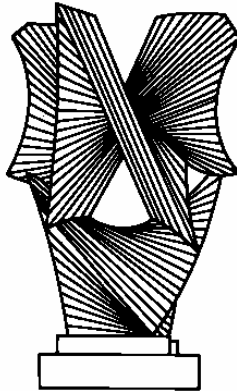


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## VICTIMS, "CLOSURE," AND THE SOCIOLOGY OF EMOTION

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# VICTIMS, “CLOSURE,” AND THE SOCIOLOGY OF EMOTION

By Susan Bandes

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## **Abstract:**

The concept of closure, almost unknown two decades ago, has had a meteoric rise. It has been enthusiastically embraced by the legal system not only as a legitimate psychological state, but as one that the criminal justice system ought to help victims and murder survivors to attain. In the death penalty context, the concept of closure has changed the way we talk about the rationale for capital punishment, it has changed the shape of the legal process, and it has even changed what both survivors and jurors in capital cases expect to feel. Yet, as I will illustrate, the term closure in fact connotes several different and poorly differentiated concepts, each with separate and quite serious implications for the conduct of the capital trial. For example, depending on how closure is understood, it might require a chance to give public testimony, an opportunity to meet with the accused, a more expeditious trial, a sentence of death, or an execution. Yet there is inadequate evidence on whether any of these institutional processes or outcomes can actually contribute to a state of closure for survivors.

As current research in disciplines including cognitive neuroscience, sociology, psychology, and political science suggests, emotions are dynamic processes that evolve in a reciprocal relationship with social structures. As the legal system becomes increasingly invested in helping victims and survivors achieve closure, we need to take a hard look at the emotional content of this concept, and at how it affects, and is affected by, the institutional framework in which it operates.

## VICTIMS, “CLOSURE,” AND THE SOCIOLOGY OF EMOTION

By Susan Bandes\*

For the families of murder victims,<sup>1</sup> the grief, anger and pain a murder leaves in its wake must to some degree unfold in public, institutional settings. Grieving is rarely an entirely private, internal experience. In every culture, grief is experienced and expressed against a background of social expectations, and ideally, within a network of social support. The expectations facing murder survivors include the grim task of cooperating with the criminal justice system, a task that may include a public trial and intense media scrutiny. Over the last couple of decades, this grim task has undergone a “symbolic transformation,”<sup>2</sup> particularly in the death penalty context. Every aspect of the capital system has been recast as serving therapeutic goals; specifically, helping survivors heal and attain closure. This incursion of the language of emotion and healing into the legal realm has been insufficiently examined, especially given its enormous practical and symbolic consequences for the operation of the death penalty.

Closure is a term with no accepted psychological meaning. It is, in fact, an unacknowledged umbrella term for a host of loosely related and often empirically dubious concepts. Nevertheless, it is a concept that has had a meteoric rise, both in the public consciousness and in the legal arena.<sup>3</sup> Virtually unmentioned only two decades ago, closure has been enthusiastically embraced not only as a legitimate psychological state but as one that the legal system ought to help victims and survivors to attain. In the

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\* Distinguished Research Professor, DePaul University College of Law, Visiting Professor, University of Chicago Law School, 2007-2008. I am grateful to Erin O’Hara for organizing and including me in the “Conference on Group Conflict Resolution: Sources of Resistance to Apology, Forgiveness and Reconciliation” for which this paper was written, to Al Alschuler, Jeffrie Murphy, Martha Nussbaum, Erin O’Hara, Carol Sanger, Jeremy Waldron, Noah Zatz, and colleagues at the Ohio State University Moritz College of Law, St. Johns’ Law School, the University of Chicago Law School and Vanderbilt Law School for their incisive comments on earlier drafts of this paper, and to Laura DeMichael of the University of Chicago Law School Class of 2009 for excellent research assistance.

<sup>1</sup> I will use the term “survivors” to connote family members and others bereaved by murder.

<sup>2</sup> Frank Zimring, *The Contradictions of American Capital Punishment* at 48 (New York: Oxford University Press 2003).

<sup>3</sup> Frank Zimring found that prior to 1989, the terms “closure” and “death penalty” were never mentioned together. They were linked once in 1989. Starting in 1993, the mentions grew geometrically to more than 500 in 2001. In 2001 an ABC News/Washington Post poll asked whether the death penalty is fair because it gives closure to the families of murder victims, and 60 percent agreed with this statement strongly or moderately. *Id.*

death penalty context, its rapid embrace has changed the way we talk about the rationale for capital punishment, it has changed the shape of the legal process; it has even changed what both survivors and jurors within the capital system expect to feel.

The term closure has come to connote several different and poorly differentiated concepts, each with separate and quite serious implications for the conduct of the capital trial. Closure is sometimes used to refer to the sense of catharsis that comes of speaking publicly about one's loss. Advocates of victim impact statements argue that the statements assist with healing and closure because they permit survivors to give voice to their pain and sense of loss in a public setting.<sup>4</sup> Closure has also come to stand for the constellation of feelings—peace, relief, a sense of justice, the ability to move on—that come with finality. The term sometimes refers to the ability to find answers to the terrible questions a murder may leave open—the circumstances of the murder, the identity of the killer.<sup>5</sup> This sort of closure might require solving an open crime, but it might also involve some sort of interaction with the killer; an attempt to learn more.<sup>6</sup> It might require a verdict and imposition of a sentence.<sup>7</sup> In the capital context, it might require a sentence of death. The logical outgrowth of this argument is that only an execution can provide

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<sup>4</sup> See e.g., Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 *Crim. L. Rev.* 545, 550-53.

<sup>5</sup> See e.g., Chip Brown, *The Confessor: Conversations with a Serial Killer*, *New York Times Magazine* 39, 41, April 29, 2007 in which a detective uses the term to describe a motive for his quest to solve open murder cases. See also "For the Family of Sneha Anne Philip, Closure," *New York Magazine*, January 31, 2008 (discussing the efforts of the family of a woman missing since September 10, 2001 to prove that she had died at the World Trade Center rather than as the victim of a crime in which her own recklessness might have played a role, and their vindication in a Manhattan appellate court).

<sup>6</sup> See e.g., Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 *Ohio State Criminal Law Journal* 329, 336-37 (2007) ("many [victims] want to confront offenders face to face, tell their stories, and understand why their crimes happened.")

<sup>7</sup> In their review of news articles about executions which recount the reactions of the victims' family members, Sam Gross and Daniel Matheson found a broad range of reactions. Among the minority who said they experienced some sort of closure, the term was given several different meanings, including relief that the long court process had ended, relief that the defendant could not hurt anyone else, and relief that the defendant would stop receiving so much press attention. None claimed that their suffering for the loss would be in any way alleviated by the execution. Samuel R. Gross and Daniel J. Matheson, *What They Say at the End: Capital Victims' Families and the Press*, 88 *Cornell L. Rev.* 486, 490-94 (2003). See also Vik Kanwar's interesting discussion of closure as a "sanitized version" of the more visceral "satisfaction." Vik Kanwar, *Capital Punishment as "Closure:" the Limits of a Victim-Centered Jurisprudence*, 27 *NYU Review of Law & Social Change* 215, 248 (2001).

closure, and that delays and impediments to execution deprive survivors of the closure they need.<sup>8</sup>

Each of the above meanings of the term closure has been offered as the rationale for various initiatives that have helped transform the capital system. It has become the predominant argument for victim impact testimony. It has become an effective argument for limiting procedural protections that delay conviction, sentencing, final judgment or execution. It has taken on the authoritative ring of a clinically accepted reason for execution itself. In short, it has transformed expectations about the purposes of a capital trial, offering a promise to survivors and society at large that the legal system may be ill-equipped to keep. And at the most basic theoretical level, closure has recast the traditional debate about the purposes of capital punishment, suggesting that support for the death penalty can be premised on the urge to offer solace and healing to survivors of murder.

On one level, there is an irony to the success of closure as a legal concept. The phenomenon seems to contradict the conventional wisdom that the legal system abjures emotion as an unwarranted interference with rational deliberation. At first glance it might even seem to be good news for those who argue in favor of recognizing emotion's role in the deliberative process. I argue, to the contrary, that the unwarranted embrace of closure should be understood as a consequence of the law's unwillingness to grapple with the role of emotion. This unwillingness is often expressed as a mistaken belief that it is both possible and desirable to banish emotions—as a class—from the legal realm, except in carefully delineated contexts.<sup>9</sup> The closure phenomenon illustrates the converse mistake—a belief that certain emotional claims should be sacrosanct; off limits to the rigors of legal analysis. The better approach is to recognize that emotion influences legal actors and legal institutions in numerous ways, some desirable and some undesirable. The questions are: how do various emotions operate in various contexts, and to what extent

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<sup>8</sup> For example closure is cited by lower courts as a value militating against granting defense motions that might delay or reopen a capital case. See e.g., *Grayson v. King*, 460 F.3d 1328 (11<sup>th</sup> Circ 2006) (describing the government's compelling interests, which in this case outweighed the capital defendant's due process argument for post conviction access to biological evidence, as including "guarding against a flood of requests, protecting the finality of convictions, and ensuring closure for victims and survivors.") See also *Skaggs v. Commonwealth*, 2005 WL 2314073 (2005) and *State v. Korsen*, 141 Idaho 445, 111 P.3d 130 (2005) (citing survivor and victim closure as interests weighing against reopening or delaying a verdict.)

<sup>9</sup> Susan Bandes, *The Passions of Law*, Introduction (1999).

should they be encouraged or discouraged? These descriptive and normative questions cannot be addressed as long as emotions are ignored and denied on the one hand, and enshrined and insulated on the other.

