

# Seeking Sanctuary: Interviews with Family Members of Capital Defendants

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# SEEKING SANCTUARY: INTERVIEWS WITH FAMILY MEMBERS OF CAPITAL DEFENDANTS†

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† This Article is a collaborative effort between researchers and capital defenders. Those capital defenders among us routinely see the debilitating effects of psychological trauma on the family members of capital defendants and recognize that this harm generally is overlooked and, sometimes, viewed as an appropriate extension of capital punishment. The researchers involved in this project sought to understand the effects of a capital trial on family members and to subject their experiences to the rigors of scientific inquiry. Ultimately, we hope that this work will lay the groundwork for members of capital defendants' families, particularly their children, to become full participants in a restorative justice response to homicide, one that serves families, victims, and defendants.

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## INTRODUCTION

The effects of a capital charge on the family members of capital defendants are felt not only by the individuals themselves, but may impact the trial process and outcome as well. Many scholars and practitioners have analyzed important issues surrounding the death penalty, such as its meaning, purpose and morality,<sup>1</sup> as well as more

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<sup>1</sup> See FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT (Michael L. Radelet ed., 1989) [hereinafter FACING THE DEATH PENALTY] (discussing the meaning, purpose, contentiousness, and morality of the death penalty). Professor Radelet notes that "[t]he death penalty is one of the most controversial issues in American politics." Michael L. Radelet, *Introduction and Overview* to FACING THE DEATH PENALTY, *supra*, at 3, 6. Despite international condemnation of the death penalty, opinion polls show broad American support for the death penalty. *Id.* (noting that in one poll, seventy percent of Americans favor the death penalty for murder); see also Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 25, 25-46 (James R. Acker et al. eds., 1998) [hereinafter AMERICA'S EXPERIMENT] (offering an overview of public support for the death penalty). Public sentiment has greatly influenced policymaking regarding punishment. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 183-84 (1976) (plurality opinion) (noting that public sentiment is a legitimate basis for justice policy). As to moral issues surrounding the death penalty, religion often propels both individual and affiliational sentiments. See generally DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY (1990). The role of religion, and especially fundamentalist religious denominations that believe in a literal interpretation of the Bible and view God as punitive, has been linked to support for the death penalty for both adults and juveniles. See Harold G. Grasmick et al., *Religious Beliefs and Public Support for the Death Penalty for Juveniles and Adults*, 16 J. CRIME & JUST. 59-86 (1993).

The execution of innocent people and evidence of racial bias have tempered support for the death penalty. Indeed, in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Thurgood Marshall claimed that if given information about the death penalty, "the great mass of citizens would conclude . . . that the death penalty is immoral and therefore unconstitutional. . . . [T]he average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand." *Id.* at 363, 369 (Marshall, J., concurring). Perhaps the most striking problem associated with the death penalty is that we may execute the innocent. See MICHAEL L. RADELET

pragmatic issues of cost,<sup>2</sup> systemic unfairness to racial minorities and the poor,<sup>3</sup> and inaccuracy of the legal process.<sup>4</sup> These commentators have mostly ignored, however, the social and psychological consequences of capital punishment on individuals closely involved with the defendant.<sup>5</sup> In this Article, we seek to show that the death penalty process harms, and indeed can victimize such family members. The

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ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 10 (1992) (noting that hundreds of people have been wrongfully convicted of capital or potentially capital crimes.).

<sup>2</sup> See Radelet, *supra* note 1, at 8–9 (explaining that capital murder trials are more expensive than other murder trials). Although the cost could be decreased by reducing the number of possible appeals, presently over two thirds of death sentences are overturned on appeal. See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at 5 (2000), available at <http://www.law.columbia.edu/instructionalservices/liebman>; see also LANE NELSON & BURK FOSTER, DEATH WATCH: A DEATH PENALTY ANTHOLOGY 7 (2001) (stating that the estimated cost of a death penalty trial in New York would be \$1,828,000); Robert Bryce, *Trial's High Costs Tax Jasper Coffers*, CHRISTIAN SCI. MONITOR, Feb. 25, 1999, at 2 (explaining that the county of Jasper, Texas raised its property taxes by eight percent to finance death penalty trials); *Does Death Work?*, ECONOMIST, Dec. 10, 1994, at 27–28 (stating that it costs three million dollars for an execution in Florida, money that could house three prisoners in high-security prison for forty years each).

<sup>3</sup> See ABA Recommendation No. 107 (1997), available at <http://www.abanet.org/irr/rec/107.html> (calling upon jurisdictions to stop carrying out the death penalty until some of its flaws are addressed, including “discrimination in capital sentencing on the basis of the race of either the victim or the defendant”).

<sup>4</sup> See LIEBMAN, ET AL., *supra* note 2. Serious error—error substantially undermining the reliability of capital verdicts—has reached epidemic proportions. See *id.* More than two out of three cases involving a capital sentence were found by a reviewing court to be seriously flawed. *Id.* Notably, Liebman and his coauthors’ study included the states from which this Article’s study draws. *Id.* at vii; see also JIM DWYER ET AL., ACTUAL INNOCENCE xiv (2000) (reporting in 1999 that irrefutable evidence proved that over sixty people were sent to death row for crimes they did not commit); *Ill. to Suspend Executions, Study Wrongful Convictions*, BOSTON GLOBE, Jan. 31, 2000, at A5 (reporting that Illinois Governor George Ryan called for a moratorium on executions in the state, citing the large number of death sentences reversed on appeal).

<sup>5</sup> But see Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants’ Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 FLA. ST. U. L. REV. 1119, 1124 (1999) (explaining that death row defendants’ family members suffer from stigmatization, social isolation, depression and chronic grief, and supporting execution impact statements from the family members of the convicted); Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in AMERICA’S EXPERIMENT, *supra* note 1, at 477, 477–79 (describing several unique aspects of capital punishment, including its impact on family members); Sarah Eschholz et al., *Offenders’ Family Members Responses to Capital Crimes: The Need for Restorative Justice Initiatives* (2002) (unpublished manuscript, on file with author) (using this Article’s data set to examine the need for restorative justice measures within a capital punishment context). An individual previously known as brother, son, husband, father becomes known as the “accused,” “defendant,” “offender,” “inmate,” “pardoned,” or perhaps “exonerated,” depending where his case resides in the continuum of legal proceedings. As a result, we had a difficult time arriving at a consistent term to refer to capital defendants. We decided to use either “defendant”—even though a trial has concluded—or “offender,” the term most often used in restorative justice literature. Further, we use the inasculine pronoun because all of the defendants in this study are male, as are most capital defendants.

theoretical backdrop to this Article includes the victims' rights movement<sup>6</sup> and the restorative justice movement.<sup>7</sup> The victims' rights movement structures our understanding of how homicide traumatizes the family members of homicide victims twice—both at the time of the crime itself and through the secondary victimization<sup>8</sup> caused by the criminal justice system's response. At the same time, restorative justice provides the context for understanding harm<sup>9</sup> and the ways in which the system addresses harm.

The neglect of defendants' family members not only harms the families directly, but it also may impact the capital trial and sentencing processes. For example, the psychological trauma the families experience may impede their ability to assist with the investigation and presentation of mitigation evidence.<sup>10</sup> Therefore, neglect of defend-

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6 The victims' rights movement stresses the impact of homicide on victims' family members and the need to provide resources for crime victims. See LEIGH GLENN, *VICTIMS' RIGHTS* (1997); PEGGY M. TOBOLOWSKY, *CRIME VICTIM RIGHTS AND REMEDIES* 3–11 (2001) (providing an overview of the victims' rights movement); see also Susan L. Karamanian, *Victims' Rights and the Death-Sentenced Inmate*, 29 ST. MARY'S L.J. 1025, 1028–35 (1998) (discussing the role of victims' rights in capital cases). Karamanian points out that the victims' rights movement calls for swift retribution and the limiting of defendants' procedural rights. See *id.* at 1031. Thus, she argues that victims' amorphous right of participation is “dismantling an already problem-plagued habeas process” and trumping the rights of defendants. *Id.* at 1035.

7 The restorative justice movement emphasizes the needs of victims, offenders, and communities as they attempt to recover from the harm created by violent crime. For an overview of restorative justice, including its roots and theory, see Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration*, 41 AM. BEHAV. SCIENTIST 768, 771–78 (1998), and John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 4–6 (1999). For descriptions of restorative justice which note that *healing* is not a term often associated with criminal justice or law, see also DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE* 37–51 (2d ed. 2002), and HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990).

8 See GLENN, *supra* note 6, at 1–4, 13–15 (discussing the alienation of victims). The term “secondary victimization” describes the harm that governmental process and actors cause to victims. See DEBORAH SPUNGEN, *HOMICIDE: THE HIDDEN VICTIMS* 10–11 (1998) (discussing the notion of a “second wound” which is often inflicted by processes and actors involved with the criminal justice system, including the defendant, media, prosecutors, police, friends, and family); see also Lula M. Redmond, *Sudden Violent Death*, in *LIVING WITH GRIEF AFTER SUDDEN LOSS* 53–71 (Kenneth J. Doka ed., 1996) (stating that experiences with the criminal justice system, media, and the police may exacerbate victims' adjustment problems, and that many families describe the trauma associated with this secondary victimization as more severe than the psychological trauma of the murder itself). Spungen, however, views the term “secondary victimization” as inappropriate for failing to convey the extent of the pain caused by those from whom the victim expected help. See SPUNGEN, *supra*.

9 See Eschholz et al., *supra* note 5 (explaining that restorative justice is based on the premise that crime creates a rift in the community and in individuals' lives and that the rift is at the center of the notion of harm).

10 Mitigation evidence consists of facts and circumstances that reduce the culpability and blameworthiness of a defendant. If the defendant is convicted of a capital crime, mitigation evidence takes on critical importance because the trial moves to a sentencing

ants' families may negatively affect the reliability of the outcome of death penalty trials.<sup>11</sup>

We interviewed the family members of nineteen capital defendants and studied the harm that occurs to families. The data show that defendant family members are major stakeholders in a restorative justice outcome.<sup>12</sup> That is, family members stand to benefit from restorative justice because they often are harmed by the offense itself, by the state's intention to seek the death penalty, and by interactions with the criminal justice system, its actors, the community, and the media. Our research revealed that the cumulative effect of these harms produces trauma responses within families of capital offenders that are similar to the experiences of murder victims' families.

