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# "Why Rebottle the Genie?": Capitalizing on Closure in Death Penalty Proceedings

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# “Why Rebottle the Genie?”: Capitalizing on Closure in Death Penalty Proceedings<sup>†</sup>

JODY LYNEÉ MADEIRA<sup>\*</sup>

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*Closure, though a term with great rhetorical force in the capital punishment context, has to date evaded systematic analysis, instead becoming embroiled in ideological controversy. For victims who have rubbed the rights lamp for years, inclusion in capital proceedings and accompanying closure opportunities are perceived as a force with the potential to grant wishes of peace and finality. Scholars, however, argue for rebottling the closure genie lest closure itself prove false or its pursuit violate a defendant’s constitutional rights. In order to effectively appraise the relationship of closure to criminal jurisprudence, however, and thus to decide whether and to what extent closure is an appropriate adjudicative goal, it is necessary to more thoroughly investigate the concept and develop a theory of closure. This Article provides an argument against rebottling the closure genie, a task not only seriously implausible but unsound under principles of communicative theory. Proposing that closure is an authentic cultural and communicative construct that has become indelibly linked to capital proceedings, this Article advocates a shift in focus to more practical questions. This Article first summarizes how legal scholarship has described closure up to this point, and then examines how courts utilize the rhetoric of closure to effect change for victims’ families in a variety of contexts. It then reviews widespread scholarly opposition to utilizing criminal law to pursue therapeutic ends. Thereafter, this Article seeks to broaden the contemporary understanding of closure by exploring how members of one victim population—Oklahoma City bombing victims’ families and*

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survivors—have described closure in intensive face-to-face interviews. These reflections provide the foundation for theorizing closure as a communicative concept composed of two interdependent behaviors: intervention and reflexivity. While intervention is an interpersonal component that urges victims' families to take action to effect change and pursue accountability, reflexivity is an intrapersonal component that nudges them to contemplate and work through grief, emotion, and trauma after a loved one's murder. Finally, this Article considers the pragmatic ramifications of applying a communicative theory of closure.

## INTRODUCTION

For victims who have rubbed the rights lamp for years, inclusion in capital proceedings and accompanying “closure”<sup>1</sup> opportunities are perceived as a force that can grant wishes of peace and finality. Most scholars, however, argue for rebottling the closure genie lest closure itself prove false or the pursuit of closure violate a defendant's constitutional rights.

What exactly is “closure”? It is surely a multifaceted term, referring primarily to a comforting or satisfying perception of finality. In the context of coping with a loved one's death, closure can be derived from appropriately celebrating that life through remembrance and mortuary rituals that can lay the dead to rest and assuage the loss for the living. These gestures can lend a sense of finality to a (usually) troubling, unsettling, or tragic event. It is no surprise that this form of closure has ancient roots. In Homer's *Odyssey*, Odysseus's drunken companion, Elpenor, perishes in a fall from the roof of Circe's house, and his body is left “unburied and unwept” after more urgent tasks drive the intrepid adventurer onward. When Odysseus later encounters Elpenor's restless shade in Hades, it implores the hero to remember him:

I beg you, master, to remember me then and not to sail away and forsake me utterly nor leave me there unburied and unwept, in case I bring down the gods' curse on you. So burn my body there with all the arms I possess, and raise a mound for me on the shore of the grey sea, in memory of an unlucky man, so that men yet unborn may learn my story.<sup>2</sup>

Time's passage, however, leaves few cultural constructs unchanged, and closure is no exception. Talk of closure is ubiquitous in contemporary discourse. It has been mentioned in conjunction with well-publicized murders<sup>3</sup> and white collar crimes<sup>4</sup> alike,

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1. “Closure” is placed in quotation marks here to indicate that it is a term with a contested meaning.

2. HOMER, *THE ODYSSEY*, Book 11, at 70–76 (E.V. Rieu trans., D.C.H. Rieu rev. trans., Penguin Books 2003).

3. See, e.g., Associated Press, *Laci Peterson's Mother: “Closure Will Only Occur . . . When I Die,”* Dec. 23, 2004; B. Drummond Ayres, Jr., *Simpson Trial: Closure, but for Whom?*, N.Y. TIMES, Jan. 26, 1997, at 10; Linda Loyd, *Award Sends Message in Einhorn Case*, PHILA. INQUIRER, Aug. 1, 1999, at E03; Luz Villarreal & Fred Shuster, *Browns, Goldmans Go Their Separate Ways; For Families, There Is No ‘Closure,’* L.A. DAILY NEWS, Feb. 11, 1997, at N3.

4. See, e.g., Gina Teel, *Enron Whistle-Blower Finds Closure: Too Many Executives Motivated by Their Stock Options, Says Sherron Watkins*, VANCOUVER SUN, Oct. 31, 2006, at D7; Today: *Profile: Mixed Emotions in Houston over Kenneth Lay's Death* (NBC television

and has been sought by victims and their families on both national and international<sup>5</sup> stages, justifying initiation of war crimes prosecutions and truth and reconciliation commissions.<sup>6</sup> Since 1991, when the United States Supreme Court ruled in *Payne v. Tennessee*<sup>7</sup> that states could permit murder victims' family members to deliver victim impact testimony at sentencing, closure has become an especially popular topic in criminal law, and new participative opportunities have been extended to victims' families, symbolizing a shift in legal focus to more therapeutic ends.<sup>8</sup> As crime victims have gained political prominence,<sup>9</sup> they have carried their asserted need for closure with them into the limelight.<sup>10</sup> At the same time, justifications for punishment have expanded from "detering and incapacitating" offenders to the need to "reform, educate, vindicate victims, produce catharsis, and express condemnation."<sup>11</sup> Closure, then, "has had a meteoric rise, both in the public consciousness and in the legal arena."<sup>12</sup>

Of particular interest is closure's relationship to capital punishment—the idea that victims' families require an execution to heal. Before 1989, closure was never mentioned by the media in conjunction with the death penalty; in that year, the terms were used together once.<sup>13</sup> Beginning in 1993, however, the degree to which closure was identified with the death penalty grew exponentially, occurring 500 times in 2001,<sup>14</sup> when an ABC News/*Washington Post* poll found that sixty percent of respondents strongly or somewhat agreed with the statement that the death penalty was fair because it gave closure to murder victims' family members.<sup>15</sup> In the capital context, closure encompasses not only the need for the victim's family to celebrate the victim's life through traditional rituals, but also the desire to vindicate the victim through the criminal

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broadcast July 6, 2006).

5. See, e.g., Roger Cohen, *To His Death in Jail, Milosevic Exalted Image of Serb Suffering*, N.Y. TIMES, Mar. 12, 2006, at 1; Derek Scally, *Milosevic's Death "A Great Pity for Justice"*, IRISH TIMES, Mar. 13, 2006, at 10; Tom Walker, *Milosevic Death Cheats His Victims*, SUNDAY TIMES (London), Mar. 12, 2006, at 1; Olivia Ward, *Justice Maybe, but No Closure: The Killers Can't Hear Their Victims*, TORONTO STAR, Oct. 23, 2005, at D1.

6. See generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

7. 501 U.S. 808 (1991).

8. See, e.g., Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1 (2009) [hereinafter Bandes, *Sociology*].

9. See, e.g., *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the S. Comm. on the Judiciary*, 104th Cong. 1 (1995) ("[P]unishment provides closure and peace of mind to victims of crime who too often are forgotten by the criminal justice system.").

10. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 121 (2001) ("[V]ictims have become a favoured constituency and the aim of serving victims has become part of the redefined mission of all criminal justice agencies.").

11. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1389 (2003).

12. Bandes, *Sociology*, *supra* note 8, at 1.

13. FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 48 (2003).

14. *Id.*

15. *Id.* at 61.

justice system by attaining a guilty verdict. This verdict not only marks the end of legal proceedings and imposes accountability, but also confirms the victim's intrinsic worth and human dignity and demonstrates the tragedy of loss, becoming a form of remembrance. Many victims' family members believe that invoking the victim's name in capital proceedings is not merely a tribute to the victim, but also is compelled by the horrific nature of the crime. Scholars have noted that closure has wrought substantial change in capital proceedings, becoming an independent justification for the death penalty, victim impact testimony, and limiting procedural protections for condemned defendants.<sup>16</sup> Evidence of the impact of closure also extends beyond the courtroom. After commuting the death sentences of all Illinois death row prisoners to life without possibility of parole in 2003, Governor George Ryan reported that, in meetings with victims' families, each family had pleaded for execution, citing a need for closure.<sup>17</sup>

Closure is in many ways an attractive concept. It reflects the notion that legal processes have socially constructive consequences beyond adjudication. It is a convenient way to refer to a body of ambiguous but related concepts pertaining to victims and their families: finality, catharsis, peace, relief, satisfaction, and a sense of justice. Its widespread usage extends the hope of healing. Though its ease of use comes from its ambiguity, these semantics also render it difficult to grasp in an empirical sense. Thus, despite its popularity, many assert that closure is problematic.<sup>18</sup>

In grappling with closure, scholars have regarded the concept as Justice Stewart did pornography, following an "I know it when I see it"<sup>19</sup> approach, and have either made tentative efforts at definition or briefly alluded to the term's diverse applications without further explicating its multidimensionality. They have focused instead on

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16. See Bandes, *Sociology*, *supra* note 8, at 26; Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance, and the Role of Government*, 27 *FORDHAM URB. L.J.* 1599, 1605 (2000) [hereinafter Bandes, *Victims*] ("Governor Jeb Bush of Florida, for example, in his current campaign to truncate the death penalty appeals process in that state, has 'emphasized the suffering of victims' families and complained that inmates spend about fourteen years on death row before they are executed."); Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 *N.Y.U. REV. LAW & SOC. CHANGE* 215, 216 (2001) ("[T]he cultural production of a feeling of closure for the secondary victims has become, at least implicitly, an independent justification for the retention and enforcement of the death penalty in the United States. . . . [C]losure has become the central trope of the growing victim-centered jurisprudence.").

17. George Ryan, Ill. Governor, Speech at the Northwestern University College of Law (Jan. 11, 2003) (transcript available at <http://www.deathpenaltyinfo.org/article.php?scid=13&did=551>).

18. Professors Armour and Umbreit state:

The notion of closure is rarely advanced by the survivors themselves. Many, if not most, vehemently deny that there is closure or that closure will ever be possible for them; they abhor the word because it implies "getting over it." Many survivors also insist there can be no justice because nothing will bring their loved ones back.

Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 *MARQ. L. REV.* 381, 398 (2007); see also Peter Loge, *The Process of Healing and the Trial as Product: Incompatibility, Courts, and Murder Victim Family Members*, in *WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* 411, 412 n.5 (James R. Acker & David R. Karp eds., 2006).

19. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

closure’s consequences—the inclusion of victims’ families in criminal proceedings, and particularly the incorporation of victim impact testimony in sentencing proceedings. Some scholars assert that such activities offer powerful opportunities for victim healing,<sup>20</sup> while others argue that they are means to therapeutic ends which legal proceedings are ill-suited to effectuate in light of a criminal defendant’s constitutional rights.<sup>21</sup> Yet, in order to effectively appraise the relationship of closure to criminal jurisprudence, and thus to decide whether and to what extent closure is an appropriate adjudicative goal, it is necessary to more thoroughly investigate the concept and develop a theory of closure.

The time has come to assess closure in its own right, as a value-neutral phenomenon. While closure may trigger strong personal reactions, it may also be stripped of them. It is unduly simplistic to regard closure merely as an individual’s attempts to heal, or as a solely therapeutic concept. Closure is a process, not a destination, a recursive series of adjustments that involves both intrapersonal and interpersonal communicative aspects. This view of closure as a strategic, sense-making process suggests that legal scholars and practitioners should not attempt to rebottle the closure genie, a task not only seriously implausible but unsound under principles of communicative theory. Demonstrating that closure is a real cultural and communicative construct that has become indelibly linked to capital proceedings prompts a shift in focus to more practical questions: What is closure in mainstream media culture and for victims’ families? Why is it a proper legal pursuit? How has it been integrated into capital proceedings? How can it be achieved without violating defendants’ constitutional rights? The first three questions constitute the heart of this Article.

In Part I, this Article first summarizes how legal scholarship has described closure up to this point, such as by using other amorphous phrases like “seeing justice done” or the “closing of a chapter” or by adopting victims’ own descriptions of closure without providing further contextualization. It then examines how courts utilize the rhetoric of closure to effect change for victims’ families in three different contexts: procedural concerns (interests in finality and preventing undue delay), preserving victims’ entitlements (interests in victim participation and in effecting a timely end to legal proceedings), and accomplishing therapeutic goals (promoting healing, catharsis, and control). Although closure can be used to describe the needs of those victimized by diverse crimes, this Article will focus primarily on closure in the context of capital murder. Having laid a foundational understanding of the semantics of closure, the Article reviews why the vast majority of scholars are opposed to utilizing criminal law to pursue therapeutic ends, and explains how existing scholarship confounds the closure issue by (1) confusing efforts to conquer grief with attempts to regain a sense of control and (2) failing to distinguish accountability from vengeance.

In Part II, the Article seeks to broaden the contemporary understanding of closure by exploring how members of one victim population—Oklahoma City bombing

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20. See, e.g., Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006).

21. See, e.g., Bandes, *Sociology*, *supra* note 8; Bandes, *Victims*, *supra* note 16; Wayne A. Logan, *Confronting Evil: Victims’ Rights in an Age of Terror*, 96 GEO. L.J. 721 (2008) [hereinafter Logan, *Confronting Evil*]; Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999) [hereinafter Logan, *Through the Past Darkly*].

victims' families and survivors—have described closure in intensive face-to-face interviews. Thereafter, in Part III, it elucidates a theory of closure as a communicative concept composed of two interdependent behaviors: intervention and reflexivity. While intervention is an interpersonal component that urges victims' families to take action to effect change and pursue accountability, reflexivity is an intrapersonal component that nudges them to contemplate and work through grief, emotion, and trauma after a loved one's murder. Finally, in Part IV, the Article considers the pragmatic ramifications of applying a communicative theory of closure.

## I. EXISTING PERSPECTIVES ON CLOSURE

### A. Scholarly Attempts to Define Closure

Several scholars have noted the need for a more comprehensive definition of closure.<sup>22</sup> Significantly, psychologists, psychiatrists, and social workers<sup>23</sup>—the very individuals who one would expect to define the term—have failed to comment on the term, except to say that closure is nonexistent for victim's family members. It does indeed seem that “[c]losure is a term with no accepted psychological meaning.”<sup>24</sup> Victim-turned-victim-advocate Deborah Spungen, however, states that closure is synonymous with the attitude that victims should “get over it,” that trauma and grief are transitory and that a final resolution is possible.<sup>25</sup> While acknowledging that partial resolution may be felt after various stages such as a suspect's arrest or the conclusion

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22. See, e.g., Armour & Umbreit, *supra* note 18, at 421 (“The variety of reactions to closure, some of which are contradictory, make it difficult to draw definitive conclusions about the meaning of closure, degree of closure or the events that impact closure. The current literature debates the existence and viability of closure or critiques its use as a tool of death penalty proponents. What is missing is a direct examination of the survivors' experiences of ultimate penal sanctions and the meaning, process, and function of closure.”); see also Bandes, *Victims*, *supra* note 16, at 1602 (“We might begin by examining the question: what do victims require in order to achieve some measure of closure? Assertions about what victims need are often presented as if they are empirically based. If this is indeed an empirical question about what conditions are most likely to help, we ought to be looking for empirical answers, and there are surprisingly few out there.”); Peter Hodgkinson, *Capital Punishment: Meeting the Needs of the Families of the Homicide Victim and the Condemned*, in CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION 332, 353–54 (Peter Hodgkinson & William A. Schabas eds., 2004) (“[T]he reason generally offered by politicians and some victims' lobbies for witnessing an execution is that the spectacle brings ‘closure.’ . . . [Family members of victims who witness executions] in common with most informed commentators were unclear as to what ‘closure’ is.”); Margaret Vandiver, *The Death Penalty and the Families of Victims: An Overview of Research Issues*, in WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 235, 235 (James R. Acker & David R. Karp eds., 2006) (noting the paucity of research on closure after reviewing the research on homicide survivors and the death penalty).

23. Clinical psychologist Therese Rando does use the term, however, stating, “the survivors' mourning continues to be complicated by supplemental victimization and a torturous lack of closure.” THERESA A. RANDO, TREATMENT OF COMPLICATED MOURNING 549 (1993).

