FINDING INSPIRATION IN ISLAMIC LAW FOR EXPANDING THE ROLE FOR FAMILIES OF MURDER VICTIMS IN THE UNITED STATES CAPITAL SENTENCING PROCEEDINGS

By

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Submitted to the graduate degree program in Law and the Law Faculty of the University of Kansas in partial fulfillment of the requirements for the degree of Doctor of Juridical Science.

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Date Defended: July 21, 2016

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ABSTRACT

Where the death penalty is still applied for murder, a victim's family participates in the decision-making processes to varying extents depending on the legal system. Under Islamic law, the victim's relatives play a central role in the sentencing of the offender. They are the ones who decide whether or not death penalty will be imposed. They may choose to have the offender executed. They may also choose to pardon the offender, either for free or in exchange for monetary payment. Yet, forgiveness is preferable and more rewarding according to the Qur'an, the Holy Book of Islam (5:45). The family also may waive the death penalty, but the state maintains an interest in punishing the offender with a discretionary penalty less than death.

In the United States, however, the role of capital murder survivors is relatively limited. The only tool that survivors may use to participate in the sentencing processes of a capital trial is to provide victim impact evidence, in which they share their victimization experience with the sentencing authority. Courts do not allow family members of capital murder victims to voice an opinion about the sentence to be imposed. Victim sentencing opinions are deemed irrelevant even when the family members do not want the defendant to receive the ultimate penalty.

This Dissertation argues that, inspired by the Islamic approach, the United States should extend the role of victims' relatives in the capital murder sentencing process. Having suffered the most, family members should, at the very least, be given the opportunity to weigh in on the sentencing process by permitting their views on punishment to be presented to the jury, particularly when they want to speak for mercy.

DEDICATION

To my mother, Samira Al-Dahmani, and my late father, Mahmoud Jeaash,

the reasons behind everything I have and will ever achieve

To my uncle, Nuredin Giayash,

for being more than a father during all my years in the United States

To my beloved brothers, Haitem, Mohamed, and Sadam,

for always being there for me

And to my friends in the United States,

my second family and best supporters

ACKNOWLEDGEMENTS

In the name of Allah, the Most Gracious, the Most Merciful,

First and foremost, I would like to thank my Creator for giving me the strength and patience to finish this dissertation. Without His blessing, I would not be here today.

I would like to express my gratitude and deep appreciation to Professor Jean K. Gilles Phillips, my supervisor and the Chairperson of my dissertation committee, for her immense expertise, valuable instructions, and guidance. I greatly appreciate her kindness, flexibility, and understanding. I could not have imagined having a better advisor and mentor for my S.J.D. study.

In addition to my supervisor, I would like to thank my committee members, Professor Elizabeth Cateforis and Professor Alice A. Craig, for their time and contribution to better my work.

A very special thanks must also go to Professor Michael Benza, for giving me the honor of being the external member of my dissertation committee. It was his suggestion that I followed in choosing my dissertation topic. For this, I am immensely thankful.

A sincere thank you to my former supervisor, Professor Melanie Wilson, for her precious support and direction during the initial course of this dissertation.

I must acknowledge as well my outstanding editor, who truly won me over with her kindness and commitment to quality. Without her help, this Dissertation could never have met the required standards for legal writing.

I am grateful also to the University of Kansas, the School of Law, and the Wheat Law Library, for creating the perfect environment to succeed and complete my degree.

And to everybody else who assisted, advised, and supported me over the years to make this dissertation possible, I thank you.

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I. INTRODUCTION

Two years after his death sentence became final and while awaiting execution in Tripoli, Libya, a convicted murderer was forgiven by the widow and two adult offspring of his murder victim.[1] As a result of the victim's family's pardon, the defendant's case was sent back to the court that granted the final judgment of death, and he was sentenced to life imprisonment instead.[2] Under Islamic law,[3] which Libya applies in homicide cases,[4] the family members of the victim determine whether or not a convicted murderer is to die, and may waive the penalty of death at any time before execution is carried out.[5]

In the American criminal justice system, there is no similar mechanism for mercy in capital murder proceedings--it is the jury's duty to determine what punishment should be administered. In fact, survivors of capital murder are prohibited from even expressing their opinions on the proper sentence,[6] including cases where they have a desire for forgiveness and do not want the defendant to be executed.

A capital trial in United States is divided into two phases, a guilt phase and a sentencing phase. During the first phase, a judge or jury initially determines a defendant's innocence or guilt. If the defendant is found guilty of committing the crime she or he is accused of, the trial proceeds to the sentencing phase. At this second phase (the penalty phase), the jury decides whether the defendant shall be put to death or receive life imprisonment, taking into account

[1] THE DEATH PENALTY IN LIBYA (March 20, 2008), http://www.deathpenaltylibya.org/.
[2] *Id.*
[3] Whenever the tem "Islamic law" is used, the author refers to the body of Qur'anic verses and collections of Prophetic sayings and actions agreed upon by the various legal schools of thought in Islam, not to the law as it is interpreted by contemporary states.
[4] In addition to Islamic law, Libyan law will be used to provide an example of a modern society that incorporates the classical Islamic doctrine regarding homicides into its penal code. *See infra* text accompanying notes 528-34.
[5] *See infra* text accompanying notes 20-23.
[6] The tem "survivors" refers to the family members of a murder victim.

both aggravating and mitigating factors. During this stage, the prosecution may introduce members of the murder victim's family to testify about the victim's personal characteristics and the emotional effects that the crime had upon them (victim impact evidence).

Victim impact evidence includes three types of information: (1) descriptions of the victim's character, (2) the impact of the crime on the victim's family, and (3) the family members' opinions of the defendant, the crime, and the appropriate punishment (this last category is referred to as "victim opinion evidence"). *Booth v. Maryland* was the first United States Supreme Court case to address families' participation in capital sentencing through victim impact evidence.[7] The *Booth* Court barred all three categories of evidence, finding that they violate a defendant's Eighth Amendment right not to be subjected to arbitrary and capricious sentencing.[8] According to *Booth*, all such evidence is irrelevant to a defendant's blameworthiness, and would likely elicit an arbitrary imposition of the death penalty based on emotion rather than reason.[9]

Four years later, in *Payne v. Tennessee*,[10] the Court overruled the ban against evidence of a victim's characteristics and the emotional impact of the crime on the victim's family, considering such evidence relevant to the harm caused by the murder, and thus constitutional.[11] Although *Payne* did not directly address the admissibility of the third type of information regarding survivors' opinions or characterizations of the defendant, the crime, and the proper sentence to be imposed (victim opinion evidence), the overwhelming majority of courts have held that *Payne* did not end *Booth*'s prohibition of such evidence.[12] Thus, the

[7] 482 U.S. 496 (1987).
[8] *See id.* at 502-09. *See infra* pp. 11-16 (providing a brief review of *Booth v. Maryland*).
[9] *See id.*
[10] 501 U.S. 808 (1991).
[11] *See id.* at 825-27. *See infra* pp. 20-27 (providing a brief review of *Payne v. Tennessee*).
[12] *See infra* notes 296-98 and accompanying text.

prevailing wisdom is that victim opinion evidence is constitutionally impermissible in the penalty phase of a capital trial.

After *Payne*, the validity of a family's opinions regarding the appropriate sentence to be imposed (sentencing opinion evidence), in particular, differed depending on whether the victim's family recommended death or life in prison as the proper penalty for the defendant. Oklahoma was the only jurisdiction where sentencing opinion was allowed to be included in victim impact evidence. Oklahoma court rulings have addressed only recommendations for the death penalty, even though the language of the Oklahoma statute allowing sentencing opinions provides no such restriction.[13] Two years ago, however, the United States Court of Appeals for the Tenth Circuit in *Dodd v. Trammell*,[14] ruled that the Oklahoma law permitting sentencing recommendations as part of victim impact statements violated the Eighth Amendment's prohibition on cruel and unusual punishment, and the violation was not harmless.[15] The Tenth Circuit noted that *Payne* made clear that it was not overruling the *Booth*'s prohibition on evidence concerning a victim's family members' opinions about the appropriate sentence.[16]

As for voicing an opinion against imposing capital punishment (a mercy opinion), the Tenth Circuit in *Robison v. Maryland*[17] held that *Payne* did not expand relevant mitigating evidence to cover the evidence of a family's opposition to the death penalty.[18] State courts have consistently followed the *Robison* court, declaring mercy opinions to be constitutionally impermissible evidence.[19]

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[13] *See infra* notes 307-13 and accompanying text.
[14] 753 F.3d 971(10th Cir. 2013), *cert. denied*, 134 S. Ct. 1546 (2014), *and cert. denied*, 134 S. Ct. 1548, (2014).
[15] *Id.* at 994. *See infra* notes 315-21 and accompanying text.
[16] *Id.* at 996.
[17] 943 F.2d 1216, 1217 (10th Cir. 1991).
[18] *Id.* at 1217.
[19] *See infra* notes 409-19 and accompanying text.

Under Islamic law or *Shari'a*,[20] murder is a capital offense punishable by death following the principle of an "eye for an eye," or the law of *qisas* (equality in retribution).[21] What is unique about the Islamic legal system, and distinguishes it from other systems in this regard is that, murder is considered an individual wrong. As such, under the law of *qisas*, the heirs of the murdered person are given a choice to demand *qisas* (death), pardon the murderer and accept the payment of "blood money" (*diyya*) instead,[22] or simply choose to forgive him or her outright. Further, pardoning the murderer by remitting the penalty of *qisas* is encouraged. Based on Qur'anic text, it is more rewarding to the victim's family to forgive than to put the murderer to death.[23] Leaving the decision of the death penalty in murder cases to the victim's family does not mean that the state will play no role regarding the punishment process. If the family members choose to waive their right to *qisas*, in lieu of *diyya* or for free,

[20] Since there is no standard method of transliteration from Arabic to English, there are many ways to spell certain key words relevant to a discourse on Islam. For consistency, the *Shari'a* is herein spelled as such (instead of, for instance, "*Shari'ah*" or "*Sharia*"). Further, the Qur'an is spelled herein with a "Q," one "a," and with punctuation (other forms are "Koran," "Qur'aan," and "Quran"). Also, *Sunnah* and *Hadith* are herein spelled as such (instead of "*Sunna*" and "*Hadeeth*"). Finally, the term *diyya* is herein spelled as such (rather than "*diya*," "*diyah*," or "*diyeh*").

