in the criminal justice system.[85]

The victims' rights movement was born primarily out of the unacceptably high crime rates of the 1960s and 1970s and the confluence of the women's movement and nascent victims'

80. *Id.*

81. *See* CHARLES K. B. BURTON, GETTING EVEN: REVENGE AS A FORM OF JUSTICE 62 (1981) (discussing the "sense of satisfaction which is felt by victims and those close to them when due punishment is imposed on their wrongdoers").

82. *Id*.

83. *See* George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 62 (1999).

84. *Victims' Rights*, NATIONAL CENTER FOR VICTIMS OF CRIMES, http://victimsofcrime.org/help/for-crime-victims/get-help-bulletins-for-crime-victims (December 18, 2019).

85. *See* Office of Justice Programs, *About Victims' Rights*, https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp (last visited March 15, 2020) ("Today, every state, the District of Columbia, and several territories have an extensive body of basic rights and protections for victims of crime within its statutory code.").

compensation programs.[86] The underlying purpose of the movement's founding was seemingly to build resources and support for struggling victims of crimes.

In the 1960s and 1970s, the United States faced an unprecedented surge in violent crime. The national homicide rate multiplied by more than two and a half times, from a low of 4.0 homicides per 100,000 people per year in 1957 to a high of 10.2 in 1980.[87] There was a material upsurge in rates across most categories of major crimes, including rape, assault, robbery, and theft.[88] This outburst of crime left behind many more victims than the nation's criminal justice system had previously been required to handle.

In 1966, the crime wave led to the formation of the President's Commission on Law Enforcement and the formation of the Administration of Justice, which conducted the first national victimization survey.[89] The survey showed that victimization rates were far higher than would be indicated by the statistics disclosed by law enforcement figures.[90] The study revealed that many victims failed to report crimes because they distrusted the justice system.[91] Simply stated, victims believed that the system was not working for them.

Recognizing that the existing criminal justice system was failing many victims, the government determined that there was a need to provide better support to victims. Initial state action to remedy this problem came in the form of victim compensation programs, and the early compensation programs were designed as welfare programs to provide help to victims in need. California initiated the first state victim compensation program in 1965, soon followed by New York. By 1979, there were 28 state compensation programs.[92]

As later programs were developed, states began to focus less on the needs of the victims—the center of welfare concerns—and more on the deserved justice for the victim.[93] Victims' needs were no longer part of the calculation. As Supreme Court Justice A.J. Goldberg commented in

86. Marlene Young & John Stein, *The History of the Crime Victims' Movement in the United States* (Dec. 2004), https://www.ncjrs.gov/ovc_archives/ncvrw/2005/pdf/historyofcrime.pdf, at 1.

87. STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED (2011) 107.

88. *Id*.

89. Young & Stein, *supra* note 86, at 2.

90. *Id.*

91. *Id*.

92. *Id*.

93. *Id*.

regards to victim compensation, "[i]n a fundamental sense, then, one who suffers the impact of criminal violence is also the victim of society's long inattention to poverty and social injustice . . . ."[94] At root, the victim compensation programs were molded to remedy society's inability to prevent the circumstances surrounding crime.

The victim compensation programs precipitated an expansion of similar reforms. The increase in serious crimes took an especially heavy and unprecedented toll on women in the form of increased domestic abuse, leaving many victimized women without the post-trauma support they needed.[95] Leaders of the feminist movement immediately saw the need to provide additional support programs to victims of rape and domestic violence.[96] This led to the development of victim assistance programs, which focused on non-financial mechanisms of support. The first three victim assistance programs in the United States all began in 1972, and "two were rape crisis centers (in Washington, D.C., and the San Francisco Bay area)."[97] The Department of Justice, in a report examining the history and development of the victims' rights movement, noted that there were two significant contributions that these programs brought to the victims' movement: (1) "emotional crisis was recognized as a critical part of the injury inflicted,"[98] and (2) "intervenors learned to help victims with the practical consequences of rebuilding their lives, rather than relying on a criminal justice system where they were too often mistreated."[99] These initiatives formed the basis for the growth of what has now developed into broad victims' rights statutes across the country.[100]

Victims' rights programs have expanded greatly since their beginnings in the 1970s. There are over 32,000 statutes nationwide that define and protect victims' rights.[101] In 2004, after much debate surrounding proposed victims' rights legislation, Congress passed the

94. A.J. Goldberg, *Preface: Symposium on Governmental Compensation for Victims of Violence*. 43 S. CAL. L. REV. 1, 2–3 (1970).