In this article, I argue for the importance of evaluating emotional dynamics in social context. An emotional process or outcome that advances familial, spiritual or therapeutic goals may be poorly suited for a court of law. For example, when we speak of healing or closure, we ought to attend closely to the emotional outcomes we are trying to facilitate, and to whether a capital proceeding is an appropriate place to facilitate them. As I will argue, the failure to grapple with the role of emotion in law generally, and with the role of particular emotions in specific social settings, has had enormous consequences for capital jurisprudence and the operation of the capital system.<sup>10</sup>

### **The Sociology of Emotion**

Twenty five years ago, in *The Managed Heart*, her seminal work on the sociology of emotion, Arlie Hochschild identified the tendency to treat emotions and private and internal as one of the major barriers to serious inquiry into the nature of emotions.<sup>11</sup> As I will argue, this tendency is also a barrier to constructing and maintaining fair and effective legal institutions. When emotions are regarded as a-contextual entities rather than dynamic processes, it appears seductively logical to extrapolate from studies of private, internal emotion to contexts involving complex groups, or involving public settings. And the social sciences for too long took precisely this approach: studying individual subjects and their individual emotions,<sup>12</sup> and then assuming the knowledge had broad application to emotions in diverse contexts.<sup>13</sup>

More recently, a number of disciplines have begun focusing on emotion in social context. The sociology of emotion is now a burgeoning field.<sup>14</sup> Psychologists are

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<sup>10</sup> See supra text accompanying notes 46-120.

<sup>11</sup> Arlie Hochschild, *The Managed Heart: Commercialization of Human Feeling* at 201-203 (Berkeley: University of California Press 1983).

<sup>12</sup> Psychologist Dacher Keltner, director of the Berkeley Social Interaction Laboratory, states that 95% of all studies of emotion involve individual subjects (email from Dacher Keltner to Susan Bandes, May 2, 2007, on file with author).

<sup>13</sup> Jerome Kagan observes that social scientists tend to “generate hypotheses from abstract concepts rather than concepts that are closely tied to observed phenomena.” Jerome Kagan, *Three Seductive Ideas* at 78 (Cambridge, Harvard University Press 1998).

<sup>14</sup> Jonathan H. Turner and Jan E. Stets, *The Sociology of Emotions* at 1 (2005).

increasingly interested in emotion and social cognition, emotional dynamics in group settings,<sup>15</sup> and the interaction between emotion and culture.<sup>16</sup> Political scientists are beginning to think about the role of emotion in democratic deliberation.<sup>17</sup> The emerging field of affective neuroscience is examining the neural dynamics of emotional interchange. One of its founders, Richard Davidson, observes “You can’t separate the cause of an emotion from the world of relationships—our social interactions are what drive our emotions.”<sup>18</sup>

In short, we know that emotions are not formed, experienced or expressed in a vacuum. There are likely some basic emotions that exist across cultures,<sup>19</sup> but even as to those, social context shapes not only how they are communicated to others, but how they are formed, experienced and interpreted by the individual.<sup>20</sup> And once inter-group behavior is added to the mix, questions arise both about how the expression and interpretation of emotion change in a group context, and about how an emotional climate may arise in a group—through mechanisms like emotional contagion and synchronization.<sup>21</sup>

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<sup>15</sup> See e.g., Eliot R. Smith, Charles R. Seger and Diane M. Mackie, Can Emotions be Truly Group Level? Evidence Regarding Four Conceptual Criteria, 93 *Journal of Personality and Social Psychology* 431 (2007).

<sup>16</sup> See e.g., Paula M. Niedenthal et al, *Psychology of Emotion: Interpersonal, Experiential and Cognitive Approaches* (2006).

<sup>17</sup> Sharon Krause, *Public Deliberation, Democratic Politics, and the Feeling of Impartiality*, paper presented at the conference *Law and the Emotions: New Directions in Scholarship*, Boalt Hall Law School at U.C. Berkeley, February 8 and 9, 2006, available at [https://www.law.berkeley.edu/institutes/cslls/lawemotion\\_conference/PublicDeliberation\\_paper.pdf](https://www.law.berkeley.edu/institutes/cslls/lawemotion_conference/PublicDeliberation_paper.pdf)

See also Drew Westen, *The Political Brain: The Role of Emotion in Deciding the Fate of the Nation* (2007); George E. Marcus, *The Sentimental Citizen: Emotion in Democratic Politics* (2002).

<sup>18</sup> Richard Davidson, director of the Laboratory for Affective Neuroscience at the University of Wisconsin, quoted in Daniel Goleman, *Social Intelligence: The New Science of Human Relationships* at 83 (2006). See also Richard J. Davidson and Steven K. Sutton, *Affective neuroscience: the emergence of a discipline*, 5 *Current Opinion in Neurobiology* 217 (1995).

<sup>19</sup> The extent to which emotions are biologically rooted is also an important and burgeoning area of study. See e.g., Antonio Damasio, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness* at 51 (1999). Damasio refers to a group of primary or universal emotions: happiness, sadness, fear, anger, surprise and disgust, and to a larger group of secondary or social emotions, and argues that although culture and learning can alter the expression and meaning of emotions, all share a biological core. See also Erin O’Hara and Douglas Yarn, *On Apology and Consilience*, 77 *Wash. L. Rev.* 1121, 1140-31 (2002) (discussing biologically rooted taste for apology and forgiveness); Peggy Thoits, *The Sociology of Emotions*, 15 *Annual Review of Sociology* 317, 320 (1989) (noting the ongoing debate about socially constructed versus basic or biologically rooted emotions); Andrew Ortony and Terence J. Turner, *What’s Basic About Basic Emotions?*, 97 *Psychological Review* 315 (1990) (raising the possibility that the concept of basic emotions is an article of faith).

<sup>20</sup> See e.g., Turner and Stets, *supra* note 14, ch. 1, *Conceptualizing Emotions Sociologically* (2005).

<sup>21</sup> See e.g., Sigal G. Barsade, *The Ripple Effect: Emotional Contagion and its Influence on Group Behavior*, 47 *Administrative Science Quarterly* 644-675 (2002).

It is becoming increasingly clear that understanding of these dynamics is an interdisciplinary project. The need for interdisciplinary interchange highlights the importance of specifying context. A neuroscientist seeking to measure fear responses in the amygdala of lab rats, an anthropologist comparing cultural responses to the approach of strangers, and a psychologist studying fear of maternal separation in infants may have much to learn from one another, but they first have to find a common language. Their uses of the term “fear” describe different agents, targets, contexts, methodologies, and research goals, and the term will be useful only if these are specified.<sup>22</sup> The use of the term altruism provides another example of the problem: whereas psychologists puzzle over the motivations for altruism,<sup>23</sup> philosophers are divided over whether to define it in terms of a mere willingness to aid others, irrespective of motivation,<sup>24</sup> and evolutionary biologists often use it to describe behavior such as helping one’s kin in order to promote replication—in other words, behavior that common parlance is unlikely to classify as strictly altruistic.<sup>25</sup>

The imprecise use of terms describing emotional states and processes may hinder rather than facilitate interchange. Left undefined or insufficiently contextualized, these terms may serve only to conflate and confuse concepts that diverge in important respects.

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<sup>22</sup> Kagan, *supra* note 13 at 14-38.

<sup>23</sup> See e.g., C. Daniel Batson, Prosocial motivation: Is it ever truly altruistic? 20 *Advances in Experimental Social Psychology* 65 (1987).

<sup>24</sup> There is no agreement on the relevance of motive in the philosophical literature. Many philosophers would use the common meaning of the term altruism, which is “an unselfish regard for the welfare of others,” (Merriam Webster dictionary); that is, they would require some sort of benevolent motivation, such as compassion or concern for others (see letter from Jeffrie Murphy to Susan Bandes, May 28, 2007 (on file with author)). However Thomas Nagel, in his well-known formulation, asserts: “By altruism I mean not abject self-sacrifice, but merely a willingness to act in the consideration of the interests of other persons, without the need of ulterior motives.” Thomas Nagel, *The Possibility of Altruism* at 79, Oxford: Clarendon Press (1970). See also 10 *Social Philosophy and Policy* Volume 1 (Winter 1993) (an entire issue devoted to the philosophy of altruism).

<sup>25</sup> The classic behavioral definition of altruism is “behavior that benefits another organism, not closely related, while being apparently detrimental to the organism performing the behavior, benefit and detriment being defined in terms of contribution to inclusive fitness.” Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 *Quarterly Review of Biology* 1, 35-37 (1971). The adaptationist view, however, focuses on evolved design rather than behavior; processes such as ‘kin selection’ and ‘reciprocal altruism’ lead to the evolution of mechanisms designed to deliver benefits to other organisms because such behaviors lead to the replication of the genes that underlie them. John Tooby and Leda Cosmides, *Friendship and the Banker’s Paradox: Other Pathways to the Evolution of Adaptations for Altruism*, *Proceedings of the British Academy* 88, 119-43 (1996); Robert Kurzban, *Biological Foundations of Reciprocity, in Trust, Reciprocity, and Gains from Association: Interdisciplinary Lessons from Experimental Research* at 105-127 (E. Ostrom and J. Walker eds. (2003)). I’m grateful to Rob Kurzban for his guidance on these issues.



There is no accepted definition of the term *emotion*. Indeed, the more light is shed on the dynamics of cognitive processing, the less clear it is that emotion defines a discrete function or phenomenon. Current neurobiological research views emotions as a set of processes, distributed throughout the brain, that assist us in appraising and reacting to stimuli, and that are very sensitive to context.<sup>26</sup> Recent work in psychology and sociology also portrays emotions as processes; formed, interpreted and communicated in social context.<sup>27</sup> They influence the way we screen, categorize and interpret information. They influence our evaluations of the intentions and credibility of others. They help us decide what is important or valuable. Perhaps most important, they drive us to care about the outcome of our decision-making, and motivate us to take action, or refrain from taking action, on the situations we evaluate.<sup>28</sup> All these processes are shaped, refined and communicated in a social and cultural context.