[21] The author prefers to keep the original term when she refers to *qisas*. Although "*qisas*" is usually translated into "retaliation," the term "retaliation" does not reflect the correct meaning of "*qisas*." *Qisas* means retaliation in the sense of "returning of like for like," or "equality in retribution," but not in the sense of "retuning evil for evil" or "an act of revenge," since the penalty of *qisas* in Islam came with a strong recommendation of pardon (*afw*). For more details about the concept of *qisas*, *see infra* text accompanying notes 652-56. Regarding the encouragement of forgiveness under Islamic law, *see infra* text accompanying notes 731-34. Mohamad El-Sheikh does not approve of "retaliation" as the translation for "*qisas*," considering the high degree of encouragement for mercy in Islam, explaining that "retaliation in English has a broader meaning, often equivalent to "returning evil for evil," and would be more appropriately applied to "the blood-feuds of the Days of Ignorance before the advent of Islam." MOHAMAD A. EL-SHEIKH, THE APPLICABILITY OF ISLAMIC PENAL LAW (*QISAS* AND *DIYAH*) IN THE SUDAN 97 (Proquest Dissertations Pub. 1987).

[22] "Blood money" commonly refers to money paid to the family of someone who has been killed. Susan Hascall wrote:

> Although *diyya* is often translated to mean "blood money," it . . . carries with it a negative connotation. It conjures up images of gangsters, contract killers, and those who betray the lives of others for money . . . . However, the payment of money to the innocent victims or their families has nothing in common with paying the guilty parties for the murder or injury.

Susan C. Hascall, *Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?*, 4 BERK. J. MIDDLE E. & ISLAMIC L. 35, 60 (2011).

[23] THE QUR'AN: A NEW TRANSLATION BY M. A. S. ABDEL HALEEM, 5:45 at 72; 3:133-34 at 44; 42:40 at 314. (Oxford Univ. Press 2005), https://yassarnalquran.files.wordpress.com/2015/06/the_quran-abdel-haleem.pdf.

the state has the power to inflict a discretionary punishment other than death, such as life imprisonment, on the grounds that setting murderers free endangers the peace of the whole community.[24] Further, the victim's family members pardon the *qisas* punishment (death) and not the crime itself.

This Dissertation does not advocate that families of capital murder victims take over the jury's duty in deciding whether a defendant should receive a death of life sentence. However, this Dissertation suggests that family members of victims should at least be permitted to voice an opinion as to whether the defendant should be executed. This becomes more advisable when the victim's family do not want the defendant to be put to death.

It is contradictory to prohibit the jury from hearing a concise statement recommending the death penalty while *Payne* has allowed them to listen to emotional, tearful, and angry victim impact testimony.[25] More importantly, if the rationale behind precluding death recommendations is to protect capital defendants against prejudicial evidence, it is nonsensical to deny the victim's family the opportunity to inform the jury that they do not want the defendant to be executed where such evidence clearly serves the interest of the defendant.[26] Even if it were possible that the jury could be influenced by the family's call for mercy, the other recommended punishment—life in prison— would still be sufficiently serious. Further, permitting mercy opinions would provide a place for mercy in the courtroom and would allow survivors to express forgiveness, which helps some to find closure.[27]

[24] *See infra* text accompanying notes 833-35.
[25] *See infra* notes 330-32 and accompanying text.
[26] *See infra* text accompanying notes 429-31.
[27] *See infra* notes 485-96 and accompanying text.

Part II examines the role of murder victims' families in the capital sentencing phase under the United States criminal justice process. It provides an overview of victim impact evidence by addressing its constitutionality and states' varied approaches with regard to what information might be included, who and how many may testify, the permissible form of such evidence, the timing, and the procedures for admitting it. It focuses on victim sentencing opinions calling for death by reviewing their validly after *Payne* and providing several arguments in favor of allowing death recommendation in capital trials. Then, mercy opinion will be analyzed, starting with courts' positions on introducing it into evidence and ending with the reasons why a victim's family members should be authorized to speak in favor of mercy in death penalty cases.

Part III of this Dissertation discusses the victims' participation in sentencing decisions in murder cases under Islamic law, and under Libyan law as a modern penal code that implements Islam in homicide offenses. It begins with a brief overview of the sources of Islamic law, the Islamic Legal Schools of jurisprudence, the taxonomy of crimes, and homicides. It then explores the right of demanding *qisas* (death) by demonstrating who owns such right, whether *qisas* must be demanded unanimously, and the procedural framework of imposing *qisas* punishment. That Part also addresses the right of pardon by covering the timing of pardon, and the alternative retributions when pardon is offered: blood money (*diyya*) and discretionary punishment (*ta'zir*).

Part IV proposes allowing families of capital murder victims to voice their opinions on sentencing, especially when they advocate mercy, by applying a broader standard of relevance in capital murder sentencing. It concludes with a proposed framework for victim sentencing opinions. Finally, a brief summary will be presented in Part V.

II. THE FAMILIES OF MURDER VICTIMS PLAY A LIMITED ROLE IN THE UNITED STATES CAPITAL SENTENCING PROCEEDINGS

Even though the family members of a capital murder victim are the actual persons harmed by the murder, they were not allowed to have a voice in the sentencing hearing until 1991 when the case of *Payne v. Tennessee* was decided.[28] The United States Supreme Court finally allowed survivors of the murdered person to present victim impact evidence describing the victim's character and the harm they suffered as a result of the defendant's actions, to be heard by the jury during the sentencing phase of a capital trial.[29] This holding left the bar against such participation set forth in *Booth v. Maryland*,[30] and *South Carolina v. Gathers*.[31]

Unfortunately, the role of victims' families in capital sentencing ends at offering victim impact statements. Most courts have held that *Payne* only partially overruled *Booth*, leaving undisturbed *Booth*'s holding that "the admission of a victim's family members' characterizations *and opinions about* the crime, the defendant, and *the appropriate sentence* violated the Eighth Amendment."[32] Thus, families of murder victims cannot express their opinions with regard to the appropriate sentences the defendants should receive. In addition, as for family members who support death penalty, they are allowed to communicate their sentencing preference to the jury by expressing their grief and pain through victim impact evidence. On the other hand, there is no available means for those families who are not in favor of the ultimate penalty to exercise forgiveness.

[28] 501 U.S. 808 (1991).
[29] *See id.* at 825-27.
[30] 482 U.S. 496 (1987).
[31] 490 U.S. 805 (1989).
[32] *See Payne*, 501 U.S at 830 n. 2 (emphasis added).

Survivors' involvement in capital sentencing proceeding should exceed the mere entitlement of being able to introduce victim impact evidence. A survivor's view on the appropriate punishment for a defendant should matter to the system as well. After allowing victim impact evidence, a concise statement by the surviving relatives expressing their desires for the penalty of death to be imposed would not be prejudicial to defendant, considering that such a desire would be anticipated by most jurors. In fact, the ban on death recommendations may motivate family members to try to influence the jury to vote for death by presenting heartbreaking and angry victim impact statements. When a family requests leniency, there is no way that defendant's constitutional rights would be harmed if a capital jury hears such request. Rather, allowing mercy opinions would be entirely in a capital defendant's favor.

The approach of permitting family members to make sentencing recommendations does not replace the role of the jury. Instructions could be given to the jury by the trial judge that such recommendations may be taken into account, yet the jurors are the only authority to make the ultimate decision of life or death. In addition, a capital defendant can always seek relief under the Fourteenth Amendment's Due Process Clause if a sentencing opinion was prejudicial enough to render his or her sentence fundamentally unfair. As for the lack of relevance of a family's recommendations to the determination of a sentence, the rules of evidence can be changed to provide the family with a larger role in the criminal justice process.

Because sentencing recommendations are but one type of victim impact evidence, addressing murder survivors' participation through those recommendations requires a review of some foundational information about victim impact evidence as an essential background. This Part will start with an overview of victim impact evidence. Then, it discusses the validity

of victim sentencing opinions that specifically call for imposing death and why they should be allowed in court. The final section examines mercy opinions.

A. An Overview of Victim Impact Evidence

As a result of the victims' rights movement, court began to pay increased attention to the significance of the harm suffered by victims when determining appropriate sentences for defendants. The introduction of victim impact statements into criminal proceedings supports that assertion.[33] Victim impact statements are statements made by, or on behalf of, crime victims at the sentencing stage, to be considered by the sentencing authority, and are the type of victim impact evidence used most frequently.[34] The statements describe the impact of the offenses on the victims, or on their surviving family members in cases of homicide.

The United States Supreme Court has struggled over the admissibility of victim impact evidence in capital trials. First, an Eighth Amendment bar to presenting victim impact evidence was created in *Booth v. Maryland*.[35] Then, *South Carolina v. Gathers*[36] extended the bar to statements made by the state to a capital sentencing jury regarding the personal qualities of the victim. However, in *Payne v. Tennessee*,[37] victim impact evidence was later held to permissible in capital sentencing.

The rules of admitting victim impact evidence at the penalty stage of a capital trial vary among jurisdictions. With regard to the content of such evidence, some states only allow

[33] Richard S. Murphy, *The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1303 (1988). The *Payne* Court stated that "[c]ourts have always taken into consideration the harm done by the defendant in imposing sentence, and the [victim impact] evidence adduced in this case was illustrative of the harm caused by [the defendant]'s double murder." *Payne*, 501 U.S. at 825.
[34] Courts have permitted other forms of victim impact evidence. *See infra* note 241 and accompanying text.
[35] 482 U.S. 496 (1987).
[36] 490 U.S. 805 (1989).
[37] 501 U.S. 808 (1991).

information concerning the victim and the impact of the murder on the victim's family members.[38] Further, while some states have held that only the victim's family may present impact evidence, other jurisdictions have extended the use of such evidence to allow statements from close friends and even co-workers of the victim.[39] Different forms of victim impact evidence have been permitted in different courts, such as statements, photographs, and videos.[40] Some state statutes identify the penalty phase of a trial as the proper time to introduce victim impact evidence, while few courts have ruled that impact evidence is permissible when making determinations of guilt.[41] Finally, the procedural rules regarding notice, jury instructions, preliminary hearings, and cross-examination of the victim impact witnesses also vary by state.[42]

The Supreme Court jurisprudence regarding the constitutionality of victim impact evidence and the framework shaped by the states for the admission of such evidence will be explored next.

1. The Constitutionality of Victim Impact Evidence

Three significant cases dealt with the constitutionality of victim impact evidence at capital sentencing: *Booth v. Maryland* (1987),[43] *South Carolina v. Gathers* (1989),[44] and *Payne v. Tennessee* (1991).[45] *Booth* was the first occasion, the United States Supreme Court ruled directly on the constitutionality of victim impact evidence. The Court held that victim impact evidence was constitutionally inadmissible in capital cases because it violated the

[38] *See* discussion *infra* pp. 29-36
[39] *See* discussion *infra* pp. 36-39.
[40] *See* discussion *infra* pp. 40-43.
[41] *See* discussion *infra* pp. 43-45.
[42] *See* discussion *infra* pp. 45-50.
[43] 482 U.S. 496.
[44] 490 U.S. 805.
[45] 501 U.S. 808.