95. *See* Young & Stein, *supra* note 86, at 2 ("Their leaders saw sexual assault and domestic violence – and the poor response of the criminal justice system – as potent illustrations of a woman's lack of status, power, and influence.").

96. *See id.* ("The new feminisits immediately saw the need to provide special care to victims of rape and domestic violence.").

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id*. ("There is little doubt that the women's movement was central to the development of a victims' movement.").

101. *See* Young & Stein, *supra* note 86, at 8.

Crime Victims' Rights Act[102] in an effort to codify the national efforts to protect the rights of crime victims and afford them the respect they deserve during the prosecution and sentencing of offenders.

Unfortunately, in far too many cases, victims' rights statutes are not fully enforced, leaving victims feeling frustrated and left out by the criminal justice system.[103] In response, a number of states have elevated victims' rights to a constitutional level.[104] By enshrining certain rights within their constitutions, states emphasize the importance of recognizing victims throughout the justice process and promote their dignity by ensuring the enforcement of the support and protections they are guaranteed.[105] Currently, 35 states have amended their state constitutions to include some form of a victims' rights amendment.[106]

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102. Crime Victims' Rights Act of 2004, 18 U.S.C § 3771 (2004)

103. *See, e.g.*, United States v. Atlantic States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 532 (D.N.J. 2009) (finding a narrow, exclusive definition of the term "statutory crime victim").

104. *See, e.g.*, AL. CONST. amend. 557(a) ("Crime victims . . . are entitled to the right to be informed, to be present, and to be heard when authorized, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the person accused of committing the crime.").

105. Marsy's Law Foundation is a leading proponent of victims' rights state constitution amendments. The stated purpose of the amendment is to "preserve and protect the right of crime victims to justice, to ensure crime victims a meaningful role throughout criminal and juvenile justice systems, and to ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than the protections afforded to criminal defendants and juvenile delinquents." It provides a very extensive list of enumerated rights in a piece of model legislation that is designed to set the framework for state's victims' rights amendments across the country. Enumerated rights of note include: the right to have the safety and welfare of the victim and the victim's family considered when setting bail or making release decisions; the right to privacy, which includes the right to refuse an interview, deposition or other discovery request and to set reasonable conditions on the conduct of any such interaction to which the victim consents; the right to be heard in any proceeding involving release, plea, sentencing, adjudication, or parole, and any proceeding during which a right of the victim is implicated; the right to confer with the prosecuting attorney; the right to provide information regarding the impact of the offender's conduct on the victim and the victim's family to the individual responsible for conducting any pre sentence investigation or compiling any pre sentence investigation report, and to have any such information considered in any sentencing recommendations submitted to the court; and the right to receive a copy of any pre sentence report, and any other report or record relevant to the exercise of a victim's right, except for those portions made confidential by law. *See* Marsy's Law For All, *Marsy's Law: A Model Constitutional Amendment To Afford Victims Equal Rights*, https://www.nacdl.org/getattachment/bfffdaa7-ad92-4394-b85a-1215b771c5e1/marsys-law-model-constitutional-amendment.pdf.

106. Anne Teigen, *Rights for Crime Victims on the Ballot in Six States*, THE NCSL BLOG (Oct. 12, 2018), http://www.ncsl.org/blog/2018/10/12/rights-for-crime-victims-on-the-ballot-in-six-states.aspx.