The insight that emotional experience and expression vary across contexts and cultures has to some degree entered conventional wisdom. We commonly speak, for example, about shame cultures and guilt cultures,<sup>29</sup> or about honor cultures—the vigilante tradition<sup>30</sup> in certain southern states, for example. My focus here is on the fact that emotion norms vary not only across geographic lines, but among other more subtly drawn “emotion cultures” as well. The distinctions among these emotion cultures are in part about the acceptable expression of emotion. Display rules<sup>31</sup> regulate the acceptable range of emotional behavior and provide scripts for socially appropriate enactment of emotion.

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<sup>26</sup> See generally 22 *Emotion Researcher* (2006-2007). (The *Emotion Researcher* is the Official Newsletter for the International Society for Research on Emotion).

<sup>27</sup> See e.g., Turner and Stets, *supra* note 14 at 1.

<sup>28</sup> See e.g., Elizabeth A. Phelps, *The Interaction of Emotion and Cognition: Insights from Studies of the Human Amygdala*, in *Emotions and Consciousness* (Lisa Feldman Barrett et al. eds. 2005); Antonio R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (1994) (somatic marker hypothesis); Joseph Forgas, *Mood and Judgment: the Affect Infusion Model*, 117 *Psychol. Bulletin* 39 (1995); Oliver Goodenough and Kristin Prehn, *A neuroscientific approach to normative judgment in law and justice*. *Phil. Trans. R. Soc. Lond. B* 359 at 1717 (2004).

<sup>29</sup> See e.g., [http://mtsu32.mtsu.edu:11283/shame\\_guilt.htm](http://mtsu32.mtsu.edu:11283/shame_guilt.htm) (last visited May 30, 2007), a web page charting the differences between shame cultures and guilt cultures for the benefit of students planning to study abroad.

<sup>30</sup> Zimring, *supra* note 2 at 89.

<sup>31</sup> See e.g., Thoits, *supra* note 19 at 322. The work of Erving Goffman on interaction rituals is seminal to the study of cultural scripts for performing and interpreting emotions. See e.g., Erving Goffman, *Interaction Ritual: Essays on face-to-face behavior* (1967); Erving Goffman, *The presentation of self in everyday life* (1959); Erving Goffman, *Frame analysis: an essay on the organization of experience* (1974). Goffman “considered himself to be a disciple of Emile Durkheim, especially Durkheim’s late work on religion.” Thoits, *id* at 27. See e.g., Emile Durkheim, *The Elementary Forms of the Religious Life* (1965).

Sociologists have been investigating the means by which emotion cultures transmit not only display rules (expression norms), but also feeling rules (emotion norms), which “specify the emotions that individuals should feel in a situation.”<sup>32</sup> For example, Candace Clark’s influential study of sympathy norms describes implicit rules governing both the feeling and expression of sympathy—rules which vary across cultures, across time, and by class and gender.<sup>33</sup> Sociologists argue that these implicit rules and norms teach us what we ought to be feeling, and in doing so, guide the way we shape and experience our inchoate emotions.<sup>34</sup> The investigation of feeling rules is a complex topic, comprising a wide range of sociological approaches to which I cannot do justice here.<sup>35</sup> The emotion cultures that develop these rules may be geographical—such as the shame and guilt cultures mentioned earlier. They may be temporal.<sup>36</sup> Notions of romantic love—what it feels like, when one ought to feel it and for whom, whether it’s important—shift over time and among cultures.<sup>37</sup> Some emotion cultures are quite localized and specific. An early and seminal investigation of an emotion culture and its feeling rules was Arlie Hochschild’s study of feeling management among flight attendants.<sup>38</sup> As Hochschild showed, emotion cultures may be identified by gender and status hierarchy, among other variables. Legal institutions contain and comprise many overlapping “micro” emotion cultures—the culture of the courtroom or the jury room, for example.<sup>39</sup>

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<sup>32</sup> Thoits, *supra* note 19 at 323.

<sup>33</sup> See Candace Clark, *Misery and Company: Sympathy in Everyday Life* (1998), discussed in Thoits *id* at 323 (examining “sympathy norms and the rules of sympathy exchange.”)

<sup>34</sup> See Candace Clark, *Misery and Company: Sympathy in Everyday Life* (1998), discussed in Thoits *id* at 323 (examining “sympathy norms and the rules of sympathy exchange.”)

<sup>35</sup> For excellent summaries of the work in this area, see Thoits, *supra* note 19 and Turner and Stets, *supra* note 14

<sup>36</sup> For example, American Studies professor Joel Pfister noted in his contribution to the volume *Inventing the Psychological* that “some Western emotions, once deemed vital to human essence, are now obsolete (the medieval notion of ‘accide’ or losing one’s zeal for praying, the Renaissance notion of melancholy.” Joel Pfister, *On Conceptualizing the Cultural History of Emotional and Psychological Life in America* at 22, in *Inventing the Psychological: Toward a Cultural History of Emotional Life in America* (Pfister and Schnog eds. 1997).

<sup>37</sup> See e.g., Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love* (in Bandes, *The Passions of Law*, *supra* note 9).

<sup>38</sup> Hochschild, *The Managed Heart*, *supra* note 11.

<sup>39</sup> No single institution operates independently, of course. To study the culture of the capital system implicates a web of interlocking institutions, including the criminal justice system, the jury system, police and prosecutors, the prison system and the media.

## The Reciprocal Relationship between Emotion and Social Structure

When we use internal emotional processes or reciprocal private exchanges as the model for all emotional dynamics, we lose essential information about how emotion and law interact. We proceed on faulty assumptions about human behavior in the legal context, and about how to structure legal institutions in light of that behavior. These institutions, as Martha Nussbaum observes, “can either promote or discourage” emotions, “and can even shape [emotions] in various ways.”<sup>40</sup> This is not solely a top-down process.<sup>41</sup> Institutional structure is influenced by assumptions about what people feel and ought to feel.

For example, we have developed a thriving set of “grief industries” in the U.S. which are premised on certain assumptions (many of them empirically dubious) about when and how grief needs to be managed, or even left behind.<sup>42</sup> Similarly thriving are anger management programs, some of them flourishing because of referrals from the judicial system,<sup>43</sup> though the premises of anger management are quite controversial generally, and particularly dubious in certain legal contexts.<sup>44</sup>

On a more basic level, institutions both reflect and shape our emotional commitments.<sup>45</sup> For example, institutional structures and expectations can channel victims’ complex and evolving set of needs in various directions, reflecting a range of

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<sup>40</sup> Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* at 405 (2001) (discussing the power of institutions to influence emotions that impede appropriate compassion).

<sup>41</sup> *Id.*

<sup>42</sup> See e.g., Jerome Groopman, *The Grief Industry*, *The New Yorker*, January 26, 2004.

<sup>43</sup> See e.g., *U.S. v Bull*, 214 F.3d 1275 (11<sup>th</sup> Cir. 2000) (upholding district court’s imposition of anger control treatment and requirement that the defendant pay for the treatment as properly falling within statutory authorization to impose “special conditions of supervised release” in case involving unauthorized use of a VISA card); *State of Oregon v. Kline*, 963 P.2d 697 (1998) (upholding trial court’s imposition, at parole revocation hearing, of condition that abusive father refrain from fathering any additional children until he had completed drug treatment and anger management programs).

<sup>44</sup> See e.g., Benedict Carey, *Anger Management May Not Help at All*, *New York Times*, November 24, 2004 (noting that state and county programs have been set up without supporting research on effectiveness of anger management, and that studies show that the programs are often ineffective and sometimes exacerbate anger); Molly Butler Bailey, *Improving the Sentencing of Domestic Violence Offenders in Maine: A Proposal to Prohibit Anger Management Therapy*, 21 *Maine Bar J.* 140 (Summer 2006) (noting that in Maine, there are three approved sentences for domestic violence offenders: jail time, batterer’s intervention, and anger management therapy, and arguing that anger management therapy is dangerous and ineffective in this context and should be prohibited as a sentence).

<sup>45</sup> In Nussbaum’s phrase, “compassionate individuals construct institutions that embody what they imagine; and institutions, in turn, influence the development of compassion in individuals.” Nussbaum, *supra* note 40 at 405.

attitudes toward criminality, victimization, and community.<sup>46</sup> We should carefully scrutinize the costs of importing the language and assumptions of private, dyadic emotion into institutional contexts, rife with their own peculiar rules for the display and feeling of emotion, and their own range of influence, both practical and symbolic.

### **Victim Impact Statements and the Public Expression of Grief**

The incursion of the concept of ‘closure’ into the legal system illustrates the dangers of failing to evaluate emotions and their dynamics in particular contexts. Closure has been imported to the legal realm without regard for the differences between the therapeutic, spiritual or familial contexts and the legal context, or between the private realm and the public realm. The concept has fueled the reshaping of the institution of capital punishment in significant ways<sup>47</sup> —it has transformed the debate about the legitimacy of capital punishment, and it has led to significant changes in the administration of the capital system. These changes are part of a feedback loop. Survivors have been promised that they will feel ‘closure,’ and come to expect that they will and should feel it, and legal actors have come to believe they should help deliver it. And the capital system must be perpetuated in order to continue to provide it.

In the capital context, the shift to the therapeutic is identifiable in changes both ideological and concrete. It began with the efforts of victims’ rights advocates to gain reforms in the treatment of victims and survivors.<sup>48</sup> When crime victims organize to combat their marginalized status and the lack of dignity they are accorded in the criminal justice system, there are a number of goals they might pursue. Reform of the treatment of victims in court is the most obvious place to begin. Beyond that, there is much divergence. Organizers’ efforts might coalesce around restorative efforts like counseling

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<sup>46</sup> See *infra* text accompanying notes 47-50.