## I

### VICTIMS AND THE CRIMINAL JUSTICE PROCESS

In developed nations, the focus of crime resolution at some point shifted from redressing harm done to individuals to redressing the perceived harm to society. As a result, an increased focus on deterrence and retribution left victims relegated to the status of mere witnesses.<sup>13</sup> Consequently, victims themselves were often distanced from

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phase in which jurors decide what punishment the defendant will receive. Jurors hear evidence presented by the state about the aggravating circumstances that increase the severity of the offense and make it eligible for punishment by death. To counter this evidence, the defense presents evidence showing that the defendant is an individual who is worthy of life. The argument for a life sentence is often centered around information and testimony provided by the defendant's family. Therefore, factors that diminish the ability of the defendant's family to contribute relevant and material evidence to the defense for the sentencing phase presentation can erode the effectiveness of the defense, and therefore potentially affect the reliability of the outcome of the trial.

<sup>11</sup> In death penalty cases, fact-finding procedures aspire to a heightened standard of reliability. See *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case." (quoting *Gardner v. Florida*, 430 U.S. 349, 363-64 (1977) (White, J., concurring) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976))); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (citations omitted)); see also *California v. Ramos*, 463 U.S. 992, 998 (1983) (recognizing "the qualitative difference of death from all other punishments").

<sup>12</sup> Restorative justice brings a number of "key stakeholders"—those who have been affected by a crime—together in a process that promotes healing. See Bazemore, *supra* note 7, at 769-70. The restorative justice movement emphasizes the needs of victims, offenders, and communities as they attempt to recover from the harm created by violent crime. See *id.*

<sup>13</sup> See Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 23 (1999) (stating that in ancient legal codes, such as the Torah and the Code of Hammurabi, victims played a central role in crime resolution and that restitution

the process of reaching resolution.<sup>14</sup> Moreover, as nations modernized, they also excluded victims' families from the criminal justice process.<sup>15</sup> These changes went unquestioned until the last half of the twentieth century.<sup>16</sup> A sustained rise in crime rates during the 1960s and 1970s,<sup>17</sup> and a concomitant increase in crime victims' recognition of their alienation from the criminal justice system, triggered a reexamination of the system's treatment of victims.<sup>18</sup> As a result, crime victims, including surviving family members of homicide victims, currently have greater access to the criminal justice system.<sup>19</sup>

#### A. The Victims' Rights Movement

President Lyndon Johnson's Commission on Law Administration and Justice recommended an increased focus on crime victims' needs and losses, as well as a need for greater victim involvement in the criminal justice process.<sup>20</sup>

Around this time, two additional phenomena emerged to support crime victims. First, victimology, a new academic specialty within the field of criminology, arose. Victimology is the study of the social and

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was more important than retribution); *see also* ROBERT ELIAS, *VICTIMS OF THE SYSTEM: CRIME VICTIMS AND COMPENSATION IN AMERICAN POLITICS AND CRIMINAL JUSTICE* 2, 19–20 (1983) (discussing the evolving role of victims in the criminal process); TOBOLOWSKY, *supra* note 6, at 5–6 (same); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 *STAN. L. REV.* 937, 938–42 (1985) (providing a comprehensive review of the historical legal role of victims).

<sup>14</sup> *See* sources cited *supra* note 8 and accompanying text.

<sup>15</sup> *See* JOHN HAGAN, *VICTIMS BEFORE THE LAW: THE ORGANIZATIONAL DOMINATION OF CRIMINAL LAW* 8–9 (1983) (noting that in early tribal societies, which were largely kinship based, victims and their families were prominent in avenging harms done to them).

<sup>16</sup> *See* TOBOLOWSKY, *supra* note 6, at 6–9.

<sup>17</sup> JAMES ALAN FOX & MARIANNE W. ZAWITZ, *BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE U.S.* 9 (2001), *available at* <http://www.ojp.usdoj.gov/bjs/homicide/hmrt.htm> (reporting that rates of homicide victimization doubled between the mid-1950s and mid-1970s).

<sup>18</sup> *See* TOBOLOWSKY, *supra* note 6, at 7–9.

<sup>19</sup> *See id.* at 9–11 (stating that victims have seen a substantial increase in the services that are available to them); *see also* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 *UTAH L. REV.* 289, 289 (explaining that thirty-one states have included victims' rights provisions in their state constitutions and that other states address victims' rights by statute). Moreover, the victims' rights movement recognized that the families of murder victims are also victims. *See* SPUNGEN, *supra* note 8, at 8–10. Indeed, Spungen explains the need for a term to describe this category of people. Although the terms "homicide survivor" and "survivor-victim" are used, she prefers the term "co-victim," as it does not assume that such family members have reached the psychological state in which they are survivors. *Id.* at 9.

<sup>20</sup> For an overview of the formation and work of Johnson's Commission, *see* GLENN, *supra* note 6, at 13–15. In 1965, Johnson initiated the President's Commission on Law Enforcement and Administration of Justice, often referred to as the Katzenbach Commission, which set up the Law Enforcement Assistance Administration. *Id.* Furthermore, in 1968, Johnson created the National Commission on the Causes and Prevention of Violence. Together, these commissions focused national and political attention on crime. *See id.*; TOBOLOWSKY, *supra* note 6, at 7–8.

psychological impacts of victimization,<sup>21</sup> and victimologists study the status and role of victims within the criminal justice system.<sup>22</sup> The second phenomenon, an outgrowth of feminism, was the development of the rape crisis and domestic violence movements. Founders of these movements sought to elevate the role of rape and abuse victims within the criminal justice system, and, moreover, to support their psychological, physical, and financial needs.<sup>23</sup>

During the 1970s, the federal government made grants available to state law enforcement agencies so that they could incorporate victims into the criminal justice process.<sup>24</sup> Personnel and volunteers were trained to provide support for victims' psychological and emotional needs, and most states initiated victim-oriented programs that are still in existence today.<sup>25</sup> These services addressed homicide victims' long- and short-term needs and included counseling, medical services, and compensation for losses.<sup>26</sup>

The victims' rights movement gained momentum during the 1980s, when President Ronald Reagan's initiatives formed the founda-

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<sup>21</sup> See RONALD D. HUNTER & MARK L. DANTZKER, *CRIME AND CRIMINALITY: CAUSES AND CONSEQUENCES* 170 (2002) (defining victimology as the "study of crime victims and issues related to victimization"). The authors note that while some consider victimology "an important subfield within criminology," others consider it "a separate discipline in itself." *Id.*; see also WALTER S. DEKESEREDY & MARTIN D. SCHWARTZ, *CONTEMPORARY CRIMINOLOGY* 126 (1996) (describing the growth of victimology as an academic discipline); John Pointing & Mike Maguire, *Introduction: The Rediscovery of the Crime Victim*, in *VICTIMS OF CRIME: A NEW DEAL?* 1, 1 (Mike Maguire & John Pointing eds., 1988) (stating that criminologists traditionally viewed victims simply as sources of information about the occurrence of crimes).

<sup>22</sup> See HUNTER & DANTZKER, *supra* note 21, at 168-70.

<sup>23</sup> See GLENN, *supra* note 6, at 15-17; TOBOLOWSKY, *supra* note 6, at 7-8. Notably, efforts to support the psychological needs of rape victims sparked renewed interest in the study of psychological trauma and its aftermath. See JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 9-32 (1997) (arguing that the study of trauma has historically emerged in conjunction with a political movement).

<sup>24</sup> See GLENN, *supra* note 6, at 13-15, 51 (explaining that in 1974, the Law Enforcement Assistance Administration set up the Crime Victim Initiative to grant resources for victim support services offered through law enforcement and prosecutors' offices).

<sup>25</sup> See *id.* at 15.

<sup>26</sup> See TOBOLOWSKY, *supra* note 6, at 7-8. The National Organization for Victim Assistance (NOVA), established in 1975, also supports states' and localities' attempts to allow victim participation in the criminal justice system, as well as to provide counseling and medical services. See Nat'l Org. for Victim Assistance, *About the National Organization for Victim Assistance*, at <http://www.try-nova.org/AB/aboutnova.html> (last visited Oct. 18, 2002). NOVA claims that the following seven principal activities comprise the core of victims' services: (1) protecting victims from intimidation and harm; (2) informing victims about the criminal justice process; (3) helping victims obtain reparations; (4) preserving victims' property and employment; (5) protecting victims' rights to due process in criminal court proceedings; (6) treating victims with dignity and compassion; and (7) assuring victims enjoy the right to counsel. See Nat'l Org. for Victim Assistance, *Crime Victim and Witness Rights*, at <http://www.try-nova.org/Victims/cwrights.html> (last visited Oct. 18, 2002).

tion of the victims' support structures of the criminal justice system.<sup>27</sup> In April 1981, Reagan inaugurated "National Crime Victims Rights Week."<sup>28</sup> This symbolic act was significant for two reasons. First, it publicly demonstrated Reagan's commitment to victims. Second, and more important, it was the first time a government entity associated the term "rights" with crime victims.<sup>29</sup> A number of legislative initiatives followed. These initiatives included setting guidelines for supporting medical services; providing for restitution, which was funded primarily by a \$100 million allocation to victims' compensation programs; and allowing victim impact statements in sentencing.<sup>30</sup>

The use of victim impact statements in death penalty trials, however, is controversial. In *Booth v. Maryland*, the U.S. Supreme Court held that the admission of victim impact statements in death penalty cases was violative of the Eighth Amendment.<sup>31</sup> However, the Court overruled *Booth* four years later in *Payne v. Tennessee*.<sup>32</sup> The Court's decisions reflect the tension between those who believe it is essential

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<sup>27</sup> The victims' rights movement has not been without controversy, particularly surrounding the Reagan initiatives. See Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 383-85 (1999) (arguing that the victims' rights movement is less concerned with victims than with crime control).

<sup>28</sup> See GLENN, *supra* note 6, at 17.

<sup>29</sup> See Henderson, *supra* note 13, at 951-53 (discussing the political symbolism associated with the terms "rights" and "victim's rights"). Professor Henderson notes that the term "rights" is "a powerful rhetorical device, particularly in American history and culture." *Id.* at 952. Specifically, the term "victims' rights" often is associated with the rhetoric of conservative political agendas, which typically incorporate the crime control model of justice. See *id.* Indeed, the term implies "some undefined, yet irreducible right of crime victims that 'trumps' the rights of criminal defendants." *Id.* at 952; see also GLENN, *supra* note 6, at 4, 18-19 (explaining that victim participation is a right); Henderson, *supra* note 27, at 385-421 (setting forth the arguments made by victims' rights advocates and revealing their shortcomings). Henderson concludes that a constitutional amendment securing victims' rights is premature, as evaluations of victims' rights innovations are scarce. See *id.* at 441-42.

<sup>30</sup> See GLENN, *supra* note 6, at 17-18; TOBOLOWSKY, *supra* note 6, at 10-11; Nancy E. Marion, *The Federal Response to Crime Victims, 1960-1992*, 10 J. INTERPERSONAL VIOLENCE 419, 423 (1995).