Though there is some variation among the federal[107] and state[108] victims' rights laws, most have the following basic components:

> (1) the right to be treated with dignity, respect and sensitivity by law enforcement and other officials throughout the criminal justice process;[109]
>
> (2) the right to be informed about the services and resources available to victims as well as what to expect from the criminal justice system, including notice of significant events in the judicial process such as bail and plea proceedings, trial, sentencing and appeals;[110]
>
> (3) the right to protection from the criminal actor including threats, intimidation or retaliation during criminal proceedings;[111]
>
> (4) the right to seek crime victim compensation to reimburse for expenses resulting from the crime which typically include medical and counseling expenses and funeral expenses;[112]
>
> (5) the right to restitution from the offender so as to hold him or her directly responsible to the victim for the financial harm caused which typically include lost wages, property loss and insurance deductibles;[113]
>
> (6) the right to the prompt return of personal property which may have been used as evidence in criminal proceedings;[114]
>
> (7) the right to criminal justice proceedings free from unreasonable delay including the right to a speedy trial;[115]

107. *See, e.g.*, Crime Victims' Rights Act of 2004, 18 U.S.C § 3771 (2004) (enumerating 10 explicit rights guaranteed to victims by the federal government).

108. *See, e.g.*, Fla. Stat. § 960.001 (2019); 725 Ill. Comp. Stat. Ann. 120 (2015); 18 Pa. C.S. § 11.101 (2007); Tex. Rev. Civ. Stat. Ann. Art. I, § 30 (2017).

109. *See* Office of Justice Programs, *supra* note 85, at 1 (including "[t]he right to be treated with fairness, dignity, sensitivity, and respect").

110. *See id.* (including "[t]he right to be informed of proceedings and events in the criminal justice process, including the release or escape of the offender, legal rights and remedies, and available benefits and services, and access to records, referrals, and other information").

111. *See id.* (including "[t]he right to protection from intimidation and harassment").

112. *See id.* (including "[t]he right to apply for crime victim compensation").

113. *See id.* (including "[t]he right to restitution from the offender").

114. *See id.* (including "[t]he right to the expeditious return of personal property seized as evidence whenever possible").

115. *See id.* (including "[t]he right to a speedy trial and other proceedings free from unreasonable delay").

> (8) the right to submit a victim's impact statement during the sentencing or parole phase of criminal proceedings describing how the crime has affected them, and;
>
> (9) the right to the enforcement of victims' rights.[116]

Upon review of the enumerated rights articulated by these statutory schemes, there is a clear emphasis on establishing the dignity and security of the victim. These laws seek to return the victim to normalcy. They are focused specifically on rebuilding the victim's emotional and financial stability after the crime. However, the statutes do not hint at providing a means for victims to firmly engage in the punishment process.[117]

The judiciary's consideration of the Crime Victims' Rights Act demonstrates that the goal of victims' rights is to provide a sense of dignity and closure. In 2004, Congress passed the Crime Victims' Rights Act ("CVRA").[118] In *Kenna v. U.S. District Court for the Central District of California*,[119] the Ninth Circuit interpreted the CVRA. Here, crime victims who were victimized by two separate defendants filed suit to enforce their victim participation rights.[120] The victims were granted the

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116. *See id.* (including "[t]he right to enforcement of these rights and access to other available remedies").

117. *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL33679, CRIME VICTIMS' RIGHTS ACT: A SUMMARY AND LEGAL ANALYSIS OF 18 U.S.C. § 3771 (2015) 28–29 ("In capital cases, victim impact statements are constitutionall precluded from including 'characterizations and opinions about the crime, the defendant, and the appropriate sentence.'").

118. 18 U.S.C. § 3771(a) (2012). The enumerated rights include:

> (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy; (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement; (10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

The Justice for Victims of Trafficking Act added the language in (9) and (10). Pub. L. No. 114–22, § 113(a)(1), 129 Stat. 240 (2015).

119. Kenna v. United States Dist. Court for C.D. Cal., 435 F.3d 1011 (9th Cir. 2006) *subsequent mandamus proceeding sub nom. In re Kenna*, 453 F.3d 1136 (9th Cir. 2006).

120. *Id*. at 1012–13.

opportunity to speak at the sentencing hearing for the first defendant but denied the opportunity to speak at the second defendant's hearing.[121]

In holding that the CVRA granted the victims an "indefeasible right to speak"[122] at both hearings, the court observed that a prime goal of the CVRA was to "force the defendant to confront the human cost of his crime" and "to allow the victim 'to regain a sense of dignity and respect rather than feeling powerless and ashamed.'"[123] The court further remarked that "the CVRA gives victims the right to confront every defendant who has wronged them; speaking at a co-defendant's sentencing does not vindicate the right of the victims to look *this* defendant in the eye and let him know the suffering his misconduct has caused."[124]

Analogous to the issue before the court in *Kenna*, one development of the victims' rights movement has been the utilization of victim impact statements during sentencing hearings. Such statements provide opportunities for victims or their families to have a voice in the sentencing phase of a criminal proceeding.

