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SHARI’AH AND CHOICE: WHAT THE UNITED STATES SHOULD LEARN FROM ISLAMIC LAW ABOUT THE ROLE OF VICTIMS’ FAMILIES IN DEATH PENALTY CASES

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We ordained therein for them: “Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.” But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers.1

Under classical Islamic law,2 homicide is considered an individual wrong.3 As such, the family members of the victim have the right to choose the punishment that is to be imposed. They may choose to have the offender put to death. Or, they may choose to collect a fine from the convicted person and his or her family. They may even choose to forgive the convicted person without exacting any fine.4 This last option is encouraged and based on Qur’anic

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2. By classical Islamic law, I refer not to the law as it is interpreted by modern nation states, but rather the verses of the Qur’an itself, the widely accepted interpretations of those verses as agreed upon by the various schools of thought in Islamic law, and the canonical writings and collections of hadith by the founders and most influential scholars of each of those schools of thought. See RUDOLF PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 1–2, 6–8 (Cambridge Univ. Press 2005) (explaining the sources and development of classical Islamic jurisprudence).

3. Homicide falls under the category of qisas wrongs. ABDUR RAHMAN I. DOI, SHARI’AH: THE ISLAMIC LAW 232–33 (Ta Ha Publishers 1984). For wrongs that are classified as qisas, the principle of private prosecution requires that the individuals harmed by the act control the process of prosecution and sentencing. PETERS, supra note 2, at 39.

4. See PETERS, supra note 2, at 39 (stating that the victim’s next of kin may pardon the person who commits willful homicide). Even though the victim’s family may pardon the murderer, the state maintains an interest in punishing the offender and may inflict some punishment such as imprisonment. Id. See also infra Part Two.I.C (discussing the ta’azir punishments).
In the United States, however, courts do not allow the family members of a murder victim to even voice an opinion regarding the sentence to be imposed. Courts consider this testimony irrelevant—even when the victims do not want the death penalty to be imposed. This refusal to allow the family members of the victims to recommend a particular sentence is not simply the result of logical application of the rules of evidence, relevance, state sentencing statutes, or Supreme Court precedent (which is not clear when the victims want to express their preference against execution). Rather, it is the consequence of power struggles in Mediaeval England that led to the current distinction between tort and crime. Notwithstanding the designation of homicide as a crime against the state in the West—and its theoretical justifications—it is the family members of the victims who are the ones most affected by a murder. The author of this Article argues that the true victims should at the very least be allowed to voice an opinion on sentencing in a capital case, particularly when they wish to advocate mercy; for example, that the perpetrator of the crime should not be put to death. Redefining the scope of permissible victim impact testimony in state sentencing statutes to allow the victims to voice their opinions on the proper sentence to be imposed would demonstrate respect to those most personally affected by the grief and horror of murder—the family members of the victims. This approach would also be in accordance with the goals of the victims' rights movement, the restorative justice movement, and classical Islamic jurisprudence—from which we can learn a great deal.

INTRODUCTION

The reinstitution of the death penalty in the United States has raised a number of philosophical and moral questions that go to the heart of the nation’s jurisprudence. The United States Supreme Court has declared that the imposition of the death

5. THE QUR’AN, supra note 1, at 5:45.

penalty is not per se unconstitutional under the Eighth Amendment. However, death penalty law and jurisprudence remains rife with controversy. Since the reinstitution of the death penalty, the Supreme Court has addressed a number of important questions, such as what are cruel and unusual methods of execution, which crimes qualify for capital punishment, and whether minors and mentally disabled individuals may and should be executed. In addition, in many death penalty cases the Court has focused on the procedures necessary to protect the fairness of a capital trial.

Following the Supreme Court's lead in emphasizing the special importance of fairness in capital cases, many states have devised unique procedures designed to protect the constitutional integrity of the procedures involved in death penalty cases. As in any criminal proceeding, in a capital case the jury initially determines whether the defendant has committed the crime with which she or he is charged. However, in death penalty cases there

8. See In re Kemmler, 136 U.S. 436, 447 (1890) (stating that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there is [sic] something inhuman and barbarous,—something more than the mere extinguishment of life."). The Supreme Court has never found a method of execution (firing squad, electrocution, gas chamber, hanging, or lethal injection) violative of the constitution. Kenneth C. Haas, The Emerging Death Penalty Jurisprudence of the Roberts Court, 6 Pierce L. Rev. 387, 387-90, 436-38 (2008).
13. See, e.g., Payne v. Tennessee, 501 U.S. 808, 826-30 (1991) (focusing on the fairness of a capital trial in holding victim impact testimony as permissible); Gregg, 428 U.S. at 170-87 (holding that the death penalty is constitutional as long as legitimate guidelines and proper procedures are followed in reaching the decision to impose it).
is a second phase of the trial in which the jury decides whether the defendant deserves to be sentenced to death. During the penalty phase, the attorneys introduce mitigating and aggravating factors, according to applicable state statutes. At this stage, the defense may offer evidence about the life of the convicted person as mitigating evidence, and the prosecution may introduce evidence about the nature of the crime to support a finding of excessive cruelty, which in many states is an aggravating factor. In addition to these aggravating and mitigating factors, the Supreme Court has held that the jury may hear evidence concerning the impact of the crime on the victim’s family. However, the overwhelming majority of courts do not allow these witnesses to express their opinions regarding the penalty to be imposed, even when the witnesses wish to recommend leniency.

There are two categories of evidence that victims can supply at the sentencing phase of a capital trial: victim impact evidence and victim opinion testimony. The Supreme Court addressed both types of evidence in 1987 in Booth v. Maryland. There, the Supreme Court held that testimony by the relatives of the victim regarding the personal characteristics of the victim, the impact of the crime on family members, and the harm caused by the murder was impermissible and violative of the Eighth Amendment. The Court also determined that victim opinion testimony, such as the victims’ opinions or characterizations of the defendant, the crime, and the proper sentence to be imposed were not allowed. The Court reasoned that all such evidence was irrelevant because it did not bear on the defendant’s blameworthiness, and it was so likely to elicit an arbitrary imposition of the death penalty based on emotion rather than reason that admission of such evidence

14. See Gregg, 428 U.S. at 196–207 (holding that the jury must consider specific “aggravating” and “mitigating” circumstances of the offense, which may include the defendant’s character and record). Most death penalty statutes require the jury to “weigh” aggravating and mitigating factors. Other states require a threshold finding of an aggravating factor before the jury can return a death sentence. LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 52–54 (LexisNexis 2d ed. 2008).

15. Id. at 95, 131–32.


20. Id. at 507–09.
would violate the defendant's constitutional rights.\textsuperscript{21}

However, four years later, the Supreme Court issued its decision in \textit{Payne v. Tennessee}.\textsuperscript{22} In that case, the Court held that introducing victim impact testimony was relevant to the harm caused by the crime and therefore not violative per se of the defendant’s constitutional rights. The Court did not, however, directly address victim opinion testimony regarding sentencing, as that issue was not before it. Most courts after the \textit{Payne} decision have interpreted that case to only partially overrule \textit{Booth} and to hold that the portion of \textit{Booth} dealing with victim opinion testimony remains intact.\textsuperscript{23} Thus, the prevailing wisdom is that such testimony is constitutionally impermissible in the penalty phase of a capital trial.

One state stands alone in allowing victims to recommend a sentence to the jury. Oklahoma state courts interpret \textit{Booth} as overruling the entire \textit{Payne} decision by implication and therefore hold that both victim impact testimony and victim opinion testimony are not per se unconstitutional.\textsuperscript{24} Furthermore, the Oklahoma legislature defined relative victim impact testimony to include victim opinion testimony in its death penalty sentencing statute and thus allows victims to testify regarding the sentences to be imposed.\textsuperscript{25}

The reasoning of the majority of courts that have interpreted \textit{Payne} as only partially overruling \textit{Booth}, and thus disallowing victim opinion testimony regarding sentencing, is logical to a point. This is particularly true when the defendant asserts his or her constitutional rights will be violated by the victims telling the jury that they believe the defendant should be executed. After all, the purpose of disallowing such testimony is to prevent the jury from being incited by inflammatory rhetoric to impose a death sentence based on irrelevant evidence in violation of the Constitution. However, when confronted with a situation where it is the defendant who proffers the victim opinion testimony, some courts simply conclude the evidence is irrelevant and inadmissible under the state sentencing statutes. Other courts, oddly, have gone further. Those courts have concluded that even when victims plan to tell the jury they do not recommend the death penalty, it is

\begin{itemize}
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} \textit{Payne}, 501 U.S. 808.
  \item \textsuperscript{23} See infra Part One.II.C (discussing how different U.S. courts have handled the use of victim opinion testimony).
  \item \textsuperscript{24} See \textit{Conover v. State}, 933 P.2d 904, 921 (Okla. Crim. App. 1997) (holding that victim opinion as to the proper sentence is admissible if its probative value is not outweighed by undue prejudice); \textit{Ledbetter v. State}, 933 P.2d 880, 891 (Okla. Crim. App. 1997) (holding that victim opinion about proper sentencing was permissible both under the Eight Amendment and Oklahoma law).
  \item \textsuperscript{25} \textit{OKLA. STAT. tit. 22, § 984(1) (1993).}
\end{itemize}
improper to admit that evidence because it would violate the defendant's constitutional rights under the Eighth and Fourteenth Amendments. 26

The Supreme Court has declined to grant certiorari in each case since Payne that has raised the issue of victim opinion testimony. This includes those cases from Oklahoma in which the court allowed the victims to recommend a death sentence; it is also true for the cases from other states that do not follow Oklahoma's interpretation of Payne but still bar victims from asking for leniency under the rational set forth in Booth.

The Supreme Court's approval of victim impact testimony has been consistent with the wishes of most victims' rights advocates in the United States who have called for a balancing of the victims' rights with those guaranteed to the defendant under the Constitution. 27 Members of the victims' rights movement seek to impose harsher sentences for the perpetrators of crime and to have the criminal justice system take into account the impact of crime on the victims. 28 The movement has garnered significant attention and has achieved some success in attempting to bring the voice of the victims back into the decision-making process surrounding charging, prosecution, trial, sentencing, and parole of defendants. 29 Nevertheless, the victims of crimes still play a relatively minor role in criminal process and procedure in the United States today—even in Oklahoma. However, this model need not continue to guide American legal thought.

This Article will examine the development of Anglo-American legal thought to explain how the victims' family members lost the right to decide whether the offender should live or die. This Article

26. See, e.g., Brown v. United States, 583 F. Supp. 2d 1330, 1340–41 (S.D. Ga. 2008) (finding inadmissible evidence that the widower of the murdered person did not want the defendant put to death); State v. Glassel, 116 P.3d 1193, 1215 (Ariz. 2005) (refusing to allow a victim's husband to testify he did not want the defendant executed even after the court had permitted the prosecutor to elicit emotional impact testimony from the witness); Kaczmarek v. State, 91 P.3d 16, 34 (Nev. 2004) (stating that "[w]e join our sister courts in rejecting the proposition that opinions in opposition to the death penalty fall within the parameters of admissible victim impact testimony or rebuttal thereto."); Greene v. State, 37 S.W.3d 579, 586 (Ark. 2001) (refusing to allow the defense to present a letter written by the victim's wife asking that the defendant not be executed); Floyd v. State, 569 So.2d 1225, 1230 (Fla. 1986) (refusing to allow as mitigating evidence testimony by the murder victim's daughter that she and the victim opposed the death penalty); Barbour v. State, 673 So.2d 461, 468–69 (Ala. Crim. App. 1996) (affirming the trial court's refusal to allow the jury to hear the content of a letter written by the victim's brother asking for leniency, relying on the reasoning by the Alabama Supreme Court in Ex parte McWilliams, 640 So.2d 1015, 1017 (Ala. 1993)).

27. See generally Henderson, supra note 6.

28. See id. at 966–68 (listing proposals of the victim's rights movement).

29. See infra Part One.III.A (discussing the restorative justice movement).

See generally LAFAVE, supra note 6.
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relies on two principles. First, victim participation in prosecution and sentencing has a long history in the common law and European legal traditions. However, through the transformation of homicide from a wrong against an individual to a crime against the sovereign, victims eventually lost even the right to make a statement to the jury as to the punishment the defendant deserves. Second, although the United States does not officially incorporate religious law into its federal or state law, the impact of Judeo-Christian thought and legal traditions continues to influence the debate surrounding the death penalty. These ideas filter into courtrooms and influence courts' opinions regarding the proper role of a victim in the sentencing stage of a death penalty case and contribute to the marginalization of victims who wish to give their opinions regarding the proper sentence to impose—even when the victims would like the jury to show mercy by withholding the death penalty.

By contrast, in the Islamic legal tradition, the role of the victim has always been of paramount importance. Islamic law never experienced the upheavals caused by the fall of the Roman Empire and the subsequent rise of feudalism, which led to the classification of homicide as a crime against the state under Anglo-American law; instead, under classical Islamic law, homicide is classified as an individual wrong. Thus, under classical Islamic law, the family members of homicide victims retain their ability to exert some control over the punishment to be inflicted by the state.

In addition, in contrast to the texts cited by proponents of the death penalty that call for a “life for a life,” in the Qur'an, the text clearly encourages the victims to exercise mercy rather than to extract the ultimate penalty. By focusing on the victims as those who should make the life or death determination, the Qur'an empowers them. The nations that incorporate classical Islamic criminal law into their legal systems are prevented from removing the victims from the process of sentencing. Because Islamic law differs in these two substantial ways with regard to the role of the victim in sentencing in a homicide case, examining Islamic law provides a perfect mirror through which we may reexamine the role of the victim in capital trials.

This Article does not advocate that victims replace authority

30. See Henderson, supra note 6, at 939–42 (describing the origins of victim’s rights in criminal law).
32. Id.
33. See THE QUR'AN, supra note 1, at 5:45 (stating that “if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers.”).
of the prosecutors, judges, or juries in deciding who should be arrested, charged, or punished for crimes. Clearly, the state has an interest in maintaining peace and order and preventing vigilantism. However, this Article takes the position that family members of victims should at least be permitted to voice an opinion as to whether the defendant should be executed. This is especially true when the interests of the defendant and the victims coincide: where the victims call for mercy.

Although the Unites States Supreme Court has not yet clarified the extent to which Payne overruled Booth, state legislatures should consider enacting statutes that clearly define victim impact testimony to include testimony regarding sentencing opinions. Moreover, courts should develop case law permitting such input from the victims. Permitting such testimony gives the jury additional relevant evidence that it may consider or reject as it deems appropriate.

A simple statement recommending the death penalty would cause little additional prejudice to the defendant. After listening to the emotional, tearful, and angry victim impact testimony, which is permitted under Payne, most jurors would assume the family members were in favor of the death penalty. Perhaps more importantly, when the victims do not want the death penalty to be imposed, they should not be subjected to the further trauma of the defendant’s execution without at least the chance to inform the jury that they do not want the defendant to be put to death. For some victims, expressing forgiveness would aid in their healing process.

Part One of this Article reviews the history of the death penalty in England and the United States and explains the conversion of homicide from a private wrong to a crime against the state. This section also examines the current trends in victim participation in sentencing decisions in the United States. It will include an analysis of the cases interpreting Payne and Booth, a discussion of the victims' rights movements, and an analysis of the secular and religious theories that support the death penalty.

Part Two discusses the classical Islamic doctrine regarding the victims' participation in sentencing decisions in homicide cases. A brief overview of the character, purpose, and sources of Islamic law will be given. The Article will explain the taxonomy of crimes under Islamic law, which differs substantially from the taxonomy of crimes under Anglo-American law. The role of the victim in the prosecution and punishment of a murderer will then be examined. As a result of the classification of homicide as a qisas crime—a crime not against G-d but against an individual—the victims of such crimes retain important roles in sentencing decisions. Special emphasis will be placed upon the victims to remit the sentence of death for the murderer, as it stems from a
Part Three discusses a proposal for states to adopt legislation that would permit the victims in a capital trial to express their opinions on sentencing, particularly when they speak in favor of mercy.

PART ONE: THE DEATH PENALTY AND VICTIM PARTICIPATION IN SENTENCING IN THE WEST: THE ENGLISH AND AMERICAN TRADITIONS

Capital punishment has long been a part of Western legal tradition. However, the forms of the death penalty, justifications for the death penalty, and those with the power to impose the death penalty have changed over time. It is not to be assumed that the death penalty must be available as a punishment for certain crimes. In fact, by embracing the death penalty, the United States is out of step with other Western nations and with the majority of states that are members of the United Nations. Nevertheless, the death penalty exists in the United States, and there is no indication that the Supreme Court will find it unconstitutional in the foreseeable future. Thus, it is incumbent upon lawyers, judges, legislators, and academics to attempt to ensure that the imposition of the death penalty is as fair as possible. This is the path that the Supreme Court has taken in several cases dealing with the procedures used in death penalty cases.

34. By “Western” I mean the traditions and cultures that make up Western Europe and the countries that were colonized by those Western powers and remain in their world view and legal tradition dominated by ideas imported to those countries by the colonizers, specifically, the United States.


36. Justices Brennan and Marshall were steadfast opponents of the death penalty. In Furman v. Georgia, they concluded that the death penalty was unconstitutional under any circumstance. Furman v. Georgia, 408 U.S. 238, 305 (1972) (Brennan, J., concurring); Furman, 408 U.S. at 359–60 (Marshall, J., concurring). After Gregg v. Georgia, where the court held capital punishment to be constitutional under certain circumstances, either Justice Brennan or Justice Marshall dissented in every death penalty opinion in which the Court did not vacate the death sentence. No current member of the Supreme Court takes such a position against the death penalty. In fact, some have argued that today’s Court shows much more support for the death penalty than it has for decades. Cf., Haas, supra note 8, at 388 (arguing that the Roberts’s Court has become more reluctant to impose limitations on the death penalty or to grant capital defendants meaningful procedural safeguards).

37. This is the path that the Supreme Court has taken in several cases dealing with the procedures used in death penalty cases. See, e.g., Payne, 501 U.S. 825–27 (focusing on the fairness of a capital trial in holding victim impact
The pertinent question, however, is whether the definition of "fair" used by the courts should be expanded to take into consideration the fairness, or lack thereof, to the actual persons harmed by the murder. We should reexamine our notion of fairness in the context of death penalty trials in light of current sensibilities rather than rely on unexamined assumptions based on antiquated notions that deprive the victims of the crime a voice in sentencing. Victims' participation in sentencing should be reexamined in light of their current utility and must be justified according to modern circumstances and sentiments. Furthermore, the reasoning courts use to stop even calls for mercy by applying the applicable statutory rules and Supreme Court precedent is flawed. For these reasons, American courts and legislatures should change the prevailing death penalty rules that define permissible victim impact testimony at sentencing to include statements regarding the proper penalty to be imposed.