<sup>47</sup> Although the concept is used in non-capital contexts as well, my focus here is solely on its use in capital cases. Every legal context raises certain unique issues for victims and their role in the justice system. For example, one study of victim impact statements and their reception by judges in non-capital cases found that judges exhibited very different attitudes toward the appropriate expression of emotion by rape victims and by domestic violence victims. See Mary Schuster and Amy Proppen, *Victim Impact Statements in Domestic Violence and Sexual Assault Cases; Judicial Reaction* (unpublished manuscript on file with author). The capital system raises a number of unique issues, most obviously the role of survivors in the system and the fact that the defendant may be executed.

<sup>48</sup> See generally Douglas E. Beloof et al, *Constitutional Implications of Crime Victims as Participants*, 88 *Cornell L. Rev.* 282 (2003). See also Beck et al, *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 *Cornell L. Rev.* 382, 387-390 (2003 (describing the victims’ rights movement).

and support programs, crime prevention initiatives, or victim-offender mediation. Alternatively (or in addition), they might coalesce around demands for retributive measures—more punitive sanctions and restrictions of defendant civil liberties.<sup>49</sup> As criminologist Vanessa Barker found in a recent comparative study of victims' rights movements in California and Washington State,<sup>50</sup> the directions victim reform movements take and the goals they seek are heavily influenced by the political and institutional structure in which they take shape.<sup>51</sup>

The most significant reform attained by the nascent victims' rights movement in the United States in the early 1980's was the introduction of the victim impact statement, a vehicle now in use in federal capital trials and in 35 of the 37 capital states,<sup>52</sup> which allows survivors to testify to the harm caused by the murder.<sup>53</sup> In *Payne v. Tennessee*,<sup>54</sup> the Supreme Court upheld the use of these statements in capital cases in the face of an Eighth Amendment challenge, finding that they provided useful information to the jury at the sentencing phase. It held they gave juries a fuller picture of the harm caused,<sup>55</sup> and

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<sup>49</sup> I have argued elsewhere that although victims often set out to gain the former set of goals, in our current adversary structure they tend to succeed mostly in attaining the latter. Susan Bandes, *Victim Standing*, 1999 Utah L. Rev. 331.

<sup>50</sup> Vanessa Barker, *The Politics of Pain: A Political Institutional Analysis of Crime Victims' Moral Protests*, 41 *Law and Society Review* 619 (2007). Barker concludes that political structures that were intensively polarized tended to deepen crime victims' demands for vengeance and provide legal expression for those demands, whereas political contexts with intensive civic engagement and well developed norms of social trust and reciprocity tended to bring about pragmatic measures mixing restorative and restrictive approaches.

<sup>51</sup> It is beyond the scope of this article to consider fully the complex interaction of social, cultural, political and legal forces that account for the evolution of the capital system in the United States generally, or the increasing influence of the victims' rights movement in particular. For influential explorations of these issues, see eg. Zimring, *supra* note 2; Stuart Banner, *The Death Penalty: An American History* (2003); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001); James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2005) and Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007).

<sup>52</sup> Wayne Logan, *Victim Impact Evidence in Federal Capital Trials*, 19 *Federal Sentencing Reporter* 5, 9 fn19 (2006).

<sup>53</sup> This is a topic I've visited before (Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 *U. Chi. L. Rev.* 361 (1996)). In that paper I examined the arguments against the original premise for upholding the use of victim impact statements—specifically, their informational value. The question that concerned the Court then was whether these statements would allow death sentences to be imposed based on improper or irrelevant factors. My focus in this paper is mainly on the shift in rationales, and the use of the healing and closure rationale. But it is also on what we have learned in the nearly 20 years since *Payne* was decided, both about the actual workings of victim impact statements, and about emotion, cognition, and institutions—and also what we still need to find out.

<sup>54</sup> 501 U.S. 808 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987)).

<sup>55</sup> *Id.* at 825.

made salient the unique individuality of the victim, illustrating why his death represented “a unique loss to society and in particular to his family.”<sup>56</sup>

Gradually, the public act of conveying information about the victim, remembering the uniqueness of the victim and describing the pain of the victim’s loss has been recast as a way for the survivor to move toward healing and closure.<sup>57</sup> The theme of the courtroom as a place for closure or catharsis has become explicit in the years since *Payne*. Lower courts explicitly invoke the importance of closure.<sup>58</sup> Victim assistance programs often advise survivors to testify as part of the healing process.<sup>59</sup> Once survivors are promised this opportunity to heal, the decision to exclude their testimony becomes, not merely an evaluation of the information value of the statement, but an act fraught with emotional meaning.<sup>60</sup>

What we are witnessing is a confusion or conflation of cultures—the therapeutic and the legal; a mapping of the language of private grief onto an entirely different sort of emotion culture—collective, public, hierarchical, adversarial, coercive. The emotional dynamics of the capital trial in fact bear little resemblance to those of private expressions of grief. The dynamics of this emotional interchange are comprehensible only in light of its social and institutional context. If we read out its social and collective aspects we miss information that is crucial to the operation of the capital system and to its ability to provide just processes and outcomes for survivors, defendants, and the community.

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

<sup>57</sup> Justice O’Connor touched on the idea that the statement is for the benefit of the victim in her concurrence in *Payne*, in which she said “Murder is the ultimate act of depersonalization. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.” *Payne* at 832 (O’Connor, J., concurring). As Robert Mosteller observes, “the argument is styled in terms of returning something to the murder victims themselves, but obviously that action is symbolic. Its impact is for the benefit of the victims’ families and friends...” Robert P. Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules*, 88 *Cornell L. Rev.* 543, 550 (2003).

<sup>58</sup> See note 105, *infra*. As I will discuss in detail below, attaining closure has come to implicate not only the survivor’s ability to be heard, but also the need for a sentence of death and an execution. See *infra* text accompanying notes

<sup>59</sup> See e.g., Criminal Justice Intervention, *Victim Impact Statements*, at <http://www.letswrap.com/legal/impact.htm> (last visited April 13, 2007), a summary of information on victim impact statements from the Minnesota Center for Crime Victim Services, stating that the statement provides victims a right to address the court prior to sentencing, allows them to express the impact of the crime on them and their families, and may aid victims in their emotional recovery. See also Mary Lay Schuster and Amy Propen, 2006 WATCH Victim Impact Statement Study 6, available at [www.watchmn.org](http://www.watchmn.org) (last visited May 1, 2007), stating that “judges and advocates were generally in agreement that the impact statement can be a powerful ‘part of the healing process’ for the victim.”

<sup>60</sup> See discussion of McVeigh case *infra* text accompanying notes 103-118.

As I will discuss, to treat the victim impact statement like a private or familial expression of grief is to ignore the ways in which the survivor's message is channeled, translated, even transformed, in light of the expression rules and role expectations of the forum. The extrapolation from the private realm also elides the competing agendas that come into play when a survivor gives victim impact testimony in a capital trial. Specifically, the survivor may find herself in conflict with or in reluctant collaboration with a prosecutorial agenda that affects her own autonomy. Moreover, the audience for the victim impact statement—at least the only audience with any power to act on the information conveyed—is a collective entity: the penalty phase jury.

To understand how each individual juror reads the emotional content of the testimony, how these interpretations change once the jury deliberates, and how the jury as a collective body translates its responses into action requires an understanding of how emotions develop in group settings in general, and in the particular setting of the capital trial. And if we confuse the expression of grief at a capital trial with the grief expressed in a familial or therapeutic setting, we miss the point of the whole exercise. The penalty phase capital jury has only two possible ways to respond to the expression of grief—it can sentence the defendant to death, or not.

Finally, if we view victim impact evidence apart from its institutional context, we miss the feedback loop. We fail to consider the ways in which assumptions about grief, healing and closure are affected by the capital system, and the ways in which the system in turn is shaped by assumptions about these emotions.

To have an informed and constructive debate about the use of victim impact statements or the role of the justice system in promoting closure, it is essential to focus on how context affects the meaning of psychological terms. It is also essential not to lose sight of the particular requisites of the legal context at hand—a system of capital punishment governed by constitutional standards. The capital context gives rise to a particular and in some respects unique set of risks, which cannot be weighed solely in light of the possible therapeutic value of victim impact statements to survivors. There are risks to survivors. Some survivors may benefit from the ability to participate, and some

may feel co-opted or re-victimized by the process.<sup>61</sup> There are also significant risks to the capital defendant, who is entitled to a jury whose decision about whether to take or spare his life is based on constitutionally acceptable criteria.<sup>62</sup>

### **The Role of the Survivor in the Capital System**

For the survivor, the trial is a poor vehicle for authentic expression of emotion.<sup>63</sup> It is, unavoidably, a ritualized public performance, with particular scripts, conventions, and role expectations. For example, there are pressures for the statement to conform to certain stock expectations<sup>64</sup> about victimhood. Murder survivors are not a monolithic group with identical emotions and perspectives,<sup>65</sup> and moreover individual survivors may find that while some emotions will never abate, others might diminish or intensify over

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<sup>61</sup> See Susan Bandes, Reply to Paul Cassell: What We Know About Victim Impact Statements, 2 Utah L. Rev. 545, 551-52 (1999) (citing studies on victim satisfaction and noting lack of studies on psychological effects of victim impact statements on murder survivors); Robert C. Davis and Barbara E. Smith, Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?, 22 Journal of Criminal Justice 1 (1994) (study of non-capital felony cases, finding little evidence that victim impact statements promote victim satisfaction) and Robert Elias, The Law of Personhood: A Review of Markus Dirk Dubber's *Victims in the War on Crime: The Use and Abuse of Victims' Rights*, 52 Buff. L. Rev. 225, 246 (2004) (arguing that encouraging victims and survivors to voice hatred may increase sense of victimization).

<sup>62</sup> This is not to suggest that the constitutional criteria are clear, or that their interpretation is free of controversy—quite the contrary.