Eighth Amendment.[46] The *Gathers* Court extended the *Booth* ruling to statements made by a prosecutor regarding the personal character of and a murder victim positive he had in his community.[47] In *Payne,* the Court reversed its holdings in both *Booth* and *Gathers*, deciding that victim impact evidence is constitutional.[48]

While *Booth* and *Gathers* were overruled by *Payne*,[49] both provide the foundation and context necessary to fully understand the *Payne* decision. Thus, before exploring *Payne,* the Court's two prior decisions will be thoroughly reviewed.

a. Booth v. Maryland

In *Booth v. Maryland,* the United States Supreme Court first addressed the issue of whether the admission of victim impact evidence at the sentencing stage of a capital trial violates the Eighth Amendment.[50] In a five-to-four decision, the Court held that the Eight Amendment prohibits a state from allowing capital sentencing juries to consider victim impact evidence.[51]

John Booth was convicted of two counts of first-degree murder for repeatedly stabbing his neighbors, an elderly couple, in their chests with a kitchen knife after gagging and

[46] *Booth*, 482 U.S. at 496.
[47] *See Gathers*, 490 U.S. at 805.
[48] *Payne*, 501 U.S. at 808.
[49] The combined holdings of *Booth* and *Gathers* barred three types of evidence: descriptions of the victim's character, statements concerning the emotional impact of the crime on the victim's family, and the family members' opinions of the defendant, of the crime, and of the appropriate punishment. Since the *Payne* Court did not address the third type (victim opinion evidence), most courts have interpreted *Payne* as only partially overruling *Booth* and *Gathers*, meaning that the portion of *Booth* and *Gathers* dealing with victim opinion evidence is still valid.
[50] *See Booth*, 482 U.S. at 501-02. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The prohibitions of the Eighth Amendment apply to the States through the Due Process Clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 666 (1962).
[51] *See Booth*, 482 U.S. at 497-98.

bounding them.[52] He chose to have a jury, rather than a judge, determines his sentence.[53] At the sentencing phase of Booth's trial, the state offered a victim impact statement as mandated by Maryland statute.[54]

The victim impact statements were based on interviews with the victims' children, son-in-law, and granddaughter.[55] They included the emotional and psychological impact of the crime on the family, descriptions of the victims' outstanding personal qualities, and the family members' opinions and characterizations of the crime and the defendant.[56] For instance, the son stated to the jury that he could not sleep and felt very depressed.[57] Similarly, the daughter said that she suffered from lack of sleep and had become "withdrawn."[58] The family members described the victims as loving parents and grandparents whose family was most important to them" and "extremely good people who wouldn't hurt a fly."[59] Regarding the family members' opinions of the crime and the defendant, the victim's son said that his parents had been "butchered like animals" and no one "should be able to do something like that and get away with it."[60] The victims' daughter stated that her parents were stabbed repeatedly and viciously.[61] She added that she "could never forgive anyone for killing them that way. . .

[52] *See id.* Booth was also convicted of two counts of robbery and one count of conspiracy to commit robbery. *Id.* at 498.
[53] *Id.*
[54] The Maryland sentencing statue at the time of Booth's trial, not only permitted, but required, the admission of victim impact statement during a capital sentencing. *See id.* at 498-499 (citing MD. ANN. CODE, Art. 41, § 4-609(c) (1986)).
[55] *Id.* at 499.
[56] *See id.* at 499-500.
[57] *Id.* at 512.
[58] *Id.*
[59] *Id.* at 514.
[60] *Id.* at 512.
[61] *Id.* at 513.

animals wouldn't do this."[62] She concluded that such a murderer could never be rehabilitated.[63]

Booth moved to suppress the victim impact statements, contending they were irrelevant and unduly inflammatory and, thus, their use would violate his rights under the Eighth Amendment.[64] The Maryland trial court rejected his motion, holding that the jury may consider "any and all evidence which would bear on the [sentencing decision]."[65] Booth was sentenced to death for the first count of first-degree murder and to life imprisonment for the second.[66]

On appeal, the Maryland Court of Appeals affirmed Booth's death sentence and stated that victim impact evidence furthered an important interest by informing the jury of the "full measure of the harm caused by the crime."[67] The court also highlighted that the victim impact evidence in *Booth*'s case contained only a "relatively straight-forward and factual description of the effects of [the crime]," and did not cause the jury to base its death sentence on passion or emotion.[68]

The Supreme Court disagreed with the Maryland court, and held that state's statute mandating that victim impact statements be considered at the sentencing stage of a capital murder did violate the Eighth Amendment rights of the defendant.[69]

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[62] *Id.*
[63] *Id.*
[64] *See id.* at 500-01.
[65] *Id.* at 501.
[66] *Id.*
[67] *Id.* This was not the first time the Maryland Court of Appeals addressed the issue of whether to consider victim impact evidence during a capital sentencing hearing. In *Lodowski v. State*, the court of appeals found that victim impact evidence was not constitutionally proscribed and was relevant to a capital sentencing determination. 490 A.2d 1228, 1259 (1985), *vacated by*, 475 U.S. 1078 (1986). The Court observed that "there is a reasonable nexus between the impact of the offense upon the victim or the victim's family and the facts and circumstances surrounding the crime." *Id.* at 1254.
[68] *Booth*, 482 U.S. at 501.
[69] *See id.* at 509.

The Court found that the information contained in the victim impact statements was "irrelevant to a capital sentencing decision, and that its admission create[d] a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."[70] The Court added that imposing a capital sentence by a jury must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[71] Evidence considered in a capital sentencing, the Court held, must have some bearing on the defendant's "personal responsibility and moral guilt."[72] The Court observed that there was no connection between the victim impact evidence, which focused on the character of the victim and the impact of the murder on his or her family, and the "blameworthiness" of the defendant.[73] Put differently, since the harm caused by a defendant is not related to the moral blameworthiness of the defendant, imposing a punishment based on the harm rather than the crime itself would be inherently arbitrary.

Justice Powell expressed that the introduction of information concerning the survivors' grief and their opinions regarding the crime and the defendant could "serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."[74]

The majority also noted that the introduction of "victim good character" evidence would then necessitate allowing the defendant to rebut that evidence, which would create a "mini-trial" on the character of the victim.[75] Such a "mini-trial" could "distract the sentencing jury

[70] *Id.* at 502-03. The *Booth* Court pointed out that the kind of information contained in victim impact statements might be admissible at capital sentencing if it "related directly to the circumstances of the crime." *See id* at 507 n. 10.
[71] *Id.* at 502 (quoting Gregg v. Georgia, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).
[72] *See id.* (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).
[73] *See id.* at 504.
[74] *Id.* at 508.
[75] *See id.* at 506-07.

from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime."[76]

Court further based its decision on the fact that death is different from all other punishments.[77] Therefore, the Court limited its holding to capital punishment cases only.[78]

Justice White and Justice Scalia focused their separate dissents[79] on two main arguments. The first one argument relates to the relevance of the harm suffered by the survivors. Justice White disagreed with the majority view that only evidence related to the defendant's blameworthiness was relevant to the capital sentencing decision.[80] He argued that, if a sentence could be enhanced in noncapital cases based on the harm the defendant caused regardless of his or her intention to cause such harm, then "why the same approach is unconstitutional" in death penalty cases.[81] Justice Scalia also stated that "the amount of harm [a defendant] causes does bear upon the extent of [his or her] 'personal responsibility.'"[82]

The second argument concentrates on the use of victim impact evidence to counteract the defendant's mitigating evidence. Justice White's dissent pointed out that "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his [or her] family."[83] Justice Scalia concluded that, because the defendant

[76] *Id.* at 507.
[77] *Id.* at 509 n. 12.
[78] *See id* ("We imply no opinion as to the use of [victim impact] statements in non-capital cases").
[79] *See id* at 515, 519 (Rehnquist, C.J., White, O'Connor, and Scalia, JJ., dissenting).
[80] *Id.* at 516 (White, J., dissenting).
[81] *Id.* at 516-17.
[82] *Id.* at 519 (Scalia, J., dissenting).
[83] *Id.* at 517 (White, J., dissenting) (citation omitted).

is allowed to introduce evidence to mitigate his or her blameworthiness, families should be allowed to counter that mitigating evidence with victim impact statements showing the amount of harm caused by the defendant's actions.[84]

Only two years after *Booth*, the Court revisited the issue of using victim impact evidence at capital sentencing in *South Carolina* v. *Gathers*,[85] albeit in a slightly different context

b. South Carolina v. Gathers

In *Gathers*, victim impact statements were made by the prosecutor rather than by the victim's family members.[86] This slight difference, however, did not make the Court change its approach from *Booth*. *Gathers* extended *Booth*'s holding to bar similar comments made by prosecutors.[87]

Gathers had been sentenced to death for committing a first-degree murder.[88] He, along with three of his friends, beat and kicked a stranger in a park after he refused to speak with them.[89] Before leaving the park, Gathers beat the victim again with an umbrella and inserted it into his anus.[90] Gathers returned to the park "some time" later, and stabbed the victim to death.[91]

During the sentencing phase of the trial, the prosecutor commented extensively on the victim's personal qualities in his closing argument.[92] The prosecutor remarked that the victim was a religious man who cared about his community, inferring such from the victim's

[84] *Id.* at 520-21 (Scalia, J., dissenting).
[85] 490 U.S. 805 (1989).
[86] *See id.* at 808-09.
[87] *See id.* at 810-11.
[88] *Id.* at 806.
[89] *See id.* at 806-07.
[90] *Id.* at 807.
[91] *Id.*
[92] *See id.* at 808-09.

possession of religious items and a voter registration card at the time of the murder.[93] Moreover, the prosecutor read to the jury from the religious tract the victim was carrying at the time he was killed.[94]

The South Carolina Supreme Court reversed the death sentence, relying on *Booth* and stating that the prosecutor's remarks were "extensive," "unnecessary to an understanding of the circumstances of the crime," and "conveyed the suggestion [Gathers] deserved a death sentence because the victim was a religious man and a registered voter."[95] The U.S. Supreme Court affirmed.[96]

Like *Booth*, *Gathers* was a five-to-four opinion. In it, the Court reiterated that a penalty imposed in a capital case must reflect a defendant's "personal responsibility and moral guilt,"[97] holding that the statements presented by the prosecutor were unrelated to the blameworthiness of the defendant.[98]

In determining that the rule in *Booth* applied the facts of *Gathers*, the Court found that the prosecutor's statements about the victim's character were "indistinguishable" from the

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[93] *See id.* at 808. The prosecutor commented as follows:

> We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strewn [sic] them across the bike path, thinking nothing of that . . . . You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card. Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.

Id. at 808-10.

[94] *See id.* at 808-09.

[95] *Id.* at 810.