I. THE ENGLISH TRADITION

At this juncture, it is useful to this discussion to review the history of the death penalty in the West—with special emphasis on England and the United States—and the circumstances that led to the victims of crime losing all control of criminal sentencing decisions. As this section will show, the distinction between a crime and a private wrong is not something that was inevitable or that was an unavoidable part of the natural evolution or development of modern criminal law in the West. Rather, many of the ideas Americans take for granted, like the distinction between a crime and a tort, are not necessarily based on anything other than historical happenstance and the result of power struggles. By reexamining the history of the death penalty and the development of modern criminal law, the reader should gain some perspective on the insistence of some courts to deny the victims of murder the right to give opinion testimony on sentencing, even when the victims call for mercy.

38. This author does not agree with the evolutionary thesis adhered to by nineteenth century writers who believed that Victorian civilization represented the highest and most developed, rational, and perfect of all civilizations past and present, and that any variation from the Victorian forms of government were primitive, or at least less advanced than Western forms. See, e.g., SIR HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (Dorset Press 1986) (1861) (arguing that law has a course of development, similar to macro biological evolution, with English law representing the most developed form of law).
A. History of the Death Penalty in England

In the West, as in many other parts of the world, the killing of killers has long been practiced. Even before the Roman conquest of Western Europe, there is evidence that execution was practiced by the indigenous population. However, the first written records dealing with the death penalty in the West come to us from the time of the Romans. The Romans codified death penalty law around 300 B.C.E. in the Twelve Tables of Rome. In Britain, the Roman law was the law of the land until Rome officially withdrew from Britain in the year 410 C.E.

After the Romans left Britain, the infrastructure they had built began to crumble. The Roman law was also a casualty of the chaos and disorder that plagued Britain in the post-Roman period. It was gradually replaced by the Germanic legal traditions of the invaders, including the Saxons, Angles, Jutes, and Danes, who also practiced execution as the penalty for certain crimes. This period of English legal history will be discussed in the

39. For more than three hundred years, Rome controlled vast expanses of Western Europe and began its conquest of England in earnest in the first century. See generally LISI OLIVER, THE BEGINNINGS OF ENGLISH LAW (Univ. of Toronto Press 2002).

40. The influence of Roman law in the West is well documented, and even after the fall of Rome, it retained influence in Western Europe through the adoption and influence of the Code Justinian, which forms the basis of most of the legal systems in Western Europe. HANS JULIUS WOLFF, ROMAN LAW: AN HISTORICAL INTRODUCTION 3–6 (Univ. of Oklahoma Press 1951).

41. See WOLFF, supra note 40, at 56, 59 (noting that there is some disagreement among scholars as to the exact date and composition of what is now referred to as the Twelve Tables of Rome). In addition to intentional homicide, the Twelve Tables provided capital punishment for other crimes committed against individuals. Id. at 53. Among these crimes were arson, evil incantation, and the theft of crops at night. Id.

42. Id. at 4. Rome began to lose control of Western Europe in the fifth century as it withdrew from the further-flung colonies in order to defend against threats from northern tribes and deal with other problems closer to home. OLIVER, supra note 39, at 4. At this time, the Saxons and other Germanic tribes began to increase their attacks on Britain. Id. at 3. Local indigenous leaders arose to fight the invaders. Id.

43. Although Roman law and the later civil-law tradition were never formally adopted as sources of either English or American law, several scholars have argued that Roman law had an important influence on both legal systems. MICHAEL H. HOEFLICH, ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY 1–2, 5 (The Univ. of Georgia Press 1997); Peter Stein, The Attraction of the Civil Law in Post-Revolutionary America, 52 VA. L. REV. 403–34 (1966),reprinted in THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS 411–42 (Hamledon Press 1988). See also G.R.Y. RADCLIFFE & GEOFFREY CROSS, THE ENGLISH LEGAL SYSTEM 15–16 (Butterworth & Co., Ltd. 3d ed. 1954) (discussing the renaissance of Roman Law during the eleventh century and its influence on Canon law and the role of both in the making of English law until the fourteenth century).
next section, as it was during this time period that homicide began to be classified as a crime against the state rather than a private wrong.

When the Normans conquered England in 1066, they brought with them Norman legal traditions, which they imposed to some extent on the local populations.\footnote{A.K.R. Kiralfy, Potter's Outlines of English Legal History 7-10 (Sweet & Maxwell Ltd. 5th ed. 1958) (1923).} After the Conquest, execution was common and was usually accomplished by hanging the convicted person.\footnote{Michael H. Reggio, History of the Death Penalty, in Society's Final Solution: A History and Discussion of the Death Penalty (Laura E. Randa ed., 1997), available at http://www.pbs.org/wgbh/pages/frontline/shows/execution/reading/history.html. However, the first Norman ruler of England, William the First (William the Conqueror), disliked execution and placed a moratorium on hanging for any offense. Id.; Frederick C. Millett, Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?, 6 Pierce L. Rev. 547, 551 (2008). William the Conqueror preferred mutilation. Reggio, supra; Millett, supra, at 551.} In the later Middle Ages, execution was often accompanied by torture,\footnote{Reggio, supra note 45. During the Middle Ages, a variety of techniques were used to put a person to death. Id. These included hanging, drowning, burning, drawing and quartering, pressing, and beheading. Id. The types of crimes for which the penalty of death could be imposed included high and petty treason, as well as all felonies. 2 Frederick Pollock & Frederic W. Maitland, The History of English Law 476 (Cambridge Univ. Press 2d ed. 1911). By the reign of George III, in the mid-eighteenth century, there were over two hundred crimes punishable by death, including petty theft. David D. Cooper, The Lessons of the Scaffold: The Public Execution Controversy in Victorian England 27 (Ohio Univ. Press 1974).} but certain persons were exempt from the death penalty under the doctrine of the privilege or "benefit of clergy."\footnote{See Sir James Fitzjames Stephen, A General View of the Criminal Law of England 26 (Fred B. Rothman & Co. 2d ed. 1890) (discussing the benefit of clergy in the thirteenth century). Under this doctrine, members of the clergy were often exempted. Id. The exemption was later extended to literate persons. John D. Bessler, Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement, 4 NW. J. L. & Soc. Pol'y 195, 218 n.143 (2009); see Stephen, supra, at 35-36 (discussing the development of the benefit of clergy). They were, however branded with an "M" for murder or a "T" for other felonies and were allowed only one exemption. Bessler, supra, at 31; see Stephen, supra, at 36 (discussing the limitations placed on the benefits and noting that murder was removed from clergiable offenses during the reign of Edward VI, in the mid-sixteenth century).} Once colonies were established abroad, even criminals without the benefit were often transported in lieu of execution.\footnote{Reggio, supra note 45; Cooper, supra note 46, at 27.} 

During the eighteenth and nineteenth centuries, reform measures were taken in Britain and in the United States, and the number of capital crimes gradually declined, as did the number of executions.\footnote{Reggio, supra note 45; Cooper, supra note 46, at 27.} Following the publication of Dei Delitti e Delle Pene,
by Cesare Bonesana Beccaria in 1764, the opponents of harsh penalties for petty crimes began to mobilize in England. The leaders of this movement included English philosopher Jeremy Bentham and the statesman Sir Samuel Romilly. In the early 1800s, Sir Romilly six times introduced bills to Parliament that would have abolished the death penalty for petty crimes such as shoplifting goods valued at five shillings. The House of Commons passed each of the bills, but each was defeated in the House of Lords.

B. Current Trends: Abolition of the Death Penalty in the West

By the mid-nineteenth century, the reformers and abolitionists had gained some traction in Europe, parts of the United States, and in South America. In 1868, in a first step toward abolition, Parliament passed the Capital Punishment Within Prisons Bill, which ended the spectacle of public executions. However, it was not until 1965 that capital punishment was finally abolished in the United Kingdom. The death penalty has now been abolished in almost all of the nations of Europe and in 138 countries world-wide. It has also been condemned by the General Assembly of the United Nations.

50. COOPER, supra note 46, at 29 (citing CESARE BONESANA BECCARIA, DEI DELLITI E DELLE PENNE (AN ESSAY ON CRIMES AND PUNISHMENTS) 93 (Phillip H. Nicklin trans., 1819)).

51. Id. at 29–31. The reformers observed that rather than actually imposing disproportionately harsh penalties for relatively minor crimes, judges were tending to find the accused guilty of lesser offenses—ones that were not punishable by death. Id. at 33. This, they argued, worked against deterrence of crime in that the certainty of a milder punishment was a better deterrent to crime than the possibility of a severe punishment. Id. at 29–30, 32.

52. Id. at 33.

53. Id. at 33.

54. Id. at 144.

55. Id. at 175–76.


United States has not followed the global trend of abolishing the death penalty.\textsuperscript{60}

\textbf{C. From Private Right to a Crime against the State: A History of Victim Participation in Sentencing Decisions in England}

Today, in the United States and in England, the victims of violent crimes cannot prosecute the perpetrator under the criminal law, nor can they control the penalty imposed by the state. The wrong—if it is severe enough—is classified as a crime. Therefore, it is not the individual who was wronged who has the power to prosecute or (in the most serious cases) to execute an offender; that power belongs to the state. The following section of this Article will explain how the victims of homicide have lost control over prosecution and punishment of the murderer in the Anglo-American legal system, which eventually led to the victims losing even the right to suggest a sentence to the jury.

In the early Roman period, intentional homicide was punishable by death.\textsuperscript{61} However, it was considered a private wrong against an individual citizen, and the relatives of the victims were involved in the punishment of the murderer.\textsuperscript{62} Yet in the Republic period, the power of the victims to control prosecution and sentencing began to wane. Murder was classified as a public offense and was therefore prosecuted by state officials.\textsuperscript{63} The

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\textsuperscript{60} In 2008, at least 2,390 people were executed in twenty-five countries, including the United States, and at least 8,864 people were sentenced to death in fifty-two states around the world, including the United States. \textit{The Death Penalty in 2008}, supra note 58.

\textsuperscript{61} WOLFF, supra note 40, at 52–53.

\textsuperscript{62} Id. After murder was codified in the Twelve Tables, the state probably performed the actual execution, but the individuals who were actually harmed had the right to decide whether the accused should be prosecuted in the first instance. Id. at 53.

\textsuperscript{63} Id. As did later English law, Roman law took into account the social status of both the victim and the convicted person when the death penalty was at issue. Reggio, supra note 40. Certain crimes were punishable by execution if committed by a slave, but not if committed by a freemen or nobility. See id. (stating that the death penalty "was punishment for crimes such as the publication of libels and insulting songs, the cutting or grazing of crops
execution of a murderer was likewise a state responsibility. After Rome withdrew from Britain, the distinction between public and private crimes was lost.

In England, under the early Anglo-Saxon period, the blood feud served as the main deterrence to the commission of murder. When a person was murdered, the victim's family resorted to self-help in order to seek retribution. They would instigate a private war against the perpetrator and his family. Under this system, the wishes of the victim's family were tightly integrated into criminal prosecution. In addition to providing the victims with an avenue to attain retribution, the blood feud was also a way to repair the social rupture created by the murder. As such, the whole community participated in the feud by withdrawing its protection from the individual who had committed the crime.

During the fifth and sixth centuries, the kings of certain parts of what would later become England began to draft codes of law. Through these codes, they began to limit the extent of vengeance injured parties were allowed to extract through the blood feuds.
The "law of wrongs," as it was called, had some aspects that made it similar to criminal law. During this period, however, the Crown did not have charging authority when the injury was to an individual. Those who were personally harmed still had the responsibility of coming forward to request redress from the authorities.\footnote{3} Furthermore, during this period the injured parties were not bound to go to the authorities to request justice; however, they maintained the option of seeking personal redress for the wrong.\footnote{4}

In the later periods of the Anglo-Saxon domination of England, the law of wrongs became more complex. The authorities began to exert further control over the victims of violent crimes by encouraging them to accept monetary compensation rather than seek blood vengeance.\footnote{5} The \textit{uer} provided for compensation to victims for every injury,\footnote{6} including homicide.\footnote{7} The \textit{uer} lists set the \textit{wergild}, or value of a person's life according to his rank.\footnote{8} If a person could be killed to compensate for the murder of a thane was limited to six. \textit{Id.} In the later stages of Anglo-Saxon law, the blood feud could lawfully be conducted only after the aggrieved parties had demanded and been refused payment in the form of set tariffs for each type of injury. \textit{Id.}

\footnote{3}{See RADCLIFFE \& CROSS, supra note 43, at 6–7 (discussing the early attempts to limit private feuds through requiring the offenders to pay compensation to the injured parties, but noting that acceptance of the compensation was not mandatory, and that the law was powerless to force the victims to accept payment in lieu of feuding).}

\footnote{4}{Id. at 7; KIRALFY, supra note 44, at 153.}

\footnote{5}{KIRALFY, supra note 44, at 153–54 (citing POLLOCK AND MAITLAND, supra note 46). Outlawry was also displaced during this period. \textit{Id.} Potter's Outlines describe outlawry as a punishment for the worst of offenses. \textit{Id.} If a person was declared an outlaw, he or she was beyond the protection of the community and subject to abuse by any member of the community. \textit{Id.} at 154. See also 1 PATRICK WORMALD, THE MAKING OF ENGLISH LAW: KING ALFRED TO THE TWELFTH CENTURY 96 (Blackwell Publishers 1999) (discussing the importance of codification of the traditional law in England and noting that these codes served to allow for an alternative to feuding by providing compensation to the victim).}


\footnote{7}{See OLIVER, supra note 39, at 65–71 (discussing the \textit{wergild} lists of King Aethelberht). Of course, during this time period of the sixth and seventh centuries, England was not united, but rather it consisted of a number of kingdoms. The Laws of Aethelberht were essentially the laws of the Kingdom of Kent. \textit{Id.} at 8.}

\footnote{8}{KIRALFY, supra note 44, at 154. See also BLACK'S LAW DICTIONARY supra note 67, at 1430 (defining "\textit{wergild}" or \textit{were} as "[t]he estimation or price of a man, especially of one slain. In the criminal law of the Anglo-Saxons, every man's life had its value, called a 'were' or 'capitis aestimatio.'"). This payment was called the \textit{weregild} or \textit{wergild}. BLACK'S LAW DICTIONARY, supra note 67, at 1430–31.}
person was killed, the wrongdoer or his family was required to pay the victim's family the amount of his *wergild*. This compensation to the victim was intended to deter feuding and blood vengeance. Later, part of the *wergild* was paid to the king as compensation for the loss of his subject and to the victim's lord as compensation for the loss of his vassal.

In addition to providing the victims of wrongs with compensation, the early Anglo-Saxon codes also provided the central authorities power to collect fines and punish wrongs. The authorities could extract payment from a wrongdoer by imposing a *wite*, which was a fine. Unlike the *wer*, the purpose of the *wite* was not to provide compensation to victims as an alternative to blood vengeance, but rather it was meant to merely punish the wrongdoer. The fine was payable to the king, but might also include some payment to the "public authority." The Anglo-Saxon law also classified certain wrongs that were punishable by the authorities in the first instance. The *botleas* were wrongs for which no *bot* could be paid; in other words, they were "*botless*" crimes. Persons convicted of a *botlea*, were required to surrender both their bodies and their goods to the authorities. As it was in the interest of the Crown's finances for a wrong to be classified as a *botlea*, the number of offenses so categorized increased until the eleventh century and eventually

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79. KIRALFY, supra note 44, at 154.
80. RADCLIFFE & CROSS, supra note 43, at 6 (referring to the *bots* as early attempts to restrict feuding).
81. The *wergild* was paid "partly to the king for the loss of a subject, partly to the lord for the loss of a vassal, and partly to the next of kin of the injured person. In the Anglo-Saxon laws, the amount of compensation varied with the degree or rank of the party slain." BLACK'S LAW DICTIONARY, supra note 67, at 1430. Unlike the *wer*, which required a fixed payment to the victim of the wrong according to the value of the person harmed—which was tied to his rank—the *bot* was a payment more closely tied to the particular harm done by the act. RADCLIFFE & CROSS, supra note 43, at 6. The *bot* would be paid to compensate the person injured and was fixed according to the injury sustained, rather than tied to the rank of the person himself. *Id.* If a person was murdered, his or her relations might demand payment of the amount of his *wer* rather than the *bot* amount for homicide. STEPHEN, supra note 47, at 10–11 (discussing the substitution of *wer* for *bot* and describing the *bot* lists of King Alfred's laws).
82. STEPHEN, supra note 47, at 11.
83. WORMALD, supra note 75, at 105 (discussing the concepts of *wer* and *wite* under King Ine of Kent).
84. KIRALFY, supra note 44, at 154.
85. RADCLIFFE & CROSS, supra note 43, at 7.
86. *Id.* See also KIRALFY, supra note 44, at 155 (explaining that these wrongs were so serious that they could be redressed with only "afflictive" punishment). These crimes included treason, sacrilege, and cowardice. *Id.*
87. RADCLIFFE & CROSS, supra note 43, at 7.
included murder. Nevertheless, prior to the Norman Conquest, the blood feud remained a common practice and served alongside the codified penalties and payments as a deterrent to murder.

As the power of the kings grew, the concept of an offense against the state began to expand. The *wer, wite,* and *botlea* were eventually rendered obsolete as the theory of the King’s Peace developed. The breach of such required the payment of a fine to the Crown, but the actual victim was still entitled to some compensation. Over time, the concept of the King’s Peace began to grow, and the number of wrongs that were answerable to the Crown rather than to another individual began to increase. These wrongs could be litigated in the nascent royal courts of England and were called Pleas of the Crown. Eventually, Pleas of the Crown included all breaches of the King’s Peace, which by the twelfth century included homicide.

The fines incurred for these violations either went to the Crown itself, or were dolled out to prelates and thanes. Either

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88. Prior to the Norman Conquest, murder was classified as a *botleas.* KIRALFY, *supra* note 44, at 159. In the thirteenth century, felonies became distinguished from misdemeanors. Both were considered breaches of the King’s Peace; however murder, of course, was considered a felony. Id. A felony was distinguished from other wrongs by being punishable by death. Henderson, supra note 6, at 939. See also Young, supra note 76, at 6 (stating that early attempts at state regulation of wrongdoing were largely premised upon eradication and containment of the blood feud, where “blood” referred to kinship ties as opposed to the viciousness of the feud).

89. See POLLOCK & MAITLAND, supra note 46, at 31 (noting that “[i]n England the legalized blood-feud expired almost within living memory, when the criminal procedure by way of ‘appeal’ was finally abolished.”).

90. Henderson, supra note 6, at 939; Young, supra note 76, at 6.

91. KIRALFY, supra note 44, at 155. Originally, the sphere of the King’s Peace consisted only of the personal space surrounding the king, or on certain holy days, it might include a wider area of England. Id. Eventually, however, any form of violence or disorder in any part of the realm could be considered a breach of the King’s Peace, including homicide. RADCLIFFE & CROSS, supra note 43, at 35 (stating that by the end of the twelfth century, all offenses involving breaches of the peace were considered Pleas of the Crown, including homicide).