24. Bandes, *Sociology*, *supra* note 8, at 1.

25. DEBORAH SPUNGEN, HOMICIDE: THE HIDDEN VICTIMS; A GUIDE FOR PROFESSIONALS 239 (1998).

of the trial, Spungen terms "total closure" illusory as that implies that victims' families are unchanged and that the murder made no difference.<sup>26</sup>

Legal academics, however, have made a few definitional sallies. Attempts to define closure parallel the growing use of the term. Thus, scholarship from the early- to mid-1990s is most likely to speak of "grief" instead of closure, or is likely to equate closure with grieving.<sup>27</sup> Other scholars have noted that closure is a monstrosity inclusive term, with various references spouting hydra-like from its ambiguity. In surveying trends and patterns in victims' media statements following execution, Gross and Matheson find that closure is the most frequently mentioned issue<sup>28</sup> and that it encompasses a wide variety of ideas, including the idea of finality (putting the murder behind them),<sup>29</sup> termination of proceedings,<sup>30</sup> the removal of the defendant as a threatening presence,<sup>31</sup> amorphous therapeutic terms such as "healing,"<sup>32</sup> and a conclusion to a life stage.<sup>33</sup> Similarly, Bandes describes closure as "an unacknowledged umbrella term for a host of loosely related and often empirically dubious concepts" which is often tied to legal proceedings:

Closure is sometimes used to refer to the sense of catharsis that comes of speaking publicly about one's loss. . . . Closure has also come to stand for the constellation of feelings—peace, relief, a sense of justice, the ability to move on—that comes with finality. The term sometimes refers to the ability to find answers to the

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26. *Id.*

27. For instance, in 1998 Paul Rock questioned whether closure was possible for homicide victim support group members, and also tied closure to grief:

[T]he precept that there can be a finish to grief is a subject of some ambivalence amongst homicide survivors. It is resisted by many, but not all, active members of the new organizations. [Support groups hold that closure is] a permanently bereft state. To suggest otherwise, to impose an alien developmental programme that proposes that one should "move on" or "get over it", is very often taken not only to belittle the scale of their grief and invalidate their very special identity as deep mourners, but also to betray the dead for whom they grieve. . . . [T]he need to retain a memory prevents closure.

PAUL ROCK, *AFTER HOMICIDE: PRACTICAL AND POLITICAL RESPONSES TO BEREAVEMENT* 58–59 (1998). Kanwar does not interpret closure in the therapeutic context of grieving, but instead asserts that closure has merged with a more vindictive term, the "satisfaction" that victims' families may receive from obtaining a guilty verdict or witnessing an execution, and notes that closure is a "relatively solemn and quasi-clinical" term. Kanwar, *supra* note 16, at 239.

28. Samuel R. Gross & Daniel J. Matheson, *What They Say at the End: Capital Victims' Families and the Press*, 88 CORNELL L. REV. 486, 489 (2003).

29. *Id.* ("[T]he survivors say that they hope they will be able to put the murder behind them or fear that they will never be able to do so.")

30. *Id.* at 490 ("[F]amily members expressed a clear desire for their ordeal to be over.")

31. *Id.* ("In some cases, victims' relatives explain the relief they feel after the execution in apparently concrete terms: Now the defendant is no longer a threat to them or to anybody else.")

32. *Id.* at 491 ("More often, victims' families state their desire for a conclusion in abstract or metaphorical terms. Some of the relatives say that now, with the execution behind them, they can complete (or begin) the process of 'healing'.")

33. *Id.* at 491–92 ("Family members frequently refer to the execution as a conclusion—the end of a chapter, the end of a book, the closing of a door—rather than as a cure.")



terrible questions a murder may leave open—for example, the circumstances of the murder or the identity of the killer. This sort of closure might require solving an open crime, but it might also involve some sort of interaction with the killer in an attempt to learn more. It might require a verdict and imposition of a sentence. In the capital context, it might require a sentence of death.<sup>34</sup>

Others assert that closure can involve intense desire or yearning<sup>35</sup> and refer to the cessation of suffering from pain and anger, peace from forgiving the murderer, a reaction to learning previously unknown details of the crime,<sup>36</sup> or catharsis.<sup>37</sup> Armour and Umbreit note that closure may be partial in the sense that suffering remains, and distinguish various types of closure, such as judicial (i.e., “the end of survivors’ involvement with the criminal justice system”), emotional (i.e., “letting go of long-standing anger toward the murderer”), or psychological (i.e., “the completion of a final act to honor the victim”).<sup>38</sup> Closure is also defined in the negative, indicating “that what was taken can never be restored,” “cannot[ing] disappointment that the murderer died too easily or to protest . . . that another death caused by executing the murderer could ever bring solace,” and “signify[ing] the amount of vengefulness a survivor feels.”<sup>39</sup> Ultimately, Armour and Umbreit characterize closure as a term that is “commonly presented as an end state and evaluated as a dichotomous variable due, in part, to its use as part of a [pro-death penalty] political agenda” but assert that it may more appropriately be thought of as a “continuum,” so that one could speak of degrees of closure.<sup>40</sup>

Scholars, then, regard closure as an emotional state<sup>41</sup> (or a continuum of states, per Umbreit). These descriptions of closure as an emotional state imply that those seeking closure can comport themselves in a variety of manners, ranging from restrained therapeutic grieving to intense, primal<sup>42</sup> feelings of rage or vengeance. The spectrum of closure behaviors, then, would seem to be bounded on one end by sadness or grief and on the other by anger. Some explicitly assert that closure has more to do with anger or vengeance than grieving.<sup>43</sup> This anger in particular concerns scholars, who fear the

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34. Bandes, *Sociology*, *supra* note 8, at 1–2.

35. Kanwar, *supra* note 16, at 216 (“[T]he ostensible finality of the execution itself is invested with such extraordinary anticipation—a yearning for the irretrievable, a desire for the unimaginable . . .”).

36. Armour & Umbreit, *supra* note 18, at 417–18.

37. Kanwar, *supra* note 16, at 237 (“‘Closure’ and ‘satisfaction’ are twin notions of catharsis that are reflected differently in the familiar markers of our culture.”).

38. Armour & Umbreit, *supra* note 18, at 418.

39. *Id.*

40. *Id.* at 418–19.

41. See, e.g., Bandes, *Sociology*, *supra* note 8; Bandes, *Victims*, *supra* note 16.

42. Kanwar, *supra* note 16, at 238 (“[Satisfaction] suggests a visceral craving, like the insatiable desire for gratification or a ‘fix.’”).

43. *Id.* at 239 (“[R]emedies aimed at closure often partition off the emotional content that drives them: rage, vengeance, and satisfaction.”); *id.* at 240 (“According to retributivist Paul Boudreaux, individual vengeance is the ‘desire to punish a criminal because the individual gains satisfaction from seeing or knowing that the person receives punishment.’ This is the kind of satisfaction that a victim is supposed to experience when she is allowed to view an execution or influence a sentence.”).

punitive instinct that proffered closure threatens to release. As Arrigo and Williams remark, "This punitive urge is not consistent with informed, reasoned, and reflective judgments; instead, this tendency is reactive, responding to unconscious primitive fears and dark affective undercurrents that are artifacts of the collective human psyche."<sup>44</sup> Such assurances that "expressions of emotional intensity—whether in the form of lust, grief, disgust, shame, or yearning—are regularly disqualified from legal discourse" rest on the presumption that there is a strict divide between emotion and reason, with law eschewing the former.<sup>45</sup>

### B. *The Use of Closure in Case Law*

The extension of criminal law to effectuate closure for victims' families illustrates a therapeutic orientation to law. Therapeutic jurisprudence "proposes the exploration of ways in which, consistent with principles of justice and other constitutional values, the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law."<sup>46</sup> It is premised upon the assumption that "[I]legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences."<sup>47</sup>

A survey of the use of closure in case law shows that courts have not hesitated to adopt its rhetoric. Ruling that the victim need not be a "faceless stranger,"<sup>48</sup> the Supreme Court noted in *Payne v. Tennessee* that murder "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."<sup>49</sup> Justice Scalia, concurring, remarked that it was absurd that "a crime's unanticipated consequences must be deemed 'irrelevant' to the sentence," and that the Court's former holdings "conflict[ed] with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."<sup>50</sup>

Judicial references to closure have occurred only recently in case law and may be classified under three interrelated categories: (1) procedural concerns (interests in finality and preventing undue delay), (2) victims' entitlements (interests in victim participation and in effecting a timely end to legal proceedings), and (3) therapeutic goals (promoting healing, catharsis, and control).

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44. Bruce A. Arrigo & Christopher R. Williams, *Victim Vices, Victim Voices, and Impact Statements: On the Place of Emotion and the Role of Restorative Justice in Capital Sentencing*, 49 CRIME & DELINQ. 603, 613 (2003).

45. Kanwar, *supra* note 16, at 238.

46. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997).

47. *Id.*

48. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

49. *Id.* at 832.

50. *Id.* at 834 (Scalia, J., concurring).

## 1. Procedural Concerns

In mentioning closure in a procedural sense, judges express a felt need to move proceedings along in a timely manner so as to comport with victims' entitlements—what is thought to be “owed” to victims by the criminal justice system—and with helping victims to “heal” as quickly as possible. Thus, this category overlaps to a large extent with the other two, and these interrelationships are discussed below.

Finality is treated as an independent judicial interest.<sup>51</sup> Activities such as learning the whereabouts of a victim's body from the defendant,<sup>52</sup> a defendant's confession,<sup>53</sup> the attainment of a guilty plea,<sup>54</sup> enforcing a guilty plea,<sup>55</sup> and a conviction<sup>56</sup> are thought to effect closure for victims' families, and closure has even been used as justification for DNA testing.<sup>57</sup> Closure is of course connected to the implementation of a death sentence; as the Eleventh Circuit noted with respect to one defendant who had been convicted over twenty years before the present action, “[c]ompelling interests—*e.g.*, guarding against a flood of requests, protecting the finality of convictions, and ensuring closure for victims and survivors—support the State's position in this case.”<sup>58</sup>

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51. *Grayson v. King*, 460 F.3d 1328, 1342 (11th Cir. 2006) (stating that “the government has a strong interest in the finality of duly adjudicated criminal judgments”); *see also* *State v. Watts*, 835 So. 2d 441, 453 (La. 2003) (“The finality of judgments is an important judicial and societal goal. Those who have been victimized and the families of those who have been victimized desire closure, especially in a brutal and senseless crime against an innocent victim.”).

52. *In re Lawrence*, 59 Cal. Rptr. 3d 537, 565 (Ct. App. 2007) (“Elkins finally revealed the location of the victim's body some 10 months after the murder. By the time it was found, and the victim's relatives received some closure, the body was partially eaten by animals.”).

53. *Winkles v. State*, 894 So. 2d 842, 848 (Fla. 2005) (“Little weight was given to appellant's having provided closure to the victims' families by confessing . . .”).

54. *Robles v. Fischer*, No. 05 Civ. 3232(JSR)(FM), 2008 WL 627509, at \*4 (S.D.N.Y. Feb. 22, 2008) (“Prior to imposing sentence, Justice Solomon noted that the negotiated plea provided a level of certainty that a trial could not, as well as closure for the victims and their families.”).

55. *Patterson v. State*, 660 So. 2d 966, 969 (Miss. 1995) (Lee, J., dissenting) (“Enforcing agreements where the defendant pleads guilty to capital murder in exchange for a sentence of life imprisonment not only promotes public policy, but also serves to preserve valuable judicial resources and allows the family members of victims a certain degree of closure.”), *overruled by* *Twillie v. State*, 892 So. 2d 187, 190 (Miss. 2004).

56. *United States v. Chong*, 181 F. Supp. 2d 1135, 1136 n.1 (D. Haw. 2001) (“Moreover, where a defendant's suicide results in vacating his conviction of committing murder, the victim's family and friends are deprived of closure by a conviction.”).

57. *People v. Young*, 850 N.E.2d 284, 303 (Ill. App. Ct. 2006) (“The *Garvin* court held that the ‘main purpose’ for the collection of DNA was ‘to absolve innocents, identify the guilty, deter recidivism by identifying those at a high risk of reoffending, or bring closure to victims’ which it found distinct from ‘traditional law enforcement practices designed to gather evidence in a particular case to solve a specific crime that ha[d] already been committed.’” (quoting *People v. Garvin*, 847 N.E.2d 82, 92 (Ill. App. Ct. 2006))).

58. *Grayson v. King*, 460 F.3d 1328, 1342 (11th Cir. 2006) (emphasis in original); *see also* *Jones v. Allen*, 485 F.3d 635, 641 (11th Cir. 2007) (“If this court were to grant the motion to stay to allow Jones to proceed on his § 1983 challenge in district court, the implementation of the State's judgment would be delayed many months, if not years. Jones, in essence, would receive a reprieve from his judgment.”).

## 2. Victims' Families' Entitlements

Judges can be somewhat protective of victims' family members, ensuring that they receive what is essentially "due process"—timely adjudication of the suspect and the opportunity to participate in proceedings. "Due process" for family members may be contrasted with defendants' opportunities to appeal a conviction and sentence. In *Grayson v. King*, for instance, the Eleventh Circuit stated that Grayson "has enjoyed extensive judicial process over the years; indeed, it has been over twenty years since his conviction, and he now seeks to forestall his death sentence by seeking further process with minimal probable value."<sup>59</sup> Family members also have other needs, such as receiving information about the crime; as the court in *State v. Poelking* recognized, "the commission of a crime for no reason at all can sometimes be the worst form of the offense because the offender's actions go unexplained, leaving a victim without closure."<sup>60</sup> Closure itself may even be an entitlement; one court faulted a defendant for "refus[ing] to give closure to the victim's family, instead choosing to hide behind lies set forth in his idle claims of innocence . . . ."<sup>61</sup>

Judges describe the family members' adjudicative interests as "strong,"<sup>62</sup> and often correlate those interests with the offender's timely trial and punishment.<sup>63</sup> One of the strongest statements of this entitlement was made by the Arizona Supreme Court, which stated, "[o]ne of the guarantees afforded by that [Arizona] constitutional amendment is a 'prompt and final conclusion of the case after the conviction and sentence.' We agree that if this provision is to have meaning, victims are entitled to closure much sooner than 25 or 30 years after their perpetrators' convictions . . . ."<sup>64</sup> In *Jones v. Allen*, the Eleventh Circuit noted that

[n]ot only the State, but also the Nelson children, who watched Jones and his co-defendant kill their parents and attack their grandmother and who themselves were

59. *Grayson*, 460 F.3d at 1342.

60. No. 78697, 2002 WL 538767, at \*5 (Ohio Ct. App. Apr. 11, 2002).

61. *State v. Rimmer*, No. W1999-00637-CCA-R3-DD, 2001 WL 567960, at \*13 (Tenn. Crim. App. May 25, 2001). The entire text of the statement is as follows:

Further, the Defendant showed no remorse at the trial or sentencing hearing, and never revealed the location of the victim's body. The Defendant's refusal to divulge the location of victim's body is callous in this court's opinion, and in choosing to withhold such information, the Defendant has done much more than commit murder in this case. Indeed, his refusal to divulge the location of the victim's body effectively perpetrates on the victim's family a never-ending victimization. The Defendant's refusal to give closure to the victim's family, instead choosing to hide behind lies set forth in his idle claims of innocence, obviously demonstrated to the jury the cold, heartless nature of the Defendant.

*Id.*

62. *See, e.g., Jones v. Allen*, 485 F.3d 635, 647 (11th Cir. 2007).

63. *See, e.g., Buhl v. Cooksey*, 233 F.3d 783, 807 (3d Cir. 2000) ("We do not intend our analysis to in any way detract from the noteworthy efforts of the trial judge to protect Buhl's constitutional rights or to uphold the dignity of Buhl's victim, and afford her some measure of closure by expeditiously bringing this matter to trial.").

64. *State v. Richmond*, 886 P.2d 1329, 1333 (Ariz. 1994) (quoting ARIZ. CONST. art. II, § 2.1) (citation omitted).

stabbed and shot, have a strong interest in seeing Jones's punishment exacted. . . . The State and the surviving victims have waited long enough for some closure to these heinous crimes.<sup>65</sup>

Similarly, in *Dickey v. Ayers*, the court remarked, "[t]he State observes that 14 years have already passed since Dickey was convicted, and unnecessary tolling would hinder the ability of the victim's survivors to obtain timely closure and jeopardize society's interest in swift punishment."<sup>66</sup> Finally, in *Skaggs v. Commonwealth*, the Kentucky Supreme Court stated, "[s]urely the family and friends of the two victims are entitled to some consideration as to the closure of these grisly and senseless murders—24 years have passed. The legal process afforded the convicted killer has been much more than due."<sup>67</sup>

### 3. Therapeutic Goals

Judges believe that victim participation is an effective means to therapeutic ends, and that legal proceedings can help victims heal or enhance closure prospects in ways ranging from opportunities for victim impact statements<sup>68</sup> to punishing the offender.<sup>69</sup>

Courts that have commented on victims' families' inclusion opine that such involvement prevents victims and their needs from being overlooked by the criminal justice system. Obtaining relatives' input on sentencing helps "further respect for the law" by "enabl[ing] the court to have an idea of what someone in society who has been forced to confront the issue deems a just punishment" and by "allow[ing] the victim to realize that she is more than a mere spectator in the criminal justice process."<sup>70</sup> Similarly, the court in *United States v. Blake* stated of the effects of victim statements, "[i]nstead of the victim feeling depersonalized and forgotten by the legal processes, she can feel that her situation was properly understood and considered."<sup>71</sup> Finally, restitution hearings have been described as proceedings that not only "inform the court" but also "assure the victims (many of whom were unaware of the workings of the American justice system) that they were being treated fairly."<sup>72</sup>

Courts appear to place particular value on opportunities for victims' families to make statements in legal proceedings; judges find that "[s]ound policy and practice, as well as the need for consistent application of criminal law, mandate allowing crime victims to be heard by the sentencing judge."<sup>73</sup> This principle is embedded in 18 U.S.C. § 3593,<sup>74</sup> which states that victims must be given an opportunity to be heard in capital cases, and information about the victim impact must be included in presentence

65. *Jones*, 485 F.3d at 641.