<sup>31</sup> 482 U.S. 496, 509 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

<sup>32</sup> 501 U.S. at 830. The *Booth* Court held, in a 5-4 decision, that victim impact statements violate the Eighth Amendment. 482 U.S. at 509. Similarly, the Court in *South Carolina v. Gathers*, 490 U.S. 805, 812 (1989), *overruled by* *Payne*, 501 U.S. at 830, held in a 5-4 decision that a trial prosecutor's suggestion that a death sentence was warranted in part because the victim was a religious man and a registered voter violated the Eighth Amendment. In 1991, however, the *Payne* Court, in a 6-3 decision, held that victim impact testimony is constitutional and that it helps capital juries to "assess meaningfully the defendant's moral culpability and blameworthiness." 501 U.S. at 825, 830. Chief Justice Rehnquist, writing for the majority, noted that victim impact evidence may counter the use of mitigation evidence presented by the defense. *Id.* at 822. Thus, Rehnquist acknowledged the tension between co-victims, who make victim impact statements, and members of the defendants' families, who generally provide the bulk of mitigation evidence.

for jurors to hear the voices of those left behind,<sup>33</sup> and those who assert that such testimony is potentially inflammatory and prejudicial to defendants, as well as irrelevant to their blameworthiness.<sup>34</sup>

One of *Payne's* unfortunate effects is that families of defendants and families of victims are unavoidably pitted against each other in court.<sup>35</sup> The heightening of adversarial feelings between the families of victims and defendants undoubtedly runs counter to the goals of restorative justice.<sup>36</sup>

## B. Restorative Justice Values in Criminal Justice

Restorative justice advocates oppose the practices of the traditional criminal justice system, which seeks to detect crimes and perpetrators, and to determine appropriate punishments.<sup>37</sup> Conversely, restorative justice advocates view crime as a fundamental disruption of individual and community relationships that is best addressed by focusing on the needs of the victim and by probing the moral, social, economic, and political aspects of the offense.<sup>38</sup> With an eye toward healing, restorative justice advocates acknowledge the harm done by an offense and seek repair.<sup>39</sup> Accordingly, the following are four goals of restorative justice: (1) to provide for the needs of victims and their families; (2) to address safety and quality of life issues in commu-

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<sup>33</sup> See, e.g., Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 494–96 (1999) (discussing what victims' survivors perceive as unfairness in capital sentencing procedures). Professor Cassell describes the outrage of Marvin Weinstein, whose ten-year-old daughter was murdered. Weinstein was enraged that the defendant's mother was allowed to address the jury—to show them her grief—but that he could not speak to the jury about his daughter. *Id.* at 495.

<sup>34</sup> See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 362–66 (1996); Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 546 (1999) (arguing that victim impact statements “block the jury’s ability to hear important counternarratives that they are duty-bound to consider when deciding whether to exercise mercy during the sentencing phase” of a capital trial); Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 64–65 (1992).

<sup>35</sup> While victims' and defendants' families may share many emotions and experiences—fear of testifying, loss of control over their lives, mortification at having intimate family matters discussed in open court, and a vital interest in the outcome of the proceedings—the mutual sympathy that these shared burdens might engender is often overshadowed by their competing roles at trial.

<sup>36</sup> See sources cited *supra* note 7.

<sup>37</sup> See VAN NESS & STRONG, *supra* note 7, at 227 (listing rehabilitation, deterrence, incapacitation, and punishment as leading principles of the criminal justice system).

<sup>38</sup> See generally ZEHR, *supra* note 7, at 181 (noting that crime is “a violation of people and of relationships”); Braithwaite, *supra* note 7, at 2 (arguing that restorative justice provides a “different way of thinking about deterrence, rehabilitation, incapacitation, and crime prevention”).

<sup>39</sup> See, e.g., ZEHR, *supra* note 7, at 181 (suggesting that “[j]ustice ought . . . to focus on repairing, on making things right”); Braithwaite, *supra* note 7, at 5 (arguing that the core values of restorative justice involve promoting healing and repairing harm).

nities damaged by the offense; (3) to offer treatment as well as punishment for the offender while maintaining community safety; and (4) to provide mediation and reconciliation for those who choose it.<sup>40</sup> Moreover, this approach attempts to engage all key stakeholders in the criminal justice process.<sup>41</sup>

Researchers report that programs based on the restorative justice model are beneficial to victims, co-victims, communities, and offenders,<sup>42</sup> and that the use of such programs is growing.<sup>43</sup> Kathryn M. Turman, Director of the U.S. Department of Justice's Office for Victims of Crime, has noted that restorative justice offers "viable options" for serving a wide range of victims "as they try to resolve the impact of crime on their lives."<sup>44</sup>

## II

### AN EXTENDED VIEW OF VICTIMIZATION

#### A. Co-Victims of Homicide

Criminology currently focuses on two sets of victims: direct victims, who experience a crime, and indirect victims, whom the offense impacts. The latter group includes a subset of family members often referred to as "co-victims."<sup>45</sup>

For every homicide, an estimated three family members survive.<sup>46</sup> These individuals experience painful and traumatic grief.<sup>47</sup> The sud-

<sup>40</sup> See Burt Galaway, *Restitution as Innovation or Unfulfilled Promise?*, 52 FED. PROBATION, Sept. 1988, at 3, 3-14 (providing a typology that explores the ways in which victims of communities can seek restitution through a restorative justice model while also addressing offenders and their punishment); Kent Roach, *Changing Punishment at the Turn of the Century: Finding the Common Ground*, 42 CANADIAN J. CRIMINOLOGY 249, 262-67 (2000) (describing retributive accountability, rehabilitative healing, and crime prevention as three of the goals of restorative justice).

<sup>41</sup> See Bazemore, *supra* note 7, at 779-85 (describing victims, offenders, and community as co-participants in addressing crime); Eschholz et al., *supra* note 5.

<sup>42</sup> See JOHN BRAITHWAITE, *RESTORATIVE JUSTICE & RESPONSIVE REGULATION* 45-71 (2002) (summarizing empirical data tending to show that restorative justice, when it involves both victims and offenders, satisfies victims, offenders, and communities better than existing criminal justice practices).

<sup>43</sup> See Bazemore, *supra* note 7, at 773-74 (describing increased international and national interest in restorative justice and noting its dominant role in Vermont's criminal justice policy).

<sup>44</sup> *Message from the Director*, OVC BULLETIN (U.S. Dep't of Justice, Office for Victims of Crime, Washington, D.C.), July 2000, at 1-2.

<sup>45</sup> See, e.g., SPUNGEN, *supra* note 8, at 9.

<sup>46</sup> See *id.* at 10. See generally Martie P. Thompson et al., *System Influences on Posthomicide Beliefs and Distress*, 24 AM. J. COMMUNITY PSYCHOL. 785, 786 (1996) (estimating that five million adults in the United States have lost a loved one to criminal or vehicular homicide).

<sup>47</sup> See SPUNGEN, *supra* note 8, at xix (describing the feelings of family members of murder victims as "the blackest hell accompanied by a pain so intense that even breathing becomes an unendurable labor"); Paul Rock, *Murderers, Victims and 'Survivors': The Social*

denness of homicide and its association with violence heighten the sense of loss.<sup>48</sup> Moreover, co-victims report feelings of isolation and stigmatization within their communities,<sup>49</sup> and often feel overlooked by our criminal justice system, which rarely recognizes the extent of their trauma and loss.<sup>50</sup>

Co-victims of homicide often experience chronic grief,<sup>51</sup> Post-traumatic Stress Disorder (PTSD),<sup>52</sup> and cognitive changes that reflect distress.<sup>53</sup> Recognizing that grief theory and PTSD do not fully describe the overall experience of co-victims, researchers argue that fur-

*Construction of Deviance*, 38 BRIT. J. CRIMINOLOGY 185, 194 (1998) (explaining that co-victims often lack the words to describe the depth of their pain).

<sup>48</sup> See Camille B. Wortman et al., *Coming to Terms with the Sudden, Traumatic Death of a Spouse or Child*, in VICTIMS OF CRIME 108-09 (Robert C. Davis et al. eds., 2d ed. 1997); M. Virginia Sprang et al., *Psychological Changes After the Murder of a Significant Other*, 70 SOC. CASEWORK 159, 162 (1989).

<sup>49</sup> See SPUNGEN, *supra* note 8, at 10-11.

<sup>50</sup> Cf. Angelynne Amick-McMullan et al., *Family Survivors of Homicide Victims: A Behavioral Analysis*, BEHAV. THERAPIST (Ass'n for Advancement of Behavior Therapy, New York, N.Y.) (1989), at 77 (finding a strong correlation between survivor adjustment and satisfaction with the criminal justice system's handling of the case); Thompson et al., *supra* note 46, at 795 (finding a significant negative relationship between the co-victims' measure of distress and satisfaction with the police).

<sup>51</sup> See Wortman et al., *supra* note 48, at 110-14 (explaining that acute grief may induce feelings of despair, fatigue, restlessness, irritability, and anger). In an "expected" death, grief usually lasts between a few months and a year. However, the grieving process is extended when a loss is sudden, violent, or malicious, or when the survivors believe that the death was random or preventable. See *id.* at 110-11.

<sup>52</sup> See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424 (4th ed. 1994).

The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity . . . or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate . . . The person's response to the event must involve intense fear, helplessness, or horror . . . . The characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event, . . . persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness . . . and persistent symptoms of increased arousal . . . .

*Id.* PTSD is a chronic and debilitating condition; people with PTSD experience exaggerated startle responses, sleep disturbance, guilt, memory impairment, trouble concentrating, and phobias. *Id.* at 424-25; see also Angelynne Amick-McMullan et al., *Homicide as a Risk Factor for PTSD Among Surviving Family Members*, 15 BEHAV. MODIFICATION 545, 552 (1991) (reporting that 23.3% of co-victims in a sample study reported full development of homicide-related PTSD and that as many as 50% were likely to experience at least some symptoms within their lifetimes). Additionally, when the sample was examined by major criteria, higher evidence was found. Specifically, 40% of the sample reported intrusions, 40% also reported avoidance, and 50% reported hyperarousal. The authors concluded that as many as 50% of the sample were likely to experience at least some symptoms of PTSD. *Id.*

<sup>53</sup> See Amick-McMullan et al., *supra* note 50, at 76 (noting that for many co-victims of homicide, "their world views [are] dramatically altered"); cf. Ronnie Janoff-Bulman & Irene Hanson Frieze, *A Theoretical Perspective for Understanding Reactions to Victimization*, 39 J.

ther studies are necessary to more fully understand the cognitive, physiological, and behavioral problems these individuals face.<sup>54</sup>

Childhood survivors of murdered siblings are particularly vulnerable to psychological trauma.<sup>55</sup> One study, for example, indicated that eighty percent of the sibling survivors had symptoms of a variety of psychiatric disorders.<sup>56</sup>

## B. Co-Victims and a Capital Offense

Given the heightened adversarial environment in capital cases, some commentators argue that capital trial proceedings aggravate the psychological distress of victims' families, even when co-victims support a death sentence.<sup>57</sup> Consider Reverend Bernice King, daughter of slain civil rights leader Martin Luther King, Jr., who suggests that rage and the desire for revenge take an emotional toll on co-victims.<sup>58</sup> For co-victims who do not support the death penalty, the capital trial process is especially traumatic.<sup>59</sup>

SOC. ISSUES 1, 1-3 (1983) (describing how victimization can shatter one's assumptions, such as the belief in personal invulnerability).