[96] *Id.*

[97] *Id.* at 810 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

[98] *See id.* (citation omitted). In *Lockett v. Ohio*, the Court noted that evidence involved a defendant's character and record, and the circumstances of the crime were relevant to his or her blameworthiness. 438 U.S. 586, 604 (1978). *See infra* notes 438-440 and accompanying text.

statements made by the victim's family in *Booth*.[99] Thus, permitting the jury to consider such statements "could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill."[100]

The Court also rejected the State's argument that the prosecution's comments were related to the circumstances of the crime.[101] It clarified that, while victim impact evidence relevant to the circumstances of the crime is admissible, the prosecutor's argument "went well beyond that fact."[102] The Court reasoned that, while the victim's personal papers (the tract and the voter card) were admissible as relevant circumstances of the crime, the content of those papers was irrelevant because there was no evidence showing that the defendant read them.[103]

In a lengthy dissent, Justice O'Connor argued that *Booth* covered statements describing the impact of the crime on the victims' family members and should not be interpreted as "foreclosing the introduction of all evidence, in whatever form, about a murder victim."[104] In her view, the holding in *Booth* should not have been viewed so as "to preclude prosecutorial comment which gives the sentencer a 'glimpse of the life' a defendant 'chose to extinguish.'" [105] She expressed that there was no violation of the Eighth Amendment in what the prosecutor presented in his closing argument.[106]

Justice O'Connor wrote that, "nothing in the Eighth Amendment precludes the prosecutor from conveying to the jury a sense of the unique human being whose life the defendant has taken."[107] She noted that just as the defendant's background information was

[99] *Id.* at 811.
[100] *Id.* (citation omitted).
[101] *See id.*
[102] *See id.*
[103] *See id* at 811-12.
[104] *Id.* at 814 (O'Connor, J., dissenting).
[105] *Id.* at 816 (quoting Mills v. Maryland, 468 U.S. 367, 397 (1988) (Rehnquist, C. J., dissenting)).
[106] *Id.* at 820.
[107] *Id.* at 817.

relevant, the information about the victim was "relevant to the jury's assessment of the harm he had caused and the appropriate penalty."[108] Further, because the death of the victim caused harm to society, such harm should be relevant to "society's moral judgment concerning the proper punishment."[109]

As in *Booth*, Justice Scalia filed a dissenting opinion. *Booth*, he wrote, was wrongly decided and should be overruled because it restricted state and federal criminal procedures in violation of the Constitution.[110] Moreover, he contended that, because the restrictions imposed by *Booth* had no basis in the Constitution, society, common law, or present laws, the harm caused by the crime should be taken into consideration to assess the criminal responsibility of the defendant in capital cases.[111]

In addition, Justice Scalia argued that the victim's "admirable" personal characteristics were intertwined with the impact of the crime on his or her family members, stating that there was "no basis for drawing a distinction for Eighth Amendment purposes between the admirable personal characteristics of the particular victim and the particular injury caused to the victim's family and fellow citizens."[112] He added, "Indeed, I would often find it impossible to tell which was which."[113]

The dissenting approach prevailed two years later in *Payne v. Tennessee*[114] where the Court reconsidered the constitutionality of victim impact evidence at capital sentencing hearings.

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[108] *Id.* at 820-21.
[109] *Id.* at 819.
[110] *Id.* at 823-24 (Scalia, J., dissenting).
[111] *Id.* at 825.
[112] *Id.* at 823.
[113] *Id.*
[114] 501 U.S. 808 (1991).

c. Payne v. Tennessee

In the time that elapsed between the *Gathers* opinion and *Payne*, a change had occurred in the makeup of the Court, and with it came a change in the Court's position regarding victim impact evidence.[115] The Justices that formed the minorities in *Booth* and *Gathers* carried the day when their views were adopted by the majority of the *Payne* Court, finding no constitutional bar to victim impact evidence in capital sentencing proceedings.[116]

Pervis Payne had spent a Saturday morning and afternoon injecting cocaine and drinking alcohol.[117] Later that day, he entered the apartment of Ms. Christopher, a twenty-eight-year-old woman who lived across the hall from his girlfriend, and made sexual advances towards her.[118] When she resisted, Payne became violent and attacked Ms. Christopher, her two-year-old daughter, Lacie, and her three-year-old son, Nicholas.[119] Payne took a butcher knife from Ms. Christopher's kitchen and stabbed her forty-one times.[120] He also stabbed her daughter in the chest, stomach, back, and head, and then stabbed her son several times such that the wounds completely penetrated his body.[121] As a result of their stab wounds, Ms. Christopher and her daughter died, but her son survived.[122] Payne was convicted of two counts of first-degree murder and one count of assault with intent to commit murder.[123]

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[115] By 1991, Justices Powell and Brennan, the authors of each of the opinions in *Booth* and *Gathers*, respectively, had retired and were replaced by Justices Kennedy and Souter. *See* Patrick M. Fahey, *Payne v. Tennessee: An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 224-25, 225 n. 115 (1992).
[116] *Payne*, 501 U.S. at 827.
[117] *Id.* at 811-12.
[118] *Id.* at 812.
[119] *Id.* at 811-12.
[120] *Id.* at 812-13.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 811.

The victim impact evidence presented by the prosecution during the penalty stage of the trial included the testimony of the children's grandmother, who spoke about how the crime had affected her surviving grandson:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.[124]

Additionally, the prosecutor made extensive statements in his closing argument concerning the boy's condition, stating that:

> Nicholas was alive . . . [h]is eyes were open . . . [h]e was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.
>
> There is nothing you can do to ease the pain of any of the families involved in this case . . . . There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas.
>
> Somewhere down the road Nicholas is going to grow up, hopefully . . . . He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.[125]

In his rebuttal to the defense's closing argument of the defense, the prosecutor submitted:

> No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old . . . . And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.
>
> [Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever.[126]

[124] *Id.* at 814-15.
[125] *Id.* at 815.
[126] *Id.* at 816.

Payne received a death sentence on each of the murders.[127] He appealed his case to the Supreme Court of Tennessee, arguing that the grandmother's testimony and the prosecutor's comments at the sentencing phase violated *Booth* and *Gathers*.[128] Nevertheless, the Tennessee court rejected the Payne's argument and affirmed his death sentence.[129] The court found that the grandmother's testimony was "technically irrelevant," but was harmless beyond a reasonable doubt, and "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty."[130] With respect to the statements by the prosecutor, the court held that they were related to the defendant's personal responsibility and "surely relevant" to the determination of his blameworthiness.[131] Payne then appealed the judgment to the United States Supreme Court.

The Supreme Court overruled its holdings in both *Booth* and *Gathers*, declaring that victim impact evidence is constitutionally permissible.[132] In a six-to-three decision, the Court held that the Eighth Amendment does not bar victim impact evidence relating to the victim's personal characteristics or the impact of the murder on the victim's family, nor does it bar prosecutorial statements regarding such evidence, at a capital sentencing hearing.[133] Importantly, however, *Payne* did not address whether a victim's opinions of the crime, the defendant, and the appropriate sentence would be permissible. In a footnote, the Court explained:

> Our holding today is limited to the holdings of *Booth v. Maryland* and *South Carolina v. Gathers* that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family

[127] *Id.*
[128] *Id.* at 816-17.
[129] *Id.* at 816.
[130] *Id.* at 816-17.
[131] *Id.* at 817.
[132] *Id.* at 827, 830.
[133] *Id.* at 827.

> members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.[134]

Writing for the majority, Chief Justice Rehnquist discussed the justification in *Booth* and *Gathers* that evidence relating to the victim's character or to the crime's impact on his or her family is immaterial to capital sentencing because it does not reflect on the defendant's blameworthiness.[135] He noted that the harm caused by a crime has always been an important factor in determining the appropriate sentence, and that "two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm."[136] In other words, he argued that the difference in the amount of harm determines the harshness of the punishment the defendant might receive, not the level of his blameworthiness. According to Chief Justice Rehnquist, victim impact evidence is "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."[137]

Another justification relied on by the majority in favor of allowing victim impact evidence was to "keep the balance true" in the sentencing stage.[138] Chief Justice Rehnquist argued that *Booth* "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from . . . offering 'a glimpse of the life' which a defendant 'chose to extinguish.'"[139] Therefore, he concluded, the state has "a legitimate

[134] *Id.* at 830 n. 2 (citation omitted).
[135] *Id.* at 819.
[136] *Id.*
[137] *Id.* at 825.
[138] *Id.* at 827.
[139] *Id.* at 822 (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C. J., dissenting)).

interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."[140]

Justices O'Connor, Scalia, and Souter each filed separate concurrences.[141] According to Justice O'Connor, "there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial."[142] She noted out that some victim impact evidence might be "unduly inflammatory," but that such concern does not justify prohibiting all such evidence.[143] Justice O'Connor also explained that the majority's holding did not require or advise states to admit victim impact evidence; rather, it merely allowed them to use such evidence at capital sentencing proceedings.[144]

In his concurring opinion, Justice Scalia disputed the *Booth* finding that the "unanticipated consequences" of a crime are irrelevant and should not influence the decision makers.[145] He wrote that the *Booth* rationale conflicted with the public sense of justice as expressed in the victims' rights movement.[146]

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[140] *Id.* at 825 (quoting Booth v. Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting)). Payne presented evidence of his mitigating circumstances in the form of testimony from four witnesses, his parents, his girlfriend, and a psychologist. This evidence was introduced to show that Payne was a hard worker, and he did not have any criminal record nor any history of drug abuse, that he attended church, and that he was a "caring person," "good with children," and a "good son." The psychologist testified that Payne was "mentally handicapped," and that he was the politest prisoner he ever met. *Id.* at 814.
[141] *Id.* at 830-33 (O'Connor, J., concurring); *id.* at 833-35 (Scalia, J., concurring); *id.* at 835-44 (Souter, J., concurring).
[142] *Id.* at 831(O'Connor, J., concurring).
[143] *Id.*
[144] *Id.*
[145] *Id.* at 834 (Scalia, J., concurring).
[146] *Id.*

In the final concurrence, Justice Souter attacked *Booth*'s analyses that victim impact evidence is disallowed because it includes information of which the defendant is unaware.[147] He explained that every murderer knows that his victim probably has close survivors who will be harmed by the victim's death; therefore, considering those foreseeable consequences of the murder in determining the defendant's blameworthiness is morally defensible.[148] Justice Souter additionally found that permitting relevant mitigating evidence and while disllowing foreseeable victim impact evidence "may be seen as a significantly imbalanced process."[149] Finally, Justice Souter stated that he supported overruling *Booth* because it "sets an unworkable standard" for defining what constitutes proper penalty phase evidence which itself creates a risk of arbitrary results.[150]

Justice Marshall delivered one of the dissents in *Payne*.[151] He stated that *Payne* resulted from "[p]ower, not reason."[152] The *Payne*'s outcome, Justice Marshall wrote, was only the result of a change in the Court's justices because the reasons set forth by the *Payne* majority were the arguments utilized by the *Booth* and Gathers dissenters.[153] Furthermore, he agreed with the majorities' arguments in both *Booth* and *Gathers* that victim impact evidence includes information that a defendant was unaware of and, thus, unrelated to his blameworthiness.[154] With regard to the Justice Souter's foreseeability notion, Justice Marshall responded that "even where the defendant *was* in a position to foresee the likely impact of his conduct, admission of victim-impact evidence creates an unacceptable risk of sentencing