66. No. Civ. F-06-357-AWI-P, 2006 WL 3359231, at \*2 (E.D. Cal. Nov. 20, 2006).

67. No. 2002-SC-0436-MR, 2005 WL 2314073, at \*5 (Ky. Sept. 25, 2005).

68. *See, e.g., United States v. Blake*, 89 F. Supp. 2d 328, 351 (E.D.N.Y. 2000).

69. *See Benjamin v. Jacobson*, 935 F. Supp. 332, 341 (S.D.N.Y. 1996).

70. *Blake*, 89 F. Supp. 2d at 350.

71. *Id.* at 351.

72. *United States v. Cheung*, 952 F. Supp. 148, 151 (E.D.N.Y. 1997).

73. *Id.*

74. 18 U.S.C. § 3593 (2006).

reports as well under Federal Rule of Criminal Procedure 32(b)(4)(D).<sup>75</sup> At least one federal court has attested to the healing benefits of victim impact testimony:

Victim impact statements may also serve as a catharsis for victims, helping to assuage the bitterness at the fates that they have suffered. By participating in the criminal proceeding, victims realize that they are recognized as important by the court. The proceeding is not merely about the criminal, but it also accounts for the person most affected by the crime. Simply giving this person a chance to speak and be heard can have a beneficial effect.<sup>76</sup>

Courts also recognize, however, that testifying can be traumatic for victims' family members, disrupting closure. In *State v. Smith*, Justice Knoll of the Louisiana Supreme Court considered such possible psychological ramifications in his concurrence, concluding that it would be better for the judiciary and for the victim if a law enforcement officer could testify rather than a family member:

[A] surviving victim's testimony could more easily present the risk of shifting the jury's focus away from its primary function of determining the appropriate sentence for this offense and this offender. Moreover, this overlooks the trauma that a witness or surviving victim of a prior murder has suffered and the necessity of bringing closure to these life shattering events. It would be unnecessarily harsh to require them to testify years later when they have moved on with their lives when a law enforcement officer could serve the same purpose.<sup>77</sup>

### *C. Opposition to the Current Role of Closure*

The majority of scholars assert that pursuing closure for victims' families in capital proceedings is a grievous error. Scholars have three main arguments against the achievement of closure through legal proceedings: that law is ill-suited to fulfill therapeutic needs, that legal forms of closure are not what victims actually need, and that involving victims violates fundamental legal tenets.

Scholars have noted that there is a mismatch between therapeutic and legal ends. Bandes, for instance, opposes the injection of therapeutic goals into criminal adjudication, what she terms “a mapping of the language of private grief onto an entirely different sort of emotion culture—collective, public, hierarchical, adversarial, coercive.”<sup>78</sup> Thus, Bandes notes, the question of what will fulfill victims' emotional needs must be separated from the question of what legal proceedings can adequately provide to victims.<sup>79</sup>

A related argument is that victims need other forms of closure than the law can provide. Scholars are concerned that legal forms of closure are not the “therapeutic or

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75. FED. R. CRIM. P. 32(b)(4)(D).

76. *Blake*, 89 F. Supp. 2d at 351.

77. 793 So. 2d 1199, 1215 (La. 2001) (Knoll, J., concurring).

78. Bandes, *Sociology*, *supra* note 8, at 12.

79. Bandes, *Victims*, *supra* note 16, at 1603. According to Bandes, the law is already breaking promises to victims' families that closure is possible and that it is attained through legal proceedings. Bandes, *Sociology*, *supra* note 8, at 27.

spiritual closure” that victims actually seek or require.<sup>80</sup> Law, after all, necessarily entails certain forms of closure stemming from its need to seek accountability, and pronounce a verdict.<sup>81</sup> But a legal proceeding is not a counseling session. Thus, it is asserted that victims should turn to other extra-legal sources of support, such as counselors, religious advisors, and friends and family that are not divided in their loyalties towards both the defendant and the victims’ relatives.<sup>82</sup> Similarly, Kanwar opines that closure requirements are so personal that it would be difficult to incorporate any general steps to effect closure. This problem would only be aggravated if a crime committed by a single defendant had multiple victims.<sup>83</sup> Finally, a courtroom may not be the “supportive place” that family members need “in which to articulate their pain and suffering.”<sup>84</sup>

Most of the criticism concerning victim participation in capital trials has centered on its consequences for the objective conduct of the criminal trial—in short, on “justice” for the defendant. Scholars have contended that seeking closure could have serious adverse consequences for institutional and constitutional protocols and values.<sup>85</sup> Thus, although victims must be treated with respect and allowed to voice their disquiet, such opportunities must not be provided if they result in injustice,<sup>86</sup> or if they pose a danger to the rule of law.<sup>87</sup> These and other concerns prompt scholars such as Bandes to question whether healing victims’ families is worth increasing the risk that juries will impose death sentences arbitrarily.<sup>88</sup> Victims’ closure requirements may be hard to ascertain, and so it might be impossible to predict what legal steps are necessary.<sup>89</sup> Finally, retrofitting capital proceedings for closure purposes may place pressures on the legal system that it is not designed to withstand:

It exerts pressure on legislators to expand the list of death eligible crimes, or risk showing disrespect for certain classes of victims. It exerts pressure on politicians to “streamline” the capital system, for example by closing or truncating avenues of

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80. Bandes, *Victims*, *supra* note 16, at 1606.

81. *Id.*

82. *Id.* at 1605.

83. See Kanwar, *supra* note 16, at 245.

84. Arrigo & Williams, *supra* note 44, at 618–19.

85. See Kanwar, *supra* note 16, at 217.

86. See Arrigo & Williams, *supra* note 44, at 605.

87. See Kanwar, *supra* note 16, at 255.

88. Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 552.

89. Bandes, *Sociology*, *supra* note 8, at 17. Bandes states:

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. 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.

*Id.*

appeal. It exerts pressure on prosecutors to bring capital charges, particularly in high-profile cases, and even to resist reopening a case based on evidence tending to exonerate the defendant. It exerts pressure on jurors to impose a death sentence. It exerts pressure on judges to deny continuances or appeals. In general, it casts closure as an entitlement the court is eager to protect and . . . procedural safeguards, as well as grants of clemency, as cruel barriers to closure.<sup>90</sup>

The angst that legal attempts to effect closure engenders among academics can perhaps best be seen by examining the widespread scholarly consensus that victim impact testimony does not belong in capital sentencing proceedings. Here, otherwise "proper" emotions are held to be "improper" in capital proceedings, and their exclusion necessitates the restriction or outright termination of victim participation through impact testimony.

The argument against victim impact testimony exemplifies the three main contentions against victim participation. Scholars who argue against victim impact testimony frequently assert that law is not designed to effectuate the therapeutic ends that victim impact testimony is thought to accomplish. Academics claim that victim testimony does not comport with accepted penal justifications, and that it will result in death sentences imposed by juries swayed by emotion and vengeful feelings.<sup>91</sup> Others mention the likelihood that prosecutors "may explicitly or implicitly communicate their own views about what emotions are appropriate," and that these emotions—"anger and vengeance"—might increase the chances of a death sentence.<sup>92</sup> Researchers have also suggested that delivering victim impact testimony is not healing, often after canvassing victims' family members, prompting the conclusion that some victims do not feel better after providing victim allocation.<sup>93</sup> Several authors who report a lack of satisfaction, however, cite to a study by Davis and Smith,<sup>94</sup> who analyzed the experiences of victims who provided *written* victim impact statements, not oral allocution.<sup>95</sup> Thus, this study does not support the assertion that victim allocation is not healing. In actuality, research on whether victim impact statements assist in closure is inconclusive; some studies show increased satisfaction, others indicate decreased satisfaction, and still

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90. *Id.* at 20–21.

91. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 393–402 (1996) [hereinafter Bandes, *Empathy*]; Joseph L. Hoffman, *Revenge or Mercy? Some Thoughts About Survivor Opinion Evidence in Death Penalty Cases*, 88 CORNELL L. REV. 530, 533–34 (citing Ashley Paige Dugger, Note, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 399–400 (1996)); Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 222–23 (1995).

92. Bandes, *Sociology*, *supra* note 8, at 15.

93. Arrigo & Williams, *supra* note 44, at 604.

94. *See, e.g., id.* at 609.

95. Robert C. Davis & Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?*, 22 J. CRIM. JUST. 1 (1994). Davis and Smith concluded that "[t]he results do not support the idea that victim impact statements are an effective means to promote victim satisfaction with the justice system. There was no indication that impact statements led to greater feelings of involvement, greater satisfaction with the justice process, or greater satisfaction with dispositions." *Id.* at 10–11.



others point to neither increased or decreased satisfaction.<sup>96</sup> In addition, scholars contend that the negative emotional effect of victim impact statements is at fault; such statements, influenced by pain, anger, antipathy, and revenge, leave victims dissatisfied.<sup>97</sup> Other academics blame the trial forum, as its rituals and protocols suppress authentic expressions of emotion.<sup>98</sup> Therefore, those who do not conform to “stock” expectations about victimhood, such as by incorporating conventional themes into their victim impact testimony,<sup>99</sup> may face misunderstanding and hostility.<sup>100</sup>

Finally, legal scholars assert that victim impact statements disrupt the balance of capital proceedings, introducing arbitrariness into sentencing deliberations. Bandes asserts that although one naturally sympathizes with victims, such testimony elicits not only sympathy for the victim, but also legally unacceptable feelings of bias, hatred, and vengeance toward the defendant, distracting the jury from the defendant’s unique attributes and his culpability.<sup>101</sup> Other common criticisms are that juries base sentencing decisions on the victim’s characteristics, promoting inconsistency in punishments; that the relative eloquence of victims’ families unduly influences defendants’ fates; and that it may hurt family members to witness defense counsel attempt to rebut the victim impact testimony.<sup>102</sup>

## II. FOUNDATIONS OF A COMMUNICATIVE THEORY OF CLOSURE

### *A. The Emotional Landscape of Victims’ Families*

The emotional landscape of victims’ family members is complicated. Traumatic grief<sup>103</sup> is customary, resulting in part from the loss of a perceived “just world.”<sup>104</sup> Simply put, murder is disorder, and breeds further chaos.<sup>105</sup> Common emotional experiences include feelings of alienation and loss of control, simplification of moral

96. Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .*, 3 INT’L REV. VICTIMOLOGY 17, 24 (1994).

97. Arrigo & Williams, *supra* note 44, at 609.

98. Bandes, *Sociology*, *supra* note 8, at 15.

99. See Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432 (1993).

100. Bandes, *Sociology*, *supra* note 8, at 15.

101. Bandes, *Empathy*, *supra* note 91, at 395–96.

102. See, e.g., Hoffman, *supra* note 91, at 532–33.

103. According to Rando, complicated mourning arises from the nature of a homicidal death—its suddenness, violence, trauma, horror, and preventability—as well as survivors’ feelings of anger, guilt, self-blame, and shattered assumptions. Rando, *supra* note 23, at 8.

104. The “just world hypothesis” posits that “individuals have a need to believe that they live in a world where people generally get what they deserve” in order to “confront [their] physical and social environment as though they were stable and orderly” and “commit [themselves] to the pursuit of long-range goals or even to the socially regulated behavior of day-to-day life.” Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1030 (1978).

105. As Rock notes: “Major bereavement is not calm, appraising, and rational. It is instead at once a physical, emotional, and symbolic process that is built around a bewildering cacophony of intense sensations that suffuses fields of experience.” Rock, *supra* note 27, at 40.

categories into "good" and "evil,"<sup>106</sup> a need for information, and anger towards the perpetrators.<sup>107</sup>

Survivors of traumatic events, including murder victims' family members, often feel increasingly alienated in the wake of these events, and perceive that they are unable to connect with the everyday world around them.<sup>108</sup> This pervasive helplessness and loneliness may have physical manifestations, such as the inability to control behavior (e.g., spontaneous weeping in "inappropriate" locales), or social forms (e.g., loss of established routines and avoidance by former social acquaintances immediately after the event or when victims fail to "bounce back" as expected).<sup>109</sup> Homicide also creates a sense of unfinished business, with no final goodbyes or even last glimpses.<sup>110</sup> Family members also experience a desperate need for information, key for undertaking life reconstruction. Because one cannot move forward without understanding insofar as possible the circumstances of the murder, information about the crime and perpetrator is precious, and often is sought through trial attendance.<sup>111</sup> Finally, anger is of course the prototypical family response, with family members' voices passionately demanding a fitting punishment for the murderer. Anger is not only an emotion but also an activity of "self-assertion and of accusation," constructing both the angry self and the object of anger.<sup>112</sup> Anger is important because it motivates and orients family members towards a goal, encouraging them to once again assert control. Thus, in acting from anger, victims' families perform anger, and live in the anger experience.<sup>113</sup>

In an effort to restore control and prevent future losses, family members may adopt a practice of "keeping vigil" for the dead or other behaviors that maintain the traumatic pitch of post-disaster life and fulfill needs to protest injustice, keep others safe from

106. As Rock notes:

In their fervour and sense of urgency, in their anger and bewilderment, most survivors could have had no patience with anything but a simple and certain morality, and they turned to unambiguous schemes that would subdue doubt, establish firm boundaries between order and disorder, expel confusion, and point to directions for action.

*Id.* at 101. Reconstructed moral schemas can sometimes have archetypal or mythic proportions; Rock notes, "[i]t was as if on occasion survivors were recapitulating the plot of some very ancient myth, moral disorder turning to order, flux to structure . . ." *Id.*

107. See Jody Lyneé Madeira, *Blood Relations: Collective Memory, Cultural Trauma, and the Prosecution and Execution of Timothy McVeigh*, 45 *STUD. L. POL. & SOC.* 75, 86–87 (2008) [hereinafter Madeira, *Blood Relations*].

108. Not only do survivors feel a "loss of interest in the world without the loved one," but they also feel isolated from the "experience of frustration felt by others with the bereaved person's continued suffering, [to the extent that this isolation] interferes with natural healing processes." M. Katherine Shear, Allan Zuckoff, Nadine Melhem & Bonnie J. Gorscak, *The Syndrome of Traumatic Grief and Its Treatment*, in *PSYCHOLOGICAL EFFECTS OF CATASTROPHIC DISASTERS: GROUP APPROACHES TO TREATMENT* 287, 327 (Leon A. Schein et al. eds., 2006).

109. See ROCK, *supra* note 27, at 31–42.

110. See *id.* at 39.

111. As Rock notes: "Survivors thereby sought information, a restoration of control, and an end to the marginality which magnified their feelings of powerlessness and kept them apart from important sources of understanding." *Id.* at 99.

112. *Id.* at 101–02.

113. *Id.* at 49.

harm, resist loss of meaning, and remember and represent the dead or wounded.<sup>114</sup> Victims' families, then, are defined in opposition not to the deceased victim but to the perpetrator, and each evolves its meaning from its relationship to the other. Significantly, family members perceive this relationship as inequitable, with too much consideration paid to the defendant and his rights.

*B. A Case Study: Closure in the Context of the Oklahoma City Bombing*

There is unique value in asking victims' families about the meaning of closure after they have had time to reflect upon a murder and ensuing legal proceedings. Interviews conducted by the author with twenty-seven victims' families and survivors of the Oklahoma City bombing reveal definite trends and patterns in defining and negotiating closure.<sup>115</sup> When asked specifically to define closure, interviewees discussed what forms of healing were possible, and aside from a few who specifically connected McVeigh's conviction or execution to closure, did not discuss behaviors that contributed to closure. However, other perceived needs that interviewees described, such as a need to "complete" the process or to see justice done, are very much linked to the pursuit of closure or reconstruction. Thus, interviewees used the term closure to refer to therapeutic concepts such as "healing" or "coping" and also spoke of specific activities that contributed to the healing process. Significantly, none of these activities included therapeutic resources such as counseling. Individual participants are referred to by random number instead of by name to preserve anonymity.

1. Closure as a Therapeutic State

Family members and survivors discussed two definitions of closure. In mass media and popular culture, closure refers to a sense of absolute finality, or "getting over it," which interviewees assert does not exist. Closure can also denote coping with, comprehending, or contextualizing murder; this form is possible to attain, however, and many participants experienced it.