92. KIRALFY, supra note 44, at 155–56.

93. Id. at 155.

94. The first plea to the Crown was filed in the time of King Cnut, in the eleventh century. KIRALFY, supra note 44, at 155. Under the Saxon kings, there were many courts that had confusing and overlapping jurisdiction to hear claims relating to individual wrongs. Pleas of the Crown could be brought based on official or individual complaints of breaches of the King’s Peace. When a person was found to have breached the King’s Peace, the guilty person was made to surrender his holdings and goods to the Crown. Id.

95. RADCLIFFE & CROSS, supra note 43, at 35. Wrongs that could be brought as Pleas of the Crown included not only serious crimes such as homicide, but also included lesser wrongs such as individual assault. KIRALFY, supra note 44, at 155.

96. KIRALFY, supra note 44, at 155.
way, this was a money-making enterprise and helped to consolidate the power of the central authority.97 The Crown was also charged with inflicting punishment on the defendant's body.98 This signaled a shift from victim-centered criminal prosecution to one co-opted by the state.99 As a result, the victims of crimes lost the ability to control the prosecution and punishment of those who had committed violent crimes.100 The private wrong had become a public crime.

II. THE AMERICAN TRADITION

As a colony of Great Britain, the law regarding the death penalty in the colonial period of the United States mirrored to a great extent that of the mother country. The concept of homicide as a crime against the state was never questioned.101 Nor was the distinction between a private wrong (a tort) and a crime questioned, as this was a concept inherited from Mediaeval English law, as discussed above. Nevertheless, the governors of the American territories were given certain latitude to fashion their own criminal laws, and there was some variation among the colonies in regard to the death penalty.102 Some of this variation may be due to the unique history of each colony, the dominant

97. Id. Eventually, crimes that could be brought as Pleas of the Crown included almost every type of wrong, and the power of the victims of crimes to control prosecution and sentencing of crimes involving personal injury waned. Ultimately, wrongdoers would be punished by forfeiting all their property to the Crown rather than to the actual victims of the crime. See also WORMALD, supra note 75, at 105 (discussing how the early kings of England made financial gains through codifying crime and then extracting payment from the wrongdoers through the fines imposed in those codes).

98. Not only would the Crown confiscate the convicted person's property, the authorities were also charged with punishing the body of the perpetrator. This could take a number of forms such as torture, imprisonment in a dungeon, and/or execution. Young, supra note 76, at 6.

99. Henderson, supra note 6, at 940–41.

100. Id.

101. The earliest capital offenses within the American colonies included such crimes as idolatry, witchcraft, sodomy, adultery, blasphemy, rebellion, perjury in a capital trial, burglary, assault in sudden anger, man-stealing, rape, statutory rape, and murder. Millett, supra note 45, at 585 (citing HUGO ADAM BEDAU, GENERAL INTRODUCTION TO THE DEATH PENALTY IN AMERICA 5 (Hugo Adam Bedau ed., 1967)). These are taken from the Massachusetts Bay Colony in 1636. Id. In 1837, however, other states, such as North Carolina, had even stricter codes, requiring the death penalty for offenses such as: stealing bank notes, concealing a slave with intent to free him, circulating seditious literature amongst slaves, dueling if death occurs, and the second offense of forgery. Id. Following the English tradition, all crimes that were considered felonies were punishable by execution. Bessler, supra note 47, at 216 n.135.

102. See Millett, supra note 45, at 585 (discussing the "Capital Laws of New-England" of the Massachusetts Bay Colony, which listed numerous capital offenses).
There was inconsistency in the use of the death penalty between the northern and southern colonies. The northern colonies tended to impose capital punishment most frequently for crimes against morality, probably owing to their Puritan roots; whereas the southern colonies tended to impose the death penalty as a means to protect property, including the institution of slavery. As the Euro-American colonizers moved westward, they entered areas where there were few government officials, judges, and police officers to keep the peace and distribute justice.

In the first part of the twentieth century, the disparity between the north and the south's imposition of the death penalty became even more evident. Northern states began limiting the use of the death penalty, and some abolished it altogether, while southern states were still employing capital punishment for a number of offenses. These historical and cultural differences remain today. As will be described below, the modern courts that are deciding cases involving victim opinion testimony are influenced by the historical forces that shaped American concepts of homicide and victim rights. This is especially evident when

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103. Cf. KEVIN PHILLIPS, THE COUSIN'S WARS: RELIGION, POLITICS, CIVIL WARFARE, AND THE TRIUMPH OF ANGLO-AMERICA (Perseus Books Group 2000) (discussing the ancient divisions among the inhabitants of Great Britain and the United States and postulating that the English Civil War, the Revolutionary War, and the American Civil War were all wars between the same or similar alignments of religious and ethnic groups in the British Isles);

DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA (Oxford Univ. Press 1991) (where the author describes distinct folkways emerging in the Americas based on divisions that had long existed in Great Britain).

104. Millett, supra note 45, at 585.

105. Id. (citing STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 7 (2002)). For example, in the South, if a slave destroyed any manufactured good or enticed other slaves to flee it was a capital offense. Id. at 586.

106. Id. at 586.

107. Id. Michigan was the first state to abolish the death penalty for murder, although it retained the death penalty for treason. Id. Thereafter, both Rhode Island and Wisconsin abolished the death penalty for all crimes. Id. The first state to reinstitute the death penalty after Furman v. Georgia (which abolished (temporarily) the death penalty) was a southern state, Florida. See Charles W. Ehrhardt & L. Harold Levinson, Florida's Legislative Response to Furman: An Exercise in Futility?, 64 J. OF CRIM. L. & CRIMINOLOGY 10 (1973). Between 1976 and 2008, the fewest executions occurred in the north-eastern states, the most in the south and southwest. State Execution Rates, DEATH PENALTY INFO. CTR. (Apr. 17, 2009), http://www.deathpenaltyinfo.org/state-execution-rates. In that timeframe, Texas was the leader in the number of executions per year, with Virginia and Oklahoma following close behind. Id. Texas did not lead the states in the number of per capita executions. Id. Although Texas has executed the highest number of death row prisoners since 1976, Oklahoma had the highest per capita rate of execution. Id.
courts struggle to justify denying victims the right to give sentencing testimony recommending mercy.

A. The Constitutionality of the Death Penalty in the Modern United States

In the 1970s, the Supreme Court began issuing a series of opinions that would significantly alter death penalty jurisprudence in the United States. In a 1971 case, McGautha v. California, the Supreme Court held that it was constitutional to permit a jury in a capital case to determine both guilt and the penalty to be imposed in a single phase of trial.108

However, only one year later, the Supreme Court decided Furman v. Georgia.109 The decision consisted of a one paragraph, per curiam opinion as well as separate opinions written by each of the nine justices.110 In Furman, the Court held that the death penalty statutes of Georgia and Texas violated the Eighth and Fourteenth Amendments.111 The justices’ rationales for the holding ranged from the statutes being cruel and unusual in their operation, to being arbitrarily inflicted, to the death penalty being cruel and unusual under any circumstances, to the penalty being too infrequently imposed.112 Following Furman, it was clear that the Texas and Georgia death penalty statutes were unconstitutional, but the reason for their unconstitutionality remained unclear.113 Thus, many states rewrote their death penalty statutes in hopes that they would conform to the Court’s standards, whatever they were.114

Some states redesigned their capital punishment statutes to make the death penalty mandatory punishment for certain

110. Id. at 239–40.
111. Id. at 240. Justices Douglas, Brennan, Stewart, White, and Marshall filed opinions in support of the judgment. See generally Furman, 408 U.S. 238. Chief Justice Burger and Justices Blackman, Powell, and Rehnquist filed dissenting opinions. See generally id. None of the majority joined in another Justice’s opinion. See generally id.
112. See generally id.
113. Millett, supra note 45, at 595 (citing Furman, 408 U.S. 238) (“In response to Furman, the states had three practical options: (1) get rid of the death penalty completely; (2) rewrite their death penalty statutes, making the death penalty mandatory punishment for those convicted of a capital crime; or (3) rewrite their death penalty statute so that it was imposed in a less discriminatory . . . manner.”).
114. Id. at 595–96 (noting that seven states did not rewrite their death penalty statute, ten rewrote it to impose a mandatory death sentence upon conviction of certain crimes, and twenty-five states rewrote their statutes to allow the jury to impose the death penalty).
The Court struck down these statutes as unconstitutional in *Woodson v. North Carolina* in 1976. On the same day, however, a plurality opinion in *Gregg v. Georgia* held that "the punishment of death does not invariably violate the Constitution." The Georgia statute that the Court found to be constitutional required a bifurcated trial, separating the guilt phase from the sentencing phase of the trial. It also required a review of each death sentence by the state's supreme court to ensure that the penalty was not being applied excessively. After this holding, it became clear that for the death penalty to be constitutionally applied, the implementing statute must allow for jury discretion and provide specific guidelines for a jury to follow when deciding whether to impose the death penalty.

After the Supreme Court declared the death penalty constitutional under certain circumstances, legislators began to pass reforms to death penalty laws designed to temper the use of the death penalty, limiting the crimes for which it could be imposed and requiring more humane methods for execution. In addition, public executions were eliminated, and the jury began to have a greater role in determining whether the death penalty would be applied. Further limiting the broad power of the states to implement the death penalty, the Supreme Court held the death penalty to be unconstitutional under certain circumstances.

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115. *Id.* at 596.
117. *Gregg*, 428 U.S. at 187. In *Gregg*, a Georgia defendant was convicted of armed robbery and murder and was sentenced to death. *Id.* at 158. He challenged the sentence based on the Eighth and Fourteenth Amendments of the United States Constitution. *Id.* at 168. The Court established a two-part test. "First, the punishment must not involve the unnecessary and wanton infliction of pain." *Id.* at 173. "Second, the punishment must not be grossly out of proportion to the severity of the crime." *Id.*
118. *Id.* at 163. A "bifurcated trial" is one where sentencing is based on certain aggravating circumstances as determined by a jury in a separate trial than the trial in which guilt was decided. *Id.* at 195.
120. *Id.* at 586–87.
122. For example, the Supreme Court has recently held that when a defendant is mentally disabled, the state shall not impose the death penalty. *Atkins v. Virginia*, 536 U.S. 304, 349 (2002). The Court has also held unconstitutional the execution of a defendant who was a minor child at the time of the offense. *Roper v. Simmons*, 543 U.S. 551, 572 (2005). In addition, the Court held that the death penalty may only be imposed for the most
Due to perceptions of unfairness, ineffectiveness to prevent crime, or other concerns, there is a growing movement to abolish the death penalty in the United States. Nevertheless, a majority of Americans support the death penalty, and each state has the power to decide whether or not to permit the death penalty. Currently, thirty-six states permit the death penalty, and fifteen, including the District of Columbia do not permit the death penalty. Because the majority of cases that involve capital offenses come from southern and western states, the jurisprudence regarding the death penalty and the victim participating in sentencing decisions in capital cases is being shaped most directly by jurists in those states and by the federal courts reviewing habeas petitions from those states.

The exclusion of victim sentencing opinion testimony is not simply the consequence of proper state sentencing statutes and Supreme Court precedent; it is the result of political and economic events dating from the early common law times. What follows is an examination of the efforts courts make to rationalize the exclusion of such testimony and the absurdity that results when the victims' and the defendants' arguments coincide—when the victims do not want the defendant to be executed.

B. The Supreme Court Addresses Victim Impact Testimony in Booth v. Maryland and Payne v. Tennessee

The Supreme Court first addressed the issue of whether victims were permitted to offer a statement at the penalty stage of a capital trial in the 1987 decision of Booth v. Maryland. In that case the defendant, John Booth, was convicted by a jury of two counts of first-degree murder, two counts of robbery, and one count of conspiracy to commit robbery. He chose to have a jury, rather than the judge, decide whether he would receive the death penalty. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008). In Kennedy, the Court held that child rape was not punishable by death. Id. at 2644. The Court further held that any crime against an individual that did not result in the loss of life was not punishable by death. See id. (explaining that “there is a distinction between intentional first-degree murder on the one hand and non-homicide crimes against individuals, even including child rape, on the other.”).

126. State Execution Rates, supra note 107. Most of the states that permit the death penalty are located in the south and in the west of the United States. Id. Of the executions that occurred in the United States between 1976 and 2008, the majority occurred in Texas. Id.
128. Id. at 498.
penalty.\textsuperscript{129}

The Maryland sentencing statute in place at the time required the presentence report to include a description of the effect of the crime on the victim and the victim's family; in other words, it included a victim impact statement.\textsuperscript{130} During the penalty phase of the trial, the prosecutor proffered the testimony of the family members who had contributed to the victim impact statement contained in the presentence report.\textsuperscript{131} The defense counsel moved to suppress all victim impact evidence on the grounds that it was irrelevant and unduly inflammatory, and therefore its use would violate Mr. Booth's rights under the Eighth Amendment.\textsuperscript{132} The trial court rejected this motion, stating that the jury was entitled to consider "any and all evidence which would bear on the [sentencing decision]."\textsuperscript{133} The presentence report contained two types of information. First, there was information regarding the personal characteristics of the victims and the emotional impact of the crimes on their family members.\textsuperscript{134} The second type of information in the report included the opinions of the family members about the defendant, the proper sentence to be imposed, and their characterizations of the crime.\textsuperscript{135} The jury recommended that Mr. Booth receive the death penalty.\textsuperscript{136}

The Supreme Court granted Mr. Booth's request for certiorari to determine whether allowing the jury to consider victim impact evidence in a capital trial violates the defendant's rights under the Eighth Amendment.\textsuperscript{137} In its opinion, the Booth Court first discussed the general relevance of victim impact statements. The Court noted that in prior decisions it had required factors to be considered at sentencing to have some bearing on the defendant's "personal responsibility and moral guilt."\textsuperscript{138} The Court also observed that it had previously concluded that "[t]o do otherwise would create the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally

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\textsuperscript{129} Id.
\textsuperscript{130} Id. at 498–99. Although the report is compiled by the Division of Parole and Probation, the information in the report is based on information supplied by the victim's family.
\textsuperscript{131} Id. at 498–500.
\textsuperscript{132} Id. at 500–01.
\textsuperscript{133} Id. at 501 (alteration in original). Defense counsel then suggested that rather than allow the witnesses to testify regarding the impact of the crime, the prosecutor could read the victim impact statement contained in the presentence report. The prosecutor agreed to this request, and read the report to the jury. Id.
\textsuperscript{134} Id. at 502.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 496.
\textsuperscript{137} Id. at 501–02.
\textsuperscript{138} Id. at 502 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).
\end{flushleft}
irrelevant to the sentencing process."\(^{139}\)

In deciding whether evidence concerning the personal characteristics of the victim and the impact of the murder on the victim's family members was constitutionally irrelevant, the Court observed that there was no connection between this evidence and the "blameworthiness" of the defendant.\(^{140}\) It also observed that allowing the jury to consider the extent of the grief suffered by the family members or the regard in which the victim was held by the community would encourage juries to make life and death decisions on improper grounds. The Court stated that such information "does not provide a 'principled way to distinguish [cases] in which the death penalty [is to be] imposed, from the many cases in which it [is] not.'\(^{141}\)

As to the portion of the victim impact statement that included the opinions of the family members as to the character of the defendant, the crime, and the sentence to be imposed, the Booth Court concluded that such testimony would serve no other purpose than to "inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."\(^{142}\) It further noted that "[a]ny decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'\(^{143}\)

Four years after issuing the Booth opinion, the Supreme Court reexamined the constitutionality of victim impact statements in Payne v. Tennessee.\(^{144}\) There, the Court held that the use of victim impact statements would not necessarily violate the Eighth Amendment under all circumstances.\(^{145}\) In Payne, the Court overruled Booth, at least in part, and reopened the door to testimony by the family members of murder victims during the penalty phase of the trial concerning the impact of the crime on their lives.\(^{146}\)

In Payne, the victim impact testimony at issue included a

\(^{139}\) Id. (quoting Zant v. Stephens, 462 U.S. 862, 885 (1983)).
\(^{140}\) Id. at 504.
\(^{141}\) Id. at 505-506 (quoting Godfrey, 446 U.S. at 433).
\(^{142}\) Id. at 508.
\(^{143}\) Id. (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)). Included in the victim opinion evidence were statements that the victims were "butchered like animals," "animals wouldn't do this," "[t]he murders show the viciousness of the killers' anger . . . people who did this could [n]ever be rehabilitated . . . ."
\(^{144}\) Payne, 501 U.S. 808.
\(^{145}\) See id. at 825 (holding that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar.").
\(^{146}\) Id. at 825, 827.
statement by a witness who characterized the grief and emotional trauma suffered by her grandson, who was three-years-old when he witnessed the murders of his mother and younger sister. The jury was also informed that the boy had nearly died of a knife wound inflicted by the defendant during the incident. The witness testified that the boy still cried for his mother and little sister and did not understand why his mother would not come home and that he missed his little sister. The victim impact evidence also included extensive statements by the prosecutor who described the horror experienced by the surviving victim, the love other family members had for the victims, and the impact of their losses. In a clear departure from Booth, the Payne Court determined that such testimony was permissible and relevant "as evidence of the specific harm caused by the defendant." It also noted that the harm caused by a crime is normally considered in imposing sentences in criminal law, regardless of the relative blameworthiness of a particular defendant. However, the Court did not open the door to all victim impact testimony. It reiterated the principle, applicable to all relevant evidence, that if the probative value of the testimony is outweighed by its prejudicial effect, the courts must not admit the testimony. Because victim opinion testimony of the kind rejected in Booth was not introduced in Payne, the Court did not address whether the opinions of the victim impact witnesses regarding sentencing were to be allowed. In a footnote, the Payne Court declared:

Our holding today is limited to the holdings of Booth v. Maryland and South Carolina v. Gathers that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. Booth also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

This footnote has become a source of some controversy. Most courts that have addressed this issue have concluded that Payne only partially overruled Booth. These courts believe that because

147. Id. at 814–15.
148. Id. at 815.
149. Id. at 814–15.
150. Id. at 815–16.
151. Id. at 827.
152. Id. at 819.
153. Id. at 825 (stating that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.").
154. Id. at 830 n.2 (emphasis added) (citations omitted).
the *Payne* Court did not directly address victim opinion testimony, the ban on such testimony under *Booth* remains intact.\(^{155}\)

After the Supreme Court issued the *Payne* opinion, many states revised their sentencing statutes or otherwise enacted legislation to allow the kind of victim impact evidence addressed in *Payne*.\(^{156}\) Even though there is variation among the states as to the type of evidence that will be allowed in victim impact statements,\(^{157}\) almost all courts will allow victims to testify as to the harm caused by the crime.\(^{158}\) Victim opinion testimony regarding the proper sentence to be imposed, however, is another story.

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155. See, e.g., *Lynn v. Reinstein*, 68 P.3d 412, 417 n.5 (Ariz. 2003) (discussing the concurring opinions in *Payne* and concluding that they supported its interpretation of the scope of the *Payne* decision). See also *Payne*, 501 U.S. at 833 (O'Connor, J., concurring) (stating as to victim opinion testimony, "As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial."). Referring to the majority opinion's footnote 2, Justice Souter in his concurring opinion stated: "This case presents no challenge to the Court's holding in *Booth v. Maryland* that a sentencing authority should not receive a third category of information concerning a victim's family members' characterization of and opinion about . . . the appropriate sentence." *Id.* at 835 n.1 (Souter, J., concurring).