[147] *Id.* at 837-38 (Souter, J., concurring).
[148] *Id.* at 838-39.
[149] *Id.* at 839 (citing Mills v. Maryland, 486 U. S. 367, 397 (1988) (Rehnquist, C. J., dissenting)).
[150] *Id.* at 839-40.
[151] *Id.* at 844-56 (Marshall, J., dissenting).
[152] *See id.* at 844.
[153] *See id.*
[154] *See id.* at 845-46.

arbitrariness."[155] Justice Marshall also found that, because victim impact evidence has an "inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime," the probative value of admitting this evidence is "always" outweighed by its prejudicial effect.[156]

Justice Stevens who also dissented,[157] disputed the harm-based justification, contending that the unforeseeable qualities of a victim's character are irrelevant to the defendant's "personal responsibility and moral guilt."[158] Therefore, he argued, considering it as a factor at sentencing would lead to a sentence that did not reflect the defendant's blameworthiness.[159] According to Stevens, victim impact evidence "serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason."[160] Justice Stevens noted that, while the dissenters in *Booth* and *Gathers* could not find any judicial precedents for using evidence that did not relate to the defendant's character or the crime, the *Booth* holding, on the other hand, was "entirely consistent" with sentencing practices that had been established long time ago.[161] He also criticized the majority's belief that fairness would require allowing the government to introduce victim impact evidence to counter a defendant's mitigating evidence—evidence that a defendant is entitled to offer.[162] In Stevens' view, "[t]he victim is not on trial; her character, whether good or bad, cannot therefore constitute either an aggravating or a mitigating circumstance."[163] He added that sentencing procedure was, in fact, balanced, and there was no need to allow victim

[155] *Id.* at 846 (emphasis in original).
[156] *Id.*
[157] *Id.* at 856-67 (Stevens. J., dissenting).
[158] *Id.* at 860-61(quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).
[159] *Id.*
[160] *Id.* at 856.
[161] *See id.* at 858-59.
[162] *See id.* at 859.
[163] *Id.*

impact evidence to be in order to have a balanced process.[164] Just as a defendant is entitled to offer any relevant mitigating evidence he or she desires, the state is entitled to counter his or her evidence through rebuttal.[165]

Supreme Court jurisprudence regarding the constitutionality of victim impact evidence has laid the groundwork for states to determine how such evidence should be admitted.

2. States' Framework for the Admission of Victim Impact Evidence

Payne does not mandate states to allow victim impact evidence; the Court merely removed the Eighth Amendment bar to the admission of this evidence during capital sentencing.[166] Nevertheless, thirty of the thirty-one states that impose the death penalty[167] have incorporated some form of victim impact evidence into their capital sentencing proceedings on the basis of either legislative or judicial authority.[168] Fourteen states have done so by utilizing statutes that address the use of victim impact evidence specifically at the penalty phases of capital murder trials.[169] The other sixteen jurisdictions have case law that

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[164] *See id.* at 860.
[165] *See id.*
[166] *Payne*, 501 U.S. at 827 ("We thus hold that if the State chooses to permit the admission of victim impact evidence . . . the Eighth Amendment erects no *per se* bar") (emphasis in original).
[167] *See States with and without the Death Penalty as of July 1, 2015*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited June 23, 2016).
[168] The thirty-one states that have incorporated some form of victim impact evidence into their capital sentencing proceedings are: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.
[169] Those states with victim impact evidence statutes are: Arizona (ARIZ. REV. STAT. ANN. § 13-752(R) (2012)); Arkansas (ARK. CODE ANN. § 16-90-1112 (2012); Delaware (DEL. CODE ANN. tit. 11, § 4209(c)(1) (2007)); Florida (FLA. STAT. ANN. §§ 921.141(7), 921.147 (2004)); Georgia (GA. CODE ANN. § 17-10-1.2 (2010)); Idaho (IDAHO CODE ANN. § 19-2515 (2011)); Indiana (IND. CODE ANN. § 35-50-2-9(e) (2008)); Louisiana (LA. REV. STAT. ANN. § 46:1844 (2000)); LA. CODE CRIM. PROC. ANN. art. 905.2 (2011)); Missouri (MO. ANN. STAT. § 565.030 (2012)); Montana (MONT. CODE ANN. § 46-18-302(1)(a)(iii) (2003)); New Hampshire (N.H. REV. STAT. ANN. §§ 21-M:8-k, 651:4-a (2010)); Oregon (OR. REV. STAT. ANN. § 163.150 (2011)); Utah (UTAH CODE ANN. § 76-3-207 (West 2010)); Virginia (VA. CODE ANN. §§ 19.2-11.0, 19.2-299.1 (2006)).

has either made general victim impact legislation applicable to capital sentencing proceedings or has allowed victim impact testimony to be admitted in a capital case as aggravating evidence.[170] The Supreme Court of Wyoming, on the other hand, has held that existing Wyoming statutory law does not allow victim impact evidence in capital cases.[171]

Because *Payne* does not create a constitutional right for victims to introduce impact evidence,[172] states are permitted to place limits on the use of such evidence.[173] Those states that allow victim impact evidence have not integrated *Payne* into their legislations and court rulings similarly. The form and extent of victim impact evidence permitted varies by state based upon the fact that *Payne* provides minimal guidance along with vague standards as to what evidence is constitutionally permissible.[174] Each jurisdiction has therefore shaped its

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[170] Those states with case law allowing for victim impact evidence are: Alabama (ALA. CODE § 15-23-74 (1995); Gissendanner v. State, 949 So.2d 956 (Ala. Crim. App. 2006)); California (CAL. PENAL CODE § 190.3 (West 2003); People v. Pollock, 89 P.3d 353, 370 (Cal. 2004)); Colorado (COLO. REV. STAT. § 24-4.1-302.5 (2012); People v. Dunlap, 975 P.2d 723 (Colo. 1999)); Kansas (KAN. STAT. ANN. § 21-6617(c) (2012); State v. Scott, 183 P.3d 801 (Kan. 2008)); Kentucky (KY. REV. STAT. ANN. §§ 421.520, 532.055 (West 2006); St. Clair v. Commonwealth, 319 S.W.3d 300 (Ky. 2010)); Mississippi (MISS. CODE. ANN. §§ 99-19-155(b), 99-43-33 (2013); Havard v. State, 928 So.2d 771 (Miss. 2006)); Nevada (NEV. REV. STAT. ANN. § 176.015 (2013); Rippo v. State, 946 P.2d 1017 (Nev. 1997)); North Carolina (N.C. GEN. STAT. ANN. § 15A-833 (2005); State v. Smith, 532 S.E.2d 773 (N.C. 2000)); Ohio (OHIO REV. CODE ANN. §§ 2929.19, 2947.051 (West 2006); State v. Fautenberry, 650 N.E.2d 878 (Ohio 1995)); Oklahoma (OKLA. STAT. ANN. tit. 21, §§ 142A-1, 142A-8 (1995); Williams v. State, 188 P.3d 208 (Okla. Crim. App. 2008)); Pennsylvania (18 PA CONS. STAT. ANN. § 11.201 (West 2001); Commonwealth v. Means, 773 A.2d 143 (Pa. 2001)); South Carolina (S.C. CODE ANN. § 16-3-1535 (2012); Humphries v. State, 570 S.E.2d 160 (S.C. 2002)); South Dakota (S.D. CODIFIED LAWS §§ 23A-27-1.1, 23A-27-1.3 (2014); State v. Rhines, 548 N.W.2d 415 (S.D. 1996)); Tennessee (TENN. CODE. ANN. §§ 40-38-103, 40-38-205 (2010); State v. McKinney, 74 S.W.3d 291 (Tenn. 2002)); Texas (TEX. CODE. CRIM. PROC. ANN. art. 56.03(b) (West 2010); Mosley v. State, 983 S.W.2d 249 (Tex. Crim. App. 1998)); Washington (WASH. REV. CODE. ANN. §§ 7.69.020(4), 7.69.030 (2011); State v. Gregory, 147 P.3d 1201 (Wash. 2006)).

[171] Olsen v. State, 67 P.3d 536, 597 (Wyo. 2003). *But see* State v. Rhines, 548 N.W.2d 415, 446 (S.D. 1996) (rejecting a capital defendant's argument that *Payne* requires a specific state law allowing the sentencer to consider victim impact evidence, stating that *Payne* regarded victim impact evidence as no different from any other form of evidence in terms of its admissibility).

[172] The *Payne* Court merely states that "the Eighth Amendment erects no per se bar" to the introduction of victim impact evidence. *Payne*, 501 U.S. at 827.

[173] Interestingly, some jurisdictions have even expanded *Payne*'s scope as for who may qualify as victim impact witnesses. *See infra* notes 222-28 and accompanying text.

[174] For example, the Court referred to the victim impact evidence as "a quick glimpse" of the victim's life. *Payne*, 501 U.S. at 822, 830 (quoting Mills v. Maryland, 486 U. S. 367, 397 (1988) (Rehnquist, C. J., dissenting)). The majority also characterized impact evidence as "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question," and the test for seeking remedy is evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne*, 501 U.S. at 825.

own framework for the admissibility of victim impact evidence. Some examples of different approaches will be reviewed with regard to the kinds of information included in victim impact evidence, who qualifies as a victim impact witness, the permissible form of the evidence, the timing of admitting the evidence, and the procedures for admitting it.

a. Types of Information Included in Victim Impact Evidence

Under *Payne*'s holding, two types of information could be delivered through victim impact evidence; information relating to the victim's personal character and information about the impact of the crime on his or her family.[175] *Payne* did not address the third type of information which was held unconstitutional by *Booth*--opinions by the victim's family about the crime, the defendant, and the appropriate sentence (victim opinion evidence).[176]

Payne offers some guidance regarding the scope of information allowed, by expressly sanctioning evidence relating to the personal character of the victim and the emotional impact of the murder on family members,[177] and by admonishing that one should avoid evidence that "so unduly prejudicial."[178] However, it has been acknowledged that victim impact evidence "is the most problematical of all of the aggravating factors and may present the greatest difficulty in determining the nature and scope of the 'information' to be considered."[179]

As for the victim's personal characteristics, inspired by *Payne*'s language,[180] several jurisdictions offer guidance on evidence to be allowed by indicating that victim impact

[175] *Payne*, 501 U.S. at 827.
[176] *See id.* at 830 n. 2, 833 (O'Connor, J., concurring).
[177] *Payne*, 501 U.S. at 817.
[178] *See id.* at 825.
[179] United States v. McVeigh, 944 F. Supp. 1478, 1491 (D. Colo. 1996).
[180] Victim impact evidence "is designed to show instead *each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." *Payne*, 501 U.S. at 823 (emphasis in original).

evidence "shall be designed to demonstrate the victim's uniqueness as an individual human being . . . ."[181] Most state legislation does not specify what kind of information about the victim may be presented.[182] Yet, wide-ranging evidence about a victim's specific characteristics and background has been permitted based on court rulings. For instance, evidence of a victim's good character has been found to be within the bounds of appropriate victim impact testimony.[183] Courts also have approved of evidence relating to the victim's intelligence,[184] aspirations,[185] spirituality,[186] and occupation.[187] Moreover, the South Carolina

[181] *See, e.g.*, FLA. STAT. ANN. § 921.141(7) (2004); IDAHO CODE ANN. § 19-2515(5)(a) (2011); State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998) ("[V]ictim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed.").