The pop-culture conception of closure as absolute finality has apparently poisoned most family members' and survivors' opinion of the term; out of twenty-seven victims' families and survivors, twenty-two stated that closure never occurs. When asked what closure meant to him, Participant 1 remarked, "I don't know because it never occurs. I think things get better and get worse but there's, as long as a person's alive and they have the state of mind that they can remember things, there's never closure."<sup>116</sup> Participant 14 gave a similar response: "I don't even know what that term means, because . . . there's not ever closure. . . . I think that you just learn how to deal with it."<sup>117</sup> Another interviewee hinted at the possibility of partial closure, stating

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114. Melissa S. Wattenberg, William S. Unger, David W. Foy & Shirley M. Glynn, *Present-Centered Supportive Group Therapy for Trauma Survivors*, in *PSYCHOLOGICAL EFFECTS OF CATASTROPHIC DISASTERS: GROUP APPROACHES TO TREATMENT*, *supra* note 108, at 505, 568.

115. The author conducted face-to-face interviews with twenty-seven victims' family members and survivors of the bombing.

116. Interview with Participant No. 1, in Oklahoma City, Okla. (June 25, 2005).

117. Interview with Participant No. 14, in Oklahoma City, Okla. (July 16, 2005).

[t]here is no such thing. That is a dirty word that should be stricken from grief dictionaries . . . I mean you have closures on certain chapters of the event but total, no. . . . I don't know who came up with that word but it's not a very good one.<sup>118</sup>

It was common to remark that closure would only come with death; as Participant 10 stated, “I hate the word closure . . . there won't be closure till I am dead.”<sup>119</sup> Participant 18 would define closure as the comfort of knowing that a loved one was alive:

[H]ow can I terminate or end the pain that goes along with how you miss that person. . . . That's what I would want it to be. . . . Somehow to get over that pain and you know have that comfort that I knew before, but I know that's not ever going to come.<sup>120</sup>

Instead, participants had to adjust to the idea that their identities have been fundamentally changed. Participant 22 explained: “It's a part of you just like every good thing [that] happened . . . . It never goes away. It's always part of your memory.”<sup>121</sup> Participant 28 described the inability to ignore memories of the bombing through a particularly apt analogy:

[T]here is no closure. It's like a chain or a bracelet or a ring, it's all one. And when you take a piece out of it . . . that piece is gone. So it'll never be complete . . . . So there is no such thing as closure, but you can come to terms with it. And you can deal with it daily.<sup>122</sup>

Closure's unpopularity seemed to stem from nonvictims' assertions that complete healing was possible, particularly within a certain timeframe. Participant 19 felt that usage could not have been created by someone experiencing traumatic loss: “It is . . . a word often used by people who, uh, probably haven't had anything big to go through.”<sup>123</sup> It was common to blame the media for creating unrealistic expectations; Participant 17 termed closure a “media word” and a “buzz term.”<sup>124</sup> The mass media, however, is not the only party at fault; general expectations that time would heal emotional wounds sooner rather than later were also to blame. Participant 1 connected a dislike of the term closure to others' expectation that “people should get over it” within a certain period of time.<sup>125</sup> Participant 12 also was disturbed by others' expectations that things soon would be “fine.”<sup>126</sup>

118. Interview with Participant No. 8, in Oklahoma City, Okla. (July 5, 2005).

119. Interview with Participant No. 10, in Oklahoma City, Okla. (July 6, 2005).

120. Telephone Interview with Participant No. 18 (July 24, 2005).

121. Interview with Participant No. 22, in Oklahoma City, Okla. (Sept. 30, 2005).

122. Interview with Participant No. 28, in Oklahoma City, Okla. (Apr. 30, 2006).

123. Interview with Participant No. 19, in Oklahoma City, Okla. (Sept. 29, 2005).

124. Interview with Participant No. 17, in Oklahoma City, Okla. (July 17, 2005).

125. Participant 1 remarked:

Uh, I don't like the word closure because, people have a tendency to suggest that people should get over it, period and there's a time frame they give 'em that's a grace period then it should all be gone it just don't happen. It all depends on the individual and how they deal with things, and for most people, nobody's ever totally over it they get better. That's all I know. And it's not over for any of us.

Sometimes participants' frustration with closure paralleled their dislike of therapeutic language, such as assurances that certain behaviors were "normal." Participant 21 noted:

I hate it [closure], I hate it, everybody hates it. Um, as much as we hate the word normal . . . . New normal is okay but you know, when you were going through all the grief and the depression and you can't focus and you don't know where you left your car, oh that's normal. Well if this is normal, I don't wanna be normal, you know, and I hate the word normal.<sup>127</sup>

Whatever their source, unrealistic expectations of closure could be damaging, according to Participant 9: "[A] lot of people think they're going to get it and they don't then and they're upset . . . ." <sup>128</sup> Participant 17 also asserted that closure had become an improper justification for the death penalty:

I can see now the horrible lies that are told to . . . victim's family members by prosecutors that are otherwise good people, . . . educated people, . . . about how that they need to get the death penalty for this guy so that they can have some type of closure and like if we bring you his dead body, you are going to feel much better about the loss of your son or daughter whoever it is . . . .<sup>129</sup>

Seventeen interviewees remarked that things did get better over time. As is clear from the comments of Participants 1, 14, and 28 concerning the absence of closure, interviewees would often qualify a statement that there was no closure with the observation that they had learned to "deal with it." Participant 23 distinguished closure from coping: "I don't think there is such a thing as closure. There is such a thing as coming to live with the experience, the traumatic experience, in your own unique way . . . ." <sup>130</sup> Similarly, Participant 16 explicitly rejected a definition of closure as absolute finality in favor of a more workable explanation as coping: "To me closure is just a, coming to grips I guess in my own mind with what has happened and being able to cope with what happened. I think closure and coping are kind of synonyms . . . ." <sup>131</sup>

Participant 26 also believed that people often used closure to refer to an inner peace: "I can find I think some people who say that they found closure. But I think what they mean is they found a peacefulness about living with what happened to them. And I found that."<sup>132</sup>

Interview with Participant No. 1, *supra* note 116.

126. Participant 12 noted that:

Almost immediately people would say uh, "You're ok now, aren't you?" Why? Why do people do that constantly, you know, from, from like the day after onward, you're ok now, aren't you? Things will be better, you know, things are better now, right? And they'll look at you . . . it's like a demand to hear—and what counselors and, and victims all said—was you need to be able to say, fine, things are fine.

Interview with Participant No. 12, in Oklahoma City, Okla. (July 9, 2005).

127. Interview with Participant No. 21, in Oklahoma City, Okla. (Sept. 30, 2005).

128. Interview with Participant No. 9, in Oklahoma City, Okla. (July 5, 2005).

129. Interview with Participant No. 17, *supra* note 124.

130. Interview with Participant No. 23, in Oklahoma City, Okla. (Oct. 2, 2005).

131. Interview with Participant No. 16, in Oklahoma City, Okla. (July 17, 2005).

132. Interview with Participant No. 26, in Oklahoma City, Okla. (Apr. 29, 2006).

Coping behaviors included comprehending the event and placing it in context beside other life events. Participant 2 discussed this process: "I think that closure means you come to a point where you understand it, and it seems like it's, it's more or less a certain point. A closure point. And for me closure was not a point but it was a long drawn out process."<sup>133</sup> Participant 3 stated that placing the bombing into context so that it is no longer a life-governing event provided closure:

[C]losure means . . . that I'm thinking, okay now what's coming up here . . . [relative's] birthday . . . then we got the book sale, then we got my birthday, oh, forgot, April 19<sup>th</sup>, yeah we've got the seventh anniversary . . . you know that almost slipped my mind. You know, . . . where, it's just, it's not defining your life anymore. . . . I decided consciously that the rest of my life wasn't gonna be defined by the bombing, if I wrote an autobiography it would be in there, but it would be perhaps a chapter, and I might refer to it throughout the rest of the book from time to time, but it wouldn't be my defining moment.<sup>134</sup>

Participant 3's observation that the bombing would be a "chapter" in an autobiography reflects a theme of compartmentalization that was very common in participant responses, which rendered the bombing a "door being closed."<sup>135</sup> Participant 6 had an excellent description of this process:

You close off certain sections of your life and maybe in a way it is like a set of encyclopedias that's 'x' number of volumes long and you finish this one book and you shut that one book, but it's not that easy. You're going on to other chapters and they're all interwoven together and sometimes you slip back to the beginning of the first one again for a little while then come over to the fifth . . .<sup>136</sup>

Participants' ability to compartmentalize the bombing was likely to be triggered by external goings-on, such as legal proceedings. Participant 21, for instance, noted that McVeigh's death formed the conclusion of such a chapter: "Once he was executed again, that chapter was over I could go on with something else in my life."<sup>137</sup> Participant 27 states that closure was relief that came from knowing that McVeigh would not "do this again."<sup>138</sup> For Participant 27, the guilty verdict marked a personal "end" to proceedings:

[J]ust a sense of relief when they found him guilty. Just a sense that he wasn't going to be able to do it to anybody else or get off . . . I remember sobbing when they read the guilty verdict, just because it was just such a sense of—okay, it's done. For me it was done . . . I don't want to say closure, but I got a huge, I mean I moved very fast-forward.<sup>139</sup>

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133. Interview with Participant No. 2, in Oklahoma City, Okla. (June 24, 2005).

134. Interview with Participant No. 3, in Oklahoma City, Okla. (June 24, 2005).

135. *Id.*

136. Interview with Participant No. 6, in Oklahoma City, Okla. (July 3, 2005).

137. Interview with Participant No. 21, *supra* note 127.

138. Interview with Participant No. 27, in Oklahoma City, Okla. (Apr. 29, 2006).

139. *Id.*

Participant 26 found that the opening of the Oklahoma City Bombing National Memorial aroused similar feelings:

I've often told the story the way I felt when the Memorial opened that day, on April 19<sup>th</sup>, 2000. And when I walked down the steps I could feel the . . . something being lifted from me. And I felt lighter and I felt relief. And when I thought about it later, I could describe it as I had been wearing an overcoat for 5 years and had all these feelings of depression, anger, sadness, guilt, despair. All these things I'd been carrying for 5 years. And now I had a place to hang that overcoat and leave those feelings there. I didn't need to carry them with me anymore.<sup>140</sup>

Time, however, seemed to be the biggest aid in coping, contextualizing, and compartmentalizing the bombing. It took years for victims' families and survivors to gain perspective on the bombing and its aftermath. As Participant 6 noted, "The bombing certainly changed my life forever in lots of ways and it took years for me to begin to see the good ways because the initial ways were so awful."<sup>141</sup> Participant 18 stated that pain fades with time: "[Y]ou know, time, time heals a lot of that. If healing is a good word, you know, it's just the passage of time dulls the pain that you felt."<sup>142</sup> Other life accomplishments can also assist with life reconstruction; Participant 20 noted that "you, you get to a point, I guess where you're, where you're satisfied with the way you feel, I guess, whether it's, uh, [you] get remarried or . . . maybe had another kid or, you get to a point, I think where hopefully you felt like you, you put it at rest."<sup>143</sup>

Upon establishing a temporal and emotional distance from the bombing, interviewees sometimes were able to point to positive changes, and specific reasons to remember what had occurred. Participant 16 remarked:

It was bad and it was horrible and I don't ever want to forget it. I want it, I want to remember so, you know, because it was an important part of my life. It was something that made me what I am but I'd like to move on from it too. And, one, like I said one of the good things that happened for me was meeting some of these people that have really become friends.<sup>144</sup>

## 2. Closure as Therapeutic Action

What is absent from these remarks is reflection on the "lived experience" of closure—the act of holding a suspect accountable that ostensibly motivates victims' families to attend trials, give victim impact testimony, and witness executions. With the exception of a few interviewees who discussed McVeigh's execution as a moment of closure, not one defined closure explicitly as coping or healing through testimony or execution witnessing. Instead, at other points in the interview, interviewees spoke of a duty or responsibility to testify, and of a personal "need" to see that justice was done connected to a desire to see McVeigh held accountable for his actions. This does not

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140. Interview with Participant No. 26, *supra* note 132.

141. Interview with Participant No. 6, *supra* note 136.

142. Telephone Interview with Participant No. 18, *supra* note 120.

143. Interview with Participant No. 20, in Oklahoma City, Okla. (Sept. 29, 2005).

144. Interview with Participant No. 16, *supra* note 131.

indicate that participation in legal proceedings was not tied to closure but instead demonstrates that legal proceedings in and of themselves did not define the boundaries of the closure process. Legal proceedings both created new duties—a duty to self or to a beloved victim to attend legal proceedings or witness McVeigh’s execution—and provided a venue in which those duties could be satisfied. Interviewees also felt a desire to participate somehow in the process of seeking to hold McVeigh accountable. For interviewees, then, closure necessitated some involvement in legal proceedings.

Testifying in open court was one way to satisfy a duty to participate in legal proceedings. Two interviewees who were called as witnesses at McVeigh’s trial felt a tremendous duty to testify. Participant 24, a prosecution witness, felt a sense of responsibility because he was asked by the U.S. Attorney to be a government witness because of intimate knowledge about the Murrah Building. This duty made the act of testifying more difficult: “[P]robably the most difficult thing I ever did because I felt a tremendous responsibility to my friends, my coworkers, my community, to make sure that my testimony was a part of helping to prosecute those people.”<sup>145</sup> Participant 20, a critically injured survivor slated to give victim impact testimony whose testimony was cancelled at the last minute, also spoke of a duty to help sentence McVeigh to death:

The way I looked at it was . . . my story and my case and injuries . . . could make a big impact and if it could help to get him the death sentence then I was . . . I’d do my part, you know. . . . [T]hey were gonna pay my way up there for the trial and pay the lodging and all that, but if I thought me being there would help him get the death sentence, I’d-a paid my own way . . . .<sup>146</sup>

Thus, Participants 24 and 20 were willing to go through a tremendous ordeal for a higher cause in order to satisfy a complex system of responsibilities to individuals localized and dispersed, dead and alive, known and unknown, as well as to answer the deeds of McVeigh and Nichols.

One did not have to take the stand in order to be a trial “witness,” however. Physical presence, though a silent presence, was a profound reminder that others stood in for the deceased victims, either out of love and duty or from a desire to gather information. As Participant 16 stated, “I don’t think I felt a duty or responsibility as much as just wanting to know that I was there and a part of it and was able to look him in the face, you know, and call him a creep.”<sup>147</sup>

To attend a trial was to experience justice. Interestingly enough, fewer participants characterized attending the trial as a duty or responsibility than as an important step in being involved in the process. Of twenty-seven participants, fourteen did not feel a duty or responsibility to view the trial and twelve did; one felt a duty to testify but not to attend the trial. However, fifteen participants felt that attending the trial was an important step in being involved in the process. Family members and survivors who cited a need to attend the trial did so to represent victims; as Participant 22 stated: “[Y]ou want to represent your loved one. They can’t be there. You want to be there for them.”<sup>148</sup> Sometimes this felt representational need stemmed from a perception that the

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145. Interview with Participant No. 24, in Oklahoma City, Okla. (Nov. 2, 2005).

146. Interview with Participant No. 20, *supra* note 143.

147. Interview with Participant No. 16, *supra* note 131.

148. Interview with Participant No. 22, *supra* note 121.



victim would have wanted that person to attend, a need to keep others from forgetting the victim, or a need to be a spokesperson for the victim. As Participant 28 remarked:

I felt I did for . . . for my [child]. I felt . . . she can't be there . . . . If it had been the other way round, if it had been me, she'd be there . . . . She would have been very vocal. . . . And that's the least I could do as her parent . . . to be there and be her voice . . . .<sup>149</sup>

Thus, attending legal proceedings to represent a deceased victim served the function of somehow keeping alive that person's presence, and invoking it to achieve accountability.

Family members and survivors who attended the trial in Denver constantly scrutinized the defendants' behaviors; as Participant 25 noted, these behaviors "were some of the things that we was [sic] trying to watch and see how both of them would react under circumstances."<sup>150</sup> Participant 17 described the intensity of this behavioral scrutiny: "[D]uring lunch breaks and all that they are talking that all of this angry thing and how this person you know or what McVeigh did at the table, where you're sitting there . . . that he had expression of some kind or how he sat on the chair . . . ."<sup>151</sup> The nature of the Denver courtroom was a more intimate space with increased opportunities to view body language.

Another reason frequently cited by family members and survivors was the need for information; information was essential for comprehension, since one must know what occurred to understand it. Five participants felt a responsibility to attend for information-gathering purposes. Participant 10 attended to gain "insight" into why the bombing occurred "to see if I could . . . figure out why he could do something like that . . . I never got any . . . insight to it but I felt better."<sup>152</sup> This craving for information could be a consuming need: "I needed to find out everything that went on, how it went on, how they was [sic] able to prosecute or catch him and all these things. The more I knew about what was going on and in that case the better off I was . . . ."<sup>153</sup> Participant 22 described this need as a desperate hunger: "[A] huge part of going was information. I just was starved for information."<sup>154</sup> For Participant 23, live attendance was key for increased accuracy, "so that when I spoke about it, when I thought about it, it was based on facts and rule of law and . . . not just driven by rumor and emotion."<sup>155</sup> Two participants remarked that information helped them to put the "puzzle pieces" back together; as Participant 22 remarked, "[T]hat court room is the very best source . . . . You can't get it from the papers. There's not enough there. You gotta be in that courtroom to get those pieces of your puzzle back together."<sup>156</sup>

Willingness to attend the trial was connected to the expectation that trials would play an essential role in recovery. Some participants did not attend the trial or ceased to

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149. Interview with Participant No. 28, *supra* note 122.