<sup>63</sup> In general the extent to which it is possible to discern the authentic emotional states of others is itself a “formidable epistemological problem.” See Jeffrie G. Murphy, Moral Epistemology, the Retributive Emotions, and the ‘Clumsy Moral Philosophy’ of Jesus Christ, in Bandes, *The Passions of Law* supra note 9 at 157 (discussing the problem of other minds). See also Jeffrie Murphy, Remorse, Apology, and Mercy, 4 Ohio State Journal of Criminal Law 437 (2007), arguing that “issues of deep character are matters about which the state is probably incompetent to judge.” At times, the performance of an emotional state might be sufficient, irrespective of underlying sincerity, depending on the context. See e.g., Brent T. White, Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy, 91 Cornell L. Rev. 1261 (2006) (arguing for the efficacy of forced apology in the civil rights context).

<sup>64</sup> See e.g., Erving Goffman, *Interaction Ritual: Essays in Face to Face Behavior* at 48-50 (1967) (discussing rules of conduct for presentation of self in particular roles). See also Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* at 188-192 (2002) (discussing stock images of victims).

<sup>65</sup> See Susan Bandes, When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government, 5 Fordham Urban Law Journal 1599; Bandes, Empathy, Narrative, supra note 53 at 405-08; Wounds That Do Not Bind: Victim-Based Perspectives on the Death Penalty (James R. Acker & David R. Karp eds. 2006); Wayne A. Logan, Declaring Life at the Crossroads of Death: Victims’ Anti-Death Penalty Views and Prosecutors’ Charging Decisions, 19 Crim. Just. Ethics 41, 48 (1999). See also Robert Renny Cushing and Susannah Sheffer, Dignity Denied: The Experience of Murder Victims’ Family Members Who Oppose the Death Penalty, published by Murder Victims’ Families for Reconciliation; Brief of Amici Curiae Murder Victims’ Families for Reconciliation in Support of Respondent at 8, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1588549.



time.<sup>66</sup> At most, the victim impact statement is a snapshot of feeling at a particular juncture. But it is a distorted snapshot of that feeling. Ambiguity is not easily accommodated. The statement is often drafted from a template. For example, the Mothers Against Drunk Driving Victim Impact Statement Workbook provides both a template for drafting the statement and a set of guidelines on the acceptable expression of emotion.<sup>67</sup> It instructs victims and survivors to “write and speak from the heart about your pain.” Yet it also instructs them not to vent their anger (“Your goal is to express your hurt and your pain; not to blame.”)<sup>68</sup> Evolution of feeling is also difficult to accommodate. The emotions the survivor expresses during capital sentencing may change over time, but there is unlikely to be another forum in which to express these changed feelings. Sometimes survivors come to regret their role in the imposition of a capital sentence.<sup>69</sup>

Moreover, as sociologist Nick Tavuchis observed in the context of apology, once the speech goes public, it implicates others with interests and commitments of their own.<sup>70</sup> The survivor preparing to give victim impact testimony generally works with the prosecutor’s office, or with victim mediation agencies that are themselves working with

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<sup>66</sup> See Lynne N. Henderson, *The Wrongs of Victims’ Rights*, 37 *Stan. L. Rev.* 937, 964-66(1985) (discussing the evolution of emotions after victimization).

<sup>67</sup> The MADD workbook asks a series of questions to assist victims in drafting their statements. Here is one example:

The Emotional Impact

How do you feel emotionally when you wake up in the morning? What do you think about? How often do you cry? Describe the last time you cried. What do you think about when you go to bed at night? How difficult is it for you to sleep? How long do you sleep? Do you have nightmares? About how much of every day do you feel sad? Do you feel more tired than you did before the crime? Have you been diagnosed with depression, anxiety, post-traumatic stress disorder, or any other stress-related illness since the crime? Are you on any medications for those conditions? Have you considered suicide since the crime? Have you had difficulties with relationships since the crime? How has it affected your family life? Has your view of the world as a safe and fair place changed since the crime? Has your spirituality changed since the crime?

Victim Impact Statement Workbook, at

<http://www.madd.org/docs/Victim%20Impact%20Statement%20Workbook.pdf> (last visited May 29, 2007).

<sup>68</sup> MADD instructions, id (Let’s Get Started).

<sup>69</sup> See Robert Jay Lifton and Greg Mitchell, *Who Owns Death?: Capital Punishment, the American Conscience, and the End of Executions* at 204-210 (2002) describing some cases in which survivors who began by supporting a death sentence came, for a variety of complex reasons, to oppose or regret the execution of the condemned man. See also Jeff Goodell, *Letting Go of McVeigh*, *New York Times Magazine* at 40, May 13, 2001 (recounting the change of heart of Patrick Reeder, who lost his wife and mother-in-law in the Oklahoma City bombing.) See also MVFR amicus brief in *Roper v. Simmons*, supra note 65 (noting that “execution of the offender causes some victims to feel implicated in another person’s death.”)

<sup>70</sup> Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* at 51 (1991).

the prosecutor.<sup>71</sup> The prosecutor has traditionally possessed tremendous and often unbridled discretion about who may give such a statement. Thus, for example, prosecutors have on a number of occasions barred survivors who oppose the death penalty<sup>72</sup> from testifying,<sup>73</sup> as the McVeigh prosecutors did when they refused to allow the testimony of several such survivors, including Marilyn Knight, whose daughter was killed in the Oklahoma City bombing.<sup>74</sup> Even when prosecutors do not silence survivors, they may explicitly or implicitly communicate their own views about which emotions are appropriate to the occasion. Often these are emotions, such as anger and a desire for vengeance, which may increase the possibility of a death sentence.<sup>75</sup> To assume that the survivor's testimony is an authentic and therapeutic expression of emotion is to discount the real possibility that the prosecution agenda may overwhelm the survivor's voice.

In a private setting, moreover, an outpouring of sorrow would elicit a reaction—comfort, sympathy. In a truly therapeutic setting, it would elicit a response from someone trained to help. In a social setting it would be strange and cruel for such an expression to

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<sup>71</sup> Sheri Lynn Johnson, *Speeding in Reverse: An Anecdotal View of Why Victim Impact Testimony Should Not Be Driving Capital Prosecutions*, 88 *Cornell L. Rev.* 555, 559 (2003).

<sup>72</sup> Payne did not rule on the admissibility of survivor opinion testimony about the proper sentence in capital cases, a type of testimony that was previously held unconstitutional. Although the denial of survivor opinion testimony might appear to apply to both pro and anti death penalty opinions, there are two reasons why this may not be so. First, as Wayne Logan reports, judges appear more willing to allow “thinly veiled pro-death penalty opinions” such as exhortations to the jury to “show no mercy,” testimony which the Nevada Supreme Court allowed, characterizing it as “a request that the jury return the most serious sentence it found appropriate.” Logan, *Victim Impact Evidence in Federal Capital Trials*, supra note 52 at 8, citing *Witter v. State*, 921 P.2d 885, 895-96 (Nev. 1996). Compare *Robison v. Maynard*, 943 F.2d 1216 (10<sup>th</sup> Cir. 1991), in which the Tenth Circuit upheld exclusion of testimony of a survivor who planned to ask for mercy, characterizing it as opinion testimony. Second, as I discuss below, testimony that does not bear the hallmarks of a death penalty opponent, such as a plea for mercy or forgiveness, tends to be received by the jury as a plea to impose a death sentence. See *infra* text accompanying notes 113-114.

<sup>73</sup> Bandes, *Victim Standing*, supra note 49 at 341 and n45. Charles Baird and Elizabeth McGinn describe several such cases, including one in which the prosecutor sought to bar the mother of a murdered six year old boy from either giving a victim impact statement or taking the stand at all, though he put her brother, a death penalty supporter, on the stand. Charles F. Baird and Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 *Stan. L. & Pol’y Rev.* 447, 466 (2004).

<sup>74</sup> The federal Crime Victims’ Rights Act (18 USCA Sec. 3771, effective July 27, 2006) was passed to address this problem and to protect federal crime victims’ right to be heard. See testimony of Marsha A. Knight, *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearing on S. J. Res. 6 Before the U.S. Senate Committee on the Judiciary*, 105<sup>th</sup> Cong. 70 (1997). There are numerous unresolved questions about the scope and operation of the Act. However, it specifically states that it does not establish grounds for an independent cause of action based on its violation. It further states that “nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”

<sup>75</sup> See Dubber, supra note 64 at 188-89; Baird and McGinn, supra note 73 at 464-65.

be met with silence, yet in the courtroom there is usually no response. Indeed, when judges do attempt to respond, they often prove ill equipped to do so. For example they may display discomfort or, on occasion, inappropriate reactions in response to the display of emotion, or particular emotions.<sup>76</sup> The victim impact statement, then, is quite unlike a private outpouring of grief. It is better likened to a cathartic public ritual. Yet for the survivor, there is no good evidence that giving victim impact testimony provides catharsis, healing, or closure.<sup>77</sup>

### **Closure and the Culture of the Capital Trial**

The legal use of the concept of closure raises all the aforementioned problems about importing concepts from the therapeutic to the legal context. However, even in the therapeutic context, the term “closure” has no accepted clinical psychological meaning. As I noted earlier, despite its lack of bona fides, closure has been enthusiastically embraced as a legitimate psychological state and, moreover, as a state that the legal system ought to help victims and survivors attain.