156. See generally *Buckley*, supra note 17.

157. This is partially due to the fact that each state has its own sentencing statute, and therefore whether victim impact testimony offered in a particular case will be considered relevant and admissible depends on the statute to be applied and the proffered evidence itself. See also *Commonwealth v. Means*, 773 A.2d 143, 154-56 (Pa. 2001) (discussing admissibility of victim impact statements post-*Payne* under particular death penalty sentencing statutes); *Blivins v. State*, 642 N.E.2d 928, 957 (Ind. 1994) (disallowing victim impact testimony by strictly interpreting its sentencing statute to allow only specified aggravating and mitigating factors); *State v. Carter*, 888 P.2d 629, 651-52 (Utah 1995), superseded by statute as stated in *State v. Timmerman*, 218 P.3d 590 (Utah 2009) (recognizing that the victim impact evidence did not violate the Eighth Amendment under *Payne*, though the court held that the evidence was irrelevant under the heightened standard for relevance and probative value under the state's evidence rules).

158. See generally *Homick v. State*, 825 P.2d 600 (Nev. 1992) (holding the statements by the prosecutor regarding the negative impact of the murder on the victim's family permissible under *Payne*); *Means*, 773 A.2d at 155-56 (listing the states that allow victim impact evidence "under generalized considerations of relevancy regarding the circumstances of the crime, proof of the uniqueness of the victim as an individual life in being and the moral culpability of the defendant," and concluding that "[t]he jurisdictions that have considered the issue of victim impact testimony have overwhelmingly chosen to admit the testimony as relevant in capital sentencing."); *Buckley*, supra note 17, § 9[a] (listing cases in which the courts have allowed victim opinion testimony after *Payne*).
C. Victim Opinion Testimony after Payne v. Tennessee

As set forth above, victim impact testimony about the harm caused by the crime is clearly permitted under Payne, but most courts have held that Payne only partially overruled Booth, leaving intact the prohibition against victim opinion testimony. Furthermore, unlike victim impact testimony, victim opinion testimony regarding the sentence to be imposed is not directly relevant to the harm caused by the crime; rather, it is relevant to the effect the sentence will have on those harmed by the crime. While this reasoning appears logical, there are two problems with precluding victim opinion testimony under Payne and Booth.

First, once a jury is permitted to hear emotional impact testimony from victims, it is nonsense to presume that the jury will only take the facts presented and simply apply a rational analysis in an attempt to quantify the amount of suffering caused by the murder. Thus, the harm the Booth Court sought to avoid by disallowing both types of impact statements is now allowed under Payne. In fact, had the Payne Court prohibited victim impact statements but allowed victim opinion testimony regarding sentencing, there would be less emotional and inflammatory testimony during the sentencing stage of the trial than is currently considered acceptable. This is especially so when the sentencing opinion testimony consists of a simple statement of opinion, as is allowed in Oklahoma.

The second problem with excluding victim opinion testimony under Booth arises when the victims actually want the defendant to receive mercy. Courts exclude this type of testimony by concluding that the defendant's constitutional rights will be violated because all victim sentencing recommendations are "constitutionally irrelevant." This reasoning is incorrect; while recommendations of death may be "constitutionally irrelevant" under current Supreme Court precedent, recommendations of mercy should only be judged based on the simple rules of evidence. When legislatures create sentencing statutes that clearly define relevant evidence to include victim mercy opinions, such testimony is, in fact, relevant and should be allowed.

159. Id. The position of the Oklahoma courts makes more sense if, rather than relying solely on their unique conclusion that Payne overruled Booth in its entirety, one were to analyze the issue using common sense: closing the door to sentencing opinion testimony yet allowing impact testimony will not prevent the juries from relying at least to some extent on emotion and sympathy for the victims in determining the defendant's sentence.
1. When Victims Recommend Death

Two cases from Alabama are typical of the majority of the cases that have confronted the issue of victim opinion testimony after Payne when the impact witnesses recommend the death sentence. In Wimberly v. State, the defendant argued that the court erred during the sentencing stage of the trial by allowing certain victim impact testimony by the victim’s daughter. The statement the victim’s daughter read to the jury included the following:

If this convicted murderer is given life in prison, he will have just that: life. . . . At the expense of the State, he could become a college graduate, a published author, or communicate with others through the internet. We realize that no matter what your verdict, it will not bring our family back. But you can allow justice to be served. It is the desire of myself and my family that Wimberly be given the sentence that he has handed out: Give him death.

In concluding the statement was inadmissible the court stated: “We find these comments were calculated to incite an arbitrary response from the jury and that they should have been excluded.” In determining that such comments were in violation of Wimberly’s Eighth Amendment rights under Booth, the Wimberly court followed the Alabama Supreme court’s opinion of

160. Wimberly v. State, 759 So.2d 568, 572 (Ala. Crim. App. 1999). Although the Alabama Criminal Court of Appeals had already concluded that the trial court had committed plain error by admitting other evidence at trial, it decided to address Wimberly’s argument concerning the victim impact testimony under a plain error standard of review, recognizing that the same issue might arise during the sentencing stage of the case on retrial. See generally id.

161. Id. at 573 (emphasis added). The defense counsel never objected to these comments, and thus, the court reviewed the admission of these statements for plain error. Id. Under Alabama rules of appellate procedure, plain error is defined as “error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings.” Id. (quotation marks and citation omitted).

162. Id. at 574 (citing Barbour, 673 So.2d at 469). The Wimberly court noted that had it not already decided to reverse the case for a new trial, it would have set aside the sentence and remanded for a new sentencing hearing. Id. In determining that the comments were inadmissible as they were “calculated to incite an arbitrary response from the jury,” the Wimberly court also relied on the Alabama case of Barbour v. State. Id. In Barbour, however, the victims’ brother had written a letter requesting that the defendant not be put to death. Barbour, 673 So.2d at 468.

163. Wimberly, 759 So.2d at 572 (quoting Ex parte McWilliams, 640 P.2d at 1017). The Wimberly court stated: “The Alabama Supreme Court has held that a defendant’s Eighth Amendment rights were violated if a sentencer considered those portions of a victim impact statement wherein the ‘victim’s family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment.’” Id.
Ex parte McWilliams. 164

In Ex parte McWilliams, the Alabama Supreme Court addressed the defendant's argument that victim opinions recommending the death sentence were in violation of his Eighth Amendment rights. 165 The court agreed. 166 It concluded that if the trial court had considered these when it made the decision to sentence McWilliams to death, it would have violated his constitutional rights. 167 In reaching this conclusion, the court observed the "portion of Booth that proscribed the trial court's consideration of that type of statement was . . . left intact by Payne." 168

The minority position taken by the Oklahoma courts dealing with the Payne and Booth opinions is exemplified in an often cited case, Conover v. State. 169 In Conover, the state presented three witnesses who read victim impact statements to the jury during the penalty phase of the trial. 170 The witnesses each recommended the death sentence, which was allowed under Oklahoma statutes. 171 Mr. Conover argued this testimony rendered his death sentence unconstitutional under the Eighth Amendment. 172 The Conover court summarily dealt with the issue by declaring that Payne had implicitly overruled Booth's prohibition on victim

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164. Id.
165. Ex parte McWilliams, 640 So.2d at 1016–17. After the jury recommended the death penalty, the trial court reviewed the pre-sentencing report prior to a statutorily required final sentencing hearing. Id. at 1017. Included in the pre-sentence report were statements that were written by the family members of the victims. Id. In addition to information concerning the victim and the impact of the crime on the victim's family, the report also contained statements that characterized the defendant, the crime and the appropriate sentence. Id. The family members had recommended that the death sentence be imposed. Id.
166. Id.
167. Id.
168. Id. The court affirmed in part and remanded the case to the court of appeals for the trial judge to determine whether he had relied on the improper portions of the victim impact statement in making the decision to execute Mr. McWilliams. Id. at 1017, 1024.
169. Conover, 933 P.2d at 919–20 (stating that "the Payne opinion specifically addressed victim impact evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family. Victim impact evidence relating to the characterization of the homicide and the witnesses' opinion of the appropriate sentence was not an issue. However, in overruling the prior decision of Booth v. Maryland, and its prohibition of victim impact evidence, Payne also implicitly overruled that portion of Booth regarding characterizations of the defendant and opinions of the sentence. Therefore, contrary to Appellant's argument, Payne and not Booth, is the controlling case on this issue." (citations omitted)).
170. Id. at 918.
171. Id. at 918 n.6.
172. Id.
opinion testimony.\textsuperscript{173}

The \textit{Conover} court then observed that the Oklahoma legislature had specifically allowed the admission of victim impact evidence by enacting legislation one year following \textit{Payne}.\textsuperscript{174}

The sentencing statute clearly defined permissible victim impact testimony to include victim impact testimony in the form of "the witness's opinion of a recommended sentence as information." The court quoted the statutory definition of admissible victim impact testimony as follows:

"Victim impact statements" means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim, and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the witness's opinion of a recommended sentence.\textsuperscript{175}

Although the \textit{Conover} court concluded that the provisions of the statute that allowed for witnesses' sentencing opinions did not violate the Eighth Amendment,\textsuperscript{176} it also observed that there were limits to the use of victim opinion testimony under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{177} It stated that such evidence might be inadmissible if it is "so unduly prejudicial that it renders the trial fundamentally unfair."\textsuperscript{178} The court further stated that when the witnesses testify that the defendant "deserves death," such statements would be viewed with a "heightened degree of scrutiny."\textsuperscript{179} It further stated that opinions regarding the sentence to be imposed "should be limited to a simple statement of the recommended sentence without amplification. Any statements outside those parameters will be examined in context to determine if its probative value is substantially outweighed by the danger of unfair prejudice."\textsuperscript{180}

In applying this test to the victim impact statements, the court held that the witnesses' statements regarding sentencing were properly

\textsuperscript{173} Id. at 920–21 (noting that the court had dealt with this issue in \textit{Ledbetter}, 933 P.2d at 891, in which it held that victim opinion testimony recommending the death penalty was permissible both under the Eighth Amendment and Oklahoma law, and it was not unduly prejudicial to the defendant).
\textsuperscript{174} Id. at 920 (citing OKLA. STAT. tit. 22 §§ 984, 984.1, 991a(D) (1992); OKLA. STAT. tit. 22 §701.10(C) (1991)).
\textsuperscript{175} Id. (quoting OKLA. STAT. tit. 22 § 984(1) (1992) (emphasis added)).
\textsuperscript{176} Id. at 920.
\textsuperscript{177} Id. at 920–21.
\textsuperscript{178} Id. at 920 (quoting \textit{Payne}, 501 U.S. at 825). The required balancing test is set forth by Oklahoma statute, as noted by the \textit{Conover} court, at OKLA. STAT. tit. 12 § 2403 (1991). \textit{Id.}
\textsuperscript{179} Id. at 921 (citing \textit{Ledbetter}, 933 P.2d at 891).
\textsuperscript{180} Id.
admitted.\(^{181}\)

Since \textit{Conover}, Oklahoma courts have continued to analyze victim opinion statements under Oklahoma law. The courts have applied the tests set forth in \textit{Conover} and have rarely concluded that the sentencing recommendations were too prejudicial to be allowed.\(^{182}\) Although defendants have petitioned the Supreme Court many times to decide whether the Oklahoma statutory scheme that allows victims to recommend the death penalty violates the Eighth or Fourteenth Amendment rights of the defendants, and to clarify the extent to which \textit{Payne} overruled \textit{Booth}, the Court has declined to speak on these matters.\(^{183}\)

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\(^{181}\) The court concluded that some of the statements failed the test, being more prejudicial than probative. \textit{Id.} at 920. The victim impact testimony included much emotional testimony, including a statement that the victim had been “butchered like an animal.” \textit{Id.} Relying on \textit{Payne} for guidance, the court concluded this statement was “inflammatory” and “designed to invoke an emotional response by the jury,” and that these statements were inadmissible because they were “emotionally charged personal opinions which are more prejudicial than probative.” \textit{Id.}

\(^{182}\) See, e.g., \textit{Welch v. State}, 2 P.3d 356, 374 (Okla. Crim. App. 2000) (holding that the victims' sentence recommendations, which were for death, were relevant and admissible, and not outweighed by any prejudicial effect because they were given "as a straight-forward, concise response to a question asking what the recommendation is; or a short statement of recommendation in a written statement without amplification."). \textit{But see Malone v. State}, 168 P.3d 185, 209 (Okla. Crim. App. 2007) (concluding that it was plain error in violation of \textit{Payne} and the Fourteenth Amendment for the judge to permit a victim to beg the jury to sentence the defendant to death. There, the victim asked the jury to show no mercy, and invoked the Bible to suggest a religious obligation to sentence the defendant to death); \textit{Hain v. State}, 919 P.2d 1130, 1144 (Okla. Crim. App. 1996) (holding that victim's mother's statement that she wished her son "could have died a gentle death, as the family dog had experienced who was given a lethal injection . . . ." was impermissible under Section 984(1) as it was a "purely emotional plea which is not statutorily permitted.").

\(^{183}\) In \textit{Hain}, although the court held the testimony of the victim's father that "death was the only appropriate punishment" was permissible under Oklahoma law, it noted that such evidence might not be found constitutional by the Supreme Court under \textit{Payne}. \textit{Hain}, 919 P.2d at 1144 n.3. In 2002, the case went to the United States Court of Appeals for the Tenth Circuit on appeal from the district court's denial of Mr. Hain's habeas corpus petition. \textit{Hain v. Gibson}, 287 F.3d 1224 (10th Cir. 2002). There, Hain argued once again that the impact testimony that included sentencing opinions was admitted in violation of his constitutional rights. \textit{Id.} at 1238. The Tenth Circuit agreed with Hain and held that such testimony was inadmissible under the portion of \textit{Booth} left intact by \textit{Payne}. \textit{Id.} at 1239. However, although the court held the testimony violated Hain's Eighth Amendment rights, it ultimately upheld the death sentence. \textit{Id.} at 1240. The court determined the error was harmless in light of all the evidence supporting the death sentence. \textit{Id.} at 1239–40.
2. When Victims Recommend Life

After the Supreme Court issued the decision in Payne, a number of courts have wrestled with the comparatively rare situation where the victims, who might or might not give victim impact evidence, also want to inform the jury that they do not want the defendant to be executed. A leading case addressing this issue is the United States Court of Appeals for the Tenth Circuit case of Robison v. Maynard (Robison I).184

Olan Randle Robison was convicted of three counts of first degree murder by an Oklahoma jury.185 The jury also recommended the death penalty for Mr. Robison.186 Prior to the sentencing stage of the trial, the trial court held an en camera discussion with the prosecutor and the defense attorney.187 The district attorney asked the court for an order that would instruct the victim impact witnesses not to “express any kind of an opinion, to be asked any kind of question or express any kind of opinion as to whether or not they feel the death penalty should be imposed.”188 The defense counsel responded that he planned to call certain victim impact witnesses who had “expressed to me a desire to ask the jury not to impose the death penalty in this case.”189 Counsel for Mr. Robison argued that this would be proper testimony in mitigation under the 1978 Supreme Court case of Lockett v. Ohio.190 However, the trial court refused his request on the grounds that “allowing such testimony would be no more proper than allowing the State to put on testimony that the penalty should be invoked.”191

After exhausting his appeals in the Oklahoma courts,192 Robison filed a habeas corpus petition in the appropriate federal district court.193 There, he argued that the Oklahoma trial court erred during the penalty phase of the trial and deprived him of his right to due process when it refused to allow the victim impact

184. This case first came to the Tenth Circuit for a review of the denial of Mr. Robison's habeas petition. Robison v. Maynard, 829 F.2d 1501 (10th Cir. 1987), overruled on other grounds by Ramano v. Gibson, 239 F.3d 1156 (10th Cir. 2001) [hereinafter Robison I]. At this time, the Supreme Court had not issued the Payne decision, and Booth was the controlling Supreme Court authority regarding all manner of victim impact testimony. Also, the Oklahoma legislature had not yet enacted its sentencing statute that specifically allowed victims to state their opinions regarding sentencing.
186. Robison I, 829 F.2d at 1503.
187. Id. at 1503–04.
188. Id.
189. Id. at 1504.
190. Id. (citing Lockett v. Ohio, 438 U.S. 586 (1978)).
191. Id. (quotation marks omitted).
192. Id. at 1502 n.1.
193. Id. at 1502.
witnesses to testify that they opposed the death penalty.\textsuperscript{194} The district court, however, found no error, and Robison filed an appeal in the United States Court of Appeals for the Tenth Circuit. There, Robison argued that the testimony should have been allowed under the Oklahoma sentencing statute that permitted the presentation of “any mitigating circumstances” during the sentencing phase of trial.\textsuperscript{195} Robison contended that the proffered testimony was a proper mitigating circumstance because retaliation is a justification for imposition of the death penalty, and in his case the victim’s family did not desire retaliation.\textsuperscript{196}

However, the Tenth Circuit held that such evidence would interfere with the jury’s ability to determine the appropriate sentence, and therefore the evidence could not be allowed under \textit{Booth v. Maryland}.\textsuperscript{197} According to the \textit{Robison I} panel, use of the proffered victim opinion testimony might encourage the jury to make an arbitrary decision.\textsuperscript{198} It stated:

> The jury must be provided with evidence that will lead it to principled determination without any hint of arbitrariness. We conclude the testimony offered by the defense in this instance was calculated to incite arbitrary response, thus it was properly excluded...\textsuperscript{199}

After the Tenth Circuit issued the \textit{Robison I} opinion, the Supreme Court decided \textit{Payne v. Tennessee}.\textsuperscript{200} Because the decision in \textit{Robison I} relied on \textit{Booth}, the Tenth Circuit granted Mr. Robison’s request for a rehearing.\textsuperscript{201} However, in \textit{Robison II}, Mr. Robison again failed to persuade the court that the trial court should have admitted the evidence of the victim’s opposition to the death penalty.