[182] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-752(R) (2012) ("the [murder person's family] "may present information about the murdered person"); MO. ANN. STAT. § 565.030 (2012) ("evidence concerning the murder victim"); MISS. CODE. ANN. § 99-19-155(b) (2013) ("specific information about the victim").

[183] *See, e.g.*, Le v. State, 947 P.2d 535,551-52 (Okla. Crim. App. 1997) (holding that it was not unduly prejudicial for the deceased husband to be described by his wife as a "good man" who loved her and his stepdaughter, and as a "talented, hard worker who never complained," but cooked and helped with chores around the home). *See also* Moore v. State, 701 So. 2d 545, 550-51 (Fla. 1997) (finding no error in allowing the victim's daughter to testify that her father was a "good man" and very free-hearted," and that he never bothered anyone and "loved everybody"); State v. Gray, 887 S.W.2d 369, 389 (Mo. 1994) (allowing testimony that the victims were caring, involved in their community, excellent students and "advocates of social change" with "liberal political views"); Sullivan v. State, 636 A.2d 931, 940, 942 (Del. 1994) (holding that there was no plain error in allowing testimony that victim was a "generous, humble, and gracious man"); Roberts v. Bowersox, 61 F. Supp. 2d 896, 936 (E.D. Mo. 1999) (held that victim impact evidence, including witnesses' testimony about the victim's kindness and their close friendship with her, did not render the defendant's trial unfair); State v. Reeves, 448 S.E.2d 802, 811-12 (N.C. 1994) (upholding admission of witness testimony that the victim "always went to church," and was a good wife and mother who loved her children and "would do anything for anybody").

[184] *See* State v. Frost, 727 So. 2d 417, 431 (La. 1998) (held that statements by the victim's brother that she was a "smart person" and had a higher I.Q. than the witness were allowable as statements intended to show the victim's "uniqueness as an individual human being").

[185] *See* State v. Rocheville, 425 S.E.2d 32, 36 (S.C. 1993) (holding that parents' testimony about their sons' dreams and aspirations was relevant because it "merely portrayed the victims as unique individuals"). *But see* Lockett v. State, 53 P.3d 418, 427 (Okla. Crim. App. 2002) (citing Phillips v. State, 989 P.2d 1017, 1043 (Okla. Crim. App. 1999) ("[S]tatements about the victim's plans for the future may not have been relevant victim impact evidence.").

[186] *See* Turner v. State, 486 S.E.2d 839, 842 (Ga. 1997) (held that the witnesses' statements about that victim that he had "new found faith and spirituality" and was a "dedicated member" of his church were allowable and did not impermissibly inflame the jury's emotions based on religion); Lucas v. Evatt, 416 S.E.2d 646, 648 (S.C. 1992) (allowing testimony that victims were "good honest hardworking God fearing people").

[187] *See* Hyde v. State, 778 So. 2d 199, 213-16 (Ala. Crim. App. 1998) (stating that the prosecutor's comments about the fact that the victim was a police officer were relevant to the court's determination, and so they were not improper). *See also* Davis v. State, 660 So. 2d 1228, 1249 (Miss. 1995) ("We see no reason to exclude evidence of the victim's occupation simply because . . . the victim was a police officer"). Evidence of work ethic, educational background, and standing in the community has been accepted by courts as well. John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 269-70 (2003).

Supreme Court held that a seven-minute videotape showing portions of a law enforcement officer's funeral was relevant to demonstrate a victim's uniqueness. [188]

In addition to allowing evidence of a victim's good qualities, various state courts have gone further by permitting victim impact statements that contain a comparison between the "good" qualities of the victim and the defendant's "bad" character. In North Carolina, for instance, the state's Supreme Court held that a prosecutor's comments that the defendant was evil person who deserved to die and that the victim was a martyr of good cause were not improper simply because the state is allowed to rebut the defendant's character evidence which he chose to place at issue.[189] The Supreme Court of South Carolina adopted the same approach, but based it on the fact that "*Payne* does not prohibit character comparisons between defendants and victims; it prohibits comparisons that suggest that there are worthy and unworthy victims."[190]

Courts have divided over the comparison between the worth of a defendant's life and the life of his victim. Some have found that such comparisons were beyond the realm of

[188] State v. Bixby, 698 S.E.2d 572, 586-87 (S.C. 2010).

[189] *See* State v. Larry, 481 S.E.2d 907, 925-26 (N.C. 1997) (citing State v. Silhan, 275 S.E.2d 450, 484 (N.C.1981)). In *Larry*, the prosecutor states at sentencing proceeding that:

> [The victim] died a hero. He died for you. He gave his life for you . . . . He gave his life so there would be no more victims, no more kids would have guns stuck in their face . . . folks, he was a martyr to the cause of good. A martyr. Don't you think it's fair that this man who has done nothing right his whole life, nothing but wrong his whole life, nothing but hurt people, don't you think it's right he should die a martyr to the cause of evil?

State v. Larry, 481 S.E.2d at 925-26. *See also* Powell v. State, 906 P.2d 765, 776-77 (Okla. Crim. App. 1995) (finding that prosecutor's remarks describing the victim as "clean-cut," "active in his church," "loving," a "decent human being," and a "good kid," and describing the defendants as "bad kids" did not deprive the defendant of a fair trial).

[190] Humphries v. State, 570 S.E.2d 160, 168 (S.C. 2002).

permissible victim impact evidence.[191] Other state supreme courts have approved value-of-life comparisons in victim impact evidence.[192]

With respect to comparative worth of victims, the majority in *Payne* emphasized the fact that the purpose of victim impact evidence is to show the uniqueness of the victim, not to encourage a comparison of victims.[193] Utah law translated that sentiment into an explicit prohibition against comparing the worth of the victim to that of another victim or person when presenting victim impact evidence.[194] Similarly, the Texas Court of Criminal Appeals found that victim character evidence is allowed to show the victim's uniqueness, but "[w]hen the focus of the evidence shifts from humanizing the victim and illustrating the harm caused by the defendant to measuring the worth of the victim compared to other members of society then the State exceeds the bounds of permissible testimony."[195]

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[191] *See, e.g.*, Hall v. Catoe, 601 S.E.2d 335, 339 (S.C. 2004). The solicitor in his closing argument, said "it is a question of values. What are the lives of these two girls [victims] worth? Are they worth the life of this man, the psychopath, this killer who stabs and stabs and kills, and rapes and kidnaps." The court held that the solicitor's statement included an impermissible comparison because he asked the jury to compare the worth of the defendant's life with that of his victims' which was "so emotionally inflammatory." *Id.* at 341. *See also* State v. Storey, 901 S.W.2d 886, 902 (Mo. 1995). The State argued that "[t]he right of the innocent completely outweighs the right of the guilty not to die, and, so, it comes down to one basic thing. Whose life is more important to you? Whose life has more value? The Defendant's or [the victim]?" The court rejected the prosecutor's argument stating that the "'State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision.'". *Id.* (quoting Tuilaepa v. California, 512 U.S. 967, 114 (1994)).

[192] *See, e.g.*, State v. Haselden, 577 S.E.2d 594, 610 (N.C. 2003). The prosecutor said to the jury, "If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more than [the victim's] life." The court noted that the prosecutorial statement "simply reminded the jury that in addition to considering defendant's life, the jury should also consider the life of the victim. *Id. See also* Jackson v. State, 33 S.W.3d 828, 834 (Tex. Crim. App. 2000). The prosecution argued that there was "[n]o reason to give this person a life in the penitentiary sentence . . . to say there are mitigating factors...or to say he is not a continuing threat . . . mean[s] that his life is more important than [the victims' lives]." The court held that the prosecutor's argument did not violate the *Payne* standard because *Payne* only discourages the use of comparisons between the worth of a victim's life and the lives of other members of society, while the comparison in this case was between the value of the lives of the victims and the value of the defendant's life. *Id.* (citing *Payne*, 501 U.S. at 823).

[193] *See Payne*, 501 U.S. at 823. As an example of comparative judgments, the Court posed the problem that the "killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not." *Id. See also* Bums v. State, 699 So. 2d 646, 653 (Fla. 1997) (the court rejected an Equal Protection claim that victim impact evidence could encourage a jury to give "different weight to the value of different victims' lives.").

[194] *See* UTAH CODE ANN. § 76-3-207(2)(a)(iii) (West 2010).

[195] Mosley v. State, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998) The court further stated:

As for the evidence relating to the impact of the murder on the victim's family, while the *Payne* decision addressed only the "emotional" impact on the victim's family,[196] most states have allowed many more aspects of the crime's "impact" to be considered. The majority of these states have listed into their statutes several forms of "impact" that may be presented as victim impact evidence.[197] In Florida, for example, the impact statement shall be related to "the extent of any harm, including social, psychological, or physical harm, financial losses, [or] loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced."[198] The other jurisdictions provide no specification regarding the admissible type of "impact".[199] For instance, Arizona law states that victim impact evidence may contain information about "the impact of the murder" on family members.[200]

> Rule 403 limits the admissibility of such evidence when the evidence predominantly encourages comparisons based upon the greater or lesser worth or morality of the victim . . . . We recognize that this standard does not draw a bright and easy line for determining when evidence concerning the victim is admissible and when it is not. Trial judges should exercise their sound discretion in permitting some evidence about the victim's character . . . while limiting the amount and scope of such testimony.

Id.

[196] *Payne*, 501 U.S. at 808.

[197] *See, e.g.*, FLA. STAT. ANN. § 921.143(2) (2004); KY. REV. STAT. ANN. § 532.055 (West 2006); MISS. CODE ANN. § 99-19-155(b) (2012); N.C. GEN. STAT. ANN. § 15A-833 (2005); OHIO REV. CODE ANN. § 2947.051 (West 2006); OKLA. STAT. ANN. tit. 21, § 142A-1 (1995); 18 PA. STAT. ANN. § 11.201(5) (West 2001); S.C. CODE ANN. § 16-3-1535 (2012); S.D. CODIFIED LAWS §§ 23A-27-1.1, 23A-27-1.3 (2014); TENN. CODE ANN. § 40-38-203(2) (2010); TEX. CRIM. PROC. CODE ANN. art. 56.03 (West 2010); VA. CODE ANN. §19.2-299.1 (2006); WASH. REV. CODE ANN. § 7.69.020(4) (2011).