As I have discussed elsewhere, most of us cannot know how we would react if we were to lose a loved one to murder, and therefore

we ought to be very slow to judge what any particular individual in that position ought to feel or want. But there is a separate question: the question of the law’s proper role in helping victims or survivors achieve the closure they need. That is where we do need to judge, and to decide. And where it becomes important to at least try to untangle what one’s religion might urge, from what

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<sup>76</sup> See Schuster and Proppen, 2006 WATCH Victim Impact Statement Study, *supra* note 59 at 9-10. Schuster and Proppen reported, in the context of non-capital cases in which victim impact statements were given before judges, that judges were often uncomfortable with negative emotions like anger and hatred, for example. They stated: “While we observed several sentencing hearings in which judges made an extra effort to welcome, thank, or even praise the victim, we did see one in which we wished the judge had made more effort. The court waited a long time for the defendant, who was in custody for murdering his wife, to be brought into court, and the judge was clearly concerned about getting back to a trial that he was conducting. After the advocate read statements from the step-father and mother of the victim, the judge’s only comment was “ok.” The attack was particularly brutal, so much so that the sentence was an upward departure from the guidelines. We imagined that it would be hard for the victim’s family, who sat in the gallery, to interpret just what that “ok” meant.” They also recounted instances in which judges were inattentive or rude to victims. See also Wayne Logan, *Confronting Evil: Victims’ Rights in an Age of Terror*, 96 *Georgetown L. Rev.* 1 (forthcoming 2008) (recounting disturbing stories of patronizing and dismissive judicial reactions to accounts of victim suffering).

<sup>77</sup> Marilyn Peterson Armour and Mark S. Umbreit, *Exploring “Closure” and the Ultimate Penal Sanction for Survivors of Homicide Victims*, 19 *Federal Sentencing Reporter* 105, (2006); Lifton and Mitchell, *supra* note 69 at 204.

psychiatry might try to achieve, from what politics might dictate, and all of those from what the law can...even attempt to accomplish.<sup>78</sup>

When the capital system is conscripted as a means of providing the elusive state of closure, the ambiguities of the term become dangerous. If it refers to catharsis only, then perhaps the mere giving of a victim impact statement is enough. If it is aided by information from the defendant about what happened and why, a different set of questions is posed. In the courtroom, this quest for answers might be reduced to watching the defendant's demeanor and trying to read his reactions.<sup>79</sup> If it requires a reaction from third parties, it becomes important to clarify what sort of reaction is required, and from whom, and whether it is the sort of reaction a capital trial can or should provide. If it requires a more expeditious verdict, sentence or execution, this raises a host of questions about due process.

Placing this emotional exchange in its institutional context is crucial. In the particular context of the capital trial, the response to the survivor's outpouring of grief can come from only one source: the penalty-phase jury. And how does the jury interpret what it hears? This question cannot be usefully considered if the jury is treated as a collection of individuals, each reacting to the survivor's story. The jury becomes its own micro emotion culture, with its own ideologies about appropriate attitudes, feelings and responses. As psychologist Craig Haney observed about the capital jury:

The courtroom becomes the jurors' separate reality, and they spend weeks or months in this legal world, amateurs in an arena of experts. Like all people in unfamiliar and threatening situations, they become acutely sensitive to—and highly dependent upon—the social cues and implicit messages they receive from the legal experts around them.<sup>80</sup>

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<sup>78</sup> Bandes, *When Victims Seek Closure*, supra note 65 at 1601-02.

<sup>79</sup> Similarly, survivors may seek understanding from watching the defendant's demeanor as he is executed, as occurred during the execution of Timothy McVeigh. See <http://premium.edition.cnn.com/2001/LAW/06/11/mcveigh.witnesses/> (last visited June 1, 2007). See also Jody Lynnee Madeira, *Blood Relations: Collective Memory, Cultural Trauma, & the Prosecution and Execution of Timothy McVeigh* (unpublished paper on file with author) (an in-depth analysis of the importance to survivors and others of watching Timothy McVeigh's face as he was executed). Another possible venue for this attempt to gain understanding is victim offender mediation. The difficult questions that arise from a survivor's attempt to gain understanding in this way deserve in depth treatment this short article will not permit.

<sup>80</sup> Craig Haney, Lorelie Sontag and Sally Constanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 *J. Soc. Issues* 149, 151 (1994).

Emotion is deeply implicated in decision-making. It helps us choose which sources of information we will emphasize. It assists us in evaluating the intentions or credibility of others. It helps us decide what is important and valuable. It motivates us to take action.<sup>81</sup> Jurors make all these judgments in a collective context, in which they use emotion to assess not only the trial unfolding before them, but the dynamics of the jury room itself. Jurors make judgments about whom to trust, whom to attend to, and with whom to empathize, and they make these judgments as a collective body. They appraise witnesses, they watch the defendant's demeanor carefully—trying to assess his level of remorse, for example, or the fear he elicits in them. They appraise one another, and they often make these appraisals across racial, ethnic and other divides, without realizing that these divides may cause them to misread one another's demeanor and misjudge the emotions it conveys.<sup>82</sup> They form social bonds, cliques and out-groups.<sup>83</sup> They experience a very intense form of emotional contagion: they enter into collective moods,<sup>84</sup> some more amenable to open and effective deliberation than others.<sup>85</sup> We miss all of these variables if we think about emotion shorn of its social context.

The emotional dynamics of victim impact statements are only beginning to receive careful study. We need more information about the emotions these statements evoke in both survivors and jurors and the effect of these emotions on sentencing. Given how much there is to learn generally about group emotion, there is a particular need to

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<sup>81</sup> See *supra* text accompanying notes 26-28.

<sup>82</sup> For example, William Bowers, Benjamin Steiner and Marla Sandys found that white jurors interpreted the demeanor of black defendants quite differently (and more harshly) than black jurors did: where a black juror saw remorse and sincerity, a white juror saw incorrigibility and deceptiveness. They found that black and white jurors displayed similar differences in reading one another's demeanors, with both black and white jurors reading more negative emotions across racial lines. William J. Bowers, Benjamin D. Steiner and Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 *Journal of Constitutional Law* 171, 244-52 (2001).

<sup>83</sup> A recent rather colorful example of this dynamic occurred in the Lewis 'Scooter' Libby trial, in which all but one juror arrived in court on Valentine's Day wearing "bright red T-shirts with a white valentine heart over their clothes" in order "to express their fondness for the judge and the court staff." Neil A. Lewis, *Saying He Was Misled by Defense, Judge in Libby Case Puts Some Evidence Off-Limits*, *The New York Times*, February 15, 2007. The lone T-shirt holdout was later dismissed from the jury on the ground that she had been exposed to trial-related information over the weekend. Michael J. Sniffen, *No Verdict Yet From Remaining Libby Jury*, *The Washington Post*, February 26, 2007.

<sup>84</sup> Barsade, *supra* note 21.

<sup>85</sup> See generally Dr. Sunwolf, *Practical Jury Dynamics: From One Juror's Trial Perceptions to the Group's Decision-Making process* (2004) (discussing the psychological and neurological components of group dynamics in jury context); Scott Sundby, *A Life and Death Decision: A Jury Weighs the Death Penalty* (2003) (illustrating these dynamics in the context of three actual capital jury deliberations). See also Barsade, *id.* (discussing emotional contagion generally).

focus on how victim impact statements affect the emotions of the jury as a collective entity. Studies suggest that victim impact evidence, particularly when it conveys intense emotional pain, evokes sympathy and anger in jurors. Jurors perceive greater suffering after hearing such statements, and hear the emotional intensity of the statements as “a cry for help or relief.”<sup>86</sup> There is evidence that the anger they feel upon hearing victim impact statements translates into feelings of punitiveness.<sup>87</sup> There is also evidence, more generally, that anger tends to interfere with sound judgment—it inhibits detailed information processing, increases tendencies to blame, including misattributions of blame, and exacerbates the urge to punish. In other words, it makes people want to punish more harshly, and makes them less careful about whether they are punishing the correct person.<sup>88</sup> There is some evidence, albeit far from conclusive, that this punitiveness translates into harsher sentences, including more death sentences,<sup>89</sup> and that this desire to mete out harsh sentences is most discernible *after* group deliberation.<sup>90</sup>

And thus, although the Court in *Payne* did not permit survivor opinion testimony about the appropriate sentence in capital cases,<sup>91</sup> one must look to the actual dynamics of victim impact testimony to learn what message is, in fact, conveyed.<sup>92</sup> A capital jury faced with pain and grief, overcome with anger, does not have many social options at its disposal. If it wishes to take action on its empathy toward the survivor, its grief at the loss

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<sup>86</sup> Janice Nadler and Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 *Cornell L. Rev.* 419, 447 (2003).

<sup>87</sup> *Id.* at 444.

<sup>88</sup> *Id.* at 443-45; Brian Myers, Emalee Weidamen and Gregory Pierce, *Psychology Weighs in on the Debate Surrounding Victim Impact Statements and Capital Sentencing: Are Emotional Jurors Really Irrational?*, 19 *Federal Sentencing Reporter* 13, 16 (2006).

<sup>89</sup> See Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 *Cornell L. Rev.* 306, 321-22 (2003) (summarizing studies).

<sup>90</sup> Eisenberg et al, *id.*, at 319 (citing Bryan Myers & Jack Arbuthnot, *The Effects of Victim Impact Evidence on the Verdicts and Sentencing Judgments of Mock Jurors*, 29 *J. Offender Rehabilitation* 95, 99-100 (1999)).

<sup>91</sup> *Payne* overruled *Booth v. Maryland* (482 U.S. 496 (1987)) to the extent *Booth* had held the Eighth Amendment acted as a *per se* bar on the introduction of two types of victim impact evidence: evidence characterizing the victim, and evidence of the impact of the killing on the victim’s family. It did not discuss the admissibility of opinion evidence regarding sentence, and some commentators contend that therefore *Booth*’s bar on opinion evidence remains undisturbed. See Carter and Kreitzberg, *Understanding Capital Punishment Law* at 127 n47 and 129 (2004).

<sup>92</sup> See *supra* note 71 suggesting that the ban on opinion testimony tends to advantage the state, rather than affect both parties equally.

of the victim and its anger toward the defendant, its only apparent option is to vote for a sentence of death.