In \textit{Robison II}, the court observed that \textit{Payne} did not expand the admissible universe of mitigating evidence.\textsuperscript{202} The court distinguished \textit{Payne} from the case before it, finding that although

\textsuperscript{194} Id. at 1504–05.
\textsuperscript{195} Id. at 1504 (quoting OKLA. STAT. tit. 21, § 701.10 (1976)). In support of this argument, Robison relied upon \textit{Lockett}, 438 U.S. 586. In \textit{Lockett}, the Court held that a defendant in a capital case has a constitutional right to present “any aspect of [his] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” \textit{Lockett}, 438 U.S. at 604.
\textsuperscript{196} \textit{Robison I}, 829 F.2d at 1504.
\textsuperscript{197} Id. at 1505. In the later \textit{Robison v. Maynard}, the court denied that it had relied on \textit{Booth} in deciding that the proffered testimony was irrelevant, but it recognized that its holding was consistent with \textit{Booth}. \textit{Robison v. Maynard}, 943 F.2d 1216, 1217 (10th Cir. 1991) [hereinafter \textit{Robison II}].
\textsuperscript{198} \textit{Robison I}, 829 F.2d at 1505–06.
\textsuperscript{199} Id. at 1505.
\textsuperscript{200} \textit{Payne}, 501 U.S. 808.
\textsuperscript{201} \textit{Robison II}, 943 F.2d at 1216.
\textsuperscript{202} Id. at 1217.
Payne permitted victim testimony about the impact of the crime on the victim's family, Payne did not permit juries to consider how the imposition of the death penalty on the defendant would impact the victim's family. The court concluded that the victim opinion testimony was irrelevant and thus inadmissible in the sentencing phase because it did not "relate to the harm caused by the defendant." As a result, Robison was executed by lethal injection in Oklahoma on March 13, 1992. Since the Robison decisions, a number of other courts have denied requests to allow victims to inform the jury that they do not want the defendant to be executed. In State v. Glassel, the Arizona Supreme Court affirmed the trial court's refusal to allow one of the victims to testify that she did not want Mr. Glassel executed, even though she had given tearful victim impact testimony during the penalty phase of the trial. In that case, the defendant had been convicted of two counts of premeditated first degree murder and thirty counts of attempted first degree murder. After the jury returned its guilty verdicts, the trial court allowed three people to give victim impact testimony regarding the murder of Nila Lynn. The court allowed Ms. Lynn's two daughters and her husband, Duane Lynn, to testify. All the witnesses cried throughout their testimony.

Duane Lynn testified that he had been married to Ms. Lynn for nearly fifty years. He also described how their children had been saving money for an anniversary party for them but had used that money to buy a casket instead. He told of his love for his wife, how he missed her, and that she had begged him to help her as she lay dying. He also showed the jury twenty-five pictures of Nina and their family. However, in spite of his suffering, Mr. Lynn did not want the jury to impose the death penalty.

Understandably, Glassel wanted the jury to hear that Mr. Lynn, who had been crying on the stand and describing extreme emotional trauma that he had suffered, did not want the jury to

203. Id.
204. Id. at 1218.
206. See, e.g., Buckley, supra note 17 (listing cases where the victim did not want the defendant to be put to death).
207. Glassel, 116 P.3d at 1215.
208. Id. at 1201. The killings occurred when Glassel walked into a building were his former home owners' association representatives were meeting and opened fire on the group. Id.
209. Id. at 1213.
210. Id.
211. Id.
212. Id. at 1214–15.
recommend that he be executed. He argued that although the Eighth Amendment bars a victim from recommending a death sentence when the defendant objects to the testimony, it "cannot bar a recommendation of leniency when the defendant affirmatively wishes the jury to hear it" and "rights under the Eighth Amendment are the defendant's to raise or waive, not for the trial court to impose against his will."  

Sitting en banc, the Arizona Supreme Court began its analysis of whether the mercy opinion testimony was relevant and therefore admissible "turns on the question of whether the recommendation 'creates a constitutionally unacceptable risk that jurors may impose a death sentence based upon impermissible arbitrary and emotional factors.'" The court further stated that it had previously held in two prior cases, "victims' opinions about what sentence should be imposed in a capital case are constitutionally irrelevant." The court failed to make any distinction between statements recommending the death penalty, and those calling for mercy. It stated:

Although here it is a defendant who argues that a victim's recommendation of leniency should be admitted, the same reasoning applies. What makes [a] victim['s] statements relevant is the evidence of the impact of the crime. Thus, a victim's recommendation of what sentence should be imposed in a capital case, whether for or against the death penalty, is simply not relevant.

In denying Glassel's appeal, the court also noted that it had previously determined that Mr. Lynn could not give his recommendation of a life sentence because "the Eighth Amendment prohibits a victim from making a sentencing recommendation to the jury in a capital case."

In that case, Mr. Lynn had brought a special action against the trial court after it denied his request to tell the jury that he did not want Glassel to be executed. The court of appeals affirmed the trial court's decision, and Lynn was equally unsuccessful in his appeal to the Supreme Court of Arizona. There, Lynn argued that he was entitled to express his opinion on the proper sentence to be imposed under the Arizona Victims' Bill of Rights. The Victims' Bill of Rights is incorporated into the Arizona Constitution, and mandates that any victim of a crime has the

213. Id. at 1215 (quotation marks omitted).
214. Id. at 1214 (quoting Lynn, 68 P.3d at 416 n.5).
215. Id. at 1215 (emphasis added).
216. Id. (citations omitted) (emphasis added).
217. Id. (citing Lynn, 68 P.3d at 414).
218. See generally Lynn, 68 P.3d 412.
219. Id. at 418.
220. See generally Lynn, 68 P.3d 412.
right to "be heard at any proceeding involving . . . sentencing." This right is also enshrined in the Arizona Revised Statutes, which provide the victims of crime the right to "address the court" regarding "opinions that concern . . . the sentence . . . at any aggravation, mitigation, presentencing, or sentencing proceeding." Even though these rights were to be "liberally construed" and nothing in the Victims' Bill of Rights, or the relevant statutory provisions, limited these rights to victims testifying in non-capital cases, the Arizona Supreme Court did not analyze Mr. Lynn's rights under the Arizona Constitution or under the relevant provisions of the Arizona Revised Statutes. Instead, the court emphasized footnote two of the Payne opinion and characterized the holding as "not disturb[ing] its earlier determination that victim sentencing opinions were not only irrelevant in capital sentencing proceedings, but might well be prejudicial." In a footnote to its own opinion, the Lynn court stated:

The 'relevance' referred to in Booth differs from that set forth in the state rules of evidence. It is a constitutional concept that considers whether information that may bear upon the capital sentencing decision creates a constitutionally unacceptable risk that jurors may impose a death sentence based upon impermissible arbitrary and emotional factors.

Finally, the Lynn court concluded that any victim statements that are not related to the harm caused by the defendant's crime "violate the Eighth Amendment, and are therefore prohibited." It further concluded that "[v]ictims' recommendations to the jury regarding the appropriate sentence a capital defendant should receive are not constitutionally relevant to the harm caused by the defendant's criminal acts or to the defendant's blameworthiness or

221. Id. at 414 (citing ARIZ. CONST. art. 2, § 2.1(A)(4); ARIZ. REV. STAT. § 13-4426(A), (B) (2001)).
222. Id. (citing ARIZ. REV. STAT § 13-4418 (2001)).
223. Id. at 415. Instead, the court began its analysis by citing the well-known line from Booth v. Maryland to support its decision to treat capital cases differently from all other cases covered by the Victims' Rights Act. Id. It stated: "[D]eath is a 'punishment different from all other sanctions,' and that therefore the considerations that inform the sentencing decision may be different from those that apply to other punishments." Id. at 415 (quoting Booth, 482 U.S. at 509 n.12). After reviewing Booth and Payne, the court concluded that, contrary to Mr. Lynn's argument, Payne had not overruled all barriers to the admissibility of victim opinion testimony, but rather had left intact "that portion of Booth that the Court itself has characterized as prohibiting victims from recommending a sentence in a capital case." Id. at 416.
224. Id. at 417.
225. Id. at 417 n.5.
226. Id. at 417.
culpability."

III. WHEN VICTIMS' AND DEFENDANTS' RIGHTS COINCIDE: THE DIFFICULTY OF JUSTIFYING THE SUPPRESSION OF VICTIMS' CALLS FOR LENIENCY

Even assuming the Payne court only partially overruled Booth, leaving intact its holding that victim opinion testimony violates the defendant's Eighth Amendment rights, refusing to admit testimony that the victims do not want the death penalty imposed makes no sense under a close reading of the relevant Supreme Court precedent. Under a sensible reading of Booth, sentencing opinion testimony would only be constitutionally irrelevant if the victim calls for the death penalty—even though the harm sought to be avoided in Booth is already accomplished by allowing victim impact evidence. However, if the victims call for mercy, the evidence should be judged under a simple application of the state rules of evidence and sentencing statutes.

When it addressed victim opinion testimony, the Booth Court stated that such testimony would serve no other purpose than to "inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and defendant." However, it is important to note that the harm sought to be avoided from such inflammatory and irrelevant testimony was the possibility that such testimony might entice the jury "to impose the death sentence based on caprice or emotion" rather than on reason. Even though victim impact evidence consisting of victim opinions concerning the death penalty would not go to the "blameworthiness" of the defendant, interpreting that language to mean that asking for leniency would be constitutionally irrelevant—as courts suggested in Robison, Glassel, and Lynn—is absurd. Lurking behind the courts' misunderstanding of the issue is a deeply-rooted belief that homicide must be classified, and considered for every purpose, as a crime against the state rather than an individual wrong. This leads to the incorrect conclusion that the effect of the sentence imposed on the victims' family members is of no importance whatsoever.

Indeed, the problem runs even deeper. This mistaken belief leads to the implicit conclusion that victim opinion testimony as to the proper sentence to be imposed is inherently irrelevant, and therefore constitutionally irrelevant, despite the existence of statutory schemes that clearly define such testimony as relevant and admissible. If such testimony is believed to be inherently irrelevant as a matter of American jurisprudence, then the courts

227. Id.
228. Booth, 482 U.S. at 508.
229. Id.
that have applied the “constitutional relevance” analysis set forth in Booth can be more easily understood. A more careful examination of certain statements made by the courts in the cases described above, in which victims have been denied the right to call for leniency, will now be discussed to shed light on this point.

Interestingly, the Robison I court supported its decision by stating that the testimony might encourage the jury to make an arbitrary decision by declining to impose the death penalty in violation of the Eighth Amendment “[b]ecause the offense was committed not against the victim but against the community as a whole, in Oklahoma only the community, speaking through the jury, has the right to determine what punishment should be administered.”

The highlighted language is a reiteration of the belief stemming from mediaeval times that the victims are to be removed from all sentencing determinations and deserve no special status as members of the community especially affected by the crime. The idea that murder is a crime against the state is of course legal fiction, even if supported by public policy designed to protect society as a whole from violent crimes such as murder.

The Robison I court also misinterpreted Booth by ignoring the Booth Court’s underlying concern that victim opinion testimony might incite the jury to make an arbitrary decision “to impose the death sentence.” The Robison I court simply stated that allowing the victims to testify that they did not want the death penalty to be imposed “is calculated to incite an arbitrary response and is properly excluded.”

Similarly, in Lynn and Glassel, even though the court was dealing with the possibility that the jury might be influenced to withhold the death penalty if Mr. Lynn were to testify, the court analyzed the language from Booth without regard to the fact that

230. Robison I, 829 F.3d at 1505 (emphasis added). But see Proffitt v. Florida, 428 U.S. 242, 252 (1976) (stating that although “jury sentencing in a capital case can perform an important societal function . . . jury sentencing is [not] constitutionally required,” and that “judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.” (citations omitted)).

231. This idea is not, of course, emphasized by those courts that have dealt with the importance of sharing with the jury the impact on the individuals closest to the defendant.

232. Even though murder is considered an offense against the state and juries have the power to recommend life in prison or death as the punishment for this crime, victims should not be prevented from at least advising the jury as to the punishment they believe is warranted. The jury still decides, guided by a host of factors.

233. Booth, 482 U.S. at 508 (emphasis added).

234. Robison I, 829 F.2d at 1505 (emphasis added).
the Booth Court was dealing with victim opinion testimony in favor of the death penalty. The Lynn court concluded that victim opinion testimony was “not only irrelevant in capital proceedings, but might well be prejudicial.” 235 Ironically, the Lynn court also stated that in a capital case a court must assess whether the evidence given that “may bear upon the capital sentencing decision creates a constitutionally unacceptable risk [violative of the Eighth Amendment] that the jurors may impose a death sentence based on impermissible arbitrary and emotional factors.” 236 Following its reasoning in Lynn, the Glassel court determined that the evidence that the victims did not want the death penalty imposed was properly excluded because it was “constitutionally irrelevant” as it did not fall into the category of victim impact testimony, which was clearly sanctioned by the Payne Court. 237 It refused to distinguish victim opinion testimony calling for leniency from victim testimony calling for death. Without further explanation, the Glassel court simply stated that “the same reasoning” applies to both categories of testimony, and concluded that victim opinion testimony calling for leniency is “simply irrelevant.” 238

Decisions such as Robison, Glassel, and Lynn that interpret the language of Booth as banning all manner of victim opinion testimony in sentencing under the Eighth Amendment are incorrect. 239 The Eighth Amendment states in pertinent part: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” 240 The Supreme Court has interpreted the cruel and unusual language of the Eighth Amendment to include punishments that are inflicted based on arbitrary considerations. 241 It is not concerned with punishments that are withheld based on arbitrary considerations—at least in those cases where the punishment is

235. Lynn, 68 P.3d at 417.
236. Id. at 417 n.5.
237. Glassel, 116 P.3d at 1215.
238. Id.
239. See Stephen P. Garvey, As the Gentle Rain From Heaven: Mercy in Capital Sentencing, 81 CORNELL L. REV. 989 (1996) (criticizing the death selection stage of a capital trial and arguing that the penalty phase should be restructured to allow for mercy opinions); Brian L. Vander Pol, Note, Relevance and Reconciliation: A Proposal Regarding the Admissibility of Mercy Opinions in Capital Sentencing, 88 IOWA L. REV. 707 (2003) (arguing that courts incorrectly apply the rules of evidence to mercy opinions in capital cases, and proposing a model definition of a mercy opinion).
240. U.S. CONST. amend. VIII.
241. See, e.g., California v. Brown, 479 U.S. 538 (1987) (holding that a statutory sentencing scheme that allows for the arbitrary and capricious infliction of the death penalty is in violation of the Eighth Amendment’s ban on cruel and unusual punishment).
withheld from the particular defendant at issue. The Supreme Court has also determined that a statutory scheme is not arbitrary and capricious in violation of the Eighth Amendment if it allows the prosecutor discretion, allows the jury to convict of a lesser offense to avoid the death penalty, or allows for the possibility of commutation. Similarly, the Fourteenth Amendment prohibits deprivation of "life . . . without due process of law." It does not prohibit leniency that would preserve the life of the defendant without due process of law. Nor can we possibly imagine the state succeeding in an argument that a grant of clemency, commutation of sentence, or pardon violates the defendant's constitutional rights, although those decisions are often based on the exercise of expansive discretion on the part of the governor, judge, or president.

The purpose of these clauses is to protect the persons accused of committing crimes (or wrongs) from arbitrary process or excessive punishment. They should not be used or interpreted to limit the accused's rights to present evidence for fear of violation of the constitutional rights of that same accused individual, at least when such evidence is made explicitly relevant under state statutory schemes and constitutional amendments. The difficulty courts have had, to date, in extending the victims the opportunity to tell the jury that they do not want the death penalty to be imposed stems from a faulty interpretation of the language of Booth, as well as a no-longer-defensible notion that homicide is, and should be, considered strictly a crime against the state rather than against an individual for all purposes. For these reasons, and as will be discussed below, such testimony should not be considered "constitutionally irrelevant" under either our historical criminal jurisprudence or current sensibilities.

A. The Victims' Rights and Restorative Justice Movements

In his dissent in the Booth case, Justice Scalia took issue with the majority's belief that in a death penalty case the punishment should be decided based solely on evidence "relevant to the defendants' personal responsibility and moral guilt." He stated

242. A scheme that imposes or withholds punishment based on arbitrary factors may be unconstitutional when challenged by a defendant who claims his rights were violated by the imposition of punishment under such a system. See generally id.
244. U.S. CONST. amend. XIV.
245. Of course, if a statutory scheme allowed for the unbridled discretion of prosecutors or sentencers to withhold or impose the death penalty without the application of any standards, the application of the death penalty under such a scheme would be constitutionally impermissible.
246. Booth, 482 U.S. at 519 (Scalia, J., dissenting).
that the "personal responsibility" of the defendant was connected to the amount of harm caused, and the principle that "the imposition of capital punishment is to be determined solely on the basis of moral guilt does not exist, neither in the text of the Constitution, nor in the historic practices of our society . . . ." Justice Scalia then went on to support his reasoning by recognizing the concerns expressed by the victims' rights movement. Rather than emphasizing the crime of murder as a crime against society as a whole, he recognized the personal suffering of the family members of the victims, which he believed should play a role in the jury's determination as to whether or not the defendant deserves the death penalty.

The victims' rights movement has emerged in the United States as a grassroots movement over the past thirty years. This is the movement to which Justice Scalia referred in his dissent in Booth that seeks to empower victims. In the beginning, those in the movement were reacting to the way victims perceived their treatment in the criminal justice system. Some victims of crime believed that the rights of the accused and the convicted were taken more seriously than the rights of their victims. These victims of crime felt marginalized, used by the prosecution, and excluded from all decision-making regarding the trial, sentence, and possible later parole of the perpetrator of the crime. In an effort to have their injuries recognized in addition to any injury suffered by the community due to the crime, the victims' rights

247. Id.
248. Id.
249. Id. at 520.
250. Id. Justice Scalia wrote: "Recent years have seen an outpouring of popular concern for what has become to be known as 'victims' rights'—a phrase that describes what its proponents feel is the failure of courts and justices to take account . . . the amount of harm caused to innocent members of society . . . . [W]ith no one to lay before the sentencing authority the full reality of human suffering the defendant has produced—which (and not moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty . . . . There is nothing in the Constitution that dictates the answer . . . . It seems to me not remotely unconstitutional to permit both the pros and the cons in the particular case to be heard." Id. (emphasis in original).
251. See id. (describing an "outpouring of popular concern for what has come to be known as 'victims' rights').
253. See id. (stating that "[b]elieving that crimes are committed against individuals just as much as they are against the community, the crime victims' rights movement has sought to guarantee rights to crime victims through the state and federal legislative process.")
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advocates began to pressure state legislatures to enact victim friendly laws. For example, some states gave victims the right to know when and where parole hearings were to be held, and the right to testify at those hearings. Some in the victims’ rights movement began to argue that victims should be allowed to have a voice in the sentencing. In capital cases, some advocates wanted to be allowed to describe to the jury in detail how the crime had affected them and their families and to describe the positive characteristics of the victim, as well as their opinions of the defendant, the crime, and the proper sentence to be imposed.

This call for victim impact statements, including opinions about the proper penalty, has been based on an assumption that the need for vengeance is a proper instinct for victims. As Justice Scalia stated in his dissent in Booth, “perhaps these sentiments do not sufficiently temper justice with mercy.” In order to satisfy this need, so the argument goes, the victims should be allowed to vent their emotions and their desire for vengeance. The problem with this notion is that the jury might be encouraged to execute the defendant out of sympathy for the victim’s family. This was the circumstance that was addressed by the Supreme Court in Booth and held to violate the defendants’ Eighth and Fourteenth Amendment rights.