<sup>54</sup> Behavioral problems experienced by co-victims include phobic responses. For example, co-victims can develop an intense fear of stimuli associated with the offense. See Amick-McMullan et al., *supra* note 50, at 77. Additionally, co-victims can experience behavioral changes such as role changes within the family. *Id.* Amick-McMullan and her coauthors argue that the cognitive dimension of co-victims' reactions to homicide, as evidenced by the assumptive and behavioral changes they go through, renders PTSD and grief theory inadequate to describe the experience.

<sup>55</sup> See Linda N. Freeman et al., *Neglected Victims of Homicide: The Needs of Young Siblings of Murder Victims*, 66 AM. J. ORTHOPSYCHIATRY 337, 337-38 (1996).

<sup>56</sup> *Id.* at 340.

<sup>57</sup> Cf. Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 53 (2000); Donald J. Zelenka, *South Carolina Victim Advocate Helps Address Families' Concerns*, CORRECTIONS TODAY, July 1993, at 80, 80-82 (noting that the length and complexity of a death penalty case create a greater need for a victim advocate). Professors Radelet and Borg argue that the cost of a death penalty trial diverts money from victims, that a non-death sentence may make families feel as though their loved one was judged by the sentencer as unworthy of the ultimate penalty, and that the length and complexity of a trial prevent psychological wounds from healing. See Radelet & Borg, *supra*.

<sup>58</sup> See BERNICE A. KING, *HARD QUESTIONS, HEART ANSWERS: SPEECHES AND SERMONS* 41 (1996).

<sup>59</sup> See NOT IN OUR NAME: MURDER VICTIMS' FAMILIES SPEAK OUT AGAINST THE DEATH PENALTY (Barbara Hood & Rachel King eds., 2001). *Not in Our Name* features testimonials from members of Murder Victims' Families for Reconciliation (MVFR), a group that opposes the death penalty. Although its members are not immune to the desire for vengeance, MVFR's founders built the organization on the premise that the offender's death does not assist in the healing process, but rather escalates violence and actually prevents co-victims' healing. See *id.* As part of the healing process, restorative justice involves integrating a trauma into one's own life in a manner that does not involve sustained, persistent, and debilitating psychological damage, but rather transforms the tragedy into good for others. See *id.* The story of Audrey and Gus Lamm illustrates the trauma experienced by co-victims when the state and co-victims disagree about the death penalty. See State *ex rel.* Lamm v. Neb. Bd. of Pardons, 620 N.W.2d 763 (Neb. 2001). After the Nebraska Board

### C. Other Indirect Victims in Capital Cases

From a restorative justice perspective, it is important to note that the death penalty impacts a broad range of people beyond those intimately involved in a particular offense. Participants in the execution process, even those who indicate a strong belief in the death penalty, have expressed some discomfort, or even a great deal of anxiety, about their role in carrying out the death penalty.<sup>60</sup> For example, Fred Allen, a prison employee who participated in over a hundred executions, had an intense reaction to his work which resulted in uncontrollable tears and shaking.<sup>61</sup> Ron Steffey, an American historian living in Virginia, volunteered to witness an execution, hoping to probe deeper into the controversial issue of the death penalty.<sup>62</sup> Steffey reported feeling exhausted following the execution.<sup>63</sup> Reporter Leighanne Gideon recalled leaving executions in a dissociative state.<sup>64</sup>

### D. Family Members of Capital Defendants

Although there is a dearth of research on family members of capital defendants, some scholars have studied the impact that incarceration has on the children of inmates.<sup>65</sup> The children of incarcerated parents are harmed both by their parents' commission of a crime<sup>66</sup> and by the parents' absence stemming from incarceration.<sup>67</sup> The children often suffer psychological trauma from parent-child separa-

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of Pardons denied Gus and Audrey Lamm an opportunity to express their desire for clemency for the murderer of their wife and mother respectively, they sought a court order directing the Board to accord the Lamms a right to make a statement asking for clemency for the condemned man. *See id.* at 766; Renny Cushing, *The Silencing of the Lamms*, THE VOICE (Murder Victims' Families for Reconciliation Newsletter, Cambridge, Mass.), Spring/Summer 2001, at 8.

<sup>60</sup> *See Witness to an Execution*, Sound Portraits.Org, available at [http://www.soundportraits.org/on-air/witness\\_to\\_an\\_execution/transcript.php3](http://www.soundportraits.org/on-air/witness_to_an_execution/transcript.php3) (last visited Oct. 20, 2002).

<sup>61</sup> *Id.*

<sup>62</sup> *See* Ron Squire Steffey, *Witness for the Condemned*, 69 VA. Q. REV. 607 (1993).

<sup>63</sup> *Id.* at 617-18.

<sup>64</sup> *See Witness to an Execution*, *supra* note 60.

<sup>65</sup> *See generally* Denise Johnston, *Effects of Parental Incarceration*, in CHILDREN OF INCARCERATED PARENTS 59, 84 (Katherine Gabel & Denise Johnston eds., 1995) (indicating that children of incarcerated parents face enduring trauma).

<sup>66</sup> *Id.*

<sup>67</sup> *See id.* at 62-69 (reviewing major studies exploring the problems experienced by children of incarcerated parents); *see also* Travis A. Fritsch & John D. Burkhead, *Behavioral Reactions of Children to Parental Absence due to Imprisonment*, 30 FAM. REL. 83, 87-88 (1981) (discussing behavioral problems experienced by children of incarcerated parents); Stewart Gabel, *Behavioral Problems in Sons of Incarcerated or Otherwise Absent Fathers: The Issue of Separation*, 31 FAM. PROCESS 303, 304-06 (1992) (reviewing the literature of studies on children of an incarcerated parent).

tion;<sup>68</sup> have difficulty in establishing healthy relationships;<sup>69</sup> experience truancy, aggression, and withdrawal; and suffer a decline in their social and financial conditions. These children are more likely than the general population to become involved with the criminal justice system.<sup>70</sup> While one would expect children of capital offenders to have experiences similar to those of other children of incarcerated parents, it is also possible that the specter of a death penalty imposes additional risk factors for these children.

### III

#### DATA AND METHODOLOGY

##### A. Sample

Our initial sample consisted of twenty-four families of capital defendants. We were unable to contact participants in four instances and had one refusal, leaving us a final sample size of nineteen families. Sixteen defense attorneys who focus on death penalty trials and appeals in three southeastern states referred the individuals to us.

All family members were compensated fifty dollars for their time. Although some of the family members were well connected with the target population of families of capital defendants, we did not ask them to make additional referrals. At the time of the interviews, the capital defendants were involved in various stages of capital proceedings. Likewise, the length of time between the defendants' arrests and the interviews with their family members varied widely among the sample. The longest period between arrest and interview was nineteen years, and the shortest period was two years. The demographic data for the sample are found in Appendix Table 1.<sup>71</sup>

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<sup>68</sup> The negative impact of parent-child separation is well documented. *See, e.g.*, Fritsch & Burkhead, *supra* note 67, at 87-88; Johnston, *supra* note 65, at 68 tbl.5.6 (describing potential developmental effects on children, from infancy through late adolescence, and noting the effect of parent-child separation).

<sup>69</sup> *See* Creasie Finney Hairston, *The Forgotten Parent: Understanding the Forces that Influence Incarcerated Fathers' Relationships with Their Children*, 77 CHILD WELFARE 617, 621 (1998) (noting that "[p]arent-child relationships during imprisonment are tenuous at best").

<sup>70</sup> *See* Johnston, *supra* note 65, at 80.

<sup>71</sup> We do not claim that this sample is representative of the families of capital defendants. First, the participants in this study probably show greater organization, financial resources, and support of their loved ones than a total sample of family members might yield. Family members with fewer financial resources and weaker community ties are more difficult to locate. Moreover, capital defense attorneys were the source of referrals to family members who were involved in capital cases. There are certainly capital defendants who are alienated from their families during and after the capital trial process or whose families played a minimal, if any, role in their defense. Finally, the authors note that claims of a causal relationship between an offense and a family's trauma are based only on the families' report of changes that the offense brought into their lives.

## B. Methodology

We used a semi-structured interview protocol, reported in the Appendix, to conduct interviews with the members of the sample. The shortest interview was seventy minutes and the longest was three-and-a-half hours. The average length of an interview was approximately two hours. We taped and transcribed the interviews.<sup>72</sup>

We analyzed the transcripts using both inductive and deductive approaches. In the inductive analysis, we hypothesized that family members experience trauma when a loved one is charged with a capital crime. Using the Beck Depression Scale,<sup>73</sup> we assessed depression among the sample as a specific manifestation of trauma. If we identified trauma, we examined its manifestation using a variant of grounded theory.<sup>74</sup>

Grounded theory is a method of qualitative data analysis that allows the researcher to identify the meaning of data and that supports reliable and valid analysis. Additionally, by obtaining inter-rater reliability, we took measures to insure an unbiased analysis of the data.<sup>75</sup>

## IV

### SOURCES OF HARM<sup>76</sup>

*I understand that woman lost her son, I understand her feelings because we both lost sons. On that tragic evening, we both lost. Both of our lives were turned upside down for the rest of our lives.*

—A mother of a capital defendant

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<sup>72</sup> Testimonials are included *infra* Part IV (materials on file with the authors).

<sup>73</sup> AARON T. BECK ET AL., BDI-II: BECK DEPRESSION INVENTORY 1–2 (2d ed. 1996) (reporting numerous studies indicating that the average coefficient alpha, measuring the reliability of BDI, falls within the high eighties, making it one of the widest used and most respected tool for diagnosing depression).

<sup>74</sup> See generally ANSELM STRAUSS & JULIET CORBIN, BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND TECHNIQUES (1990) (explaining that grounded theory provides a systematic method of inductive guidelines used to collect and analyze data).

<sup>75</sup> Reliability in social science refers to the accuracy of the method. In qualitative analysis, the data are coded and categorized as a way of determining their meaning. To gain inter-rater reliability, separate investigators coded and categorized the data. We found over ninety percent agreement between individuals coding the same data.