In this way, the survivor's expression of pain becomes implicated in the prosecution's message to the jury—the message that jurors who truly feel this survivor's pain, and agree that the person he lost was unique and valuable, will vote to execute the defendant.<sup>93</sup> And thus it seems to follow, according to this macabre logic, that for survivors, true closure will come when the defendant is executed, and anything that stands in the way of a speedy execution denies them the closure to which they are entitled. This valuation scheme may push survivors into a distressing dilemma. Survivors who do not support the death penalty may feel the need to stay off the witness stand rather than be conscripted onto the prosecution team, but in doing so may be painted as (or may feel themselves to be) disloyal to the victim's memory.<sup>94</sup> For survivors who do believe the system's promises about closure, another type of distress may occur. Survivors who do not experience the promised closure after giving testimony, seeing the defendant receive a death sentence, or even watching the defendant die (as happened, for example, to some of those who watched Timothy McVeigh die, watching his face in vain for a hint of the “meaning” of their loved ones' deaths),<sup>95</sup> may suffer the pain of empty promises and dashed hopes.<sup>96</sup>

The valuation scheme described above exerts a profound influence on the structure of the capital system. It exerts pressure on legal actors down the line. It exerts pressure on legislators to expand the list of death eligible crimes, or risk showing disrespect for certain classes of victims.<sup>97</sup> It exerts pressure on prosecutors to bring

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<sup>93</sup> Nadler and Rose, *supra* note 86 at 447.

<sup>94</sup> John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 *Cornell L. Rev.* 257, 280 (2003). See also Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* at 59 (2004), noting that performance rituals may amount to “a demonstration of power relations...[in which] everyone is forced to either participate or watch silently.”

<sup>95</sup> See *supra* note 79. See also Susan Jacoby, *Watching McVeigh Die Helps No One*, *Newsday* at A33, April 17, 2001

<sup>96</sup> What some have called “secondary victimization” by the criminal justice system. See e.g. Deborah Kelley, *Victim Participation in the Criminal Justice System*, in *Victims of Crime: Problems, Policies, and Programs* 172, 182 (Arthur J. Lurigio et. al. eds. 1990); Deborah Spungen, *Homicide: The Hidden Victims* 10-11 (1998).

<sup>97</sup> Scott Turow, *To Kill or Not to Kill: Coming to Terms With Capital Punishment*. *The New Yorker*, January 6, 2003 (noting that “the fundamental equality of each survivor's loss creates an inevitable emotional momentum to expand the categories for death penalty eligibility.”)

capital charges, particularly in high profile cases,<sup>98</sup> and even to resist reopening a case based on evidence tending to exonerate the defendant.<sup>99</sup> It exerts pressure on jurors to impose a death sentence. It exerts pressure on judges to deny continuances or appeals.<sup>100</sup> It exerts pressure on politicians to “streamline” the capital system, for example closing or truncating avenues of appeal.<sup>101</sup> In general, it casts closure as an entitlement the court is eager to protect, and appeals, stays, post-conviction petitions and other procedural safeguards, as well as grants of clemency,<sup>102</sup> as cruel barriers to closure.

### **Survivor Evidence in Mass Killing Cases**

The use of victim impact evidence in criminal cases arising from terrorist attacks in which large numbers of people have been killed (hereinafter “mass killing cases”) raises another set of questions about the effect of context on emotional dynamics. Many

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<sup>98</sup> See e.g., the comments of the District Attorney Jim Brazelton, announcing that he was bringing capital charges against Scott Peterson: “I owe it to Laci, Conner, the community and especially the family, who are the most important people here.” Stanislaus County District Attorney James Brazelton quoted in TV interview on *The John Walsh Show* ([http://news.findlaw/court\\_tv/s/20030501/01may2003133418.html](http://news.findlaw/court_tv/s/20030501/01may2003133418.html)) For studies documenting wide disparities in capital changing decisions, see e.g., Garth Davies, Jeffrey Fagan, Andrew Gelman, Alexander Kiss, James Liebman, and Valerie West, *A Broken System: Part II: Why There is so Much Error in Capital Cases and What Can be Done About it*, available at <http://justice.policy.net/cjedfund/dpstudy/> and Report of the Governor’s Commission on Capital Punishment, Recommendation 30 (April 15, 2002) (Ryan Commission Report, Illinois).

<sup>99</sup> See generally Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 *Howard L.J.* 475 (2006).

<sup>100</sup> See e.g., cases cited in note 99 *supra*. For discussions of the political pressures on judges in capital cases more generally, and the effects of those pressures on judicial behavior, see Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 *B.U. L. Rev.* 759 (1995); Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 *Ohio State Journal of Criminal Law* 585 (2004).

<sup>101</sup> See e.g., the statement of former Florida governor Jeb Bush that by introducing lethal injection and truncating certain procedural avenues to speed up appeals “we can finally put an end to the unnecessary and endless delays long associated with death penalty cases in Florida. It is time to bring justice to the families of victims who have suffered and died at the hands of the most heinous criminals.” AMR 51/16/0027 January 24, 2000 (Amnesty International Report); See also Governor Jeb Bush’s statements before the special session of the Florida State legislature. 1/6/00 *N.Y. Times* A22, 2000 WLNR 3505770.

<sup>102</sup> Former Illinois governor George Ryan’s commutation of the sentences of all but four (pardoned) death row inmates to life in prison followed a series of highly emotional hearings on the prisoners’ clemency petitions. The hearings were requested by the Illinois States Attorneys Office. The issue of closure was raised often: both murder victims’ families and the press decried the hearings themselves for reopening painful wounds, and pled with the governor not to deprive survivors and the public of the closure of execution. See e.g., John Patterson, *Clemency Hearings Open Old Wounds*, *Chicago Daily Herald*, October 15, 2002; Editorial, *Ryan’s Hearings Cruel and Unusual*, *Chicago Sun-Times*, October 22, 2002. See generally Austin Sarat, *Mercy on Trial: What It Means to Stop an Execution*, Princeton, New Jersey (Princeton University Press 2005). See also *Deadline*, a film by Katy Chevigny and Kirsten Johnson (Home Vision Entertainment 2004), chronicling the Ryan clemency hearings (testimony of Robert Jones, father of a murdered girl: “It would be a grave insult to our daughter for the governor to grant clemency.”)



of the difficult issues that arose during the McVeigh<sup>103</sup> and Moussaoui<sup>104</sup> trials, among others, were the result of ambiguities about victim impact testimony that courts have struggled with in capital trials generally: what is their purpose; who counts as a victim; what sorts of harm are admissible; what is the court's role in ensuring the testimony is not unduly prejudicial? These issues have generated a voluminous literature, and I do not intend to revisit them here. My focus in this section is on how the mass killing context not only amplifies or exacerbates existing ambiguities about victim testimony, but affects the emotional dynamics of the capital trial in ways that pose unique institutional challenges.

As a general matter, high profile and politically charged mass killing prosecutions like the McVeigh and Moussaoui trials vividly showcase the public performative aspects of victim impact testimony, and the host of often conflicting legal, social and political interests, pressures and agendas implicated in the struggle over who gets to shape the presentation of victim impact testimony, and what form it will take. More specifically, the mass killing cases place in sharp relief the basic question raised earlier: what purpose are victim impact statements meant to serve? The ambiguity about their proper role complicates the effort to use them wisely in these highly charged cases.

Perhaps, as *Payne* itself held, victim impact statements are meant to transmit information. If so, courts should guard against redundant testimony. However, to determine redundancy it is necessary to discuss what sorts of information victim impact statements are meant to convey. Victim impact testimony is not meant to convey the fact of the murder—that is established in the guilt phase. It conveys the emotional impact of losing the particular victim. The informational value of this sort of testimony is difficult to assess. *Payne* premises the right to give victim impact testimony on the importance of conveying the uniqueness of each victim, and the Court more generally has acknowledged the informational importance of narrative accounts.<sup>105</sup> Thus it is arguable that since each victim is unique, and each narrative account will convey information more vividly than a cold evidentiary record, each survivor should be permitted to give a statement. Alternatively, defense attorneys have argued, with predictable futility, that

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<sup>103</sup> United States v. McVeigh, 958 F. Supp 512 (D. Colo. 1997); affirmed at 153 F.3d 1166 (10<sup>th</sup> Cir. 1998).

<sup>104</sup> United States v. Moussaoui, 282 F.Supp. 2d 480 (E.D. Va. 2003).

<sup>105</sup> See e.g., *Old Chief v. United States*, 519 U.S. 172 (1997).

every loss of life is terrible and leaves devastation, and that at some point the testimony becomes duplicative.<sup>106</sup> Yet in these cases it is administratively impractical to permit each of those affected to testify. In the Moussaoui case, for example, the government created a database of 8,000 persons adversely affected by the attacks of September 11<sup>th</sup>, and several hundred of them expressed an interest in testifying at the sentencing hearing. Ultimately the government had to confine itself to what it called “a reasonable sample...to convey properly the devastation...”<sup>107</sup> Three dozen people were permitted to give victim impact statements.

The mass killing cases highlight difficulties of drawing the line between informational and prejudicial victim impact statements. The distinction borders on the incoherent in the victim impact context generally, given that the value of the information *is* its ability to evoke pain and make grief salient. In mass killing trials, it is difficult to imagine a metric for determining the point at which the possible prejudicial effect of the emotions evoked by the information outweighs the value of the information.<sup>108</sup> *Payne* and its progeny assume that victim testimony will not interfere with the jury’s constitutional duty to consider the defendant’s mitigating evidence before determining whether he deserves to die.<sup>109</sup> But as Judge Matsch learned in the *McVeigh* case, it is immensely difficult to regulate the emotional climate of the courtroom in a high profile mass killing case. Despite his expressed intention to limit victim impact evidence to “facts rather than emotional impact,”<sup>110</sup> he eventually permitted more than three dozen

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<sup>106</sup> Logan, *Confronting Evil*, supra note 76 at 23, citing Al-Owahli transcript at 6809-11.