Historically, crime victims or their families were not entitled to offer their opinions as to the appropriateness of a punishment, including the death penalty, during the sentencing phase of a criminal proceeding. As the court held in *Robinson v. Maynard*, "because the offense [of murder] was committed not against the victim but against the community as a whole . . . only the community, speaking through the jury, has the right to determine what punishment should be administered."[125] Victim impact statements ameliorated to some degree what many saw as this harsh result.

Victims claim that the statements "rectify the imbalance pervading criminal courtroom proceedings by allowing them to participate in the prosecution of" the person who violated them or their family

121. *See id*. at 1013 (Three months later, at Zvi's sentencing, the district court heard from the prosecutor and the defendant . . . . But the court denied the victims the opportunity to speak.").

122. *Id*. at 1016.

123. *Id.* (quoting Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 41 (2001)).

124. *Id.* at 1017.

125. Robinson v. Maynard, 829 F.2d 1501, 1505 (10th Cir. 1987).

member.[126] Advocates further contend that the statements provide a means of coping, closure, and recovery.[127]

Victim impact statements have been especially influential in the sentencing of capital crimes. Specifically, victim impact statements have become vehicles through which victims of crimes can describe how they have been damaged physically and psychologically by the crime and ask that the offender be appropriately punished. With respect to federal crimes, United States Attorney's Offices solicit victim impact statements for a number of purposes:

> [A victim impact statement] provides an opportunity to express in your own words what you, your family, and others close to you have experienced as a result of the crime. Many victims also find it helps provide some measure of closure to the ordeal the crime has caused. The victim impact statement assists the judge when he or she decides what sentence the defendant should receive. Although the judge will ordinarily decide the defendant's sentenced primarily based on the pre-sentence report and certain sentencing guidelines, the judge should consider your opinion before making a decision.[128]

The Supreme Court has recognized the constitutionality of victim impact statements used specifically in the sentencing phase of death penalty cases. In *Payne v. Tennessee*, the Court held that testimony from a murder victim's family could be admitted during the sentencing phase of the trial without violating the Cruel and Unusual Punishment Clause of the Eighth Amendment.[129]

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126. Beth E. Sullivan, *Harnessing* Payne*: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601, 623 (1998).

127. *See id.* at 611 ("Two concerns seem to govern the movement: (1) the desire for the victim to obtain closure and regain a sense of control over life, and (2) the concern for retributive justice.").

128. United States Department of Justice, United States Attorney's Office, District of Alaska, Victim Impact Statements, http://www.justice.gov/usao-ak/victim-impact-statements. All 50 states permit victim impact statements as part of the criminal sentencing phase.

129. 501 U.S. 808 (1991). It should be noted that this overruled prior precedent. The court first addressed the role of victim impact statements in Booth v. Maryland, 482 U.S. 496 (1987). There, the defendant was convicted of robbing and murdering an elderly couple. *Id*. at 498. A victim impact statement was admitted during the sentencing phase which resulted in the defendant being sentenced to death. *Id*. The Court held in a five to four decision that the Eighth Amendment prohibited the use of victim impact statements in death penalty cases as the emotional impact of such evidence may lead to the imposition of the death penalty in an arbitrary and capricious manner. *Id.* at 503. The Supreme Court revisited the role of victim impact statements in South Carolina v. Gathers, 490 U.S. 805 (1989). There, the Court held that victim impact statements were unconstitutional, as they contain personal characteristics of victims which were irrelevant to the defendant's blameworthiness. *Id.* at 811–12.