150. Interview with Participant No. 25, Oklahoma City, Okla. (Apr. 29, 2006).

151. Interview with Participant No. 17, *supra* note 124.

152. Interview with Participant No. 10, *supra* note 119.

153. *Id.*

154. Interview with Participant No. 22, *supra* note 121.

155. Interview with Participant No. 23, *supra* note 130.

156. Interview with Participant No. 22, *supra* note 121.

attend when it became apparent that the attendance experience would not assist with coping or healing, or worse, would hinder such recovery efforts.

Finally, five participants' statements evidenced a desire to bear witness to "justice" live. Participant 1 attended from a "desire to see that, that justice was served and witness it so that if it didn't come out the way I knew it should've I could understand why it didn't" and also intended to signify to the jury that many were very concerned about the trial outcome.<sup>157</sup> Justice was the only proper response to the victims' murders; Participant 8 noted: "[W]e didn't have our loved ones. I mean at least we could see that we got justice."<sup>158</sup> Some survivors felt that the trial was the rare forum in which they received justice; Participant 15 remarked: "It was like, there is justice and there was a lot of times when we didn't feel like we had any, there was not any justice for the survivors."<sup>159</sup>

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Like participants' desire to attend the trial, their desire to witness the execution was linked to the role that they expected it to play in healing or life reconstruction, invoking the stereotypical link between execution and closure. Significantly, U.S. Attorney General John Ashcroft consented to televise the execution via closed-circuit television to accommodate more witnesses for the very purpose of effecting closure.<sup>160</sup> Some participants did not hesitate to decouple the witnessing experience from closure because it would not restore murdered loved ones to life or because their focus was no longer on vengeance against McVeigh. Others chose to witness because they perceived a need to be present for the last legal proceeding for purposes of finality or because they needed to bear witness to justice.

Eighteen participants did not feel a duty or responsibility to view the execution, and only nine said that they did. Participants' most common reason for not feeling a duty or responsibility to witness was that it was unnecessary since it would not provide closure or assist in healing, or that participants had "moved on." In short, most people did not feel that witnessing the execution would assist them; some, like Participant 14, felt that witnessing was useless because it could not alter the past, while others, such as Participant 24, supported a death sentence for McVeigh but had "moved on." Of the nine participants who felt a duty or responsibility to witness, the two most frequent justifications were a personal need to be present (to be involved or to see justice done)

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157. Interview with Participant No. 1, *supra* note 116.

158. Interview with Participant No. 8, *supra* note 118.

159. Interview with Participant No. 15, in Oklahoma City, Okla. (July 16, 2005).

160. Ashcroft stated:

I also met with about 100 survivors and victim family members on Tuesday to hear their stories and to try to understand their loss. The magnitude of this case is certainly stunning. My time with these brave survivors changed me. What was taken from them can never be replaced nor fully restored. Their lives were shattered, and I hope that we can help them meet their need to close this chapter in their lives.

Press Release, John Ashcroft, U.S. Attorney General, Dep't of Justice, Attorney General Ashcroft's Statement Regarding the Execution of Timothy McVeigh (Apr. 12, 2001), *available at* <http://www.justice.gov/opa/pr/2001/April/169ag.htm> [hereinafter Ashcroft's Statement].

in response to what McVeigh had done (three participants) and a need to see it through to completion, often related to fighting to have the execution televised (three participants). Citing a need to see justice done, Participant 15 remarked: “I guess I wanted to see him suffer but he didn’t suffer. . . . The execution was something I needed to do for myself because I deserved; I believed he needed to be punished because he knew those babies were in that daycare.”<sup>161</sup>

Participant 22 witnessed for reasons of completion—to see the process through, to know exactly what happened, and because she had fought to have the execution broadcast via closed-circuit TV:

I was not joyful about it even though I’d fought so hard for that to happen . . . . It was a difficult thing for me to do because it’s not, watching someone die is not something I just thought I really wanted to do but I felt I’d fought so hard for that I had been through the trials. . . . I had watched that man and I needed to complete the process. I needed to see it through.<sup>162</sup>

Similarly, Participant 29, a family member and live witness, felt a profound need to physically be present at McVeigh’s execution:

I think that was the most important thing to me. . . . I could have viewed it at the FAA center if I had to. . . . But it was . . . complete relief when I found out I was one of the ten selected. . . . [T]here aren’t enough words to describe how important it was for me to do that. Oh wow. It’s just . . . I still can’t believe it. . . . Oh God, I don’t even know if I can put that into words. . . . Physically being there.<sup>163</sup>

Participants 7 and 29 also felt much compelled to complete the process. The desire to be present to obtain completion suggests that the conclusion of legal proceedings against an offender is important in comprehending the event; one has a complete narrative when the offender has been convicted and held accountable through serving his sentence, particularly when the act of serving the sentence is accomplished virtually instantaneously through death.

Ideally, for reconstructive processes to be successful, traumatic crimes merit punishments of an appropriate severity. Certainly participants had different opinions of this sentence according to their death penalty beliefs,<sup>164</sup> but for the majority who supported McVeigh’s death sentence, his execution was the “answer” to the bombing, and witnessing the execution was seen as a way to answer McVeigh, an affirmative act that was not only bearing witness to justice but using one’s presence as protest. The idea of seeing justice done encompasses needs for two forms of resolution: accountability, and the spectacle of that accountability. Participant 12, though unable to attend due to injuries incurred in the bombing, characterized the execution as a “response”: “[T]he execution was a response to what he did to us and so I would like to have witnessed it . . . .”<sup>165</sup>

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161. Interview with Participant No. 15, *supra* note 159.

162. Interview with Participant No. 22, *supra* note 121.

163. Telephone Interview with Participant No. 29 (May 22, 2006).

164. See Madeira, *Blood Relations*, *supra* note 107, at 121–24.

165. Interview with Participant No. 12, *supra* note 126.

Thus, in summary, like his federal trial, McVeigh's execution provided opportunities for further closure work, with participants' willingness to witness the execution stemming from their expectations of what the experience of witnessing would accomplish.

### III. A NEW, COMMUNICATIVE, THEORY OF CLOSURE

As the previous discussion summarizing prior work on closure illustrates, scholars have not yet pushed the concept of closure far enough. Research on closure in the context of the Oklahoma City bombing demonstrates that it is far more complicated than overcoming grief and seeking vengeance, and reveals a great deal about how expectations about what closure is and how it functions should be modified.

First, it is essential to regard closure as a cluster concept that includes coping behaviors, not as a state of consummate finality; this comports with victims' families' perspectives and avoids undue simplification. Second, closure is a phenomenon that exists in both the internal self and the external world; it is not purely emotional, nor is it based only on external events. Many researchers, however, situate closure in one realm or the other—either the inward-directed context of grief recovery, or the outward-directed milieu of seeking vengeance. While closure is primarily an "internal" experience, taking place in the interior realm of the psyche, it is dependent upon events in the outside world. One might conceive of closure as a sort of feedback loop connecting the external environment with the internal thought processes that are triggered the moment a family member is notified of a relative's murder. Developments in the external world—from preliminary events such as the arrest of a suspect or the search for and discovery of a body to later goings-on such as a verdict or execution—prompt the formation of both immediate and long-term internal reactions that range from affective responses to strategic plans. In essence, an external event affects a victim's relative, who then reacts, in turn affecting the external environment. Crucially, this feedback loop never closes; it is triggered at least several times a year on "anniversary" dates such as the victim's birthday, holidays, or the events of legal proceedings. Optimally, victims' families grow more adept at managing their status and its implications over time. Closure, then, is a process at which victims' families must continually work.

Third, closure is not restricted to grief maintenance or vengeance-seeking behaviors. Instead, it is a balancing act that demands that victims' families simultaneously manage a multitude of concerns such as remembering the victim, representing the victim, channeling emotion into effective outlets, following legal proceedings, insisting on recognition, and moderating outward displays of anger and other emotions. Should any of these spinning plates fall to the ground, the whole act may collapse.

Fourth, to say that closure may be derived from participation in trials acknowledges and legitimates the secondary effects that legal proceedings have for persons other than defendants. State statutes may affirmatively protect the integrity and visibility of communicative messages the victim airs at trial, including victim impact statements and buttons bearing the victim's photo. In Oklahoma, for example, a written victim impact statement introduced at sentencing "shall not be amended by any person other

than the author, nor shall such statement be excluded in whole or in part from the court record."<sup>166</sup> In addition, the state also permits immediate family members of murder victims to wear photo buttons "containing a picture of the victim as a symbol of grief in a trial" which "shall not exceed four (4) inches in diameter"; this statute goes beyond protecting the right to wear photo buttons and actually dictates what communicative purpose such buttons serve.<sup>167</sup>

Similarly, numerous scholars have recognized that trials have dramaturgic elements and convey symbolic social messages of condemnation,<sup>168</sup> in keeping with observations on the symbolic functions of punishment<sup>169</sup> for society and for the victim.<sup>170</sup> Criminal trials "serv[e] as prime instances of 'performing the laws'—allowing matters of common public concern to be enunciated and deliberated before the populace."<sup>171</sup> Academic opposition to the pursuit of closure in capital proceedings also assumes that trials are more than just official inquiries into guilt or innocence,<sup>172</sup> and some researchers have commented upon the effects of the defendant's demeanor on proceedings.<sup>173</sup> Executions, too, are communicative events,<sup>174</sup> with the potential for interactive engagement between the condemned and victim witnesses; even the execution routine, including the identity of the executioner, has potential communicative implications. According to Bilz, this is why the State does not allow victims' families to activate the execution machinery, forsaking an executioner who would take personal pleasure in killing in favor of an impersonal one who can embody social condemnation.<sup>175</sup> When vengeful parties act as executioners, the results are particularly unsettling; one need only recall the behavior of the members of Sadri Al Mustafa's militia who executed Saddam Hussein.<sup>176</sup>

166. OKLA. STAT. ANN. tit. 22, § 984.1 (West Supp. 2009).

167. OKLA. STAT. ANN. tit. 22, § 984.3 (West Supp. 2009).

168. See, e.g., Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573 (2008).

169. See generally MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (1995); DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 234–47 (1990); PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING: EXECUTION AND THE EVOLUTION OF REPRESSION* (1984).

170. As Bilz observes, "when a criminal offender is punished, community members increase their estimation of the social standing of the *victim*; they admire, respect, and value her more. In contrast, when the offender escapes conventional punishment, community members report admiring, respecting, and valuing the victim *less*." Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1088 (2007) (emphasis in original).

171. Logan, *Confronting Evil*, *supra* note 21, at 756.

172. Bandes, *Sociology*, *supra* note 8, at 11 ("Lower courts explicitly invoke the concept of closure.").

173. See, e.g., Jody Lyneé Madeira, *When It's So Hard To Relate: Can Legal Systems Mitigate the Trauma of Victim-Offender Relationships?*, 46 HOUS. L. REV. 401, 409–11 (2008) (discussing effect of defendant's demeanor on victims' family members) [hereinafter Madeira, *Victim-Offender Relationships*]; see also Levenson, *supra* note 168 (discussing impact of demeanor upon jurors).

174. Madeira, *Blood Relations*, *supra* note 107, at 102–04; see also Gross & Matheson, *supra* note 28, at 503 (describing the communicative interactions in a "hallmark" execution).

175. Bilz, *supra* note 170, at 1093–94.

176. *Id.*

Fifth, and most importantly, the process of closure is communicative in nature. It is in actuality not concerned with effecting a "closing" but instead with bringing about an "opening"—a broadening of awareness, an expanded engagement with the external environment, a readiness to reencounter life. A communicative theory of closure acknowledges the interplay of the interpersonal and the intrapersonal, the interior of the self and the exterior of the other, the outside world. The search for closure is dependent upon communicative abilities and potencies. Victims' families seek to communicatively engage with others, to both speak and be spoken to. We recognize this communicative tendency when we speak of giving victims a "voice" through victim impact testimony. Ironically, communication scholars, like legal scholars, have long been aware of the prejudicial effects of certain messages.<sup>177</sup>

Scholars have implicitly acknowledged the communicative dimensions of closure. The means by which victims supposedly pursue closure are performative:

"Satisfaction" re-enters legal discourse as the state finds itself setting up performances for and through victims. Achieving the efficacious experience of emotional satisfaction is presumed to be the goal of these performances: when victims view an execution, when victims make statements before and after sentencing, statements after a conviction approving the punishment, and when victims sometimes address convicted criminals after sentencing. These maneuvers are widely seen as valuable because they appear to address victims' desire for closure . . . .<sup>178</sup>

Gross and Matheson's concept of a "hallmark execution" also emphasizes a performative ideal of communicative interchange, and consists of four elements: "(1) The condemned killer looks directly at the victim's family, accepts responsibility for his crimes and apologizes to them honestly and sincerely; (2) the family accepts the apology and forgives him; (3) the killer achieves peace and (presumably) is reconciled to God; and (4) the killer is put to death."<sup>179</sup> Finally, Bandes notes that therapy and a courtroom involve very different communicative norms, with the consequence that judges may be ill-suited to help family members manage grief. Whereas grieving in a private therapeutic setting would produce sympathy, such behaviors elicit silence, unease, or other inappropriate reactions from judges in a public courtroom.<sup>180</sup>

In essence, a communicative theory of closure is necessary because it acknowledges the unique communicative benefits inherent in legal proceedings, refocuses the closure inquiry on the process of attainment instead of its semantics, and helps explain why scholars should regard closure as a term that is complete in and of itself (not one that should be divided into subcategories).

177. Communication scholars, like legal academics, have long been worried about the pernicious effects of certain forms of communication, like propaganda. The notion that a number of forms of evidence are unduly prejudicial has its twin in fears dating back to the 1920s that an educated public is incapable of rising to the challenge of governance due to perils such as isolated individuals or mass gullibility. JOHN DURHAM PETERS, *SPEAKING INTO THE AIR: A HISTORY OF THE IDEA OF COMMUNICATION* 12 (1999). Thus was born the idea that "face-to-face dialogue or at least confrontation offered a way out from the crusts of modernity . . ." *Id.* at 19.

178. Kanwar, *supra* note 16, at 239.

179. Gross & Matheson, *supra* note 28, at 503.

180. Bandes, *Sociology*, *supra* note 8, at 17–18.

Such a theory recognizes that legal proceedings such as trials and executions are themselves communicative forums.<sup>181</sup> Victims' families realize that these legal proceedings are often the only places where they may find certain building blocks of closure, such as information, the opportunity to scrutinize defendants' behaviors, and accountability. It is impossible, then, to cut closure entirely out of capital legal proceedings; if the current judicial reliance on closure is any indication, courts would already be very reluctant to do so. Thus, the task becomes two-fold: defining closure, and attempting to provide channels for it that do not pinch a defendant's constitutional rights.

Regarding closure as communicative also reframes the closure inquiry, focusing on how closure can be attained instead of on its subjectivities. Leaving aside the unworkable notion of closure as utter finality, individuals have described closure as coping with the bombing, dealing or learning to live with it, laying it to rest, moving on or moving forward, reaching a point of satisfaction, forgiving the offenders, not letting the event dominate one's life, incorporating the bombing into one's personal identity, and putting things into perspective. This analysis of what closure can mean establishes that it is a real and attainable concept, and prompts the need to examine how to effectuate closure, which in turn reveals its communicative dimensions. There are only a finite number of ways in which the legal system can assist victims' families in their closure pursuit—allowing them to attend the trial, to view the defendant's behavior, to deliver victim impact testimony, to deliver post-sentence allocution, to meet with the offender in mediation, and to witness an execution. Significantly, all of them are founded upon communicative behaviors.

Finally, viewing closure through communication theory suggests that it is unhelpful to speak of different "types" of closure, such as "legal closure," "emotional closure," or "psychological closure."<sup>182</sup> Closure, which denotes family members' attempts to adjust to murder's aftermath, reflects not many types of coping, but rather coping on many different levels. Victims' families employ similar coping strategies in many different forums; the idea that "legal closure" is really different from "emotional closure" introduces artificial distinctions. Referring to different types of closure may be a well-intentioned attempt to fully grasp its dimensions, but it is an analytic misstep that inadvertently oversimplifies closure, and is therefore synonymous with the worst practice in that term's usage—referencing complete finality.

Applying communication theory to closure also corrects two common scholarly misconceptions as to the concept's history and its ties to therapeutic jurisprudence. Closure has not recently been injected into criminal proceedings in the form of victim participation and impact testimony. Rather, such expectations have been there all along; trials have always been one of the few places in which victims could accomplish reconstructive goals such as gaining information and insight into the defendant's demeanor and holding the defendant accountable. This observation calls into question legal scholars' tendency to regard victim participation as a recent and unwelcome

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181. See Madeira, *Blood Relations*, *supra* note 107, at 102–04; Madeira, *Victim-Offender Relationships*, *supra* note 173, at 417–18.