Although sharing the goal of the victims’ rights movement to empower the victims of crime, those in the restorative justice movement view crime as something that affects a community of actors. Their goal is to facilitate healing and reduce crime by creating or repairing personal relationships among those affected by the crime. In addition, psychological studies have shown that simply exacting vengeance is not necessarily the best means of recovery for victims of crime and their families. Having the opportunity to forgive the defendant by advocating for mercy in the penalty phase might better facilitate closure and healing. Furthermore, many individuals are opposed to the death penalty for personal, political, philosophical, or religious reasons. In instances where the victim’s relatives hold strongly felt anti-death penalty sentiments, the imposition of such a sentence may

254. See Henderson, supra note 6, at 938 (discussing the California Victim’s Bill of Rights).
255. See id. at 996–98 (discussing victims’ desire for vengeance).
256. Booth, 482 U.S. at 520 (Scalia, J., dissenting).
257. See id. at 508 (stating that the decision to impose the death sentence must be based on reason rather than emotion).
261. Id. at 998.
actually increase their mental anguish. Where the victim is killed by a family member, the negative consequences of the death penalty on the rest of the family are readily apparent.

Because reforms are already taking place, both within courts and legislatures, in order to reintegrate the victims formally into the sentencing of criminal defendants, legislation that provides an opportunity for victims to express their opinions on the proper sentence to be imposed in a capital case should be considered legitimate and constitutional, especially if the victims call for mercy and there is no possibility the constitutional rights of the defendant will be harmed by the testimony. It is thus time to reexamine the role of the victim in capital cases to allow victim opinion testimony regarding sentencing. If one looks at early Roman law, early English common law, and religious and secular theories regarding the death penalty, and then draws upon sensible ideas from Islamic law, it becomes clear that it is time to swing the historical pendulum back ever so slightly to allow victims to make a simple statement of sentencing preference at a capital trial.

B. Victim Opinion Testimony and Western Theories Supporting the Death Penalty

The justification of punishment for criminal behavior is a topic that intrigues thinkers in many fields. Philosophers, novelists, playwrights, criminologists, sociologists, jurists, theologians, and others have taken an interest in the subject. In the West, punishment for crime is justified either by reference to religious texts or under one of several secular theories. However, as discussed above, the death penalty has been abolished in most nation states, and the crimes punishable by death in the United States have been greatly reduced. Even as the crimes punishable by death dwindle, the general justifications for punishment of crime remain constant and are used in death penalty cases in the United States, either to support or to argue against the punishment.

263. Di Bella, supra note 6, at 116–17.
264. See, e.g., Gardner v. State, 234 P.3d 1115, 1132, 1141–44 (Utah 2010) (describing the defendant's argument that his execution would constitute cruel and unusual punishment since he had been on death row for twenty-five years and "the two primary purposes of punishment are deterrence and retribution, his execution would serve neither purpose."); Bieghler v. State, 839 N.E.2d 691, 697 (Ind. 2005) (recognizing that such claims based on "the mere passage of time" have been rejected by the courts that have considered them on the merits).
In several cases in the United States, defendants have argued that because the death penalty is justified based on a concept of retribution, when the victims do not want the death penalty to be imposed, the purpose of the punishment is lessened and such testimony should be considered by the jury as mitigating evidence. Others have argued that when the family members of the victim do not want the defendant to be executed, the purpose of the punishment ceases to exist and therefore execution would be excessive punishment, in violation of the Eighth Amendment. The retribution concept, while expressed in secular terms, is rooted in the West in the religious idea of an “eye for an eye” or a “life for a life,” also known as the lex talionis. The secular and religious theories supporting the death penalty and their relation to the victims’ lack of control over sentencing, even when the victims call for mercy, will be discussed in this section of the Article.

1. Victim Opinion Testimony and Secular Theories of Punishment

There are four main secular justifications typically offered for criminal punishment. These are: incapacitation, deterrence, rehabilitation, and retribution. Incapacitation theory rests on the notion that inflicting a punishment that prevents a criminal from committing further crime protects society. The deterrence theory differs from the incapacitation theory in that, rather than focusing on the general safety of society that may result from the incapacitation of the criminal after a crime has been committed, it focuses instead on punishment. Deterrence theory assumes criminals are rational and will weigh the possibility of punishment against other factors prior to committing crimes.

265. See generally MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 106 (Hill & Wang 1973) (defining retribution, rehabilitation, incapacitation, and deterrence). See also Kennedy v. Louisiana, 554 U.S. 407, 418 (discussing deterrence, rehabilitations and retribution as the main justifications for the punishment of crime); Henderson, supra note 6, at 987–88 (describing the four main justifications for criminal punishment and analyzing whether each theory supports victim participation in sentencing).

266. See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 58 (Stanford Univ. Press 1968) (explaining and comparing the rehabilitation and incapacitation theories). When an offender is convicted and sentenced to a term of incarceration—or some lesser penalty—his or her identity is publicized. This is supposed to put the community on notice of potentially dangerous individuals, and therefore reduce their ability to commit future crimes.

267. See JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 3–7 (Univ. of Mich. Press 1974) (discussing the concept of punishment and prevention); PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIMINAL SANCTIONS ON CRIME RATES 4 (Nat’l Acad. of Sci. 1978) (showing that research found that the effects of deterrence were shown by an inverse relationship between sanction levels and crime rates). Deterrence theory assumes criminals are rational and will weigh the possibility of punishment against other factors prior to committing crimes. Id.
potential wrongdoers will be deterred from committing crime as a result of seeing criminals punished.268 Under rehabilitation theory, criminals are to be rehabilitated by state-imposed intervention.269 Unlike the other theories discussed, the retribution theory does not aim to reduce the incidence of crime in society or rehabilitate the criminal. Rather, the goal of the retribution theory is to avenge the wrong.270

Applying these theories to capital punishment, only the deterrence and retribution theories potentially support an execution. Obviously, the aim of an execution is not to rehabilitate the offender. Although incapacitation is surely accomplished by putting a person to death, it can be argued that a life sentence would also accomplish the goals of the incapacitation theory. As to the deterrence theory, many in support of capital punishment argue that the death penalty deters crime.271 However, studies have revealed that the availability of the death penalty as punishment for certain crimes cannot be linked to any measurable decline in the occurrence of crime.272 This leaves the retribution theory as the only viable secular theory supporting the death penalty. Because retribution theory is the strongest secular theory used to support the death penalty, the question of whether

Rehabilitation theory is controversial because a myriad of factors (psychological, biological, and social) are thought to come into play when an individual chooses to commit a crime. Id.

268. Id.

269. See FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 2–4 (Yale Univ. Press 1981) (discussing the rehabilitative ideal). The rehabilitation theory differs greatly from the other theories discussed. This theory of punishment, or correction, was popular in the late 1800s and became the dominant philosophy in the 1900s. Id. This theory is the one most closely associated with the restorative justice movement.


272. See generally Radelet & Lacock, supra note 271, at 490.
allowing the victims in a capital case to express their sentencing opinions will negatively impact the retributive objectives of the death penalty must be addressed.\textsuperscript{273}

Retribution theory is based on concepts regarding the relationships between individuals and society. Retribution theory can be divided into four main sub-categories. These sub-categories differ according to the retributive purpose the punishment is supposed to accomplish and include (1) vindication, (2) anti-vigilantism, (3) social-individual moral balance, and (4) societal condemnation.\textsuperscript{274} As explained below, proponents of none of these retribution theories would have a strong argument against allowing victims to express an opinion on sentencing in a capital trial.

The vindication branch of the retribution theory focuses on the individual who was harmed by the crime. Proponents of this theory claim that wronged persons require vindication and that their suffering will be relieved by punishing the offender.\textsuperscript{275} Because the vindication theory of retributive punishment is victim-centric, it cannot be used to argue against granting the injured parties in a murder case an advisory role in sentencing.\textsuperscript{276}

The anti-vigilantism strain of the retribution theory holds that punishment by the state should be allowed in order to stop the victims of crime from striking back at the offender.\textsuperscript{277} This theory also cannot be used to support depriving the victims a chance to express their opinions during the sentencing phase of a capital trial. Allowing the victims to express an opinion as to the proper sentence to be imposed would in no way impede the state from exercising its responsibility to prevent a mob from carrying

\textsuperscript{273} It has been argued—although without success—that when the family members of the victim are opposed to the execution, the retributive interest of the state in the execution is so diminished that it would be unconstitutional under the Eighth Amendment. See \textit{Gardner}, 234 P.3d at 1132, 1141-44 (arguing that executing an individual who's family is opposed to the punishment is in violation of the Eighth Amendment). However, whether allowing the family members to express their opinion—one way or another—concerning the death penalty in a capital case would destroy the retributive impact of the sentence to be imposed is a different question.

\textsuperscript{274} \textit{Carter, supra} note 14, at 12.

\textsuperscript{275} \textit{Id.} When a person commits a violent crime against another member of society, so the theory goes, the moral balance between that person and society is disturbed and will remain so until he or she is punished. \textit{Id.}

\textsuperscript{276} Disallowing opinion testimony at the penalty phase of a capital murder trial will only increase the victims' feelings of powerlessness, and therefore be in opposition to the retributive purposes of punishment that seek to relieve the suffering of the victims.

\textsuperscript{277} \textit{Carter, supra} note 14, at 12. By preventing the victims from taking vigilante action, this theory holds that the perpetrator is protected against disproportionate or inappropriate punishment.
The moral balance theory focuses on the relationship between the convicted person and society as a whole. It is based on the idea that there is a moral balance between every individual and society.\textsuperscript{278} Allowing victim opinion testimony on sentencing would not defeat the purpose of punishment under this theory. Regardless of whether the jury chooses to follow the advice of the victims, it would still have the responsibility to select the punishment that, in its view, would restore the balance between the convicted person and society as a whole.

Finally, the societal condemnation theory holds that the retributive aspects of punishment allow for the symbolic expression of society's condemnation of the perpetrator and the act.\textsuperscript{279} The Robison court's statement that victims should not be allowed to testify because the jury is appointed to act as the conscience of the community is related to the societal condemnation theory supporting the death penalty. However the jury's duty to act as the conscience of the community would not be threatened or undermined by being informed of the victims' wishes.\textsuperscript{280} Allowing victim sentencing opinion testimony would not deter the symbolic expression of condemnation through punishment. The convicted person would still be punished even if the victims expressed an anti-death penalty opinion. If the jury decided to follow that recommendation, society's expression of condemnation could be satisfied by a sentence of life in prison.\textsuperscript{281} Thus, allowing the victims to express an opinion as to whether a murderer deserves to be put to death or deserves life imprisonment would not diminish any of the retributive purposes used to support the death penalty.\textsuperscript{282}

\textsuperscript{278} Even if victim opinion testimony were to be allowed in capital cases, the state would remain in control of the convicted person, and the jury—or judge—would retain its right to make the final decision as to the method of punishment.

\textsuperscript{279} \textit{Carter,} supra note 14, at 12.

\textsuperscript{280} \textit{Id.}

\textsuperscript{281} If the jury were indeed the community as a whole, rather than loose proximity of that community, it would include the victims themselves. As members of the community, their opinions would count. And, if such a group constituted a real community, as in the Middle Ages where people knew one another, interacted on a daily basis, and relied upon one another, rather than a group of faceless strangers, they would naturally take into consideration the wishes of the victims.

\textsuperscript{282} Of course, some might argue that in extreme cases, society's condemnation cannot be fully expressed by imposing a life sentence rather than death. However, the jury represents society and it should be able to take into consideration the wishes of those most directly harmed by the murder.

\textsuperscript{283} Another justification for the death penalty that is related to retributive theories and is often cited in secular debates on the subject is the "eye-for-an-eye" concept. Although based on scripture, this justification has been
2. Victim Opinion Testimony and Religious Theories of Punishment

Arguments derived from Christian and Jewish texts frequently have been used both to support and to reject the death penalty in the West. Courts, lawyers, scholars, and laypersons regularly call upon biblical references to further their death penalty arguments. These arguments focus either on G-d's stern command to punish murderers with the death penalty or on New Testament verses calling for forgiveness. Thus, although the United States is not overtly theocratic in its politics or law, the influence of Judaic law and Christian thought is still significant when grappling with difficult moral issues in court and society.

However, the role of the victim in criminal prosecutions is not clearly defined in the Bible. Neither side of the death penalty argument focuses on the right of the victims to make the decision. The arguments tend to focus on G-d's relationship with man in general, society's responsibility to punish wrongdoers, or the call advocated by philosophers such as Immanuel Kant, and not based on an argument that the Biblical authority is to be obeyed without question, but rather on the "principle of equality." CARTER, supra note 14, at 11 (citing William E. Connolly, The Will, Capital Punishment, and Culture War, in THE KILLING STATE; CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 190 (Austin Sarat ed., Oxford Univ. Press 1999)).

284. See Bruce S. Ledewitz & Scott Staples, Reflections on the Talmudic and American Death Penalty, 6 U. FLA. J.L. & PUB. POL'Y 33, 34 (1993) (recognizing the presence of the death penalty in ancient Israel and describing the Talmudic rules and procedures for capital punishment); Gary J. Simson & Stephen P. Garvey, Knockin' On Heaven's Door: Rethinking The Role of Religion in Death Penalty Cases, 86 CORNELL L. REV. 1090, 1110 (2001) (stating that "[p]articularly at the penalty phase, it is not uncommon in capital cases for the prosecution or defense or both to invoke religion in closing arguments. The Bible is a favorite source for both sides. While prosecutors never seem to tire of seizing upon the famous 'an eye for an eye, a tooth for a tooth' passage to exhort the jury to sentence to death, defense attorneys have argued against death by drawing on passages such as those recounting G-d's choice of penalties less than death to punish Cain for killing his brother Abel.") (footnotes omitted); Monica K. Miller & Brian H. Bornstein, The Use of Religion in Death Penalty Sentencing Trials, 30 LAW & HUM. BEHAV. 675, 677 (2006) (discussing several recent cases where Biblical verses were used in the sentencing phase of death penalty trials); Courtney Rachel Baron, An Eye For An Eye Leaves Everyone Blind: Fields v. Brown and the Case for Keeping the Bible Out of Capital Sentencing Deliberations, 103 NW. U. L. REV. 369, 392 (2009) (stating that "by relying on Biblical law, jurors impermissibly abdicate their responsibility to apply the law prescribed by the judge to the facts presented in evidence."). Cf. Proof of Religion in the Courtroom That Violates the Right to a Fair Trial 73 AM. JUR. 3D Proof of Facts 89 § 8 (2003) (discussing whether a potential juror may be excused because his or her religious beliefs would preclude a sentence of death).

285. See Baron, supra note 284, at 373 (describing a number of cases where jurors relied on Biblical passages while deliberating during the penalty phases of a capital punishment trial).
for collective societal forgiveness—which is to be expressed by the collective judgment of the jury members. In contrast, under Islamic law, some of these issues are less confused. The victims determine whether to impose the death penalty, and forgiveness is encouraged by G-d. In the West, however, it is a matter of debate whether the death penalty is required by G-d as the punishment for murder, and the role of the victim is unclear. Those arguments will be discussed more fully below.

a. Arguments from Judaism

In the five books of the Old Testament that make up the Pentateuch, or Torah, the death penalty is the prescribed penalty for more than twenty crimes, including murder. The most well-known verses from the Torah used to justify the death penalty on religious grounds contain the eye-for-an-eye, or lex talionis, principle. The lex talionis verse from Leviticus states as follows: “And he that killeth any man shall surely be put to death. . . . Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again.” This verse and other imperatives from the Torah have often been quoted in capital punishment cases as persuasive authority designed to

286. See Christian Brugger, Capital Punishment and Roman Catholic Moral Tradition 60–61 (Univ. of Notre Dame Press 2003) (listing the crimes punishable by death, which included offenses against unorthodox religious beliefs and practices and miscellaneous other crimes including theft, deception, violence, murder, and deviant sexual behavior). There is some disagreement among scholars as to the exact number of crimes for which death is the prescribed penalty in the Torah. See Daniel A. Rudolph, The Misguided Reliance In American Jurisprudence On Jewish Law To Support The Moral Legitimacy of Capital Punishment, 33 AM. CRIM. L. REV. 437, 443–44 (1996) (stating that some scholars place the number as high as thirty-six and listing six categories of crimes punishable by death).

287. Leviticus 24:17 (King James) (“And he that killeth any man shall surely be put to death.”); Leviticus 24:19–21 (King James) (“And if a man cause a blemish in his neighbour; as he hath done, so shall it be done to him; Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again. And he that killeth a beast, he shall restore it: and he that killeth a man, he shall be put to death.”) (emphasis in original). See also Exodus 21:23–25 (King James) (“And if any mischief follow, then thou shalt give life for life, [e]ye for eye, tooth for tooth, hand for hand, foot for foot, [b]urning for burning, wound for wound, stripe for stripe.”); Genesis 9:6 (King James) (“Whoso sheddeth man’s blood, by man shall his blood be shed: for in the image of G-d made he man.”); Deuteronomy 19:11-13, 21 (King James) (“But if any man hate his neighbour, and lie in wait for him, and rise up against him, and smite him mortally that he die, and fleeth into one of these cities: Then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die. Thine eye shall not pity him, but thou shalt put away the guilt of innocent blood from Israel, that it may go well with thee . . . . And thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.”) (emphasis in original).
influence jurors to encourage jurors to impose the death penalty.\textsuperscript{288} However, these verses should be understood in relation to the society in which they were first advanced.

In the ancient kingdom of Israel, murder of the innocent was considered an especially grievous sin and a crime that potentially affected the whole community. It was not only considered simply a crime against a fellow human, but also a crime against G-d, who was thought to have exclusive dominion over life and death.\textsuperscript{289} For such a crime, capital punishment was not only demanded by G-d, it was also thought to expiate evil from the murderer and to purify the community as a whole.\textsuperscript{290}

Although murder was considered a crime against the community, condemned by G-d, and punished by the state, the victim maintained an active role in the process of punishing, and even executing, criminals. Prior to the development of formal legal procedures among the ancient Israelites, it was the responsibility of the close relatives of a murdered individual to extract blood-revenge from the perpetrator.\textsuperscript{291} Even after the Israelites developed more formal legal procedures, it was still the responsibility of the blood relatives to instigate the execution.\textsuperscript{292}

By the end of the second temple period, capital punishment began to fall into disfavor.\textsuperscript{293} Nevertheless, the legitimacy of the state performing executions under certain circumstances was not questioned, as capital punishment had been commanded by G-d in the Torah.\textsuperscript{294} The dictates of Jewish law, especially the Torah,

\textsuperscript{288} See, e.g., People v. Hill, 952 P.2d 673, 692–93, 692 n.6 (Cal. 1998) (discussing how the prosecutor committed misconduct by asking the jury to rely on Bible verses in his closing argument, and the court listed the following cases where the prosecutor had similarly committed misconduct by relying on the eye for an eye verses); State v. Rouse, 451 S.E.2d 543, 560–62 (N.C. 1994) (upholding the prosecutor’s reference to the eye for an eye principle in a capital case); People v. Wash, 861 P.2d 1107, 1134–35, 1134 n.18 (Cal. 1993) (discussing how the prosecutor referred to the Old Testament in support of imposing the death penalty); \textit{Ex parte} Waldrop, 459 So. 2d 959, 962 (Ala. 1984), \textit{cert. denied}, 471 U.S. 1030 (1985) (describing how the prosecutor referred to the death penalty as consistent with the laws of G-d).