The facts underlying *Payne* are particularly egregious. Payne was convicted of the brutal stabbing murders of a twenty-eight year old mother and her two-year-old daughter.[130] At the sentencing phase of the trial, the prosecutor presented the testimony of the murder victim's mother concerning the affects the crimes had on the victim's family.[131] Payne was sentenced to death on both murder counts.[132]

The Supreme Court of Tennessee upheld the conviction and sentence.[133] The United States Supreme Court granted certiorari to consider whether "the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family."[134] Chief Justice Rehnquist, writing for the majority, held that "a State may properly conclude that for a jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."[135] Victims of capital crimes, therefore, now have an outlet to describe why the offender's punishment should be proportional to the harm which was caused.

There has not been a universal endorsement of the use of victim impact statements, particularly in capital cases. As Justice Stevens wrote in his dissent in *Payne*, the victim impact statement creates a "'tactical dilemma' for the defendant because it allows the possibility that the jury will be so distracted by prejudicial and irrelevant considerations that it will base its life-or-death decision on whim or caprice."[136]

For example, consider the case of James Bernard Campbell.[137] A few days before Christmas in 1986, Sue Zann Bosler and her father, Reverend Billy Bosler, returned home from Christmas shopping.[138] The doorbell rang, and Rev. Bosler opened the door.[139] As Bosler heard the

130. *Payne*, 501 U.S. at 808.
131. *Id.* at 815–16.
132. *Id.* at 816.
133. *Id.*
134. *Id.* at 817.
135. *Id.* at 825.
136. *Id.* at 864 (Stevens, J., dissenting) (citing Booth v. Maryland, 482 U.S. 496, 506–07 (1987)).
137. Campbell v. State, 571 So. 2d 415 (Fla. 1990)
138. *Id.* at 416.
139. *Id.*

door opening, she also heard her father making grunting sounds.[140] Bosler rushed to the door to find her father being brutally stabbed by an unknown attacker, later accused to be Campbell.[141] When Bosler tried to help her father, the assailant backed her into another room and stabbed her in the head several times.[142] She fell to the floor, pretending to be dead.[143] The attacker rummaged through the house and searched Rev. Bosler's pockets and Bosler's purse, taking an undetermined amount of money before leaving.[144] Rev. Bosler died, but Sue Zann lived.[145]

James Bernard Campbell was charged with Rev. Bosler's murder.[146] At his first of multiple trials, Campbell was convicted of first degree murder.[147] During his sentencing hearing, Bosler was invited to give a victim impact statement.[148] She gave a "'deep,'" "'dramatic,'" and "'moving'" account of her own life and the impact of her father's legacy.[149] She was described as the prosecution's "'blockbuster witness.'"[150] Campbell was sentenced to death at that hearing.[151]

After multiple courts reversed his sentence on technicalities, Campbell was tried and sentenced two additional times.[152] Bosler gave a victim's impact statement at each hearing. However, at the later hearings, she changed the tone of her statement. Instead of offering a grieving, emotional story about her father, she told the jury an "unsympathetic and undramatic" account of her life and her livelihood.[153] At the third sentencing hearing, Bolser told the jury of how she is a hair stylist, and how she rejects the death penalty.[154] Within three hours, the jury returned with a sentence of life imprisonment, as opposed to the death penalty.[155]

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140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *See id.* (quoting *48 Hours: My Father's Killer* (CBS television broadcast, Oct. 2, 1997)).
150. *See id.* (quoting *48 Hours: My Father's Killer* (CBS television broadcast, Oct. 2, 1997)).
151. *Id.* at 602.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

This case is a prime example of how an emotionally charged victim impact statement can materially affect sentencing, and if used to enrage or inflame the emotions of a sentencing judge or jury, could be used to exact revenge on a criminal defendant. Under almost the exact same conditions, the tone of a victim impact statement dramatically affected the outcome of the sentence for identical capital crimes.