<sup>107</sup> I draw on Wayne Logan’s excellent article, *Confronting Evil*, supra note 76, for this portion of the paper, dealing with victim impact statements in the mass killing context. As Logan notes, in order to exclude all but three dozen impact witnesses, the government needed to obtain an exception to the Justice for All Act, which normally allows crime victims to be reasonably heard at any public proceeding concerning sentence. 18 U.S.C. Sec. 3771 (a) (d).

<sup>108</sup> The very difficulty of raising the issue of prejudice without appearing heartless illustrates the challenge of regulating impact testimony, particularly in mass killing cases. Logan quotes an exchange from one mass murder trial in which the defense counsel, seeking to limit victim testimony, apologizes for “seeking to minimize in a legal sense what cannot be minimized in a human sense.” The judge dismisses his plea for balance, saying “What is a fair balance? Two hundred killed and 5,000 injured and what is the calculus of that?” Logan *id.* at 23, citing Al-Owahli transcript at 6809-11.

<sup>109</sup> *Lockett v. Ohio*, 438 U.S. 586 (1978) (individualized sentencing in capital cases is constitutionally required); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (sentencer must consider mitigation testimony); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (sentencing structure must give effect to mitigating evidence). See also Bandes, *Empathy, Narrative*, supra note 53 at 402-405 (discussing influence of victim impact testimony on jury’s ability to consider mitigation evidence).

<sup>110</sup> Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity that has Come from Payne v. Tennessee*, 88 *Cornell L. Rev.* 517, 520 (2003).

victim impact statements. As one commentator noted, “the grieving process...and the compelling emotional need for witnesses to pay homage to their loved ones and to find some way of sharing their intense pain—rolled over everyone.”<sup>111</sup> The effect of the testimony was so powerful that even the judge and the reporters wept.<sup>112</sup>

If, on the other hand, victim impact statements are meant to serve as a vehicle for healing and catharsis, the exclusion of any survivor testimony becomes problematic for a different reason. Once the ability to make a statement is held out as a gesture of respect for victims and a means toward healing for survivors, the exclusion of some survivors comes to seem a cruel withholding—both of respect for the value of the victim’s life, and of the survivor’s means of achieving closure.

The alternative to letting all survivors testify is to choose among survivors. There is an irony here. As I have observed elsewhere, the “victims’ rights movement revives the concept of privatized justice, by portraying the criminal case as a struggle between the defendant and the victim’s family and by seeming to erase the role of the state.”<sup>113</sup> One perhaps unintended consequence of viewing the crime as a harm to individuals rather than to the community as a whole is that it raises the question of *which* individuals will be given a forum. If only some survivors will be permitted to testify, which victims get to be remembered, and which survivors get to be heard? The situation is rife with pitfalls. In the McVeigh case, the prosecutors excluded several survivors who opposed a death sentence, whereas in the Moussaoui cases, survivors with a range of attitudes toward the

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<sup>111</sup> Burr, *id.* at 521. See also Susan Bandes, “For McVeigh’s Victims, A Spectrum of Pain,” *The New York Times* (letter to the editor), April 26, 2001.

<sup>112</sup> Although McVeigh was sentenced to death, Moussaoui was not. There is no definitive explanation for the Moussaoui sentencing decision. Several jurors attributed it to the government’s weak case. Three of the jurors attributed it to Moussaoui’s limited knowledge of the September 11<sup>th</sup> plot, and three to his minor role in the attacks. See “Moussaoui spared execution but is sentenced to life in prison,” *Chicago Tribune*, May 4, 2006. Nine of the jurors found that Moussaoui’s unstable and violent early childhood was a mitigating factor. See Richard A. Serrano, “Jurors Give Moussaoui Life Term,” *Los Angeles Times*, May 4, 2006. Several jurors talked about their determination to put their emotions aside and focus on the law. See Jerry Markon and Timothy Dwyer, “Some Saw Moussaoui as Bit Player, Juror Says,” *Washington Post*, May 5, 2006. Defense lawyers attributed the verdict in part to the fact that some of the victim impact testimony came from family members opposed to the death penalty. Neil A. Lewis, “Moussaoui Gets Life: Jury’s Verdict Surprises Prosecutors,” *Chicago Tribune*, May 4, 2006.

<sup>113</sup> See Bandes, *Empathy, Narrative*, *supra* note 53 at 406-07 and accompanying notes. See also Barton Poulson, “The Third Voice” A Review of Empirical Research on the Psychological Outcomes of Restorative Justice, 2003 *Utah L Rev* 167 (2002) (defining restorative justice as viewing crime as a violation against the person rather than the abstract entity).

death penalty were permitted to testify.<sup>114</sup> Nevertheless, even in the latter case hundreds of survivors who wanted to testify were precluded from taking the stand.<sup>115</sup>

More basically, the very question of who qualifies as a victim or survivor is ambiguous. This ambiguity is not confined to the mass killing cases,<sup>116</sup> but their circumstances do exacerbate it. For example, the Moussai case made liberal use of the anthropomorphic notion of “institutional victims,” permitting medical rescue workers, police and fire personnel and former New York mayor Rudolph Giuliani to talk about harms to their workplaces, the City of New York, the U.S. Government and the nation as a whole.<sup>117</sup> One survivor who lost her husband asked “Why Mayor Giuliani? I don’t think he needs closure, and he didn’t lose loved ones.”<sup>118</sup> The notion of institutional victims compounds the irony I mentioned above. The privatized harm perspective, which was meant to supplement the notion of crime as harm to the community at large, is here supplemented by a notion of crimes against the community. However, the framework requires those who wish to speak for the community to demonstrate the bona fides of their victimhood.

Courts, unsurprisingly, are ill-equipped to make decisions about healing and catharsis, and often seem stymied by the complex emotional dynamics survivor testimony engenders in capital cases. Mass killing cases raise particular challenges that cannot be usefully understood without inquiry into their particular emotional dynamics and how these affect—and are affected by—the operation and goals of the capital system.

### **Conclusion: The Feedback Loop**

Legal institutions inevitably rely upon implicit and explicit assumptions about human behavior, and often these assumptions fail to reflect growing knowledge about how institutional actors do in fact behave. It may not always be possible, or even desirable, for legal institutions to incorporate evolving behavioral knowledge. It may not always be possible, because legal institutions do not tend to have reliable mechanisms for

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<sup>114</sup> Logan, *Confronting Evil*, supra note 76 at 28-30.

<sup>115</sup> *Id.*

<sup>116</sup> See Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Testimony in Capital Trials*, 41 *Ariz. L. Rev.* 143 (1999).

<sup>117</sup> *Id.* at 30.

<sup>118</sup> *Id.*

incorporating the findings of relevant fields, such as the sciences or social sciences. It may not always be desirable, because there may be countervailing considerations at play. Accurate behavioral knowledge promotes many important goals in a system that relies on predicting and channeling human behavior, but the legal system has other requisites as well, including predictability, consistency and equality of treatment.<sup>119</sup> Sometimes these conflicting goals will require tradeoffs—it is not always necessary or advisable to act on knowledge about how emotion affects legal actors and legal institutions. But to make these decisions intelligently requires knowledge about what is being weighed. Proceeding in ignorance won't make the difficult choices disappear; it will simply ensure that they are made without sufficient information.

Although there is increasing recognition that cognition and emotion act in concert, there is still a tendency to approach emotions as if they remains fixed across time, place and social setting. Emotions are not static entities; they exist in dynamic reciprocal relationships with social structure. To create and maintain effective and just legal institutions requires a continuing effort to clarify institutional goals and to create institutional structures that help legal actors facilitate those goals.

I have used the concept of closure to illustrate the pitfalls and consequences of using emotion language in the legal context without sufficient attention to the content of the emotional categories employed or to the institutional goals at stake. The term, as I have argued, has a constellation of meanings, each of which has its own implications for institutional structure. In the death penalty context, too often the term is used, not only without clarity, but without regard for the constitutional requisites of the capital trial.

The theme of closure has reframed the entire death penalty debate. For many years, support for the death penalty was premised on its deterrent function. More recently, the weight of empirical evidence has rendered the deterrence rationale increasingly tenuous.<sup>120</sup> Retribution, the major alternative rationale, has always been a

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<sup>119</sup> This tension is evident in the death penalty context, in which the Eighth Amendment has been held to require both individualized consideration and guided discretion. See e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 *UCLA L. Rev.* 1147 (1991).

<sup>120</sup> John Donahue and Justin Wolfers, *Uses and Abuses of Statistical Evidence in the Death Penalty Debate*, 58 *Stanford Law Review* 58, 791-846 (2005); Susan Bandes, *The Heart has its Reasons: Examining the Strange Persistence of the American Death Penalty*, *Studies in Law, Politics and Society*, special issue “Is

harder sell. Retribution at one time sounded too close to revenge, and made people uncomfortable. The language of healing and closure has provided a way to soften the retribution rationale. If the death penalty can help survivors heal, then retribution can be viewed as therapy rather than bloodlust. Thus the notion of closure provides a rationale for our continuing commitment to the capital system. At the same time, the perceived requisites of closure have fueled changes in the structure of capital system, including the victim impact statement, truncated appeals, and broadened categories of death eligibility. In this way the feedback loop perpetuates itself. We have promised survivors that the system can give them closure, and the institution of capital punishment now needs to exist to give survivors the closure we've promised them. Unfortunately, this therapeutic promise has little to do with the actual workings of our capital system: it's a poster child for the dangers of engrafting the private language of emotion onto a complex, hierarchical and coercive governmental entity.

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the Death Penalty Dying?" (Austin Sarat ed.) (forthcoming 2008) (summarizing current evidence on the efficacy of deterrence and discussing the change in rationales articulated in public opinion polls).

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