\textsuperscript{289} BRUGGER, supra note 286, at 61.

\textsuperscript{290} Id.

\textsuperscript{291} Id.

\textsuperscript{292} Id. at 61–62.

\textsuperscript{293} Id. at 62. See also Ledewitz & Staples, supra note 284, at 34–36 (discussing the rigorous procedural and proof requirements and arguing that if these were followed, the death penalty would have been almost non-existent, and recognizing that certain scholars condemned courts for executing even one person in seventy years); Rudolph, supra note 286, at 445–47 (arguing that the death penalty was not carried out very often in the Talmudic era as the rabbis during that period attempted to use interpretation of the Torah to make the death penalty a rare occurrence).

\textsuperscript{294} See Ledewitz & Staples, supra note 284, at 34 (recognizing that even though the death penalty was controversial and was severely limited under
remain an important justification for supporting the death penalty in the United States. This is true even though in ancient Israel the death penalty was not imposed with anything approaching the regularity with which it is imposed today in the United States.

b. Christianity and the Death Penalty

The New Testament contains several ambiguous verses dealing with the death penalty. Nowhere is it absolutely condemned. Nevertheless, various verses of the New Testament have been used by proponents of the death penalty. In fact, for most of Christian history, official Church leaders, and seemingly the majority of the public, accepted the death penalty as a legitimate form of punishment for certain crimes. They did not question the authority of the state to carry out the death penalty in appropriate cases. Unlike the role of the state in executions, the role of the clergy in such proceedings was, however, questionable. During certain historical periods, the Church was not allowed to participate in capital cases at all. When the issue was heresy, however, the Church was more likely to be involved in a trial leading to the infliction of capital punishment.

Jewish law, “Judaism still permitted, even required, that certain persons would die for their crimes.”

295. See BRUGGER, supra note 286, at 60 (discussing various verses in the Old Testament that could be considered to be either in favor of the death penalty, or at least accepting of its legitimacy).

296. Id. at 64 (citing John 8:3–7 (King James)) (referencing several stories from the New Testament including the story of the woman convicted of adultery for whom Jesus told the crowd, “you who are without sin, cast the first stone” but noting the story does not condemn the death penalty per se, but only advocates forgiveness by the community of the woman’s sin). See also Matthew 5:38–39 (King James) (stating that “[y]e have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also.”) (emphasis added).

297. BRUGGER, supra note 286, at 63–65, 74–75. The role of the clergy in inflicting the death penalty changed during the twelfth century. During that period, the clergy were forbidden to take part in the infliction of the death penalty. Id. at 96–97. However, in the oath of Waldensian, Pope Innocent III stated that it was acceptable for the civil authority to administer the death penalty without the risk of moral sin. Id. at 103. In addition, Thomas Aquinas supported corporal punishment in general and capital punishment in particular as “medicinal.” Id. at 108. He argued that it was medicinal in that it contributed to the emendation of the convicted, the deterrence of others, and the order of justice. Id. In other words, Aquinas considered it healthy for the social community to expiate the criminal from its presence, and to thereby cut out a dangerous and corrupting presence from the body of the community. He stated: “[I]f any one is dangerous and corrupting to the community on account of some of some sin, it is praiseworthy and salubrious that he be killed, in order to preserve the common good.” Id. at 109–10.

298. Id. at 116–22 (stating that the Catholic Church was involved in heresy trials during the High Middle Ages and in the seventeenth century).
It was not until the second half of the twentieth century that Catholic thinkers began to question, in any serious and systematic way, the legitimacy of the death penalty. The American Bishops led the charge in the Catholic Church against the death penalty by making a number of pronouncements, culminating in the 1980 statement on capital punishment in which they outlined ten reasons to abolish the death penalty. In 2001, the Holy See issued a declaration calling for the abolishment of the death penalty, which can be taken as the official position of the Catholic Church today.

The conservative evangelical Protestants, on the other hand, have often accepted and encouraged the use of the death penalty. For example, the United States Southern Baptist Convention, the largest denomination in the United States, has issued a clear statement advocating the use of the death penalty. Other strands of Protestantism in the United States are mixed in their support of the death penalty. Most “main-line,” or non-evangelical denominations, oppose the death penalty. The Protestants, like the Jews, are split along liberal and conservative lines.

Currently, proponents of the death penalty, prosecutors, jurors, and victims who want the defendant executed tend to favor verses from the Torah, or Old Testament, to support their position. In general, they rely on the lex talionis verses and argue that it is the religious duty of the jury to remove the defendant from the community through execution. However, opponents of the death penalty, including defense attorneys, tend to appeal to the juries to exercise leniency in court based on verses from the New Testament that discuss forgiveness. For example, a favorite quote from the New Testament regarding forgiveness comes from the Book of Matthew: “Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to

299. *Id.* at 132–33.
300. *Id.* at 136–37.
301. *Id.* (citing DECLARATION OF THE HOLY SEE TO THE FIRST WORLD CONGRESS ON THE DEATH PENALTY (Strasbourg June 21, 2001)).
303. *Id.*
304. *Id.*
305. *Id.*
him the other also.”

However, the role of the victim in making these life and death decisions when it is the state exercising its authority to determine whether a person should be executed is somewhat ambiguous under both Judaism and Christianity.

Nevertheless, ideas taken from both Christianity and Judaism infuse death penalty thought and jurisprudence, sometimes taking on manifestly obvious forms, sometimes lurking unexamined in the minds of prosecutors, judges, juries, and the family members of the victims. Regardless of whether it is appropriate or unconstitutional for government officials to make reference to Judeo-Christian writings and sensibilities, their influence on our death penalty jurisprudence, including the role of the victims in a trial, should not be ignored.

In contrast to the ambiguity of the victims’ role in a capital murder trial and sentencing pursuant to Christian and Jewish thought, under Islam, the most recent manifestation of the Abrahamic religions, victims of murder have a central place in the decision-making when it comes to whether to impose the death penalty for murder. It is useful to examine the treatment of the victims of murder under Islamic law to help us consider what our system might have been like if the crime of homicide had never been categorized as a crime against the Crown and the Christian and Jewish texts had been clearer about the role of the victim in a homicide prosecution.

PART TWO: ISLAM AND VICTIM PARTICIPATION IN SENTENCING

I. OVERVIEW

Islamic law is religious law based on the Qur'an and the teachings and examples of the Prophet Muhammad. Islamic law is older than the common law and the civil law, yet it is connected to both. In order to understand Islamic law, one must first have a basic understanding of Islam, but Islam is not easily summarized. It is a complex and varied religion incorporating many different sects, interpretations, and practices. Islam is a monotheistic

307. Another story from the New Testament that is often used by opponents of the death penalty comes from the Book of John. Here, a woman had been convicted of committing adultery by the authorities, and was about to be executed by stoning. John 8:3-11 (King James). The crowd, representing the community, was to carry out the execution by throwing rocks at the woman until she was bludgeoned to death. Id. According to the account in John, Jesus tried to put a stop to the execution by exhorting the crowd, “He that is without sin among you, let him first cast a stone at her.” Id. However, this the story does not condemn the death penalty per se, but only advocates forgiveness by the community of the woman's sin by reminding them that each person is also a sinner.
308. See generally Taha Jabir Al Alwan, The Ethics of Disagreement in
religion and shares a close kinship with Judaism and Christianity. However, Muslims believe that Islam represents the final disclosure of G-d's will through his Prophet, Muhammad, and that the Qu'ran is the direct word of G-d as revealed to the Prophet Muhammad. Islam literally means the submission to the will of G-d. A Muslim is one who submits to the will of G-d.

Muslims are required to make Islam a part of their daily consciousness and to act according to the will of G-d in everything they do. Islamic law serves as a guide to Muslims attempting to act in accordance with G-d's will in daily life. However, the religion itself is not simply a set of rules to follow. There are spiritual and mystical aspects as well. These features of Islam are important in understanding Islamic law because, unlike Western law, the divine and the temporal are fused to the belief system.


309. ESPOSITO, supra note 308, at 3–4 (explaining the links between the three Abrahamic religions). As stated by John Esposito:

Islam stands in a long line of Semitic, prophetic religious traditions that share an uncompromising monotheism, and belief in G-d's revelation, His prophets, ethical responsibility and accountability, and the Day of Judgment. Indeed, Muslims, like Christians and Jews, are the Children of Abraham, since all trace their communities back to him. Islam's historic religious and political relationship to Christendom and Judaism has remained strong throughout history. This interaction has been the source of mutual benefit and borrowing as well as misunderstanding and conflict.

Id.

310. See id. (describing the relation of Islam to Christianity and Judaism through the legacy of the Patriarch Abraham). Islam incorporates much of the Jewish and Christian religious traditions, but Muslims believe that the final revelation from G-d came from Muhammad, the last prophet. See KAREN ARMSTRONG, ISLAM: A SHORT HISTORY 8–10 (Modern Library 2002) (describing the Qu'ran as the word of G-d).

311. ARMSTRONG, supra note 310, at 5. See also RODOLPHE J.A. DE SEIFE, THE SHARI'AH: AN INTRODUCTION TO THE LAW OF ISLAM 5 (Austin & Winfield 1994) (setting forth the definitions of Islamic law).

312. MOHAMMAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 1–3 (Oneworld Publications 2008). Muslims are called to abstain from certain practices, and are required to adhere to the five pillars of Islam that require daily prayer, giving alms to the poor, fasting during the month of Ramadan, going on a pilgrimage to Mecca, and believing that there is no G-d but Allah and Muhammad is his Prophet. ESPOSITO, supra note 308, at 89–93.
that gave birth to the Islamic legal tradition.

When discussing and seeking to define Islamic law, it is important to acknowledge that Islamic law is as varied and complex as Islam itself, even if the discussion is limited to the "classical" Islamic jurisprudence. It has been practiced in many different societies and in different ways over the last 1,400 years. Modern societies that incorporate Islamic Shari'ah into their legal systems do so in a wide variety of ways; most have mixed classical Islamic jurisprudence with codes influenced by Western legal systems. Some people use the terms Shari'ah and Islamic law interchangeably. However, this is not correct. The Shari'ah, which literally means, "the way" or "the path," is revealed law or G-d-given law, and it is found in the Qur'an and in the Sunnah of the Prophet.

The term Islamic law is broader than the term Shari'ah. Islamic law incorporates other sources of jurisprudence that include the works of the scholars interpreting the Shari'ah. This man-made gloss on the Shari'ah, is known as the Fiqh, or Islamic jurisprudence. Islamic jurisprudence is divided among several schools of thought that were formed by certain scholars during the classical period of Islamic civilization, roughly from the ninth through the eleventh centuries. In addition to the Shi'a schools of thought, there are four major Sunni schools of thought. For the purpose of this Article, the author has drawn on the Sunni schools

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313. See Ann Elizabeth Mayer, Islam and the State, 12 CARDOZO L. REV. 1015, 1015–25 (1991) (discussing modern and pre-modern diversity in Islamic law and institutions); Ron Shaham, Preface to RON SHAHAM, LAW, CUSTOM, AND STATUTE IN THE MUSLIM WORLD: STUDIES IN HONOR OF AHARON LAYISH, at vii-xi (Ron Shaham ed., Brill 2007) (introducing an analysis of the relationship between Arab customary law and the shari'a); Wael B. Hallaq, Authority, Continuity and Change in Islamic Law (Cambridge Univ. Press 2001) (providing an in-depth analysis of the development of classical Islamic law); see generally Wael B. Hallaq, The Origins and Evolution of Islamic Law (Cambridge Univ. Press 2005) (tracing the beginnings of Islamic law); Noel J. Coulson, Conflicts and Tensions in Islamic Jurisprudence (Univ. of Chi. Press 1969).

314. See generally Wael B. Hallaq, An Introduction to Islamic Law 87–162 (Cambridge Univ. Press 2009) (describing the effects of colonization, modernization and Islamic movements on the development of Islamic law in modern nation states). See also Haider Ala Hamoudi, The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law 56 Am. J. Comp. L. 423, 423–24 (2008) (explaining that the American legal academy falsely relies on the assumption that contemporary Islamic rules are derived from classical doctrine and suggests that scholars should take into consideration contemporary global political and economic forces shaping modern Islamic law).

315. Kamali, supra note 312, at 16.

of thought. Although there are differences between these legal traditions, fortunately the main points that are made in this Article are related to very basic Islamic legal concepts, and any minor differences in interpretation of the finer points of the law of homicide and the victims' role in prosecution under Classical Islamic law are beyond the scope of this Article and need not be addressed.

A. The Religious Character and Purpose of Islamic Law

Because Islamic law is religious law, the concept of law in Islamic law is much broader than the concept of law in the secular West. Islamic law sets forth duties owed to God, duties to the state (or community), and duties owed to other people. There is no clear division between religious and secular duties under Islamic law. Therefore, the purpose of Islamic law is broader than Western law in that it regulates the relationship between God and the individual as well as relationships between individuals and the relationship between the government and the people. It has both religious and secular characteristics, and ideas about morality are tightly interwoven into all the aspects of the law. The pervasive nature of Islamic law is linked to the Islamic ideal that every aspect of life is governed by God's divine purpose. Thus, much of Islamic jurisprudence has to do with the proper way to worship or carry out daily activities, subjects Westerners would not normally associate with legal mandates. However, within Islamic law there are a number of topics that fit within the Western conceptualization of law.

B. Sources of Islamic Law: The Qur'an, the Sunna, and Fiqh

In Islamic legal analysis and methodology, the verses in the Qur'an are considered fundamental law and represent the highest legal authority in Islamic law. In this way, the Qur'an is similar


318. Weiss, supra note 317, at 21 (discussing the moral and legal implications of the marriage contract in Islamic law).

319. Id.

320. See M. Cherif Bassiouni, Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System, in The Islamic Criminal Justice System 12–13 (M. Cherif Bassiouni ed., Oceana Publications, Inc. 1982) (stating that the conduct of man should be in his individual and collective capacity can be found in Islamic law).

to the Constitution of the United States. However, the Qur'an can never be altered and is not subject to criticism because every verse is considered to be the direct word of G-d.\textsuperscript{322} In addition, only a small percentage of the Qur'an is devoted to legal rules.

The second highest authority is the Sunna.\textsuperscript{323} The Sunna consists of the cases decided by the Prophet, using his words and deeds.\textsuperscript{324} This collection of the works and words of the Prophet were passed down by those who knew the Prophet during his life and serves to clarify the meaning of the Qur'an.\textsuperscript{325} In the Prophet's last sermon, he told the people to "obey G-d's book and his Prophet's Sunna," therefore the Sunna is mandatory authority.\textsuperscript{326} Together, the Qur'an and the Sunna make up Shari'ah.

Of course, not all questions are answered fully in the Qur'an and the Sunna. Thus, Islamic jurisprudence developed by legal scholars is also consulted and serves as another source of Islamic law. When the highly respected scholars of all the schools of jurisprudence agree on a question, there is a "consensus of the scholars" or jima. A jima is very persuasive authority on any issue.\textsuperscript{327} Although there are other sources of Islamic law, this limited discussion of Islamic theory, jurisprudence, and methodology is sufficient to address the issue of victims commenting at sentencing.\textsuperscript{328}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 21. Nevertheless, there is some room for disagreement and interpretation of the verses themselves. The first Muslim scholars engaged in this analysis of Qur'anic texts. While some verses are clear and require no explanation or interpretation, some are less clear. Moreover, some verses are general, and some are specific. And some verses have arguably been abrogated by later revealed verses. Thus, the first step in Islamic legal analysis is exegesis, the science of Tafsir. Mujtahid are experts qualified to interpret the Qur'an through the science of tafsir. They strive to understand the specific language of the applicable Qur'anic text and categorizing it accordingly. Id. at 22-30.
\item Id. at 28.
\item Id. at 30.
\item Id. at 31.
\item MATTHEW LIPPMAN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE 30–31 (Praeger 1988).
\item Id.
\item Id. at 31.
\item Id. at 31–32. According to Lippman "[c]onsensus itself is legitimized by the Qur'anic text, 'Ye are the best of Peoples, evolved for mankind, enjoying what is right, forbidding what is wrong, and believing in G-d.' The Prophet stated in a Hadith, 'My community shall never unite upon error.'" Id. at 32 (citing THE QUR'AN, supra note 1, at 3:110). See also Taymour Kamel, The Principle of Legality and its Application in Islamic Criminal Justice, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 155–56 (M. Cherif Bassiouni ed., 1982) (noting that while jima is a "consensus of the community through its competent representatives" of Islamic jurists, it is an inferior authority due to its unstable nature, being revocable when consensus changes). Consensus, or ijma, is supported in the Qur'an and in a Hadith. Id. at 155. It is stated in the Qur'an that the believers will not all be in error in interpretation of the Qur'an at once. Id.
\item The fourth level of Islamic legal authority is the argumentation by
\end{enumerate}
\end{footnotesize}
There is a highly developed body of jurisprudence within Islamic law that deals with criminal law (as is also true with respect to rules of trade, government, inheritance, marriage, divorce, and property). The Islamic law regarding criminal punishment is justified through use of principles similar to those used to justify criminal punishment in modern American law: for example, to deter further criminal activity, to rehabilitate the offender, to protect society against the offender, and as a means for retribution. Yet the law itself—the equivalent of Western substantive law—remains of a religious character. This leads to several important consequences.

Most importantly, as religious law, Shari'ah law functions as a "moralizing instrument as well as a preventative agent." It seeks to reform the individual, purify his conscience, warn against committing offenses, prohibit acts that would lead to more serious criminal offenses, recognize moral fallibility, and encourage social and economic justice. In addition, some of the crimes carry not only punishment on earth, but also a penalty in the afterlife.

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analogies or qiyas. LIPPMAN, supra note 324, at 32. Since every possible legal question could not be addressed in the Qur'an or in the Sunna, legal scholars and judges are allowed to use analogical reasoning to decide a case by relating it to those situations which are covered in the Qur'an or in the Sunna. Id. at 32. However, some schools of legal thought are in dispute as to the validity of this type of analysis. Id. There are a number of other methods of discovering the Islamic law, including but not limited to custom, the use of personal reasoning, and developing Shari'ah oriented policy attuned to modern society. See KAMALI, supra note 312, at 53-54 (explaining that the Shari'ah appears to incorporate common views of the community and known community practices into the "fabric of its laws").

329. PETERS, supra note 2, at 30.

330. These include the following: (1) There is a unity between the relationship between the Islamic criminal law prohibitions and the belief in one G-d; (2) A person who has committed a crime under Islamic law will face both earthly and eternal punishment, unless he or she repents; (3) The spiritual aspect of the criminal law serves as an internal deterrence in that the Muslim's belief in G-d will prevent him from committing crimes that are offensive to G-d; and (4) The application of Islamic criminal law is not a task left to the discretion of the state, but rather is a required function of the Muslim government. PETERS, supra note 2, at 47.