<sup>76</sup> Mitigation evidence presented in death penalty trials often includes evidence of the failures and shortcomings of the defendant's family setting. Therefore, one might conclude that the trauma effects this study identifies in defendants' family members are merely artifacts of lifelong dysfunction. We acknowledge that defendants' family members sometimes exhibit undesirable behavior patterns. However, we believe that the trauma family members experience as a result of a loved one's criminal offense leads to symptomatology and psychiatric disorders in some and exacerbates existing disorders in others. Cf. Vivian B. Brown et al., *Level of Burden: Women with More than One Co-Occurring Disorder*, 27 J. PSYCHOACTIVE DRUGS 339, 345 (1995) (finding that multi-burdened women are less likely to complete substance abuse counseling than women with fewer psychological, social, and physical problems); Vivian Brown et al., *Level of Burden Among Women Diagnosed with Severe Mental Illness and Substance Abuse*, 31 J. PSYCHOACTIVE DRUGS 31,

Family members of victims and defendants experience psychological distress<sup>77</sup> and cognitive change,<sup>78</sup> which are exacerbated in part by the criminal justice system.<sup>79</sup> Co-victims are victimized by the homicide itself, and their anguish is exacerbated by the secondary victimization of the criminal justice system. The death penalty victimizes capital defendants' families differently, and the harms they experience come in layers. Foremost, defendants' families are hurt by their connection to the offense and by the State's notice to seek the death penalty. Then, processes and actors within the criminal justice system, the community, and media cause additional pain. The accumulated effects often manifest as depression and PTSD.

#### A. Contexts of Harm

Family members of capital defendants may experience extreme stress from the following sources: the underlying offense, notification that the State is seeking the death penalty, institutional failure, their community, the media, the court, defense attorneys, visitation with their incarcerated family member, notice of execution, and the execution itself. Although these sources of trauma are not necessarily linear, we discuss them in the approximate order in which they affect the family members.

##### 1. *The Offense, the Subsequent Arrest, and the State's Intent to Seek the Death Penalty*

*I asked who was the [victim] and she told me a white lady, and that is when the death penalty hit my mind. I have not been right since.*

—A mother of a capital defendant

Several family members indicated that they found out about their relatives' arrest from a community member. One mother explained that a stranger told her that her son had killed someone and had been arrested for murder. She stated that she felt utter disbelief and seemed suspended in time. When she was finally able to see her son, she realized that his life was in the hands of a lawyer who did not even

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32 (1999) (noting that individuals with multiple impairments are at risk for higher levels of dysfunction).

<sup>77</sup> See King & Norgard, *supra* note 5, at 1138–42 (discussing the psychological distress family members of capital offenders experience); Sprang et al., *supra* note 48, at 162 (discussing psychological distress symptoms associated with murder); see also Letter from Desmond M. Tutu, Archbishop Emeritus, Diocese of Capetown, South Africa, to Gerald Garrett, Chairman, Texas Board of Pardons and Paroles 2–3 (May 16, 2002), <http://www.abanet.org/crimjust/juvjus/beazelytutu102.html> (describing the stress-related hospitalizations of Napoleon's mother, and Napoleon's sister's loss of her scholarship to Rice University resulting from Napoleon's impending execution date).

<sup>78</sup> See Amick-McMullan et al., *supra* note 52, at 556–57; Janoff-Bulman & Frieze, *supra* note 53, at 2.

<sup>79</sup> See *supra* notes 8–12 and accompanying text.

know his name. A father talked about the anguish of being isolated from his family members by the police when he received the news that his son had been arrested.

The first few days following the arrest were terrifying for many family members, who were often unable to get information about their loved one. A father explained that he was unable to see his son for three weeks following his son's arrest and that his concern was heightened because a local sheriff had been indicted for killing a prisoner. A sister of another capital defendant said that she was in a state of shock and unable to communicate or eat after the arrest of her brother. When he was moved to a state mental hospital, her anxiety increased because she did not know what had happened to him.

Receiving notification that the State intended to seek the death penalty was very difficult for all of the family members. A grandfather remembered that he felt like someone had hit him over the head and was thankful that his daughter, the defendant's mother, was not in the room when he was told. A brother stated that after the arrest "they sat me down and told me that I needed to prepare for my brother actually losing his life."

## 2. *Institutional Failure*

*He did what he did because of his suffering from mental illness without getting good treatment.*

—A brother of a capital defendant

Institutional failure harmed some of the capital defendants and family members within the study population.<sup>80</sup> Perhaps nowhere is institutional failure more poignant than among family members who sought mental health services, but received inadequate care. Four family members expressed their belief that lack of adequate mental health support contributed to their loved one's offense.

One mother's story is particularly compelling. When her son began to act strangely by talking to himself, she recognized that he was hallucinating and that she needed to seek help on his behalf. During this time, the company for which she had worked for fifteen years cut her pay from \$10.00 to \$6.00 per hour. Unable to take a day off from work, and desperately needing overtime pay, she dropped her son off at a local hospital emergency room, where hospital personnel noted on his chart that he experienced hallucinations. Eventually, he was

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<sup>80</sup> See David Freedman & David Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 SOC. SCI. & MED. 1757, 1765–66 (2000) (finding that fifteen of sixteen death row inmates studied had experienced institutional failure); see also Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 574–78 (1995) (describing the link between failure of juvenile psychiatric facilities and one defendant's violent adult life).

referred to the local mental health center, where he sat in the waiting room without registering for several consecutive days. Soon after, he was arrested for murder. His mother reported feeling guilty for her son's offense, but she believes things might have turned out differently had someone at the hospital or mental health clinic treated her son's mental illness.

Another participant expressed agony that he could only watch as his brother's mental health deteriorated. There was nowhere in his community to turn for much-needed help. Another mother questioned the adequacy of the post-hospitalization care that her son received for his mental illness.<sup>81</sup>

### 3. *The Community*

*[At work], there were times when I felt harassed, harassed, I didn't feel threatened though, but I did feel like people took it as far as they thought they could. . . . [A]t the time I was a supervisor, which was, I think, the only thing that saved me from harassment going any further than it did.*

—A brother of a capital defendant

Capital defendants' families are often harmed by interactions with their community.<sup>82</sup> Perhaps the most extreme example involved the younger brother and sister of a capital defendant. Both had to quit school, in the ninth and tenth grades respectively, as a result of harassment and threatening letters. Most of the threats were directed at the brother, whose school principal and teachers indicated that they feared for his life. Finally, school officials suggested that he leave school because they could not guarantee his safety. In another community, the mother of a capital defendant found human feces on her doorstep.

Five family members experienced acute discomfort from subtle rather than overt harassment. Participants reported overhearing people in public places pointing them out as the family member of a murderer and being badgered by coworkers to a degree that required supervisory intervention.

Four other family members felt alienated from their religious community. One brother explained that his sisters had always been pillars of the church, giving time and money, and yet, "in their moment of pain, they did not feel like the church reached out and com-

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<sup>81</sup> See Eric Silver et al., *Assessing Violence Risk Among Discharged Psychiatric Patients: Toward an Ecological Approach*, 23 L. & HUM. BEHAV. 237, 250–53 (1999) (finding that lack of community support and follow-up care is associated with violent acts following psychiatric discharge).

<sup>82</sup> Several family members attributed the lack of community support that they received to the media's sensational treatment of the story. One participant stated, "You do not get any sympathy from the public because of the news. I have no faith in the news at all. . . . They painted the whole thing so horrible."

forted them.” Two other family members felt abandoned by their ministers, who did not comfort them. Another participant left her church because of its pro-death-penalty stance.<sup>83</sup>

Even when there were no overt tensions within their community, participants felt uncomfortable leaving their homes. One sibling explained, “It’s terrible, horrible, you feel ashamed, embarrassed, intimidated, scared . . . your world is turned upside down, your friends are your enemies.”

#### 4. *The Media*

*That is your worst enemy—the press. You say one thing, it can be turned around.*

—An aunt of a capital defendant

All family members described the media as problematic and hostile. Reflecting on the coverage, one brother explained, “It made me feel angry and depressed. Things were twisted, the way he was portrayed like a monster or something.” An aunt said, “I guess the hardest thing was every time we picked up the paper there was this case. And my heart would just about stop, reading what they were saying about him.” Another mother believed that the sensationalistic media coverage might have influenced the trial outcome and community support. She proclaimed, “What do you expect when [the media] call [a] single shooting [during a birthday celebration] ‘a birthday massacre?’”

Some family members felt that the media were intentionally cruel. One family member talked about a picture in the newspaper following the execution of her loved one that depicted the ambulance driver laughing while transporting the body. Several participants recalled being hounded by the media. One brother described several occasions on which his coworkers covered for him so that he could sneak away from work to avoid the media.

Most participants were approached by reporters and, frustrated by inaccurate portrayals of the defendant, a few agreed to be interviewed. Only one mother was happy with the result; the other participants felt betrayed by reporters who had feigned genuine interest in the family’s perspective.

#### 5. *The Court System*

*I was in dreamland, still believing in the system.*

—A father of a capital defendant

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<sup>83</sup> It is important to note that two mothers reported receiving enormous comfort and support from their churches.

Family members viewed the court system as a terrifying maze of incomprehensible rules that stacked the odds against their relative. Indeed, all of the participants expressed a belief that the system is unjust. "Most people [would] be shocked and devastated by how unfair a trial is," asserted one father. He continued, "As you are sitting in the courtroom and watching the process operate, you are listening and thinking, 'This can't be real, this is not happening.'" Four family members had pre-existing fears of their community's criminal justice system. As one family member explained, "[I]t is a prejudiced town, and there was a black boy that had killed a white girl." Each of these family members indicated that their preconceived fears paled in comparison to their actual experiences.

Participants also indicated that they felt ill-treated in the courtroom, despite the fact that they had not been implicated in the crime. Two mothers described being instructed to refrain from crying or showing emotion. They compared this treatment to the treatment of the victim's family members, who were given tissues and breaks when they were overcome with emotion. As one father concluded, "You know you are not as good as the victim's side—they get water and you get nothing." All participants in this study believe that they were treated with disrespect by the criminal justice system solely because they were related to the accused. A sibling recalled his frustration at his family being placed out of the jury's sight, while the victim's family was prominently placed in the courtroom. He wanted the jury to see his family's anguish for the victim and his family.

