

"ALL BUT DEATH, CAN BE ADJUSTED"



RECOGNIZING VICTIMS' NEEDS IN DEATH PENALTY LITIGATION

*All but death, can be adjusted
Dynasties repaired
Systems — settled in their sockets
Citadels — dissolved*

*Wastes of lives — resown with colors
By succeeding springs
Death — unto itself — exception
Is exempt from change*

— Emily Dickinson

The rights of victims in criminal cases, including capital cases, have been expanded during the past 20 years by the U.S. Supreme Court¹ and by legislation at the state and federal levels. The federal government enacted the Victim and Witness Protection Act of 1982, and in 1985, the United Nations issued a Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power.² In 2004, as part of the Justice for All Act,³ the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillos and Nila Lynn Crime Victims' Rights Act became law. This statutory alternative came out of an eight-year campaign for a constitutional amendment to guarantee the rights of victims.⁴

At the state level, 48 state attorneys general have expressed their belief that "only a federal constitutional amendment will be

sufficient to change the culture" of our legal system.⁵

Congress has directed all U.S. Attorneys and the FBI to provide victim advocate services. Moreover, because of federal support for victims since the 1970s, most offices of local district attorneys offer assistance to victim witnesses.

All of these developments have given victims a greater voice in the prosecution of cases, including capital cases. For too long, defense attorneys treated victims in capital cases as if they were adversaries who

should not be relevant, either legally or ethically, to capital proceedings. Experienced capital defenders have slowly come to realize that effective representation includes recognizing the rights of victims and acknowledging their enormous loss, which will likely be considered in determining punishment. In fact, a growing number of capital defense teams understand that they must listen to the voices of victims, whether the defense goal is a life sentence by plea or trial. Many of these attorneys are incorporating outreach to victims into their advocacy for their clients.

The Development of Defense-Initiated Victim Outreach

More than a decade ago, an explosion rocked the Alfred P. Murrah Federal Building in downtown Oklahoma City. Shortly after, authorities arrested Timothy McVeigh and charged him with the



**Defense-Initiated
Victim
Outreach**

BY PAMELA BLUME LEONARD

bombing that killed 168 people and injured 500. Realizing that they would face overwhelming victim impact testimony, McVeigh's attorneys sought advice for planning an effective response to surviving victims. Defense attorney Richard Burr⁶ consulted Howard Zehr, a professor of restorative justice at the Center for Justice and Peacebuilding at Eastern Mennonite University in Harrisonburg, Va.

Dr. Zehr had extensive experience in working with victim survivors and with people convicted of committing violent crimes. He enlisted Tammy Krause, a former graduate student, to develop a process of defense-initiated victim outreach founded on principles of restorative justice. This process relies on a specially trained person, a defense-initiated victim outreach specialist, to offer victims access to the defense team throughout capital proceedings. Victims are able to interact with both the prosecution and the defense teams to address the victims' questions, concerns and needs.

Restorative Justice in Defense-Initiated Victim Outreach

Restorative justice, like the victims' rights movement, gained prominence in the 1970s. However, its historical roots are at least as old as recorded conflict.⁷ Advocates of restorative justice 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."⁸ Crime is a violation of people and relationships that creates obligations to make things right.⁹ In order to move toward making things right, victims must have the opportunity to identify and speak their needs and the offender must do what she or he can to address those needs.

Restorative justice responses in the criminal justice system have been somewhat confined to juvenile offenses.¹⁰ Violent offenses often have been considered beyond the scope of restorative justice. However, as applications of restorative justice broaden, victims and their advocates acknowledge that restorative justice offers a number of improvements over the traditional criminal justice process. Susan Herman, former executive director of the National Center for Victims of Crime, applauds the opportunity for victims to tell their stories, get answers to questions about the motive and circumstances of the crimes, and sometimes, hear sincere apologies that comes from deep remorse.¹¹

On the other hand, Herman points out that offenders, being incarcerated, indigent, unemployed or in other adverse circumstances, are often very limited in their ability to "restore" victims through restitution. The emotional impact of crime — victims may suffer continuing trauma that can result in lost work, substance abuse, and depression — must be addressed more comprehensively than current restorative justice practices provide. Herman concludes that the government must be far more active in fulfilling the societal obligation to assist in rebuilding the lives of victims.¹²

Without doubt, the limitations Herman describes apply to the application of restorative justice in capital cases. Still, the victim may gain from information provided by the defense, and there are defendants who take responsibility for their actions. In such cases, victim-centered, offender-sensitive practice can contribute to healing and restoration.