182. Armour & Umbreit, *supra* note 18, at 418 ("There are also types of closure. Judicial closure may refer to the end of survivors' involvement with the criminal justice system. Emotional closure may mean letting go of long-standing anger toward the murderer. Psychological closure may signify the completion of a final act to honor the victim.").

development legitimized by the Supreme Court in *Payne*. Furthermore, if scholars are correct and victim impact testimony does impinge upon defendants' rights, it cannot be an instance of therapeutic jurisprudence, as its principles do not support the subordination of due process or other fundamental legal tenets.<sup>183</sup> Indeed, "therapeutic jurisprudence has always suggested that therapeutic goals should be achieved only within the limits of considerations of justice."<sup>184</sup> Thus, if pursuing closure as a goal undermines defendants' constitutional rights, such an activity would not comport with therapeutic jurisprudence.

A communicative theory of closure is comprised of two types of behaviors: reflexivity and intervention. Closure as reflexivity denotes reflective, or thoughtful, behavior; closure as intervention consists of physical action. The division of closure into these interdependent internal and external dualities finds support in historical and contemporary research. In his 1914 essay *Remembering, Repeating, and Working-Through*,<sup>185</sup> Freud developed the interdependent concepts of "acting-out" and "working-through" trauma; whereas acting-out consists primarily of "continuous repetitions of the original trauma or subjection that constitute and maintain subjectivity,"<sup>186</sup> working-through is the process of ending these traumatic repetitions by negotiating an appropriate interpretation of an event with psychotherapeutic assistance.<sup>187</sup> Acting-out pushes aside trauma; working-through engages and "dissolves . . . tension gradually by changing the internal conditions which give rise to it."<sup>188</sup> Working-through parallels reflexive and interventive closure processes, in which victims' families break cycles of negative affect by pursuing new goals, such as holding the offender accountable, which require them to reestablish interpersonal relations in which they might discuss the murder.

More recently, Armour has referred to internal and external dimensions in coping with murder, observing that "because the deeds that mark the journey for homicide survivors are often done in reaction to being in the public eye, meaning making is both an intrapersonal and interpersonal endeavor."<sup>189</sup> According to Armour, the "intrapersonal level consisted of the individual's appraisal of self and other including the significance to the homicide survivor of his or her behavior," whereas the interpersonal level "consisted of actions done in response to external events and

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183. See Winick, *supra* note 46, at 191. As Winick states, "Although therapeutic jurisprudence suggests that law should be used to promote mental health and psychological functioning, it does not suggest that psychological and physical health is a transcending norm. It suggests that law reform should be informed by this value, but only when otherwise normatively unobjectionable." *Id.*

184. *Id.* at 203.

185. Sigmund Freud, *Remembering, Repeating, and Working-Through (Further Recommendations on the Technique of Psycho-Analysis II)* (1914), reprinted in 12 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 145 (James Strachey trans. & ed., 1958).

186. KELLY OLIVER, WITNESSING: BEYOND RECOGNITION 76 (2001).

187. See *id.* at 81.

188. *Id.* at 77 (quoting Edward Bibring, *The Conception of the Repetition Compulsion*, 12 PSYCHOANALYTIC Q. 486, 502 (1943)).

189. Marilyn Armour, *Meaning Making in the Aftermath of Homicide*, 27 DEATH STUD. 519, 520 (2003).



meaning made in interaction with others including family, friends, representatives of social institutions, and others in the community.”<sup>190</sup>

#### *A. Closure as Reflexivity*

Focusing on closure as reflexive, or thoughtful, behavior requires broadening one’s analytical focus from grieving to narrativity. Academics frequently associate closure with grieving, asserting that “courts cannot bring about the ultimate moment of cessation in an infinitely more complicated process of grieving”<sup>191</sup> or that grief is exorcised through participation in capital proceedings.<sup>192</sup> There is no doubt that victims’ families grieve for murdered loved ones. However, grieving does not encapsulate the full range of emotional responses which family members experience in the aftermath of murder. Grieving refers to sadness or mourning in response to loss; in addition, however, family members suffer many other emotional and psychological aftershocks, including trauma, simplified moral schemas, a desperate need for information, anger, alienation, and helplessness.<sup>193</sup> Because these responses are intertwined with grieving behavior, their amelioration, for example, a restoration of control, might assist in the mourning process. However, just because these responses overlap with grieving does not mean that they are synonymous with such behaviors.

Moreover, relying upon grieving terminology actually has pernicious effects. Regarding victims’ families through the lens of grieving may set them apart as unhealed and therefore emotionally diseased or even mentally disordered, through no fault of their own. This in turn prompts coddling reactions, reinforcing family members’ powerlessness and further alienating them. As Rock notes, “[V]iolent, intentional death is linked inextricably with images of powerlessness—the powerlessness of the victim to resist, and the powerlessness of the bereaved to intervene at the time of the killing and to control events thereafter.”<sup>194</sup> Yet, the task of healing requires precisely the opposite—empowerment through participative opportunities in which family members can fulfill perceived responsibilities to deceased victims, exercise agency, and undertake strategies to ensure accountability. Effecting change for victims’ families necessitates avoiding measures that inadvertently keep victims powerless. Victims hardly need assistance that exacerbates their weaknesses instead of encouraging them to develop new strengths. It is for these reasons that family members and survivors of the Oklahoma City bombing “sought information, a restoration of control, and an end to the marginality which magnified their feelings of powerlessness and kept them apart from important sources of understanding.”<sup>195</sup> In addition, summarizing the emotional state of victims’ family members under the category of “grieving” inappropriately widens the perceived gap between criminal adjudication and victims’ family members. It is much harder to fathom a court playing a role in grief recovery—a task for grief counselors—than it is

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190. *Id.* at 535.

191. Kanwar, *supra* note 16, at 242.

192. See Bibas, *supra* note 11, at 1410.

193. See Madeira, *Blood Relations*, *supra* note 107, at 86–87.

194. ROCK, *supra* note 27, at 53.

195. *Id.* at 99.

to envision it restoring some elements of control to victims by affording them some participative opportunities in the criminal justice process.

Broadening the focus on victim behavior from grieving to coping, reflexive closure entails narrativity—learning how to structure and ultimately tell the story of the murder. The debate over the proper place of victims in criminal proceedings is actually a debate over which narratives belong where, implicating both “narrative relevance (is the trauma of the surviving family members of a murder victim relevant to the guilt of the defendant?) and narrative closure (are the sequels to murder, in the sufferings of the survivors, part of the murder story?).”<sup>196</sup>

Coping entails learning how to narrate the murder and its aftermath. Until it is closed through narrative, the world is an open sea awash with myriad interpretations of events. Forming a narrative of an event fixes it in a certain form, with definite interpretive consequences.<sup>197</sup> Narrative, then, is a form of sense making that imposes “fictive concords with origins and ends, such as give meaning to lives.”<sup>198</sup> Moreover, a narrative imposes structural constraints upon a series of events, confirming that a life is progressing and changing, and explaining these changes.<sup>199</sup> This narrative continuity is as important for our interpersonal relations as it is for our intrapersonal relations:

If we are to play a believable role before an audience of relative strangers we must produce or at least imply a history of ourselves: an informal account which indicates something of our origins and which justifies or perhaps excuses our present status and actions in relation to that audience.<sup>200</sup>

A narrative resolution is merely a sensible arrangement of events around such turning points, what Henry James refers to as the “distribution at the last of prizes, pensions, husbands, wives, babies, millions, appended paragraphs, and cheerful remarks.”<sup>201</sup> Law is a site in which participants seek and deliver narrative closure; for instance, in a trial, attorneys can prompt lead jurors to become either passive or active decision makers through linguistic cues, and jurors who become active decision makers can provide the closure that the attorney’s account lacks.<sup>202</sup>

196. Peter Brooks, *Narrativity of the Law*, 14 *LAW & LITERATURE* 1, 5 (2002).

197. As defined by Labov and Fanshel, narrative analysis relies on order and structure, and is “one means of representing past experience by a sequence of ordered sentences that present the temporal sequence of those events by that order.” WILLIAM LABOV & DAVID FANSHL, *THERAPEUTIC DISCOURSE: PSYCHOTHERAPY AS CONVERSATION* 105 (1977).

198. FRANK KERMODE, *THE SENSE OF AN ENDING: STUDIES IN THE THEORY OF FICTION* 7 (1967).

199. Jody Lyneé Madeira, *A Constructed Peace: Narratives of Suture in the News Media*, 19 *CAN. J.L. & SOC’Y* 93, 94 (2004).

200. PAUL CONNERTON, *HOW SOCIETIES REMEMBER* 17 (1989).

201. *Id.* at 16–17.

202. See generally Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 *N.Y.L. SCH. L. REV.* 55, 75–110 (1992) (examining prosecution and defense arguments in a murder trial as dialogic structures). Possible techniques include using verbs and active metaphors in describing the events leading to the accident and the evidence, using present tense to discuss crucial points in the story, and strategically deploying rhetorical questions. NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 121 (2001).

The struggle to narrate a traumatic event such as a murder is a struggle to pull together the self that has survived.<sup>203</sup> Thus, narrative is as much a tool of self-comprehension as it is of interpersonal understanding.<sup>204</sup> Finally, narrative is a form of communication that “allow[s] us to interact meaningfully with others and to make those interactions comprehensible and memorable.”<sup>205</sup> Communication itself always involves strategic deployment of narratives,<sup>206</sup> we must “select[] the stories that we know and tell[] them to others at the right time.”<sup>207</sup> Narrative also accomplishes paramount communicative functions, serving “to achieve catharsis, to get attention, to win approval, to seek advice, or to describe [our]selves.”<sup>208</sup>

Crises, in particular — “the discords of our experience”<sup>209</sup> — demand narration.<sup>210</sup> A murder is indisputably a crisis. Journalistic narration of crises perhaps explains why the media defines closure as utter finality; such news coverage is characterized by a “narrative lingering” that emphasizes not only the “tragic distance between is and ought but also the possibility of heroic overcoming.”<sup>211</sup> This heroic overcoming celebrates the indomitability of the individual, a key value in news coverage.<sup>212</sup> Healing that stops short of completion is simply not as compelling. In a news story covering a murder, individuals such as victims’ families “play large- or small-scale restorative functions in an attempt to again make right what was made wrong, or more appropriately, to make right what was not addressed by organizations and institutions charged with bringing wrongdoers to justice.”<sup>213</sup>

Thus, “the condition of narrative is unsurpassable.”<sup>214</sup> Narratives have performative qualities,<sup>215</sup> and in their performativity, are used to “advance certain theses or to make knowledge claims . . . .”<sup>216</sup> Formulating a narrative also allows a victim’s family members to entomb the dead in representative form, simultaneously laying them to rest and fixing them in place; according to Lyotard and Thebaud, “the dead are not dead so

203. Armour, *supra* note 189, at 521 (“[P]eople who have experienced traumatic loss . . . assimilate the loss by constructing a coherent self-narrative that preserves a sense of continuity about who they have been and are now.”).

204. ROGER C. SCHANK, *TELL ME A STORY: A NEW LOOK AT REAL AND ARTIFICIAL MEMORY* 44 (1990) (“We tell stories to describe ourselves not only so others can understand who we are but also so we can understand ourselves.”).

205. Madeira, *supra* note 199, at 95.

206. *See generally id.*

207. SCHANK, *supra* note 204, at 12.

208. *Id.* at 41.

209. KERMODE, *supra* note 198, at 80.

210. Madeira, *supra* note 199, at 102.

211. RONALD N. JACOBS, *RACE, MEDIA, AND THE CRISIS OF CIVIL SOCIETY: FROM WATTS TO RODNEY KING* 9 (2000).

212. HERBERT J. GANS, *DECIDING WHAT’S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK, AND TIME* 50 (1979).

213. Madeira, *supra* note 199, at 103.

214. BILL READINGS, *INTRODUCING LYOTARD: ART AND POLITICS* 65 (1991).

215. *See* JEAN-FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, *JUST GAMING* 6 (Wlad Godzich trans., 1979).

216. READINGS, *supra* note 214, at 81.

long as the living have not recorded their death in narratives'. . . . One is dead when one is narrated and no longer anything but narrated."<sup>217</sup>

Narrative as a sense-making activity imposes structure, thus altering the manageability of a murder's aftermath. Narrative development is often the first step that victims' family members must take in order to prepare themselves to engage in interventive behaviors. It also imposes a therapeutic distance between the narrator and the story. For a victim's relative who is struggling to regain control, it offers a means of grabbing the reins of the horses hitched to the runaway litigation wagon. Therefore, by learning how to narrate the murder, victims exercise narrative agency and thus regain a needed sense of control.<sup>218</sup>

### *B. Closure as Intervention*

Closure as intervention incorporates victims' reflexive accomplishments; victims who intervene not only share their narratives of the murder, but do so strategically. Creating a narrative of a murder's aftermath is one way to establish some degree of control, and may indeed aid victims' families in coming to terms with their new status and its implications. However, such narratives do not walk or talk on their own and can only effect change in the external world if they are delivered to others. This and other intervention behaviors, such as victim impact testimony, demand the physical presence of victims' family members. Through intervention, victims' families in effect choose their preferred means of closure and endeavor to bring it about by identifying which legal outcome they prefer, strategizing how to effectuate it, and following through with that plan.<sup>219</sup>

In the interventive process, victims stand to garner others' recognition and respect and gain an even greater degree of control in the process. According to Hoffman, allowing victims' families to participate in sentencing proceedings may be seen as restitution, in which the defendant sacrifices sentence predictability for the mortal losses he has inflicted upon others.<sup>220</sup> Therefore, participation may be therapeutic, in that it assists family members to regain agency<sup>221</sup> and thus enables empowerment and enhances trust in legal proceedings.<sup>222</sup> Arrigo and Williams also describe victim participation as an activity that is "largely regarded as a means to provide those harmed (including family members) with much-deserved recognition and, consequently, some amount of power and control in the system in which they find themselves as unwilling participants and in a process from which they have been alienated as noncontributing outsiders."<sup>223</sup> Given the high stakes of participation, it is not surprising that "[m]ore

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217. BEVERLEY SOUTHGATE, *WHAT IS HISTORY FOR?* 57 (2005).

218. *See* Hoffman, *supra* note 91, at 538.

219. *Cf.* Armour, *supra* note 189. Armour states that "the performative dimension of meaning making is a form of coping in response to the appraised meaning of post-homicide events." *Id.* at 525. Armour characterizes this performative dimension as "fighting for what's right," including "fighting for what's mine" and "fighting to correct what's wrong." *Id.* at 526.

220. Hoffman, *supra* note 91, at 538.

221. *Id.*

222. *See id.*

223. Arrigo & Williams, *supra* note 44, at 603-04.

than 75% of victims surveyed considered it very important to be heard or involved in charge dismissals, plea negotiations, sentencing, and parole proceedings.”<sup>224</sup> All this is to say that victims derive psychic or affective benefits from participation in legal proceedings. Successful participation—defined by one’s ability to carry out the participative task, not by sentencing outcome—restores agency and control and allows for the display of self-control, allowing the victim to step away from a state of perceived powerlessness, silence, and incapacity. Thus, external behaviors have a very real impact on life reconstruction.

The issue of victim participation begs the question of whether victims expect that attending a trial and/or execution will fulfill all of their mental health needs, as many scholars assert. Victims’ families do not indiscriminately expect every person or institution to assist them in attaining closure. This is not to say that cultural mediums do not hype the forms and extent of closure that can be derived from legal proceedings, perhaps prompting some family members to place all of their closure eggs in the execution basket. However, they realize that a trial or execution is not a counseling session, and regard the trial as an opportunity to effectuate important goals that can be accomplished nowhere else, such as information gathering and extracting accountability.<sup>225</sup> Thus, family members use the trial not so much to overcome grief but to gain understanding and some measure of control that is lost upon victimization and again when family members are silenced in legal proceedings.<sup>226</sup>

Three intervention behaviors are worthy of attention: maintaining a participative presence at legal proceedings, a desire to confront the defendant, and giving victim impact testimony (discussed in the following Part). Together, these behaviors cover the range of communicative closure needs: performative events that family members want to witness, what family members want to communicate to the defendant, and what family members want the defendant to communicate to them.

Previous scholars have overwhelmingly asserted that vengeance becomes a goal for victims’ families. The term is often used synonymously with family members’ anger at the offender; Kanwar, for instance, defines vengeance broadly as the desire to punish someone based on satisfaction derived from seeing that person punished.<sup>227</sup> Thus, seeking vengeance is certainly an intervention behavior. Minow provides a more nuanced definition:

Vengeance is the impulse to retaliate when wrongs are done. Through vengeance, we express our basic self-respect. . . . Vengeance is also the wellspring of a notion of equivalence that animates justice. . . . Yet vengeance could unleash more response than the punishment guided by the rule of law . . . .

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224. Bibas, *supra* note 11, at 929.

225. See generally Madeira, *Victim-Offender Relationships*, *supra* note 173.

226. See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85, 136 (2004).

227. Kanwar, *supra* note 16, at 240; see also Arrigo & Williams, *supra* note 44, at 609 (stating that victim impact testimony is “fueled . . . by expressions of pain, anger, resentment, and vengeance”); Bandes, *Empathy*, *supra* note 91, at 396 (stating that victim impact statements evoke “undifferentiated vengeance”); Bandes, *Victims*, *supra* note 16, at 1606 (referring to an individual’s needs for “vengeance, forgiveness, closure”).