In that vein, victim impact statements may merely serve to satisfy the victim's desire to play a role in determining punishment. By achieving the goal of providing victims a "voice" in sentencing, victim impact statements indulge and facilitate a victim's desire to cause the wrongdoer pain. Catherine Bendor writes, "[t]he only clear role for this evidence is to serve as a direct appeal to the emotional sympathies of the jurors, or to lead them to base their decision on an assessment of the value of the victim's life and the extent to which a victim is missed by survivors."[156]

Opponents of the use of victim impact statements also argue that such inputs could lead to vengeful justice.[157] Critics claim that a victim's opinion on sentencing is "irrelevant to any legitimate sentencing factor, lacks probative value in a system of public prosecution, and is likely to be highly prejudicial."[158] Because of this reality, victim impact statements may play into the hands of prosecutors. Prosecutors are aware of the persuasive impact of victim impact statements and "may be more inclined to seek the death penalty in those cases" which present a sympathetic victim with a story, "whose family's victim impact statement can help them to secure" the death penalty.[159] Such statements allow the criminal justice system to be potentially influenced by a family's search for vengeance.

CONCLUSION

As is reflected in Justice Brennan's opinion in *Furman*, America has historically and collectively thought itself above killing "criminals

156. Catherine Bendor, *Defendants' Wrongs and Victims' Rights:* Payne v. Tennessee, *111 S. Ct. 2597 (1991)*, 27 HARV. C.R.-C.L. L. REV. 219, 236 (1992).

157. *See* Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On*, 3 INT'L REV. OF VICTIMOLOGY 17, 19 (1994) ("Opponents of victim integration in the criminal justice process often portray the victim as a vindictive individual whose main onjective in providing input will be to ensure severe punishment of the offender.").

158. D. R. Hellerstein, *Victim Impact Statement: Reform or Reprisal*, 27 AM. CRIM. L. Rev. 391, 429 (1989).

159. Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 113 (1997).

simply to get even with them."[160] There has arguably been a paradigm shift in the American political and criminal justice system whereby revenge, so long as administered by the state, is an acceptable and legitimizing justification for punishment, including the death penalty. Now, the American criminal justice system is the model venue for the vindication of victims' rights which Professor Eisenstat described:

> The law is the only venue which can provide victims with one source of their recovery; that is knowledge that their offender has been adequately punished. If the law fails to perform that function, then society faces the very perils which forced the state to first interject itself into resolving disputes between its citizens; that individuals will seek revenge on their own, thus leading us back to the days of the blood feud.[161]

Having now assumed the responsibility to carry out state sanctioned revenge, it is unclear whether legal and political forces can direct the American criminal justice system to impose this punishment in a fair and just manner.

What is clear is that the pendulum has swung from a fundamental focus on the protection of the rights of the perpetrator as reflected in the Court's various opinions in *Furman*, to a recognition in *Gregg* that those convicted of crimes are deserving of punishment (including the death penalty). This recognition of retributive justice has resulted in the development of victim oriented legislative schemes designed to protect and promote the rights and dignity of the victims of crimes.

Perhaps the imposition of the death penalty is in fact constitutional and not a violation of a criminal defendant's Eighth Amendment rights. We also may assume that the recognition of the rights and dignity of crime victims is a legitimate state interest worthy of protection. However, like all pendulum swings, there is the danger of overcorrection and misplaced emphasis.

Protecting the rights of crime victims and their families does not necessarily require an overblown reliance on the passionate testimony of a victim or his or her family. Looking out for the rights of victims

160. Furman v. Georgia, 408 U.S. 238, 305 (1972). For example, soon after the World Trade Center Attack in 2001, President George W. Bush, in an address to the FBI, confirmed that the United States intended to take the war on terror to the Taliban. President Bush explained that, "[O]urs is a nation that does not seek revenge, but we do seek justice." Thane Rosenbaum, *Eye for an Eye: The Case for Revenge*, THE CHRON. OF HIGHER EDUC. (March 26, 2013), https://www.chronicle.com/article/The-Case-for-Revenge/138155 (March 15, 2020).

161. Eisenstat, *supra* note 22, at 1151–52.

also does not necessarily require that penalties be imposed for the express purpose of causing the victim to suffer out of revenge for the suffering the offender caused. We must heed the words of Justice Gorsuch that a prisoner condemned to death is not guaranteed a painless death, perhaps because of the pain he inflicted. Nonetheless, we similarly should never forget the profound observation of Justice Brennan that as a society, "we have no desire to kill criminals simply to get even with them."[162] Revenge simply has no legitimate role to play in our criminal justice system.

162. *Furman*, 408 U.S. at 305.