[198] FLA. STAT. ANN. § 921.143(2) (2004). *See also* KY. REV. STAT. ANN. § 532.055 (West 2006) (victim impact evidence included descriptions of the nature and extent of any physical, psychological, or financial harm the victim's family suffered); MISS. CODE ANN. § 99-19-155(b) (2013) (victim impact evidence includes evidence pertaining to the financial, emotional and physical effects of the crime on the victim and his or her family); 18 PA. STAT. ANN. § 11.201(5) (West 2001) (victim impact evidence includes evidence describing the physical, psychological and economic effects of the crime on the victim and his or her family"); VA. CODE ANN. §19.2-299.1(2006) (victim impact evidence includes any economic loss suffered by the victim, the nature and extent of any physical or psychological injury, any change in personal welfare, lifestyle or familial relationships that resulted from the offense, and any request for psychological or medical services initiated by the victim or his or her family that resulted from the offense").

[199] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-752(R) (2010); ARK. CODE ANN. § 16-90-1112(a)(1) (2012); IDAHO CODE ANN. § 19-2515(2011); IND. CODE ANN. § 35-50-2-9(e) (2008); LA. CODE CRIM. PROC. ANN. art. 905.2 (2011); MO. ANN. STAT. § 565.030 (2012); NEV. REV. STAT. ANN. § 176.015 (2013t).

[200] ARIZ. REV. STAT. ANN. § 13-752(R). (2012)

Further, in some jurisdictions, the allowable victim impact evidence is not restricted to the impact that the crime has had on the victim's family, alone. Indiana's statute expressly permits evidence that relates to the impact of the murder on the victim's friends.[201] Additionally, in Missouri, victim impact evidence "may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others."[202] Evidence regarding the impact on the "community" has also been allowed by several laws[203] and court rulings.[204]

Most used of all forms of impact evidence is that relating to the "emotional" harm that results from the killing of a loved one. While some courts have tried to limit victim impact evidence, in general, by emphasizing that such evidence should not be "overly emotional,"[205] the Tennessee Supreme Court acknowledged the fact that emotional impact evidence, in particular, has no clear limit.[206] "[T]here is no bright-line test," the court stated, "and the

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[201] IND. CODE ANN. § 35-50-2-9 (2008). *See also* LA. CODE CRIM. PROC. ANN. art. 905.2(A) (2011) ("The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates.").

[202] MO. ANN. STAT. § 565.030 (2012).

[203] *See, e.g.*, FLA. STAT. ANN. § 921.141(7) (2004) (impact evidence is intended to demonstrate the "resultant loss" to the victim's death caused the members of his or her community); IDAHO CODE ANN. § 19-2515(5)(a) (2011) (same); GA. CODE ANN. § 17-10-1.2(a)(1) (2010) ("[T]he court shall allow evidence from the family of the victim, or such other witness having personal knowledge of . . . the emotional impact of the crime on the victim, the victim's family, or the community."); PA. STAT. ANN. tit. 42 § 9721(b) (West 2001**)** (allowing evidence regarding the "gravity of the offense" as it relates to the impact on the victim's community); UTAH CODE ANN. § 76-3-207(2)(a)(iii) (West 2010) (evidence may be introduced on the impact of the offense upon the victim's family and his or her community).

[204] *See, e.g.*, State v. Bixby, 698 S.E.2d 572, 587 (S.C. 2010) (quoting *Payne v. Tennessee*, 501 U.S. 808, 822 (1991)) (holding that a videotape showing actual mourners and the traditional trappings of a law enforcement officer's funeral was relevant to show "the general loss suffered by society," considering that victim impact evidence, according to *Payne*, "demonstrates 'the loss to the victim's family and to society" that resulted from the victim's homicide); Hyde v. State, 778 So. 2d 199, 215 (Ala. Crim. App. 1998) (upholding evidence related to the impact of the victim's murder on the "law enforcement community"); State v. Burns, 979 S.W.2d 276, 282-83 (Tenn. 1998) (finding that testimony offered to show the effects of the crimes on the community--that people felt scared after the two murders in the neighborhood, and began locking their doors--did not render the defendant's trial unfair).

[205] State v. Hartman, 754 N.E.2d 1150, 1172 (Ohio 2001) (citing State v. Reynolds, 687 N.E.2d 1358, 1369 (1998)). *See also* Malone v. State, 168 P.3d 185, 211(Okla. Crim. App. 2007) (concluding that victim impact evidence was "too emotional").

[206] State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998).

admissibility of specific types of victim impact evidence must be determined on a case-by-case basis."[207]

Various jurisdictions have also approved evidence relating to unpredictable or indirect consequences of the murder. For example, in Tennessee, the state court upheld testimony from a victim's mother that she was so affected by the killing of her son that she divorced her husband.[208] Impact evidence relating to heart attacks,[209] negative health effects,[210] and other traumatic experiences[211] has been allowed as well.

In most cases, in order to be held admissible, evidence must be related to the impact of the murder for which the defendant is being sentenced, ant not related to the impact of other offenses.[212] According to the Supreme Court of Nevada, evidence concerning the impact of a prior homicide was inadmissible because it was irrelevant to the murder on trial.[213] The Texas Court of Criminal of Appeals adopted the same approach on the basis that the admitting impact evidence from a previous crime "would open the door to admission of victim impact evidence arising from *any* extraneous offense committed by a defendant."[214] Nevertheless, the North Carolina Supreme Court has allowed survivors of prior homicides—the court has approved of testimony from the daughter of a woman killed by a defendant many years

[207] *Id.*
[208] *See* State v. Burns, 979 S.W.2d 276, 282 (Tenn. 1998); McDuff v. State, 939 S.W.2d 607, 620 (Tex. Crim. App. 1997) (approving of testimony from a victim's sister that her marriage ended because of the impact the murder had on her).
[209] *See, e.g.*, Young v. State, 992 P.2d 332, 342 (Okla. Crim. App. 1998) (upholding admission of testimony that the victim's aunt suffered a fatal heart attack as a result of hearing the news of the murder).
[210] *See, e.g.*, Griffith v. State, 983 S.W.2d 282, 289 (Tex. Crim. App. 1998) (allowing the victim's brother to testify that, after his sister's murder, their father stopped fighting cancer).
[211] *See, e.g.*, Lee v. State, 942 S.W.2d 231, 236 (Ark. 1997) (allowing testimony from victim's sister about how painful it was selecting a wig for her murdered sister to wear at her funeral).
[212] *See, e.g.*, State v. Nesbit, 978 S.W.2d 872, 903 (Tenn. 1998) (citing State v. Bigbee, 885 S.W.2d 797, 812 (Tenn. 1994)) ("[V]ictim impact evidence of another homicide, even one committed by the defendant on trial, is not admissible."); Gilbert v. State, 951 P.2d 98, 116-17 (Okla. Crim. App. 1997).
[213] Sherman v. State, 965 P.2d 903, 914 (Nev. 1998); People v. Dunlap, 975 P.2d 723, 745 (Colo. 1999).
[214] Cantu v. State, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997) (emphasis in original).

before.[215] In Ohio, the state supreme court has held that the introduction of evidence from noncapital survivors in a capital case was a *statutory* violation, considering that there is no provision in the statute that allows for the presentation of such evidence.[216] Yet, the same court added that there was no *constitutional* violation in permitting evidence related to noncapital crimes in capital cases because "*Payne* does not limit the 'evidence of the specific harm' caused by the defendant to the capital victim's family only."[217]

b. Who Qualifies as a Victim Impact Witness and How Many Witnesses May Testify

States have addressed victim impact witnesses differently on the subject of who may present victim impact evidence and how many of those witnesses are allowed to testify. Regarding the first issue, the *Payne* Court approved of evidence concerning the impact of the murder on the "victim's family."[218] Yet, the Court did not clarify whether victim impact evidence is restricted to family members of the victim, or whether other persons affected by the crime may testify as well. Accordingly, states have taken different approaches. In many jurisdictions, a victim impact witness should be a family member of the deceased.[219] The Idaho Supreme Court signaled that the state's legislature had intended to limit victim impact

[215] *See* State v. Robinson, 451 S.E.2d 196, 204-05 (N.C. 1994).
[216] *See* State v. White, 709 N.E.2d 140, 155 (Ohio 1999).
[217] *Id.* at 154-55 (citation omitted). *But see* Tong v. State, 25 S.W.3d 707, 713 (Tex. Crim. App. 2000) (noting that impact evidence regarding unrelated crimes was different from the victim impact evidence addressed by *Payne*).
[218] *Payne*, 501 U.S. at 817.
[219] *See, e.g.*, IDAHO CODE ANN. § 19-5306 (2011) (the right to present victim impact statements "shall apply equally" to the homicide victims' immediate families); KY. REV. STAT. ANN. § 421.500 (West 2006) ("If the victim is deceased . . . the following relations shall be designated as 'victims' for the purpose of presenting victim impact testimony . . . 1. A spouse; 2. An adult child; 3. A parent; 4. A sibling; and 5. A grandparent"); LA. REV. STAT. ANN. § 46:1844 (2000) ("[V]ictim's family members shall have the right to make a written and oral victim impact statement"); N.H. REV. STAT. ANN. § 21-M:8-k (2010) (victim includes a homicide victim's immediate family); N.C. GEN. STAT. ANN. § 15A-830 (2005) ("If the victim is deceased, then the next of kin . . . is entitled to the victim's rights under this Article.").

witnesses to the "immediate family members" of a homicide victim, considering that they are the ones who experience "direct harm" resulting from the defendant's crime.[220] Additionally, in several jurisdictions, a legal guardian of the murdered person is allowed to give victim impact testimony.[221] Some states also permit a lawful representative to testify in addition to family members.[222] The Supreme Court of Oklahoma, however, held that testimony from a family designee or representative when the family members had already testified was inadmissible, explaining that the "purpose behind a family designee is to give a voice to family members unable to testify in court," not to "provide an opportunity for those family members not listed in the statute and other interested persons to give victim impact testimony."[223] Further, if the victim had no surviving family members, his or her estate would qualify as an impact witness.[224]

Other jurisdictions give "victim impact witness" a much broader definition. For instance, the Texas Court of Criminal Appeals held that "distantly related family members, close friends, or coworkers may, in a given case, provide legitimate testimony".[225] Under South Dakota statute, the term "victim" encompasses "the parent, spouse, next of kin, legal or

[220] *See* State v. Payne, 199 P.3d 123, 150 (Idaho 2008).
[221] *See, e.g.*, VA. CODE ANN. § 19.2-11.01 (2006) ("victim" means "a spouse, parent, sibling or legal guardian of such a person who . . . was the victim of a homicide"); WASH. REV. CODE ANN. § 7.69.020(2) (2011) (defining the victim's "survivors" as the "spouse or domestic partner, child, parent, legal guardian, sibling, or grandparent").
[222] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-752(R) (2012) (defining "victim" as "the murdered person's spouse, parent, child, grandparent or sibling, any other person related to the murdered person by consanguinity or affinity to the second degree or any other lawful representative of the murdered person"); S.C. CODE ANN. § 16-3-1510(1) (2012) (victim "includes any individual's spouse, parent, child, or the lawful representative" of the deceased).
[223] Lott v. State, 98 P.3d 318, 347-48 (Okla. Crim. App. 2004).
[224] *See* OKLA. STAT. ANN. tit. 21, § 142A-1 (1995).
[225] Mosley v. State, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998). *See also* People v. Pollock, 89 P.3d 353, 372 (Cal. 2004) (allowing testimony from the victims' friends, explaining that harm resulting from a murder is not limited to the effect of the victims' deaths on the members of their immediate family members, but extends further to the effects of the death on the victims' close personal friends); State v. Byram, 485 S.E.2d 360, 365-66 (S.C. 1997) (holding as admissible testimony of the victim's co-worker).