#### 6. *The Defense Attorney*

*I remember Mom writing a note to [her son saying] we need to get another lawyer because they were not doing anything but then you don't have the money to buy another lawyer. . . . You're left at the mercy of whomever . . . and that is a sad thing.*

—A sister of a capital defendant

The quality of death penalty defense lawyers ranges from excellent to appalling.<sup>84</sup> In fact, in Georgia, two-thirds of death penalty cases appealed between 1972 and 1995 were reversed, with ineffective-

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<sup>84</sup> See Stephen B. Bright, *Counsel for the Poor: The Death Penalty Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1843–44 (1994) (arguing that arbitrary results in death penalty cases frequently stem from inadequacy of counsel). Some defense lawyers have come to court intoxicated, slept through parts of the trial, and used racial slurs when speaking to their clients. *Id.* at 1843. Moreover, many defense attorneys lack adequate resources. See Stephen B. Bright, Keynote Address, *Capital Punishment and the Criminal Justice System: Courts of Vengeance or Courts of Justice?*, 45 AM. U. L. REV. 279, 287 (1995) (stating that public defenders have a statutorily mandated \$2000 limit on out-of-court time in Alabama death penalty cases).

ness of trial counsel as the principal reason.<sup>85</sup> Our study documents some of the effects of poor or insensitive defense counsel on the well-being of defendants' family members. Family members experienced intense trauma when they lost confidence in their relative's lawyers and in their commitment to defending the case. Even the most well-meaning attorneys sometimes fail to recognize the trauma experienced by the families of their clients.<sup>86</sup> Nine family members assessed the defense lawyer's performance as poor. Eight of these cases resulted in the death penalty, and one resulted in a life-without-parole plea agreement.<sup>87</sup>

One distraught mother attributed a great deal of her agony to the "total incompetence" of her son's attorney. She explained that, along with a public defender, a lawyer to whom she paid \$12,000 represented her son. When she was first told that a private attorney had agreed to take the case, she saw it as "an answer to a prayer." "I thought it was a miracle, I really did," she said. The trial, according to this mother, was "crazy. . . . It was like the defense played right into the prosecution." Explaining that the stress of her son's case affected her blood pressure, quality of life, and ability to work, she stated, "This is my child and the state wants to kill him and he never got a [fair] trial." This mother's pain is compounded because she blames herself for her son's poor representation: "You feel stupid, you blame yourself. I feel like my whole family was raped by the system. And we were, and we were left feeling so stupid."

In addition to poor representation, seven family members related stories of hurtful, even abusive, interactions with the defense team. These family members also indicated that they were deeply distressed because they believed that the defense lawyer lacked commitment to the case. One mother, whose son was convicted of robbery and murder, recalled that moments before the trial began, the lawyer turned to look at her and said, "I had a friend that was killed in a robbery." On hearing that remark, she realized how little respect the defense attorney had for her son. She was not surprised by his poor performance at trial. A second mother who attempted to assist the defense was rebuffed. She described the lawyer's dismissive comments: "Look

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<sup>85</sup> See LIEBMAN ET AL., *supra* note 2, at app. A-10, C-19.

<sup>86</sup> It is also important to note that even well-meaning and sensitive lawyers will often cause harm, as families are often asked to open old wounds to provide insight into the defendant's life.

<sup>87</sup> Seven of the participants believed that their relative's trial attorneys did a very good or excellent job of representing their loved one. Contrary to expectation, five of these cases resulted in a death sentence, but all of these participants believe that unfairness in the criminal justice system was the primary reason the death penalty was imposed. Three offenders are each serving a life or life-without-parole sentence. The family members of these men had no particular complaints, but were reserved in their support of the defense lawyers.

lady, he committed a crime. He is going to have to pay for it, you know. There is not much I can do.”

Defense attorneys walk a fine line when sharing their realistic assessment of a case with their client's family. However, one mother found it difficult to be around the defense team because they were so “doom and gloom.” Conversely, two family members were devastated when their loved one's actual sentence far exceeded the positive outcome the defense attorney had led them to expect.<sup>88</sup>

### 7. *Prison Visitation*

*They treat them like dogs. I mean, you do not treat human beings like you do in prison. They were bound, everything feet and leg, walking in to see us. [When] they closed the visits, a lot of parents would stand there and look at the[m,] I did not. I left immediately. I could not stand to look at him in chains.*

—A father of a capital defendant

All the participants described the process of visiting an incarcerated relative as difficult and painful. One grandfather explained that the way he was treated during visits reminded him of the time that he spent as an Austrian dissenter of National Socialism in a Nazi work camp. He limited his visits as a direct result of this treatment and the memories it recalled. Often during capital trials, prosecutors refer to family visitation as a benefit the defendant can enjoy, but which the victim cannot. This comment, while certainly true, ignores the constrained and demeaning aspects of visiting a death-row inmate. In many ways, visitation provides another forum for families of capital defendants to feel labeled and shamed.

Family members consistently remarked that the glass partitions separating them from their incarcerated relatives made for excruciatingly difficult interactions. One participant recalled her frustration with not being able to touch or hold her son, particularly during a visit after his father had committed suicide. One mother said, “Not being able to take him in my arms and hold him is the hardest thing.” Another mother said she would be happy to be shackled if it would get her any closer to her son. Glass partitions caused physical pain for two older participants who described having to stay crouched over to hear through the waist-high opening in the glass.

Family members recognize the need for valid security measures, but perceived the abundance of restraints as designed for humiliation

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<sup>88</sup> All of the participants indicated that they wanted to be told the truth about the status of the case, no matter how dire the prospects. At the same time, they each noted that they needed defense attorneys to maintain a sense of hope while conveying the status of the case. Family members further indicated that assurances that the defense team was working hard instilled a sense of hope in them.

rather than safety. One mother compared the feelings she had about her son's treatment to the death of her daughter. "My son—it is harder. I worry about him a lot. They chain and shackle him when they bring him out. It is hard to sit there and look at your child chained like a dog," she said. A father made a similar comparison. A brother talked about his disappointment upon seeing his brother shackled across the room when he was told that he could have a contact visit. He did not realize that a contact visit is one where no glass wall divides the meeting.

#### 8. *Notification of Impending Execution*

*It's like your most dreaded fear becoming a reality.*

—A sister of a capital defendant

Receiving notice of an impending execution is agonizing. Those family members who are notified directly must disseminate the information to other family members. A sibling describes the burden of having to tell her mother that her brother's time was getting close:

He had written to me that March and told me he wouldn't live to see his next birthday and asked me if I would tell the rest of the family. It was kind of like your most dreaded fear becoming a reality because you spend all those years thinking and praying that it won't come to this. It was Easter, and you think "Okay, that is not a good time to tell Mom that her son is going to be executed . . ." and then of course there is Mother's day. You can't tell her before Mother's Day.

Family members usually receive numerous notices of impending execution, because many scheduled executions are stayed before actually taking place. Going through this process takes a toll on family members. In one case, defense attorneys tried to assure their client and his father that the state would not carry out the execution, but the father remained terrified. He recalled, "I was climbing the walls. I did not trust the system. All those years of finding out how crooked it was. They could make one little slip and go and kill my kid." An aunt actually said goodbye to her nephew, and then the state stayed his execution for one year. While the family welcomed the additional year, repetition of the notification process was excruciating.

#### 9. *Execution*

*We don't have a marker on his grave yet, [my wife] can't put a marker there. I think it would have been different if she had been able to say goodbye.*

—A father of a capital defendant

Three of the twenty participants experienced the execution of a relative. Even though this is a very small sub-sample, the similarities of their experiences are noteworthy. The effects on family members of

an impending execution and the execution itself are devastating, especially for mothers. One participant, a father, recounted that his daughter told him that the day her brother was executed, she lost both her brother and her mother; her mother was never the same. A sister described the change in her mother as monumental. "She is now distant from everyone and won't mention her son," she said. Another mother died of a heart attack prior to her son's execution, and her sister attributes her heart failure to her son's impending execution.

Notably, the executions these three families experienced occurred within weeks of Thanksgiving or Christmas. One father remarked on the cruelty of this timing: "If you really want to make it hell for families, then do it at the holidays."

One of the defendants was never allowed to have a contact visit; thus, his mother and sister were unable to touch him before his death. When another family member called the prison to try to arrange a contact visit prior to execution, her query was met with derisive laughter. A sister mentioned that her brother had to sign a document indicating his choice of execution method. His answer was "natural causes, thank you." She continues to be repulsed by this process. "How did he feel getting this [question]? Somebody handing you a piece of paper in black and white saying from the date of the letter your execution is ordered. It is barbaric to see in black and white that your government has ordered this."

The pain and humiliation do not end with execution. A sister explained that having her brother's execution order returned with his belongings was "awful. It's unreal. You're thinking, 'Someone really does this. They actually sit down and sign something saying to kill someone. No more chances. No more anything. Kill this person.'"

## B. Psychological Distress

Capital defendants' family members experience stress as their relatives move through the criminal justice system. This stress manifests as depression and symptoms consistent with PTSD.

We asked all participants whether they had been diagnosed with depression, a stress disorder, or any other psychiatric ailment. We explored the occurrence of depression and PTSD with the fourteen participants who provided primary support to a capital defendant.<sup>89</sup> Specifically, we asked them to answer the questions found on the Beck

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<sup>89</sup> We postulated that those who were the primary support for a capital defendant would carry a larger burden than the rest of the family; thus, we explored psychological distress within this sub-sample.

Depression Scale, a standardized instrument with twenty-one questions.<sup>90</sup> Two participants declined to participate.

We did not access the incidence of PTSD with an existing scale.<sup>91</sup> Instead, we asked participants if they had experienced any of the diagnostic criteria for PTSD and, if so, the severity and frequency of their experiences. From this information, we determined whether the participants displayed symptoms consistent with PTSD.

Of the fourteen participants who comprised the sub-sample of primary support persons, twelve parents and one sibling participated in the psychological assessment phase of data collection. Eleven of the respondents were diagnosed with major depression, and all of them had symptoms consistent with PTSD. This is consistent with reports that significant co-morbidity exists between depression and PTSD.<sup>92</sup>

### 1. *Depression*

*I got depressed when I lost my daughter, but I came out of it. I can't come out of this.*

—A mother of a capital defendant

Symptoms of depression include suicidal thoughts, functional impairment, chronic sadness, inability to feel pleasure, irritability, and physical symptoms.<sup>93</sup> Depressed family members indicated that the loss of life as they knew it prior to the arrest contributed to their depression.

Although many of the depressed family members said that they would have preferred their own death to the experience that they endured, only three actively contemplated suicide. One participant's suicidal ideation was so intense that she required hospitalization. Additionally, three family members suffered complete functional disability. As one mother explained, she did not open her mail or pay a bill for years. She stated, "I lost everything . . . I became a burden on my family."

The eleven participants suffering from depression described chronic sadness, inability to feel pleasure, and irritability. One partici-

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<sup>90</sup> See BECK ET AL., *supra* note 73.

<sup>91</sup> See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 52, at 424. We believe that receiving notification that the state intends to seek the death penalty in a loved one's case is a sufficiently traumatic stressor to meet the criteria specified in the *Diagnostic and Statistical Manual*. See *id.* No one has proved this assertion, however. Thus, in this Article we refer to symptoms consistent with a diagnosis of PTSD.