331. See SANAD, supra note 317, at 49 (explaining that the status as a moralizing instrument is obtained by seeking to reform the individual and clear his conscience, warning people against committing offenses through harsh punishment, requiring Muslims to aid one another in the search for righteousness, preventing crime by restricting access to the materials necessary for commission, and requiring the rich to aid those less fortunate).

332. Id. at 49-50.

333. Id. at 50. The punishment for murder extends to the afterlife; as the Qur'an states: "If a man kills a believer intentionally, his recompense is Hell, to abide therein (forever): and the wrath and curse of Allah are upon, him, and a dreadful chastisement is prepared for him." THE QUR'AN, supra note 1, at 4:93.
This leads the majority of Islamic scholars to recognize the importance of atonement: the idea that if a criminal is punished in this life, he will not be punished for his crime or sin in the afterlife.334 The theological dimension of crime gives rise to repentance as a defense limited to certain crimes under Islamic law.335

C. Taxonomy of Crimes in Classical Islamic Law

In keeping with the purpose and theory of Islamic law, the penalties for the commission of a crime and the procedures that are to be followed in the prosecution and sentencing of a perpetrator are dependent on whether the crime is one for which the punishment is prescribed in the Qur'an, one for which the punishment is retaliation or payment of a fine, or one for which the punishment is discretionary. Islamic Shari'ah law thus divides crimes into three categories: hudud, ta'azir, and qisas.336

The hudud are sometimes considered crimes against G-d because their punishments are prescribed in the Qur'an and in the Sunna.337 Hudud crimes include theft, highway robbery, rebellion, illegal sexual relations (zina), false accusation of zina, drinking alcohol, and apostasy (renouncing Islam).338 As crimes against G-d,

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334. SANAD, supra note 317, at 31 (quoting FRANK VOGEL, ISLAMIC LAW AND LEGAL SYSTEM; STUDIES OF SAUDI ARABIA 241 (Brill 2000), for the following hadith: “The hand of the repentant thief precedes him into heaven,” but noting that the hadith is not found in the authoritative canon of ahadith).
335. Id. at 27. A minority of Islamic scholars contends that for atonement to be achieved in the afterlife, the offender must sincerely repent the acts he has committed, and the earthly punishment alone will not lead to atonement for the sinful aspect of the crime. See id. at 31 (noting the Hanafites argument regarding repentance and atonement). See also KAMALI, supra note 312, at 191–92 (arguing that the Qu'ran has proscribed punishment that is not mandatory for theft, adultery, slanderous accusation, and highway robbery because references punishments for such crimes are followed by descriptions of reformation and repentance).
336. SANAD, supra note 317, at 40–41.
337. Id. According to Sanad, “[t]herefore, the prosecution of such crimes is mandatory, and punishment must be imposed exactly as prescribed in the Qur'an or the Sunna. Once guilt has been proven, no human judge, governor, or even imam (ruler) can increase, reduce, probate, or suspend the sentence.” Id. at 50.
338. LIPPMAN, supra note 324, at 39–41. See also SANAD, supra note 317, at 50 (explaining the dispute over which crimes constitute hudud crimes, with scholars agreeing solely on adultery, theft, banditry, and defamation). Scholars disagree as to whether drinking alcohol and apostasy are hudud crimes. Id. See also KAMALI, supra note 312, at 191, 220 (noting that the punishments for drinking alcohol and apostasy are not set forth in the Qur'an, but rather are found in the books of fiqh, and arguing that apostasy should not be considered a hudud crime because the Qur'an specifically provides for freedom of choice in religion). However all agree that zina, theft, highway robbery and false accusation of zina are hudud crimes. Id. at 191–93.
hudud crimes are considered the most serious. The punishments for such crimes vary in severity, ranging from applying lashes, to amputation, to execution. However, all such punishments are corporal in form.

Ta'azir crimes are those transgressions described in the Qur'an or the Sunna for which no punishment is specified. Among the ta'azir crimes are embezzlement, perjury, and sodomy. Although the death penalty is not usually imposed for ta'azir crimes, it can be meted out in exceptional circumstances. However, the victims of these crimes may request that the state pardon the defendant, and the judge has the discretion to grant or deny such a request.

The qisas are crimes against the body of a person. Homicide is a qisas crime. After the hudud crimes, qisas crimes are the most serious under the Islamic Shari'ah. The word qisas actually means retribution by the infliction of equivalent harm. One of the results of classifying intentional homicide as a qisas crime was to deter the blood feuds that were common in Arabia. By limiting retribution to the harm committed, excessive retribution through tribal feuding was restricted.

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339. SANAD, supra note 317, at 50.
340. Id. at 51–56.
341. Id. at 56. Corporal punishment is defended by Professor Sanad on the following grounds:

[C]orporal punishments in Islamic law are carried out in a swift manner and are effective in deterring the individual from committing that crime once again. In addition, the individual (male) is not separated from his family as he would be if imprisoned, and thereby prevented from supporting them and controlling them. This method is therefore preferable to incarceration in prison, which is a drain on public resources and a training school for further criminal activity. Id. at 57.

342. Id. at 63. See also KAMALI, supra note 312, at 188–89 (explaining that the judge has the discretion to specify punishment for ta'azir crimes from a list of accepted penalties).
343. SANAD, supra note 317, at 64.
344. EL-AWA, supra note 31, at 109. According to El-Awa, there is a split between the schools of thought as to which Ta'zir crime merit the death penalty. Id. According to the Hanafi school, “the habitual homosexual, the murderer on whom qisas cannot be imposed because of the means used in the crime (al-gatl bil-muthgil), and the habitual thief who attacks a man's house and who is not to be prevented from doing harm by means of other punishments” are to be executed. Id. Under the Maliki school, the death penalty will be imposed in cases of serious nature or where the defendant is beyond reform. Id.
345. LIPPMAN, supra note 324, at 41.
346. Id. at 38.
347. SANAD, supra note 317, at 61.
348. Id.
349. DOI, supra note 3, at 232–34 (discussing the blood feud and the concept of qisas in Arabia before the Qur'an was revealed).
Qisas crimes include both intentional and unintentional harm inflicted upon the body of another person.\footnote{SANAD, supra note 317, at 61.} However, physical punishment will only be inflicted if the harm caused was intentional.\footnote{SANAD, supra note 317, at 61–63. According to Sanad, qisas punishments are also limited in the following manner: (1) The accused must be an adult who is of sound mind and understanding at the time of the act, and the act must have been done intentionally; (2) The victim must be a Muslim or Zimmi (Christian or Jew) or, according to the majority of writers, a musta'min (a non-Christian or non-Jew who has entered the land of Islam pursuant to a peace treaty); (3) Only the male blood relatives (father or grandfather) in a line of ascendancy can claim qisas in the case of the death of the victim: only the victim can claim it in the case of injury or maiming; (4) A Muslim or Zimmi cannot be executed or maimed for the killing of someone not a musta'min (i.e. pagan and apostates); (5) The infliction of the qisas must be in the least painful manner; (6) The person who inflicts the qisas must have the knowledge and competence which enable(s) him to inflict it. Id. Otherwise, a professional executioner is assigned to carry out the sentence on behalf of the victim or his family; (7) The person shall not inflict a greater degree of harm than that which has been inflicted; (8) Talion (physical punishment) should not be applied unless conclusive evidence exists. \textit{Id.} Doubtful evidence is valid to sustain diyya (monetary payment) only. \textit{Id.}} Islamic law also recognizes varying degrees of homicide based on the intent of the perpetrator and the manner of the killing. Only some of these types of homicide are subject to the qisas penalty.\footnote{LIPPMAN, supra note 324, at 50–51. Intentional killing with an instrument that is recognized as a deadly weapon is called \textit{quatl al'amd}, and it is punishable by retaliation. \textit{Id.} at 50. The intent to kill is ascertained by the type of weapon used. If an instrument is used which is recognized as potentially deadly, the intent to kill is inferred. \textit{Id.} When a killing occurs that is done with an instrument that is not one which is widely accepted as having deadly potential, it is called \textit{qatl shibhu'l-'and}. \textit{Id.} at 51. The punishment for this type of homicide is the payment of diyya and religious atonement and the relinquishment of inheritance from the victim. \textit{Id.} Third, the inadvertent killing of another is called \textit{gatl al-khata'} and is punishable by requiring the freeing of a Muslim slave, or paying compensation to the victim's family and fasting. \textit{Id.} \textit{Gatl al-khata'} homicides are those which result from an error in act or an error in intention. \textit{Id.} Finally, \textit{gatl bi-sabab} is a killing that is the result of a chain of events which the defendant sets in motion. \textit{Id.} It is punished by requiring the defendant to pay monetary compensation and he will lose the right to inherit. \textit{Id.}} In addition, if there is less than conclusive proof of the guilt of the defendant physical punishment will not be extracted.\footnote{Id.} In cases of doubt, diyya, or monetary payment to the victim's family, will be required.

There is a strong presumption of innocence under Islamic Shari'ah, which was mandated by the Prophet Muhammad.\footnote{SANAD, supra note 317, at 72.} The Prophet said, "[a]void condemning the Muslim to hudud whenever you can and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favor
of innocence than in favor of guilt.”

The judge is directed to nullify the penalty if there is any doubt as to the guilt of the accused. According to the Prophet, “[p]revent punishment in cases of doubt. Release the accused if possible, for it is better that the ruler be wrong in forgiving than wrong in punishing.” In keeping with this general regard for the rights of the accused, only circumstantial evidence that tends to exonerate the accused will be admitted; incriminating circumstantial evidence is excluded.

II. QISAS CRIMES AND PUNISHMENT: THE ROLE OF THE VICTIM’S FAMILY IN CHOOSING THE PUNISHMENT OF THE PERPETRATOR

Since murder is a qisas crime, which is against an individual, the victim’s relatives play an important role in the sentencing of the defendant. The victim’s heirs are encouraged to forgive the offender. According to the Qur’an:

We ordained therein for them: “Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.” But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (no better than) wrongdoers.

One of the traditions of the Prophet amplifies the recommendation of forgiveness set forth in the Qur’an. According to the Sunna, “[i]t is regarded as more meritorious to remit retaliation . . . .” Short of total forgiveness, the family of the victim of an intentional murder for which the qisas penalty may be extracted may seek diyya, monetary payment. This payment serves to satisfy the victim’s family, and no further punishment is inflicted. If the defendant is unable to pay the diyya, which is a set amount regardless of status of the victim or ability to pay of the perpetrator, the state will pay it.

The features of Islamic law that are most relevant to the present discussion are (1) the prosecution by the victims’ family and (2) the right to forgive, or extract payment, in lieu of the death penalty. The first difference is related to the dissimilar history of the Arabian Peninsula and the surrounding Middle Eastern

355. Id.
356. Id. at 73.
357. Id.
358. LIPPMAN, supra note 324, at 51, 84–85.
359. EL-AWA, supra note 31, at 85.
360. THE QUR’AN, supra note 1, at 5:45.
361. EL-AWA, supra note 31, at 85.
362. Id. at 89. Intentional killing with a deadly weapon (gatl’al-‘amd) is among those types of homicide for which the qisas penalty may be extracted. Id. at 89–90.
363. Id. at 89–90.
cultures whose rulers did not find it necessary to remove the victims from the process of prosecution and punishment of murderers in order to consolidate their power and increase their treasuries. The second difference comes from the Qur'an itself. Unlike the Judeo-Christian texts, the Qur'an explicitly takes into account the role of the victims of crime in sentencing. Jesus preached that those who are wronged are encouraged to grant forgiveness, but in the Qur'an, they are also empowered to withhold the qisas penalty. Thus, although the state maintains responsibility to punish the murderer out of concern for the protection of society as a whole, its ability to inflict the death penalty is limited by the right of the victims to forgive the perpetrator.

In the West, as discussed previously, there was no inevitability to the conversion of homicide from a private wrong to a crime against the state and the official removal of the victims' family members from sentencing decisions. This came about due to particular historical circumstance and power struggles. Although religious doctrine and belief should not be considered at a murder trial, under the Anglo-American system it is nonetheless incorrect to assume that the participants at capital trials in the United States are unfamiliar with scriptural passages dealing with murder and forgiveness. In fact, these scriptures are referred to in many trials. If the scriptures were as clear as the Qu'ran in placing the victims at the center of the prosecution and sentencing decisions, and calls for mercy clearly encouraged, perhaps American courts would not be so reluctant to find a place for the victims to at least give their opinions on sentencing. Thus, such testimony would not be considered either constitutionally or inherently irrelevant, based on our historical criminal jurisprudence. Nor would it be considered religiously or morally irrelevant, based on our Judeo-Christian traditions. As victims rights are gaining more and more attention, and as religious leaders are becoming more outspoken in opposition to the death penalty, perhaps it is time to reexamine the underlying and unspoken barriers to victim sentencing opinion testimony. Examining the treatment of victims under Islamic law provides a perfect mirror for doing so.

PART THREE: PROPOSAL FOR ALLOWING VICTIM OPINION TESTIMONY IN THE SENTENCING STAGE OF A CAPITAL CASE

Even when state legislatures have crafted victim rights statutes, as was the case the Lynn, rather than analyze the issues under the normal rules of evidence, weighing and balancing the probative and prejudicial effect of the evidence, and come to a determination based on the definitions of relevant evidence for a sentence to consider, courts cling to the "special" rules of
"constitutional relevance" discussed in Booth. This insistence to classify all victim testimony in a homicide case as irrelevant stems from the unexamined belief that homicide is a crime against the state and that the true victims are mere interlopers in the system that is bound to punish the perpetrator.

Some statements by the courts discussed above that invoke the responsibility of the community as a whole to punish the offenders and support their relevance determination with reference to the classification of homicide as a crime against the state rather than as an individual wrong lend credence to this argument, and they are themselves irrelevant to the issues that courts were charged with determining in those cases. For example, courts' holdings about whether the testimony calling for leniency was constitutionally permissible or relevant under the state sentencing and victims' rights statutes lend credence to this argument. Moreover, even if such considerations were relevant to the issues discussed by the courts cited above, allowing the victims to give an opinion on sentencing would not by any stretch of the imagination convert the crime of murder back into an individual wrong for which the state cannot exact punishment. Nor would the jury abdicate any social responsibility as the voice of the "community" to punish the defendant. Whether or not the jury was influenced by a call for mercy, the jury would still recommend a severe punishment for the defendant: life in prison.

While the Booth opinion may be intact as it applies to victim opinion testimony that would allow the victims to incite the jury to impose a punishment of death by requesting that the defendant be given the death penalty, interpreting Booth to ban victims' calls for leniency as constitutionally irrelevant in violation of the Eighth Amendment stretches the holding of Booth beyond reason. Thus, states whose courts have determined that Booth remains intact as to victim opinion testimony should not shy away from enacting legislation that allows the victims to express their views on sentencing when they are calling for leniency.

As to the Oklahoma scheme, its constitutionality depends on whether Payne overruled all of Booth by implication or whether, as the majority of courts hold, it left intact the portion of Booth that prohibited victim opinion testimony. Since the Supreme Court has refused to answer this question, victims may testify either for death or for leniency. As stated above, where victims call for leniency, such testimony would not violate Booth. However, if Oklahoma is correct that Booth was implicitly overruled in its entirety by Payne, a simple statement as to whether the victims want the death penalty to be imposed would not, in most cases, cause the testimony to be more prejudicial than probative because, after giving emotional impact testimony about the life of the victim and the impact of his or her death and the crime on the family,
most jurors would assume that the victim’s family members are in favor of the death penalty. Furthermore, even if the victim impact testimony is constitutionally relevant to the harm caused by the defendant, such testimony is often so emotionally laden that whatever harm the Booth court sought to avoid by banning both impact and opinion testimony will likely have occurred once the impact testimony is given. It would take a very hard-hearted person not to be swayed by the emotional impact of testimony regarding the near death of a three-year-old, who witnessed the brutal murder of his mother and siblings and who asks when they are coming home.

For all these reasons, courts should interpret the ban on victim opinion testimony as permitting statements calling for leniency. Furthermore, legislatures should draft sentencing statutes that define of victim impact testimony to include statements regarding the proper sentence to be imposed. If the Oklahoma model is followed, even victim statements calling for the death penalty would cause little, if any, further prejudice to the defendant. As for statements calling for mercy, under the analysis set forth above, statutory definitions of victim impact statements that include calls for mercy should be analyzed under the normal rules of evidence and should survive any constitutional challenges under Booth and Payne.

CONCLUSION

Though it is very unlikely that the law in the United States will ever allow victims to have the final say in choosing a convicted person’s punishment, we can and should find some space in our death penalty jurisprudence to allow the family members of a victim to express their opinions as to the proper sentence to be imposed. Even though most courts that have examined this issue have determined that victim opinion testimony is irrelevant at the sentencing stage of a capital murder trial, there is nothing sacred about the rules of evidence. As long as the defendant’s constitutional rights are protected, the rules can be changed.

The reluctance to allow victim opinion testimony as to sentencing can be traced to the historical development of the concept of a crime against the state, a concept that has largely left the victims out of the official criminal procedure in the United States. Allowing the victims to voice an opinion at sentencing would not in any way impinge on the jury’s power to decide whether the defendant should be sentenced to death. A simple statement by the witness as to whether the death penalty should be imposed should be allowed. If the victims want the death penalty, the court would have to engage in a weighing of the probative versus prejudicial value of the statement. After hearing the impact statements by the victims, a simple statement by the
victims asking for the death penalty to be imposed would not be prejudicial in most cases, as the jury would probably assume that the victims want the death penalty. They are, after all, witnesses presented by the prosecution.

When the victims call for mercy, the case for allowing victim opinion testimony is even stronger. When the family members of murder victims call for mercy, they are silenced by the prosecutors and twisted interpretations of the Eighth Amendment. The decision to impose the death penalty is supposed to be made on the basis of an unemotional weighing of aggravating and mitigating circumstances, taking into account the harm caused by the murder—beyond simply the extinction of a human life. Mercy is not considered a relevant consideration. The religious arguments in favor of the death penalty in the United States normally focus on the *lex talionis* verses of the Old Testament. Mercy is not called for in these texts. The New Testament is sometimes quoted in support of forgiveness. Jesus recommends personal forgiveness for wrongs committed. But the language of those New Testament verses is ambiguous when applied to a jury making a determination as the representatives of the community whether to impose the death penalty.

The support for the death penalty in the United States is connected to the historical, religious, and philosophical backdrop of Western civilization and culture. The place of the victim's family at a trial for murder is also connected to those factors. If we consider the role of the victims' family under Islamic law, we open ourselves to the possibility that allowing the victims even the slightest role in determining the sentence—for example, simply advising the jury of their preference—would not threaten our criminal justice system. It would empower victims, and in some cases, provide a place for mercy in the courtroom. If a clear call for mercy had been enshrined in our religious texts and adhered to throughout generations of court proceedings, and had the medieval law not converted homicide from a private wrong to a crime against the state, courts today would not have the problems they encounter in refusing to find such testimony relevant under state law.