The danger is that precisely the same vengeful motive often leads people to exact more than necessary . . . . The core motive may be admirable but it carries with it potential insatiability. Vengeance thus can set in motion a downward spiral of violence . . . .<sup>228</sup>

Few victims, however, pursue so radical a goal; instead, most focus on accountability. Vengeance seems more to describe the white-hot hatred for the offender that consumes a relative immediately after the murder than it does the more tempered demand for accountability with which he approaches the trial. It connotes extremity or even savagery, hence the phrase, "with a vengeance." Accountability, in contrast, is the obligation or willingness to accept responsibility for one's actions; those who attempt to evade responsibility may be "held accountable," or have accountability forced upon them and punishment extracted. Family members opt for justice or accountability over vengeance by allowing the criminal justice system to try an offender, and not killing the offender themselves.<sup>229</sup> They wish to live in a world that is again governed by civilized norms, and some may even take pride in the example of extending rights to an offender that the murder victim did not have.<sup>230</sup> Thus, as Armour notes, family members "forcefully assert themselves by holding others accountable and claiming what is rightfully theirs. Their interventions become symbolic statements about the importance of their experience and their right to be seen. Their actions help re-establish a moral and principled world."<sup>231</sup>

Victims' family members often intervene by attending or directly participating in legal proceedings. Those who attend maintain a participative presence; attendance itself has distinct participative qualities, such as when a mother of a murder victim is determined to become "a visible presence" at legal proceedings held for the eight boys who murdered her son, a father of a murder victim breaks into applause after the guilty verdict (prompting the murderer to turn around and give him "the finger"),<sup>232</sup> or an execution witness brings a photo into the viewing chamber and holds it up to the glass. These behaviors are forms of bearing witness, a term which implies not a voyeuristic gaze but an interactive experience, for "witnessing is always, at a fundamental level, a relationship of mediation."<sup>233</sup> Thus, these activities exemplify forms of vigilance, which is most often indicative of dedication to the project of self-healing.

Maintaining a visible presence also requires witnesses to attend "in person," which is crucial for gaining accurate and timely information and impressions of legal

228. MINOW, *supra* note 6, at 10.

229. See Bilz, *supra* note 170, at 1093–94.

230. See, e.g., Madeira, *supra* note 199, at 114–17.

231. Armour, *supra* note 189, at 529.

232. *Id.* (stating that "[h]is applause redefines the occasion as joyous rather than somber, reestablishes that he, rather than the state, is the aggrieved party, and congratulates the judge, jury, and prosecution on a job well done. His applause also provokes a reaction from the murderer that validates the father's gain and presence as a force with which to be reckoned"); *id.* at 533 (stating that "a mother decided to mother her dead son by attending and becoming a visible presence at every hearing held for the eight boys who killed him. She watched over her son and his welfare by sitting in for the victim and making the court system, as well as the boys, accountable to her").

233. Carrie A. Rentschler, *Witnessing: US Citizenship and the Vicarious Experience of Suffering*, 26(2) MEDIA, CULTURE & SOC'Y 296, 297 (2004).

proceedings. Peters notes that “[l]iveness serves as an assurance of access to truth and authenticity,” and that “[b]eing there’ matters since it avoids the ontological depreciation of being a copy. The copy . . . is infinitely repeatable; the event is singular, and its witnesses are forever irreplaceable in their privileged relation to it.”<sup>234</sup>

The communicative qualities inherent in maintaining a participative presence at legal proceedings are evident in the remarks of Oklahoma City bombing victims’ families and survivors, who attended not only to “see justice done” but also to represent the murdered victims and to allow the jury to see that family members and survivors very much cared about the outcome of the trial. Victims’ families regarded attendance at trial and execution as a “right” and fought uphill battles to be permitted to attend the trial<sup>235</sup> and to witness the execution.<sup>236</sup> Participant 1, a survivor who retired in order to attend the trial stated that attendance communicated to the jury what was at stake for the victims’ families and survivors:

I think public pressure, on the court systems tends to yield a verdict sometimes that represents what the majority of people want. These jurors are to be held accountable for their decisions. . . . I think it’s important to attend . . . it’s important to show that um, you, you were concerned about the outcome of the thing and I think it does have an impact on it . . . .<sup>237</sup>

Similarly, Participant 16 spoke of “just wanting to know that I was there and a part of it and was able to look him in the face, you know, and call him a creep.”<sup>238</sup>

Victims’ family members and survivors also consciously elected to attend the trial out of a desire to be a visible presence in order to represent deceased victims or simply to be there live as proceedings unfolded. An active presence symbolized that family members and survivors derived something meaningful from the forms of closure that a trial could accomplish, not that they looked to legal proceedings to expiate their grief. They were aware that “reconciliation is not the goal of criminal trials except in the most abstract sense,” and that “[r]econstruction of a relationship, seeking to heal the accused, or indeed, healing the rest of the community, are not the goals in any direct sense.”<sup>239</sup> They knew that “[t]he trial works in the key of formal justice, sounding closure through a full and final hearing, a verdict, a sentence.”<sup>240</sup> It was precisely these adjudicative elements that they craved.

These individuals also made their participative presence felt at McVeigh’s execution. The remarks of victims’ families and survivors illustrate how important it was for individuals to attend the execution for several reasons: to witness the last stage in the legal process, to remain involved through participation, and to see justice done. Witnesses literally attend and attend to an execution on the basis of general

234. John Durham Peters, *Witnessing*, 23 MEDIA, CULTURE & SOC’Y 707, 718 (2001).

235. See Jody Lyneé Madeira, *Ties out of Bloodshed: Collective Memory, Cultural Trauma, and the Prosecution and Execution of Timothy McVeigh*, in DISSERTATION ABSTRACTS INTERNATIONAL 131–32 (2007).

236. *Id.* at 189–90.

237. Interview with Participant No. 1, *supra* note 116.

238. Interview with Participant No. 16, *supra* note 131.

239. *Id.*, *supra* note 6, at 26.

240. *Id.*

communicative expectancies—the hope that an offender may apologize, the desire for the offender to be aware of one's presence, a perception that seeing the offender die will be meaningful. For example, Participant 25 attended out of a desire to see McVeigh face-to-face:

I have not been able to see this guy face to face. I have watch[ed] him on TV, I've watched him on closed-circuit. And I'm the type of guy that I need to see what is going on. I'm hoping that if I can see his face maybe I can get some kind of idea exactly who he is and what he thinks.<sup>241</sup>

McVeigh's behavior during the execution was incredibly meaningful for participants, who felt as if they could interpret his every gesture.<sup>242</sup> For instance, Participant 5's spouse stated, "I'm glad I saw him that close up and everything 'cause that way I knew from his eyes and his expression what he was feeling."<sup>243</sup> The potential potency of a communicative interaction between the offender and an execution witness can be seen in the remarks of Participant 28:

[H]e started looking around the room. And I remember he met . . . met me eye to eye. And I . . . I mean I just . . . I'm sure I just went white and I had to turn around. I just . . . I was like . . . it's like someone had just taken my breath away. In shock I you know, I said it was like looking at the devil eye to eye. It was just a horrible, horrible feeling.<sup>244</sup>

If anything, witnesses desired more communicative interaction. Anthony Scott, another live execution witness, said in a media interview immediately following the execution that "I wish that there might have been eye to eye contact, but he couldn't see us."<sup>245</sup> Similarly, Participant 28 remarked:

I would like for him to look at my face and know the pain that I knew he's caused. And to see, you know, to see my daughter and to know that you know, you killed my daughter and her baby. You killed them. You know, yeah, I wish he could have seen my face, because I saw his, I wish he could have seen mine.<sup>246</sup>

In this vein, some witnesses wanted to send McVeigh one last message. Participant 25 wanted to communicate defiance back to McVeigh: "I wanted to see him when he was in the chair, like that, and I wanted him to see me. Because I wanted him to know that no matter what he did or didn't do, we were going to survive this thing and we would be better afterwards."<sup>247</sup> Similarly, live witness and survivor Anthony Scott stated, "I

241. *CNN Breaking News: Judge Denies Stay of Execution for McVeigh, Appeal Expected* (CNN television broadcast June 6, 2001), available at <http://transcripts.cnn.com/TRANSCRIPTS/0106/06/bn.03.html>.

242. See Madeira, *Blood Relations*, *supra* note 107, at 103–21.

243. Interview with Participant No. 5, in Oklahoma City, Okla. (July 2, 2005).

244. Interview with Participant No. 28, *supra* note 122.

245. Madeira, *Blood Relations*, *supra* note 107, at 112.

246. Interview with Participant No. 28, *supra* note 122.

247. Interview with Participant No. 25, *supra* note 150.



wanted him to see me, to somehow let him know that you didn't break the spirit that you thought you were going to break . . . ."<sup>248</sup>

Moreover, two live witnesses brought in small photographs of their murdered loved ones and held the photographs up against the glass during the execution. One of these witnesses, Participant 29, describes this experience:

I was again lucky enough, I got in the front row and [another live witness] and I had both had a picture. . . . She had her [child]'s picture and we put them right up to the window. Not that he could see it. It was more symbolic and we had to do it very discreetly because we had guards behind us. But yeah, stuck a picture up there so [deceased sibling's name] could watch it happen.<sup>249</sup>

When asked whether it was as if the murdered sibling were witnessing, Participant 29 replied "Yeah, that's why I did it. Symbolically I felt that way . . . ."<sup>250</sup>

Engaging in intervention behavior may even entail a desire to meet the offender. A recent feature story reported that nearly ninety percent of participants in a 5000-person study wanted to "face their attackers": "The majority of people, survivors, want to know why, for the offender to hear their pain and ultimately to be validated with their . . . apology."<sup>251</sup> A chance to meet with McVeigh would have been popular with family members and survivors of the Oklahoma City bombing; eleven out of twenty-seven interviewees wanted to meet with him, and another five were willing but were unsure as to whether such a meeting would have been productive because of McVeigh's stoic demeanor. Participants' reasons for meeting with McVeigh included desires to know "why" McVeigh had committed the bombing, to confront him with the extent of the damage he had wrought, to see McVeigh in person and/or outside of legal proceedings, and to learn something from being in his presence.

In summary, a communicative theory of closure more fully explicates this concept's dimensions, illustrating its reflective intrapersonal and interventive interpersonal dimensions. A communicative theory of closure also reveals that closure is far broader than grieving behavior, and that it is facilitated not by the white-hot ire of vengeance but by more temperate reflection and strategic action.

### *C. Reframing the Debate over Victim Impact Testimony as Communicative*

A more conventional participation method is providing victim impact testimony at sentencing. Victim impact testimony is itself on trial within legal academia. The debate it has engendered illustrates the conflicts that can arise when public, juridical standards are brought to bear upon private familial or domestic experiences, as in resolving child custody disputes between the State and family, or examining racial narratives of oppression.<sup>252</sup> The communicative model aids in assessing the propriety of victim

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248. Pam Belluck, *The McVeigh Execution: The Scene; Calm at Execution Site and Silence by McVeigh Prove Unsettling for Some*, N.Y. TIMES, June 12, 2001, at A27.

249. Interview with Participant No. 29, *supra* note 163.

250. *Id.*

251. *Confronting the Killer of Your Loved One*, CNN.COM, <http://www.cnn.com/2008/LIVING/personal/07/22/o.confronting.the.killer/index.html>.

252. See OLIVER, *supra* note 186, at 94.

impact testimony in capital legal proceedings—ascertaining whether and why it violates defendants' rights and marks an improper conflation of legal and therapeutic objectives.

The subjective, passionate testimony a victim impact witness lends to proceedings immediately marks the victim impact witness as atypical in legal proceedings. As Peters notes:

Legal rules prefer a mechanical witness. A witness, for instance, may not offer an opinion . . . but may only describe the facts of what was seen. . . .

. . . .

In the preference for the dumb witness lies a distant origin of both scientific and journalistic ideas of objectivity . . . . The objective witness is very different from the survivor, whose witness lies in mortal engagement with the story told.<sup>253</sup>

Testifying to the harms that a loved one's murder has wrought illustrates the communicative tensions inherent in narrating life experiences to others—one can never precisely translate experience into words, and cannot foresee what meanings will be ascribed to such testimony. As Peters notes, "Witnessing presupposes a discrepancy between the ignorance of one person and the knowledge of another . . . . It always involves an epistemological gap whose bridging is always fraught with difficulty. No transfusion of consciousness is possible."<sup>254</sup> Yet, the hope of aiding others to appreciate the victim's nature and the anguish and horror of her death is very important for family members, who may regard victim impact testimony as a way to represent the victim and to ensure "justice." Thus:

Survivors may . . . maintain that they represent not only themselves as the secondary victims of crime but also the mute, dead, and sometimes watchful primary victims as well; and their accounts were turned inward and outward, not only towards and for the victim, but also towards the world. . . . They had a strong moral purpose in testifying: believing, as other survivors believed, that "to bear witness is to take responsibility for the truth"<sup>255</sup>

In this way, victims are moved "[f]rom anonymity to embodiment, from absence to presence," allowing victim impact statements to "become[] a vehicle for resurrecting the dead and allowing them to speak as their killers are being judged."<sup>256</sup>

Victim impact testimony is not only a statement but also a performance, comprised both of the "facts" of loss and their delivery. A victim impact statement resurrects victims and embodies victims' family members in bodies of text or flesh. Victim impact statements illustrate the politics of bodily visibility; a victim impact statement that is delivered to the court on paper renders its provider visible in different and less effective ways than a statement that is delivered orally. Because empathy for the

253. Peters, *supra* note 234, at 716.

254. *Id.* at 710.

255. ROCK, *supra* note 27, at 118.

256. AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 52 (2001).

sufferings of another results in part from similarities between oneself and that other,<sup>257</sup> physical appearance may be a key factor in its formation. Empathy is perceived to invite prejudice, and so the inclusion of human bodies becomes a paramount concern, particularly when a victim is white and a defendant is black. Thus, a body of flesh is dangerous in ways that a body of text is not. This suggests that the body is a mediator between self and other, between jurors and family members; its skin is a permeable boundary for emotion and experience.

It is possible to regard several key points in the debate over the propriety of victim impact testimony as disputes over the communicative nature of victim impact testimony—whether or not it invites a jury response in the form of a death sentence. This, in turn, compels an investigation into the monologic and dialogic qualities of victim impact statements.

### 1. Victim Impact Testimony as Monologue

It may at first be strange to think of victim impact testimony as communicative, if one's idea of communication involves back-and-forth exchange; such testimony appears to have little or no dialogic component. There is no requirement that communicative interaction be dialogic, however; communicative actions such as imparting or transferring information can be one-way, or monologic. Moreover, the belief that communication involves mutual exchange can stymie and confound communicative theorizing, since “[m]uch of culture is not necessarily dyadic, mutual, or interactive.”<sup>258</sup> Peters notes that “the end of conversation and the call for refreshed dialogue alike miss the virtues inherent in nonreciprocal forms of action and culture.”<sup>259</sup> In actuality, “we are surrounded with communication situations that are fundamentally interpretive . . . .”<sup>260</sup>

Peters asserts that “one dominant branch” of communicative meaning is the act of imparting information, quite different “from any notion of a dialogic or interactive process.”<sup>261</sup> Imparting “suggests belonging to a social body via an expressive act that requires no response or recognition.”<sup>262</sup> The act of partaking is, in and of itself, a gesture of inclusion. For instance, in the publication of a scholarly article or the posting of a “communication” in the sense of a “message or notice,” there is no expectation of communicative exchange, but “some sort of audience, however vague or dispersed, is implied.”<sup>263</sup> Similarly, the “notion of communication as the transfer of physical entities, such as ideas, thoughts, or meanings” is relevant.<sup>264</sup>

According to *Payne v. Tennessee*, victim impact testimony exemplifies the “harm” done through murder, and thus is evidence that the jury should properly consider in its

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257. See generally Jody Lyneé Madeira, *Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation*, 40 U.C. DAVIS L. REV. 137 (2006).

258. PETERS, *supra* note 177, at 34.

259. *Id.*

260. *Id.* at 150.

261. *Id.* at 7.