Finally, defense advocates must stand with all victims to demand full restitution for their monetary losses and for services to aid recovery. Why? Because compassion begets compassion.

Growth of Defense-Initiated Victim Outreach

The fledgling effort by Richard Burr in the Timothy McVeigh case to find a new, less adversarial way for defense teams to interact with victims during trial sparked a movement.¹³ Krause has made scores of presentations about victim outreach in capital cases, sharing skills and knowledge as she acquired them and describing successful encounters with victims. Krause often invites victims to participate in these presentations, to tell their stories of loss and their experiences with defense-initiated victim outreach.

Early on, capital defense lawyers responded skeptically to the notion that they should have any role in "empowering" victims. Gradually, an increasing number of defense teams answered the challenge Burr and Krause posed: Do right by victims but demand nothing from them in return. Counsel might find some benefit for the client, but benefit can never be the price for consistently treating victims with respect, compassion and patience.

There is a growing cadre of trained victim outreach specialists who serve as a bridge between capital defense teams and victims. The federal defender system has institutionalized defense-initiated victim outreach in federal capital cases.

At the School of Social Work at Georgia State University in Atlanta, the Georgia Council for Restorative Justice is building on the accomplishments at the federal level by training, referring and supporting qualified victim outreach specialists at the state level.¹⁴

Methods and Principles of Working With Victims

Richard Burr described the most important aspects of defense-initiated victim outreach this way:

- A victim liaison places no conditions on his relationship with the victims;
- The relationship remains unconditional for its duration;
- A victim liaison does not approach the survivors with any type of agenda or for a hidden purpose;
- All encounters between the survivors and the liaison must be focused singularly on the needs of the survivors; and
- As part of the defense team, however, the victim liaison remains aware of the needs and interests of the defendant and considers how these needs intersect with the needs of the survivors.¹⁵

Utilizing defense-initiated victim outreach does not mean that defense lawyers forgo or diminish zealous advocacy. Nor does it require victims to forgive. Defense-initiated victim outreach recognizes that victims have a stake in the case and offers the possibility of a relationship between the defense team and the victims. It can be as simple as asking a defense-initiated victim outreach specialist to help attorneys compose a sensitive letter introducing themselves, expressing their condolences to victims, and offering the services of a victim outreach specialist.¹⁶

Defense-initiated victim outreach can take place at all stages of capital proceedings, including participation by victims in creating a plea agreement or asking for clemency. For example, in the case of Steve McHone, who was convicted and sentenced to death in North Carolina for the 1990 murder of his mother and father, Tina Adams Walker publicly sought clemency for McHone, her stepbrother. Not all the siblings wanted McHone to be spared, and he was ultimately executed. Today, Walker is comforted that, with the help of a victim outreach specialist, she was able to effectively identify and communicate her needs and opinions about

the pending execution of her stepbrother to her family, the public and state officials. However, she urges defense lawyers to reach out earlier to families. "At the time of trial, I didn't know I had any options other than supporting the death penalty."

Victims suffer terrible losses and vast emotional pain, which can cause symptoms like those seen in post-traumatic stress syndrome,¹⁷ a condition sometimes called traumatic grief.¹⁸ A further concern of victims is the criminal justice system, which can be overwhelming, frustrating, depersonalizing and, from their perspective, very slow,¹⁹ especially in death penalty proceedings.

The primary benefit to victims who choose to work with a defense-initiated victim outreach specialist is empowerment, which means having a clearer realization of what matters to her or him and why those goals are important.²⁰ Becoming empowered means to become aware of the range of options available and have some control over those options. Some of the needs frequently voiced by victims are:

- The need for general information about capital proceedings;
- Answers to questions about the circumstances of their loved one's death;
- The opportunity to fully consider whether vengeance is what they need;
- The option of meeting the offender in a safe setting at an appropriate time;
- The option of telling the offender about the losses the victim has suffered; and
- The option of having an ongoing link to the defense team throughout the victim's response to a homicide, whatever course that

response may take.

The defendant and his defense team can address these needs. Providing empathy and information to victims, within their ethical obligations, may increase options for the defendant. Also, options might be increased for the defendant's family members who often want to reach out to victims but fear they will increase the misery of victims and perhaps harm the defendant's chances of avoiding the death penalty if they do.²¹

Even if no material benefit results from reaching out to victims, simple human decency calls for defense attorneys to relate to victims with respect and compassion.