<sup>92</sup> See *id.* at 425.

<sup>93</sup> See *id.* at 339–42 (discussing Major Depressive Disorder). Notably the lifetime risk for Major Depressive Disorder is ten to twenty-five percent for women and five to twelve percent for men, but we diagnosed seventy-eight percent of our sample with major depression. *Id.* at 341.

pant described sitting in a room in the back of her house, where she cried for hours. A third participant explained that “there have been no good days” since her son’s arrest, only bearable days. She likened her experience to rape, explaining, “A rape, that’s what you have been through, you feel so dirty, so stupid, sub-human.”

Another participant, the mother of a capital defendant, lamented that her patience for her other children had worn thin and that this was a major change in her personality. “I am very mad now, I have a short fuse, [my personality] has totally altered.” Three participants had lost other children, but felt that their experience with their convicted sons was more painful.

Participants also demonstrated physical symptoms associated with depression, including the inability to control diabetes and high blood pressure, worsened emphysema, diverticulitis, massive heart attacks, and a rapidly spreading cancer. All participants associated their medical problems with the extraordinary pressure related to the capital trial process.

## 2. *Trauma and PTSD*

*It is unthinkable to have yourself associated with what happened to the victims, and the thought that someone from your family had something to do with it . . . causes its own stress. And then the stress of [my brother’s] mental health condition . . . is stressful. Dealing with people in the community and what they think and how they treat different ones in the family . . . is stressful. And then him not getting what we feel to be proper mental health help and looking at the way [the] legal system has been is stressful.*

—A brother of a capital defendant

### a. *Fear, Helplessness, and Horror*

PTSD is preceded by a terrorizing event, which induces fear, helplessness, or horror.<sup>94</sup> All of the family members experienced fear, helplessness, and horror, and eleven of the fourteen family members in the sub-sample experienced symptoms consistent with a diagnosis of PTSD.

Family members’ fears emanated from the following three sources: the execution or threat thereof, the criminal justice system, and their own community. The first source of fear, and in many ways the most intense, is execution and the threat of execution. Acknowledging the probability that her son would be executed this year, one mother explained,

I do not think I could cope with it for someone to tell me he’s gone.  
For them to come up there to outside of the prison to make the

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<sup>94</sup> See sources cited *supra* note 52 (defining and describing PTSD).

announcement. I have gone through [death] with my daughter and I cannot—I don't think I can do it a second time.

All family members experienced an enormous amount of fear of the criminal justice system. As we previously indicated,<sup>95</sup> they feared that the trial was stacked against their loved one, and many assumed that racial prejudice or their social and economic status would negatively impact the trial process and outcome. Eleven family members feared defense attorneys or other members of the defense team. Nine participants feared attorney incompetence. Others feared interactions with defense attorneys because they perceived the attorneys as hurtful and abusive.

Interactions between capital defendants' families and their communities were often a source of fear. One mother explained that she only felt safe on her side of the tracks, where other low-income African Americans lived. She was afraid when she had to cross the tracks, particularly during the trial. "I was scared too about being his mother. Like doomed. You feel like somebody is going to do something to you," she said. Like this mother, five other participants' fears kept them close to home. Another quit her position on the board of her local hospital, where she was instrumental in fundraising, because she feared leaving her house.

All twenty family members indicated that they felt utterly helpless at some point during the capital proceedings. Three themes permeated their discussion of helplessness: their inability to ensure that the defendant's story was fully and accurately presented,<sup>96</sup> their inability to address the victim's family, and their inability to hire a high-powered lawyer.

Family members described watching helplessly as the media told their loved one's story inaccurately or incompletely. One mother explained that her son's lawyer described him as spoiled and lazy. Two family members indicated that they felt helpless when defense attorneys failed to follow up leads. One participant recalled that during a hearing to establish his brother's mental competency,<sup>97</sup> the prosecutor suggested the defendant was faking his mental illness to get a disability check. This participant noted, "I am sure it had some impact on the jurors for him to say that. [The defendant] had been receiving

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<sup>95</sup> See *supra* Part IV.A.5.

<sup>96</sup> See Henderson, *supra* note 13, at 1005–06 (noting the symbolic importance of recognizing a victim's dignity and noting that for many victims, recognition "ensures some public validation of the victim's experience—the lending of a sympathetic official ear").

<sup>97</sup> See generally *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996) (holding an Oklahoma procedural rule violative of due process for requiring defendant to prove his incompetence by clear and convincing evidence). A criminal defendant is incompetent if he lacks the capacity both to understand the nature and object of the proceedings against him and to consult with counsel with a reasonable degree of understanding. See *id.* at 356.

court-ordered treatment [for his mental illness] for the seven years before the trial.”

Three family members indicated that the threat of a death penalty was an impediment to presenting the defendant’s version of the offense, and family members watched helplessly as stories were not fully told or correctly represented. In a patricide case, a mother wanted the jury to know what her son’s father had put him through in life. However, her son’s attorneys were more concerned about avoiding a death penalty and persuaded her son to plead guilty. She had hoped that by telling her son’s story fully, some good might have come out of the tragedy. She explained, “Look at the families out there that are going through something like what me and my children went through.” Another mother, whose son also pleaded guilty, said there were many things that happened the night of the murder that never came out and that it was the threat of the death penalty that made it impossible to risk a jury trial. A mother whose son pleaded guilty explained,

If it had not been a death penalty case, it would have been completely different. He would have gone to trial and had the opportunity to defend himself. Because it was a death penalty case we had no choice but to take a plea because the thoughts of losing him were so drastic.

Feelings of helplessness often prevent members of a capital defendant’s family from reaching out to the victim’s family to apologize or to acknowledge their loss. One family member recalled, “We wanted to talk to [the victim’s family] in person ourselves, write [the victim’s family] a letter, send flowers or something. But we were terrified and told by the defense team that now may not be the right time.” Another father explained, “I felt as the head of my family I needed to do something, but I could not because it might compromise the case.” One day in court, a father did try to speak to the victim’s family, but a victim’s advocate made it clear that he had literally crossed the line to the victim’s side of the courtroom and needed to go back to the other side where he belonged.

Finally, all of the families expressed feelings of helplessness because they could not provide their loved one with a high-profile attorney. Many of the family members indicated that if they could have afforded a “Johnnie Cochran,” things would have turned out differently.<sup>98</sup>

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<sup>98</sup> When asked what advice he would like to give other family members going through a similar experience, one father who hired an attorney said, “Go with a public defender. Do not pay any lawyers, if you’re a normal working person. If you are rich, I can’t give any advice because they are going to buy their way out.”

Family members described the prospect of a death sentence, the underlying offense, and the incarceration of their loved one as horrible, with many of them using the term “nightmare.” One father explained,

I almost wish the policeman had ended his life at that time [of arrest], when I see how this is stretching out, hurting us all. I am ashamed of that. But when you listen to [lawyers] describe to you point-by-point, blow-by-blow, how the electric chair is going to take your son, you think things like that.

A mother said she would look around the courtroom and think, “You want to kill my child. This is my child! It’s just awful. It is so awful that you cannot describe it.”

Families whose loved ones were sentenced to death experienced ongoing horror, some of it compounded by deficient or insensitive defense attorneys. One mother explained that she did not know that the execution date set by the judge at her son’s sentencing hearing was pro forma and that the actual execution would be much later because of mandatory appeals. She recalled, “I had to be carried out of there. It was devastating. There is no way to describe how that feels.”

b. *Intrusion, Avoidance, and Hyperarousal*

The symptoms of PTSD include intrusion, which occurs when an individual has recurrent or intrusive recollections about a traumatic event; avoidance, which appears when an individual avoids the stimuli associated with a traumatic event; and hyperarousal, which is associated with anxiety and increased stimulation.<sup>99</sup> Eight family members showing symptoms consistent with PTSD described chronic intrusion, and some lost the ability to fight the intrusive thoughts. One mother said that she slept on her hard living room couch for months because she “wanted to be as uncomfortable as [her son] was.” Another mother obsessively collected and clipped everything she could find about criminal proceedings and the death penalty. Her husband said that the project kept her fixated on her son’s execution. Another mother described her terrifying battles with intrusion, and in particular those that occur while she drives: “I just feel like crying and just wanting to scream. My mind will be on what happened [with my son]; it is not on driving.” The mother of another capital defendant described a similar experience: “I remember going uptown for something, and all of a sudden I did not know where I was. It was unreal. It was like a nightmare. It still is.”

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<sup>99</sup> See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 52, at 424.

Experiences that are related to a traumatic event can trigger these intrusive thoughts.<sup>100</sup> One mother said, "It is not good when I visit. I seem to get very anxious. I lay at night and I wonder . . . who is going to look after him when I am gone, and what is going to happen to him." During the several-hour drive to the prison, she cannot avoid experiencing distressing, intrusive thoughts. Another participant experienced intrusive thoughts when he was called for jury duty. He recalled his feelings upon entering the courtroom as "very shaky, very nervous, like a pit in my stomach . . . . It's hard for me not to feel like I am breaking down because of this situation." The brother of another capital defendant explained, "You never get away from it. Six-and-half years later you still get strangers walking up to you in the video store and saying, 'You're [the defendant's] brother,' then ask[ing] some stupid question, 'Did he kill him? Did he really shoot him five times?'"

Many stimuli are painful to the family members of capital defendants and, as a result, they often attempt to avoid these stimuli. For example, the sibling of a capital defendant said that since the execution of her brother, her mother no longer mentions him at all. Similarly, the father of one executed man never mentions his son's name in the presence of his wife. Other examples of avoidance include one mother who altered her route to work to avoid the scene of her son's crime; four family members who avoid people who remind them of their loved one's offense; and one family member who explained that she could not go to graduations or weddings because these occasions reminded her that her son would never experience such celebrations.

Psychological numbness is often associated with avoidance.<sup>101</sup> As one participant in our study commented, "I do not know if I can cry now. I think I can, but I have cried so much it has gotten so hard. I went to my sister-in-law's funeral last week and I didn't shed a tear even though she was my favorite." Finally, for some family members, denying the possibility of execution is another method of avoiding painful stimuli. Indeed, of the nine cases in our study that are still on appeal, five family members denied that their loved one would be executed. As one mother said, "I know I am crazy, but I believe he will be exonerated."

Increased arousal resulted in general nervousness for seven participants in our study. Several family members talked about changes in their sleep patterns, and many said that they rarely enjoyed a good night's rest. Three family members noticed that their arousal height-

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<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

ened when they anticipated meeting with members of the defense team.<sup>102</sup> As the brother of one capital defendant explained:

I would pray that I would always have pen and paper. I always had to have pen and paper, because there was important information that I needed to get for [the defense team]. So I always had pen and paper so I could write it down. That was always how all days were to me. I would be anxious all day waiting for [the meeting] to happen. . . then after it was done I would just start crying. Not because they were hard on me. It was just that I would have to rethink all that stuff and I really tried.