262. *Id.*

263. *Id.*

264. *Id.* at 8.

sentencing deliberations.<sup>265</sup> Arguably, then, victim impact testimony is part of a larger body of evidence that is transmitted to jurors to be evaluated in sentencing determinations. Viewing victim impact testimony as non-dialogic, it would be dangerous to believe that such statements in and of themselves compel a jury "response" of death. Rather, such statements are gestures that reflect the jury's assessment of all evidence, including victim impact statements.<sup>266</sup>

Other communicative parallels to non-dialogic victim impact testimony exist. In certain communicative situations, an answer cannot be anticipated, and "control over turn taking is restricted to one end of the transaction," as in "[a] radio show broadcast at 2:00 A.M., an SOS in a bottle cast into the sea, a personal ad in the 'agony columns' of the newspaper . . . all speak, as it were, into the void, or at least to those who have ears to hear. They await completion of the loop."<sup>267</sup> A victim's relative writing an impact statement faces the opposite task of a judge who seeks to interpret the Constitution, because the judge is actually in a similar position to members of a capital jury weighing victim impact evidence; the relative anguishes over how to get her message across, "fret[ting] about how to get [her] 'message' across the gap," while the judge and jury must discover how to read texts that lack specific interpretive mandates or assessments of relevancy or worth.<sup>268</sup>

The notion that victim impact testimony gives victims' families "a voice" further illustrates the one-sided nature of this communicative endeavor. It reflects a limited view of victim participation—by a witness who is a vocal presence, delivering a statement that is most often left unquestioned by a defense counsel who does not wish to appear hostile and inhuman. The concept of giving victims a "voice," however well-intentioned, is also rather paternalistic; victim's families already have voices, and very much wish to use them. What is provided is not a voice, but the inclusion of that voice in a meaningful forum. This voice does not speak to garner a reply, but speaks to bear witness, to deliver a message, inviting the possibility for empathic interpretation.

The absence of a dialogic component to victim impact testimony goes hand-in-hand with the notion that the victim impact witness is not a person to whom it is easy to respond, and thus explains the alienation of this individual. It may at first appear that bringing victims' family members into the courtroom to testify to the consequences of

265. 501 U.S. 808, 825–26 (1991).

266. Victims who are giving victim impact testimony must be told that their statements are just one form of evidence that the jury must consider in determining an appropriate sentence. Erez reports that, in an Australian study of victim impact testimony involving victims of many different types of crimes:

[A]most three-quarters of victims who stated they provided VIS [Victim Impact Statement] material expected the VIS to have an impact on the sentence. Less than half of them felt that their input had an effect on the sentence. For about a third of the victims who stated they provided VIS material, expectations concerning the effect of VIS on sentencing went unfulfilled.

Edna Erez, Leigh Roeger & Michael O'Connell, *Victim Impact Statements in South Australia*, in *INTERNATIONAL CRIMINOLOGY: SELECTED PAPERS FROM THE 8TH INTERNATIONAL* 205, 212 (1996). In addition, "unfulfilled expectations concerning VIS effect on sentencing were associated with increased victim dissatisfaction with the sentence." *Id.* at 213.

267. PETERS, *supra* note 177, at 151.

268. *Id.*

the victim's loss is an inclusive gesture, not an alienating one. But the status of victims' family members as co-victims or survivors is what is profoundly isolating. Though this role is what gains them inclusion, it is also what holds them apart. The jurisprudential alienation of the victims' family mirrors their lonely status in other social forums as well. No one else can understand or fully appreciate what they are enduring, and so these individuals are temporarily or permanently kept "at a distance from everyday life" not only because "[t]he contaminating power of association with murder . . . is especially ancient and frightening," but because family members may not be able to match others' expectations for concluding their grieving processes on a certain timeline.<sup>269</sup> Thus, "[h]omicide survivors tend to feel they are a group apart, a special minority, quite unlike anyone else," and find that they are "treated as importantly different."<sup>270</sup> Some victims' family members may take a sort of pride in their alienation and the uniqueness of their perspective; for them, the communicative value of victim impact testimony lies in its delivery and interpretive potential, not in its dialogic capacity. Victims' families appreciate having the last word on loss.

The nature of victim impact testimony itself further alienates those who deliver it. Its propriety is controversial, reaffirming the liminal status of the victims' families who create and enunciate these statements. One is not entirely sure where these individuals and their messages belong. Moreover, victim impact testimony may not always be chopped-up in its delivery, elicited through direct and cross-examination methods, but may be read as a whole narrative statement. Like its manner of utterance, the victim impact statement is itself distinct, unlike other forms of evidence. It offers those in the courtroom insight into a different kind of harm, and establishes surreal linkages to dead victims through the words of their living representatives.

Nonetheless, research suggests that victim impact testimony does provide relief or catharsis. Erez reports that the results of an Australian victim impact study suggest that

[a]lmost half of the victims who stated that they provided VIS [Victim Impact Statement] material felt relieved or satisfied after providing the information, and for the other half, providing VIS material did not make any difference. Only a small number of victims (6 per cent) were upset or disturbed by this experience. The overwhelming majority of victims who provided information stated they wanted or agreed to the VIS being used in sentencing. Practically all these respondents felt that if they were a victim again they would want a VIS presented in court.<sup>271</sup>

Victim dissatisfaction stemmed not from the delivery of the victim impact statement but from unrealized expectations concerning the effect of the testimony on sentencing—when victims ingenuously believed that the victim impact statement was dialogic, and expected a certain "response."<sup>272</sup> Thus, a communicative model actually explains victim dissatisfaction with victim impact testimony—the inaccurate expectation that a dialogic communicative model would apply.

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269. ROCK, *supra* note 27, at 32.

270. *Id.* at 31–32 (emphasis omitted).

271. Erez, *supra* note 266, at 213.

272. *Id.*

## 2. Victim Impact Testimony as Dialogue

Alternatively, however, victim impact testimony could be seen as an attempt to compel a response from the jury or defendant. For at the same time that a relative delivers victim impact testimony to jurors who are likely empathic, she is simultaneously confronting the very individual who is the source of her misery.

Several scholars have described the act of witnessing as involving the possibility of address and response; a witness gives testimony to another with the intent of assisting that individual to appreciate a traumatic event, thereby rendering that other a witness in turn.<sup>273</sup> According to Laub, the act of witnessing requires the presence of an inner witness, or a self-consciousness of the need to craft a testimony, and an external witness, someone to whom one imparts testimony; other scholars refer to similar concepts such as "inner dialogue."<sup>274</sup> Whereas the inner witness is set up in "dialogic relations with others, [and] necessary to give the subject a sense of itself as agent," an external witness is that other to which the inner witness addresses her statements.<sup>275</sup> This external witness is necessarily empathic. The presence of an inner witness compels the existence of an external witness, and vice versa; "[w]ithout an external witness, we cannot develop or sustain the internal witness necessary for the ability to interpret and represent our experience . . . ."<sup>276</sup> Thus, the dialogue between an inner witness (a victim's family member) and an external witness (a juror) is mutually co-constructive.

The concept of the inner witness incorporates both reflexive and interventive closure behaviors; reflexivity denotes a family member's internal attempts to comprehend and contextualize developments in a murder case and determine next steps, whereas intervention consists of a family member's strategic selection of "next steps" and their accomplishment. Legal proceedings facilitate interventive behaviors by helping family members to build new dialogic connections with others, enabling reconstruction on the premise that social construction enables self construction. Legal scholars do not find the concept of "inner witness" troubling; instead, their concerns lie with the identity of the "external witness" and the building of dialogic connections in capital proceedings. The jury as an empathic analyst is an unsettling one, for the jury is charged to respond to the defendant's crime, and not to victims' family members. Thus, the question arises whether juries can, in propriety, serve as external empathic witnesses.

Because witnessing compels response, the path to answering this query lies, as it does for a monologic conception of victim impact testimony, in determining what sort of response a dialogic victim impact statement compels. Two jury behaviors may be construed as a "response" to victim impact testimony. First, the jury's response could be the act of considering the victim impact statement in sentencing deliberations, on the premise that these remarks reflect relevant and significant concerns and therefore merit inclusion. Second, the jury could respond by recommending a specific sentence. If the response is in fact the final sentencing recommendation, rather than the incorporation of family members' concerns into deliberations, then victim impact

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273. See, e.g., OLIVER, *supra* note 186, at 87.

274. *Id.*

275. *Id.*

276. *Id.* at 88.

testimony must be omitted in order to safeguard defendants' rights. If the jury responds solely by considering family members' concerns, however, then the prejudicial or problematic effects of victim impact statements are less certain because juries ostensibly do not sentence in response to such testimony. Thus, the debate is one of dialogic ethics, concerning the propriety and efficacy of various forms of articulation and response.

However, at the same time that a relative is delivering impact testimony to jurors, she is also addressing the defendant. The defendant is scarcely likely to be an empathic external witness, and so one might think that confronting him might imperil the victim's inner witness, undermining personal resolve to provide victim impact testimony. Research shows, however, that victims' families probably long to provoke some reaction from the defendant.<sup>277</sup> In addition, it might be easier for some victims' relatives to give victim impact testimony if they are told that they are addressing the court. This renders the confrontation of the defendant almost accidental, a consequence of his courtroom presence. Framing victim impact testimony as a statement to the jury and not to the defendant might reduce anxiety as it (at least nominally) substitutes a nonthreatening party for the defendant and casts the courtroom as a supportive and safe environment. Rendering this confrontation implicit is not likely to lessen its effect, however, because victims' families are acutely aware that the defendant is present and will hear their words. Relatives may also legitimately engage in nonverbal dialogue with the offender by delivering an otherwise appropriate victim impact statement (e.g., one not linguistically addressed to the defendant) while looking primarily at the defendant instead of the judge or jury. Thus, most may deliver statements that are either partially or wholly designed to provoke a response, emotional or otherwise, from the defendant. This anticipation of a response from the defendant is necessarily dialogic, rendering the courtroom a confrontational forum, however covert.

#### CONCLUSION: PROVIDING AN OPENING FOR CLOSURE

Opposition to the pursuit of closure through criminal proceedings is not based on disapproval of closure in and of itself, but on discomfort with appeasing victims in criminal proceedings where the first priority must be rigorously safeguarding defendants' rights. Law structures the legal forums in which victims speak, and it therefore determines a trial's narrative focus. Until 1991, when the admissibility of victim impact testimony as a matter of state law was allowed by the Supreme Court in *Payne*, one central narrative purpose of a criminal trial was to publicize the defendant's private stories, such as accounts of behavior and motive, for judicial examination. Victims' family members' stories, however, were kept private. Recent expansions in storytelling agency reflect changes in stakeholding, not ownership. Without ceding the floor entirely to victims, law is recognizing its own subjectivity by according weight to other subjectivities, such as by redefining "harm" to include injury to victims' family members.<sup>278</sup> Accompanying these changes is an uneasy sense that victims' participation threatens to contaminate proceedings, undoing the rule of law. The privileging of victims' voices necessitates that we must continually grapple with the propriety of

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277. See *supra* notes 189–91 and accompanying text.

278. See *Payne v. Tennessee*, 501 U.S. 808, 825–26 (1991).

when and how these voices should speak, since the question of "if" these voices may speak is, at least as of now, resolved.

This article has endeavored to deconstruct some of the most powerful contemporary myths about why and how victims seek closure in capital proceedings, decoupling closure from grief and vengeance and exploring its links to restoration of control and to accountability. A more informed understanding should lead to the conclusion that victims have much to gain from involvement in legal proceedings, and victim participation is not inherently undesirable. If anything, demonstrating how closure does not revolve around the resolution of grief and the pursuit of vengeance brings victims' goals in line with those of criminal adjudication. As Hoffman asserts,

[T]he victims' rights movement has reminded us that crime victims are not like the rest of us; instead, they rightfully occupy a special place within the criminal justice system. Their opinions about such fundamental issues as discretionary charging decisions, plea bargains, and sentences should matter to the system, even if similar opinions expressed by the rest of us do not. The voices of crime victims (or their survivors) should perhaps be muted, in order to prevent arbitrary or irrational decisions, but those voices should not be completely silenced.<sup>279</sup>

Moreover, closure is so wedded to death penalty jurisprudence that it would be difficult if not impossible at this point to strip capital proceedings of closure implications, even in the face of a Supreme Court opinion overruling *Payne*. For better or worse, then, these therapeutic expectations are now part of the cultural expectations surrounding the death penalty. Arguing over what law's relationship to closure should or should not be is less effective when the culture is saturated with closure concerns. Instead, more empirical research is needed to bolster current claims about the effects of victim participation in capital proceedings. Significantly, a number of scholars contend that victim impact testimony in general does not provide satisfaction to victims, but cite to a study by Davis and Smith analyzing statements written by victims but read by court officials, not statements read aloud by victims. Davis and Smith explicitly state that the results would likely be very different for victims who read their own statements aloud: "Victim allocution—allowing victims to make oral statements to the court at sentencing—might offer a more effective way to promote victim satisfaction through participation. A study of the effects of a California allocution statute suggested that most victims who spoke expressed positive feelings about the experience of allocution."<sup>280</sup>

At the same time, by maintaining a monopoly on trial and punishment, the State establishes legal proceedings as the only source of many crucial elements of reconstruction in the aftermath of murder, such as information and accountability. Even victim services, the forms of assistance with which family members are likely to be most familiar and willing to seek out, are most often affiliated with prosecutors' offices, and are even housed in the same office area. Victims' families are therefore encouraged to seek closure from legal proceedings not only by cultural expectations but also through the practical arrangements of the criminal justice system.

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279. Hoffman, *supra* note 91, at 541.

280. Davis & Smith, *supra* note 95, at 11.



Fortunately, therapeutic concerns are not alien to the law; Bibas, for instance, compares the provision of remedies in personal injury cases to victim participation in criminal proceedings: “Just as society is willing to bear some of the cost of accident victims’ physical healing, it should support and fund crime victims’ emotional and psychological healing through transparent, participatory criminal procedure.”<sup>281</sup> Up until now, however, most scholars have equated victim participation with victim impact testimony. But if victim impact testimony is thought to be problematic because of its potential to infringe on defendants’ rights, then the answer is not to oppose all forms of victim participation, but to find new opportunities that do not carry the same risks.

Accommodating victims’ closure needs is workable; fortunately, the ways in which people seek closure in the context of capital proceedings are much less varied than their definitions of the concept. While some family members will surely find certain opportunities more meaningful than others, legal officials are not obliged to continuously invent and implement new ways to accommodate them. There are only a finite number of ways in which family members can seek closure through legal proceedings—accountability, confrontation, observation, information, and participation. Thus, officials will merely have to ensure that victims’ families have access to a variety of participatory opportunities, including attendance, victim impact testimony, post-sentence allocution, victim-offender mediation, and execution witnessing. Of course, not all of these options will be available in every case.

First, changes must be made in existing opportunities for victim participation. For instance, policy makers and legal practitioners must prove that they are serious about promoting closure, and not the death penalty, by allowing *all* victims’ family members—even those who are against the death penalty—to give victim impact statements. It is sometimes debatable whether the popularity of closure stems from political or altruistic concerns. Praising closure opportunities for their reconstructive benefits while ignoring the ways in which they can be politically manipulated actually subverts or altogether extinguishes their healing potential. In addition, research shows that victim impact statements are rarely given. It appears that most victims never know of their right to address the court in this manner; thus more efforts must be made to educate victims on their entitlements.<sup>282</sup> States can also increase opportunities for victim-offender mediation in the capital murder context. Bibas notes that “[m]ost victims want to tell offenders how their crimes affected them and hear offenders answer their questions about the offense.”<sup>283</sup> Hearing an offender apologize is especially crucial; “[v]ictims want face-to-face apologies so that they can understand why their crimes happened to them, release their anger, and regain a sense of control and self-esteem.”<sup>284</sup>

It is also necessary to facilitate closure by implementing new opportunities that will not affect defendants’ legal interests. Post-sentence victim allocution<sup>285</sup> would provide family members with an opportunity to address defendants after sentence is passed—

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281. Bibas, *supra* note 11, at 964.

282. *See id.*

283. Bibas & Bierschbach, *supra* note 226, at 138.

284. *Id.*

285. *See, e.g.,* TEX. CODE CRIM. PROC. ANN. art. 42.03(1)(b) (2006 & Supp. 2008) (providing for post-sentence victim allocution).

something which many, if not most, victims ardently desire.<sup>286</sup> Though the mechanics of this argument are for another article, post-sentence allocution, like victim impact testimony, fulfills families’ needs to bear witness to murderous loss. Such statements would not automatically become part of the trial record; states could determine whether their transcription was optional, at the election of the trial judge, or prohibited. Ideally, though delivered in open court, post-sentence allocution statements would be addressed to the defendant, in contrast to victim impact testimony, which is delivered to the court.

In summary, given the nature of victims’ families’ losses, closure will continue to be an important issue in criminal proceedings that must be carefully understood and cautiously pursued. Though legal scholars’ reactions imply that it is problematic or unworkable because it places the therapeutic burden of healing victims on criminal proceedings, jeopardizing and potentially superseding its primary purpose of adjudicating the guilt or innocence of a defendant, victims’ families learn that comprehending and contextualizing a murder’s aftermath must occur from the inside out, and do not look to a trial or even an execution to terminate all of their grieving. After all, they must live in and with the victim’s loss, regardless of what legal developments occur. Hence, victims’ families are actually rather astute and selective in appraising forums for their closure potential, and they rely on legal proceedings to facilitate some foundational premises of closure, such as information and accountability. They may believe, however, that closure is suspended until certain legal proceedings are over, or that it is contingent upon a certain outcome such as a guilty verdict. Thus, the process of closure does not mandate that the criminal justice system heal victims, but that victims heal themselves. Criminal law must merely provide them with footholds to do so.

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286. *See id.*