Next Steps

In light of the growing strength of victims' voices and the institutional power behind them, it behooves capital defense attorneys to reconsider their usual disconnection from victims. Victims increasingly have a voice in whether a negotiated plea is offered to capital defendants. Further, their views are routinely sought by the media, which, in turn, may influence community sentiment about punishment in general as well as the sentencing outcome for a particular defendant.

Judges and prosecutors at the federal level have recognized the benefits of defense-initiated victim outreach in the criminal justice system. However, defense attorneys and victim outreach specialists need to introduce judges, prosecutors and victim advocates to defense-initiated victim outreach at the state level where most capital cases are charged and tried.

Most importantly, defense-initiated victim outreach specialists must continue to listen deeply to the needs of victims and convey these needs to capital defense teams. One way to do this is to create a dialogue with victims' groups to

explore additional ways of building productive relationships between victims and capital defense teams.

Conclusion

There are significant intersections between the interests and needs of victims and capital defendants. Defense-initiated victim outreach offers an ethical, principled bridge between them. A defense attorney who compassionately acknowledges the terrible loss victims have suffered, and stands with them in their quest for restoration and restitution, has far greater credibility when asking for the life of his client to be spared.

Notes

1. *Payne v. Tennessee*, 501 U.S. 808 (1991), made victim impact testimony, once constitutionally prohibited, legal and customary in death penalty trials.

2. For a summary of the principles of justice sought by the National Organization for Victim Assistance, see their Web site at <http://www.trynova.org/victimrights/>.

3. 108th Congress, 18 U.S.C. § 3771 (2004).

4. National Organization for Victim Assistance (n.d.), *'Breathtaking' Statute Adopted in Near Silence — Federal Victim Rights Bill Enacted*, viewed on February 23, 2006, at <http://www.trynova.org/victimrights>.

5. National Association of Attorneys General, Letter to Hon. Jon Kyle and Hon. Dianne Feinstein (2004), viewed February 21, 2005 at <http://www.ndaa-apri.org>.

6. Richard Burr is a partner at Burr & Welch, a law firm devoted to the representation of people facing the death penalty. He formerly directed the death penalty project of the NAACP Legal Defense Fund and presently serves as a member of the Federal Death Penalty Resource Counsel Project.

7. Daniel Van Ness & Karen Strong, *Restoring Justice* 7-9, Anderson Publishing (2nd ed. 2002).

8. Elizabeth Beck, Brenda Blackwell, Pamela Leonard & Michael Mears, *Seeking Sanctuary: Interviews With Family Members of Capital Defendants*, 88 CORNELL L. REV. 390-391 (2003).

9. Howard Zehr, *Changing Lenses*, Herald Press (1995); Howard Zehr, *Little Book of Restorative Justice*, Good Books (2002).

10. Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* 11, Willan Publishing (2002).

11. Susan Herman, *Is Restorative Justice Possible Without a Parallel System for Victims?* 78-79, in *CRITICAL ISSUES IN RESTORATIVE JUSTICE* (Howard Zehr & Barb Toews eds., 2004).

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12. *Id.*

13. Richard Burr, *Litigating With Victim Impact Testimony: The Serendipity That Has Come From Payne v. Tennessee*, 88[2] CORNELL L. REV. 41-53 (2003).

14. For information about the Georgia Council for Restorative Justice, contact Pamela Blume Leonard.

15. Kristen Grunewald & Priya Nath, *Defense-Based Victim Outreach: Restorative Justice in Capital Cases*, CAPITAL DEFENSE JOURNAL, Virginia Capital Case Clearinghouse, Volume 15, Number 2, p. 19 (2003), Washington and Lee University School of Law, viewed on March 4, 2005, at <http://www.emu.edu/ctp/just-articles.html>.

16. Victim outreach specialists can provide a wide range of sample correspondence, *ex parte* motions for funds, plea agreements and other pleadings.

17. Beverly Raphael, Christine Minkov, & Matthew Dobson, *Psychotherapeutic and Psychomacological Intervention for Bereaved Persons*, in HANDBOOK OF BEREAVEMENT RESEARCH: CONSEQUENCES, COPING, AND CARE 587-612 (Margaret Stroebe, Robert Hansson, Wolfgang Stroebe, & Henk Schut eds., 2001).

18. *Id.*

19. Herman, *supra* note 11, at p. 2; Heather Strang, *Repair or Revenge: Victims and Restorative Justice* 1-23, Oxford University Press (2002).

20. Robert Bush & Joseph Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* 85, Jossey-Bass Publishers (1994).

21. Beck, et al., *supra* note 8, at pp. 408-409. ■

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