Three family members channeled their hyperarousal into prayer. "I pray. That is all I know how to do. I pray consistently," one family member explained. Others felt intensely guilty, blaming themselves for what happened. When asked how much she blames herself, one mother explained, "Bunches and bunches. Every time I think about him or when I hang up after a phone call, that is the first thing that comes to my mind."

### 3. *Cognitive Changes*

Victims of crime experience cognitive changes.<sup>103</sup> Often, ordinary life no longer feels safe but, instead, filled with threat. Defendants' family members also experience cognitive changes. They begin to feel vulnerable to a criminal justice system that they deem unfair. These cognitive changes appear in family members who already were skeptical of the criminal justice system, but also appear in family members who had been supportive of the criminal justice system. One mother explained, "I was in dreamland still believing in the system." The mother of another capital defendant said,

You think the system is working until it happens to you and you have to deal with it. And then your bubble is burst because it is not like anything that it is supposed to be or what you heard on television. Like you are innocent until proven guilty or that you have an opportunity to stand up on front [sic] of your peers and present your case. It doesn't happen that way.

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<sup>102</sup> Few family members are aware of the scope of the social history investigation that a competent capital defense team conducts. As a result, family members often become alarmed by the depth and variety of questions they are asked, and by the need for multiple interviews. To help family members understand the importance of their role in the defense, it is crucial that the defense team take time to explain the process of a capital trial and discuss counsel's professional and ethical obligations during its preparation for the sentencing phase. Simple steps, like acknowledging the anxiety the trial process creates in family members and providing referrals to local mental health care providers, can minimize the fear defendants' families feel about working with the defense team.

<sup>103</sup> See sources cited *supra* note 53 and accompanying text.

One father explained, "If every parent in this country knew how easy it was for a district attorney and a judge to convict their child, the death penalty would not last fifteen minutes."

#### CONCLUSION

Co-victims often experience psychological trauma in the form of depression, cognitive changes, chronic grief, and PTSD. In recognition of co-victims' pain and their difficulties with the criminal justice system, some communities have established support mechanisms to aid in co-victim recovery.

Data from this study show that offenders' family members are also harmed by crimes and their aftermath. Like co-victims, offenders' family members experience depression, cognitive changes, chronic grief, and symptoms consistent with PTSD. Unfortunately, however, their needs are unrecognized.

The failure to appreciate the various aspects of severe distress that offenders' family members experience can have profound implications. Indeed, the reliability of the trial outcome itself may be affected by the failure to support the defendants' family members, as distress may render them unable to contribute to the development and presentation of mitigation evidence. For example, depression and symptoms of PTSD can result in fragmented memory and storytelling, anger and distrust, chronic sleeplessness, and various other physical symptoms that may prevent or severely limit the family members' participation in the defense. In addition, unaddressed trauma can debilitate family members who, in turn, place additional burdens on society. For example, members of our study group reported deteriorating physical and mental health, declining relationships within families and communities, and financial instability.<sup>104</sup>

In general, the public views co-victims and offenders' family members differently because the latter are perceived as culpable. Defendants' family members indicated that various actors within their community and within the criminal justice system made them feel guilty for their loved one's actions. Their shame is often intensified by the nature of mitigation which, though essential to the defense, may be interpreted as suggesting the defendant's family is culpable.<sup>105</sup> To-

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<sup>104</sup> It is important to note that seven of the participants were raising minor children at the time of our study. The parents of some of these children were capital defendants. Considering that incarceration of a parent is a well-documented risk factor for subsequent incarceration of the child, it is likely that, without intervention, the cycle of criminal behavior will continue. Given the trauma we identified in adults associated with capital trials, *see supra* Part IV, there is an obvious and urgent need to identify and address the risks that capital trials may pose to children.

<sup>105</sup> It is the defense team's duty to uncover the defendant's frailties, many of which are related to shortcomings in his family. Defense counsel may find, for example, that the

gether, these factors suggest the need to examine the impact of capital punishment on defendants' family members. In so doing, it is important to bear in mind the particular experiences of family members in our study. For example, some of these family members sought to prevent the possibility of violence by seeking help for their loved one's mental illness. Other participants in our study sought refuge from abuse or sought help to end their own abusive behavior. Additionally, all of the family members said that they tried to create a loving and positive environment, but that long work hours or the destructive behavior of others undermined their efforts. Finally, it is important to note that even in the most destructive of households, there are family members who are not culpable in the destruction, but who are harmed by the offense and its aftermath.

Thus, we suggest advancing a restorative justice response to families of capital defendants by borrowing from the principals of the National Organization for Victim Assistance. Like co-victims, offenders' family members need to be protected from intimidation and harm, they need information about the criminal justice process, and their property and employment should not be jeopardized. Our community should respect the dignity of family members of capital defendants and address their needs with compassion. Further, as major stakeholders in the response to the offense, family members of capital offenders should have the opportunity to participate in making reparations to families of homicide victims.<sup>106</sup> Developing a model for such a program is another need our study identified.

Families of capital defendants and co-victims are linked by tragic circumstances. Yet the adversarial nature of the criminal justice process forms an immediate and detrimental divide between them. Proponents of restorative justice believe that we must address the harm suffered by both co-victims and offenders' families. The criminal justice system and society as a whole must formally acknowledge the needs of capital defendants' families, and must attempt to lessen the harms they suffer.

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defendant was severely abused or neglected, or that his family has a history of substance abuse.

<sup>106</sup> See Eschholz et al., *supra* note 5 (presenting data indicating that half of the family members in their study said they would have liked to have apologized to co-victims, and all of the family members expressed feelings of sadness for co-victims).

APPENDIX TABLE 1  
DEMOGRAPHIC DATA FOR STUDY PARTICIPANTS

Relationship	Race	Sentence	Type of Lawyer	Symptoms Consistent with PTSD	Depression
(PS)Mother	African American	Death	Public Defender	*	*
Grandfather	Caucasian	Plea Life+	Public Defender		
(PS)Brother	Caucasian	LWOP	Public Defender	*	*
(PS)Mother	Caucasian	LWOP	Public Defender	*	*
(PS)Mother	Caucasian	LWOP	Public Defender	*	*
(PS)Mother	Caucasian	Plea Life+	Public Defender		
Brother	African American	Death	Public Defender		
(PS)Mother	African American	Plea Life+	Public Defender	*	*
(PS)Mother	Hispanic	Death Sentence	Public Defender		
Sister	African American	Executed	Public Defender		
(PS)Mother	Caucasian	Death Sentence	Public Defender	*	*
(PS)Mother	Caucasian	Death Sentence	Public Defender/ Private Attorney	*	*
Aunt	African American	Executed	Public Defender		
(PS)Mother	African American	Death Sentence	Public Defender	*	*
(PS)Father	Caucasian	Death Sentence Commuted LWOP	Public Defender	*	*
(PS)Father	Caucasian	Executed	Private Attorney	*	*
(PS)Mother	Caucasian	Death Sentence	Public Defender/ Private Attorney		
(PS)Mother	Caucasian	Death Sentence	Public Defender		
(PS)Mother	Caucasian	Death Sentence	Public Defender	*	*

\* = Suffered from this disorder or had symptoms consistent with this disorder.

LWOP = Life Without Possibility of Parole

PS = Primary Support

APPENDIX  
QUESTIONS FOR OFFENDERS' AND VICTIMS' FAMILIES

QUESTIONS FOR OFFENDERS' FAMILIES

1. Please discuss your interactions with the Public Defenders' office. How satisfied were you with your experience?
2. Are there things that the Public Defender's office could have done better? Trial – as defense? How they dealt with you personally?
3. When the Public Defender talked with you personally, what did you like? Not like?
4. Are there any particular instances that stand out, positive or negative?
5. How did you feel when you scheduled the interview and knew that someone from the Public Defender's office was coming?
6. How did you feel following the interviews? (Probe: Did you need someone to talk to? Were they there?)
7. What resources did you use in dealing with these feelings (*e.g.*, family members, counselors, minister, friends)?

- 
1. How did your family get along before, during and after the incident?
  2. Has there been any time that you would say your family has been particularly close since the incident? Explain.
  3. What was your relationship with (offender) prior to the incident?
  4. What is your relationship with (offender) today?
  5. Has any particular family member been particularly affected by the incident and the sentence? How?
  6. What was the worst day/most difficult from the occurrence of the incident through today?
  7. What has changed for you, personally, since the incident through trial and to today?
  8. As a family, when you get together, do you talk about (offender), the trial, appeals? Are these conversations frequent?

- 
1. How were you treated in the community prior to the incident?
  2. Have you lost any friends?
  3. How does it feel, since sentencing, to go about your day-to-day activities in the community?
  4. Have there been occasions where people have made you feel uncomfortable? Comfortable?
  5. What was the behavior that caused this feeling?
  6. Have you moved and/or changed jobs since this incident? Sentencing?
  7. Do you know if anyone else in your family made job/moving decisions based on the incident?

8. How do you think you have managed to get through this situation?
9. Have you had any health changes since the incident? During trial?  
After sentencing?

#### QUESTIONS FOR VICTIMS' FAMILIES

1. Please discuss your interactions with the criminal justice system (*e.g.*, police, prosecutor). How satisfied were you with your experience?
  2. Are there things the criminal justice system could have done better? Discuss separate components (police, prosecutor, victim assistance). How did they deal with you personally?
  3. When talking with you personally, what did you like? Not like?
  4. Are there any particular instances that stand out, positive or negative?
  5. How did you feel following your discussions with members of the criminal justice system? (Probe: Did you need someone to talk to? Were they there?)
  6. What resources did you use in dealing with these feelings (*e.g.*, family members, counselors, minister, friends)?
- 

1. How did your family get along before, during and after the incident?
  2. Has there been any time that you would say your family has been particularly close since the incident? Explain.
  3. What was your relationship with (victim) prior to the incident?
  4. Has any particular family member been particularly affected by the incident and the trial? How?
  5. What was the worst day/most difficult from the occurrence of the incident through today?
  6. What has changed for you, personally, since the incident through trial and to today?
  7. As a family, when you get together, do you talk about your interactions with the criminal justice system—the trial, appeals? Are these conversations frequent?
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1. How were you treated in the community prior to the incident?
2. Have you lost any friends?
3. How does it feel, since the trial, to go about your day-to-day activities in the community?
4. Have there been occasions where people have made you feel uncomfortable? Comfortable?
5. What was the behavior that caused this feeling?
6. Have you moved and/or changed jobs since this incident?

7. Do you know if anyone else in your family made job/moving decisions based on the incident?
8. How do you think you have managed to get through this situation?
9. Have you had any health changes since the incident? During trial?  
After sentencing?