physical custodian, guardian, foster parent, case worker, victim advocate, or mental health counselor of any actual victim . . . who is deceased".[226] Moreover, a victim's neighbors have been permitted to testify regarding the impact that the defendant's crime had upon them.[227] Even more broadly, the Georgia Supreme Court found that testimony from a listener of a radio call-in talk show concerning the effect of the murder on the community was not so prejudicial as to render the defendant's trial unfair.[228]

In another approach, no limitations are placed regarding the relationship between the victim and a witness who may present victim impact evidence.[229] According to the Oregon Supreme Court, *any* person can be a victim impact witness, as long as the evidence he or she presents is relevant to the sentencing decision.[230] Likewise, the Supreme Court of Virginia held that the Virginia Code does not limit victim impact evidence to that given by the family members of the victim.[231] "Rather, the circumstances of the individual case will dictate what evidence will be necessary and relevant, and from what sources it may be drawn."[232]

Statutory limitations have not always been enforced by courts. Although the Nebraska law states that "[i]n the case of a homicide, victim means the nearest surviving relative,"[233] the state supreme court found no error in allowing testimony from relatives who were not the

[226] S.D. CODIFIED LAWS § 23A-27-1.1(2014).
[227] *See, e.g.*, Sullivan v. State, 636 A.2d 931, 939-40 (Del. 1994); Wesley v. State 916 P.2d 793, 804 (Nev. 1996).
[228] McClain v. State, 477 S.E.2d 814, 824-25 (Ga. 1996).
[229] *See, e.g.*, GA. CODE ANN. § 17-10-1.2(a)(1) (2010) (emphasis added) ("In all cases in which the death penalty may be imposed, . . . the court shall allow evidence from the family of the victim, *or such other witness having personal knowledge* of the victim's personal characteristics and the emotional impact of the crime on the victim, the victim's family, or the community.")
[230] *See* State v. Sparks, 83 P.3d 304, 317 (Or. 2004).
[231] Beck v. Commonwealth, 484 S.E.2d 898, 905 (Va. 1997).
[232] *Id.* Similarly, in Kansas, the state supreme court stated that "[n]either the Kansas Constitution Victims' Rights Amendment nor the statutory bill of rights for victims of crime restrict the ability of . . . nonfamily members to testify and submit statements during the sentencing phase of criminal proceedings.". State v. Parks, 962 P.2d 486, 490 (Kan. 1998).
[233] NEB. REV. STAT. § 29-119(b) (2006).

nearest surviving relatives.[234] The court, reasoned that the given definition of the victim "merely provides for a baseline right" to present a victim impact statement.[235]

With respect to how many witnesses may offer victim impact statements, *Payne* provides no guidance.[236] As for the states, some have chosen to limit the number of impact witnesses who should be allowed to testify. In Kentucky, only one witness may testify, and that witness selected from a certain order of family members specified by the legislator.[237] In many jurisdictions, statutes expressly state that it within the court's discretion to decide how many impact witness are permitted to testify. Georgia statute provides that "the number of witnesses other than immediate family who may testify shall be in the sole discretion of the judge and in any event shall be permitted only in such a manner and to such a degree as not to inflame or unduly prejudice the jury."[238] Alternatively, other states have placed no limit on the number of impact witnesses that are entitled to testify. The California Supreme Court, for example, rejected a defendant's argument that victim impact testimony should be received from a single witness.[239]

[234] State v. Galindo, 774 N.W.2d 190, 245 (Neb. 2009).
[235] *Id.*
[236] The *Payne* case involved testimony from a single victim impact witness. *See* Payne, v. Tennessee, 501 U.S. 808, 814-15 (1991).
[237] KY. REV. STAT. ANN. § 421.500(1)(a) (West 2006). *See also* Terry v. Commonwealth, 153 S.W.3d 794, 805 (Ky. 2005) (holding that a trial court erred in permitting both murder victim's daughter and his sister to present victim impact evidence during penalty phase of murder trial; pursuant to statutes governing victim impact evidence, only one "victim" was permitted to give victim impact evidence. Thus, when victim's widow declined to testify, adult daughter became secondary victim who was entitled to present victim impact evidence, and, had she declined to testify, then victim's sister would have become secondary victim).
[238] GA. CODE ANN. § 17-10-1.2 (2010); *see also* LA. REV. STAT. ANN. § 46:1844 (2000) ("In any case where the number of victim's family members exceeds three, the court may limit the in-court statements it receives from them to a fewer number of statements. The court may otherwise reasonably restrict the oral statement in order to maintain courtroom decorum."); MISS. CODE ANN. § 99-19-157(2)(b) (2013) ("[W]here there are multiple victims, the court may limit the number of oral victim impact statements.").
[239] People v. Pollock, 89 P.3d 353, 372 (Cal. 2004).

c. Form of Victim Impact Evidence

In *Payne*, the permissible form of victim impact evidence was left wide open. The Supreme Court only emphasized that such evidence should be demonstrating the victim's individuality and the impact of the murder on his family.[240] Accordingly, various forms of evidence have been considered by states such as testimony, photographs, videos, and several types of writings.[241] Statements from a victim's survivors are the most used type of impact evidence. Many jurisdictions have addressed victim impact statement in their legislation and indicated that victim impact witnesses are entitled to present such statement orally or in writing.[242]

In addition to testimony from witnesses, courts have permitted photographs of the victim while he or she was still alive as victim impact evidence in an effort to show his or her uniqueness as a human being.[243] Georgia law, expressly allows photographs of the victim to

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[240] *See Payne*, 501 U.S. at 817, 827.

[241] *See, e.g.*, GA. CODE ANN. § 17-10-1.2(4) (2010) ("[Victim impact evidence] may be in the form of, but not limited to, a written statement or a prerecorded audio or video statement.").

[242] *See, e.g.*, LA. REV. STAT. ANN. § 46:1844(K)(1)(b) (2000) ("The . . . victim's family members shall have the right to make a written and oral victim impact statement."); *see also* ARK. CODE ANN. § 16-90-1112 (2012); FLA. STAT. ANN. § 921.143 (2004); IND. CODE ANN. § 35-50-2-9(e) (2008); N.H. REV. STAT. § 21-M:8-k(II)(p) (2010); MISS. CODE ANN. § 99-19-157 (2013); OKLA. STAT. ANN. tit. 21, § 142A-8(A) (1995); S.C. CODE ANN. § 16-3-1535(A)(4) (2012); S.D. CODIFIED LAWS §§ 23A-27-1.1, 23A-27-1.3 (2014).

[243] *See, e.g.*, Harris v. State, 632 So. 2d 503, 531 (Ala. Crim. App. 1992)(citation omitted) (finding no error in admission of a pre-death photograph of the victim, stating that it was not necessary for a sentencing decision to be made in a context in which the victim is a "mere abstraction"); State v. Garza, 163 P.3d 1006, 1019 (Ariz. 2007) (finding no abuse of discretion in allowing the display of victims' photographs by their mothers during their impact statements); People v. Edwards, 819 P.2d 436, 464-65 (Cal. 1991) (citation omitted) (held that a victim's photo taken the night before the murder was admissible to assist the jury in determining the victim's "size, age and vulnerability"); State v. Middleton, 995 S.W.2d 443, 464 (Mo. 1999) (concluding that the trial court did not err in admitting a photo of the victim with his daughter, offered by his mother as victim impact evidence); State v. Hill, 595 N.E.2d 884, 895-96 (Ohio 1992) (approving of the introduction of a pre-death photograph of the victim); State v. Tucker, 478 S.E.2d 260, 267 (S.C. 1996) (allowing photographs of the victim at different places on vacation, Christmas decorations in her yard, holding her godchild, and fishing); State v. Berget, 826 N.W.2d 1, 26-27 (S.D. 2013) (holding that pictures of the victim were proper victim impact evidence since they demonstrated the consequences of the defendant's actions); Darks v. State, 954 P.2d 152, 164 (Okla. Crim. App. 1998) (ruling that it was harmless error to admit evidence consisting of photographs showing the victim smiling broadly and holding her young son). *But see* Cargle v. State, 909 P.2d 806, 830 (Okla. Crim. App. 1995) (holding that it was error to admit photographs that depicted one of the victims holding his art work and the two victims together, by reasoning that the first photograph's probative value was

be included in victim impact evidence.[244]The Supreme Court of California found no undue prejudice in admitting five childhood photographs of a victim because "they simply humanized the victim, as victim impact evidence is designed to do."[245]

Some jurisdictions have gone even further with regard to the content of a photograph itself. In one capital case, in addition to the victim's photo, the state was allowed to introduce photographs related to events and structures created after the victim's death.[246] The state court explained that the photographs of a victim with her first handicapped students, a memorial garden that was built in her memory, and a balloon release ceremony dedicated to her demonstrated her "value to the community and the impact of her death upon her friends and co-workers," and "help[ed] the jury to see the victim as something other than a 'faceless stranger.'"[247] In another case, photographs depicting a victim's children and the victim swimming with his children were held admissible because those pictures humanized the victim and his family by showing "the family members as being more than just names," and the court found that their probative value was not substantially outweighed by the danger of unfair prejudice.[248] It has further been found that the prosecutor's introduction of a picture of four-year-old victim's toy was irrelevant, but was also harmless error.[249]

A third form of evidence is victim impact videos. In light of *Payne*'s authorization of providing "quick glimpse" of the victim's life,[250] many state courts have allowed the

substantially outweighed by its prejudice, and that the second photograph was irrelevant because it did not show either information about the victims or the impact of the murder on their survivors).

[244] GA. CODE ANN. § 17-10-1.2(4) (2010).

[245] People v. Nelson, 246 P.3d 301, 317 (Cal. 2011).

[246] State v. Storey, 40 S.W.3d 898, 908-09 (Mo. 2001).

[247] *Id.* (citing State v. Gray, 887 S.W.2d 369, 389 (Mo. 1994)). The *Storey* court found a photo of the victim's tombstone irrelevant, yet found that it did not deprive the defendant of a fair trial. *Id.* at 909.

[248] Solomon v. State, 49 S.W.3d 356, 365-67 (Tex. Crim. App. 2001).

[249] Long v. State, 883 P.2d 167, 173 (Okla. Crim. App. 1994).

[250] *See Payne*, 501 U.S. at 822, 830 (quoting Mills v. Maryland, 486 U. S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

prosecution to present videotapes showing victims while they were still alive.[251] Regarding the permissible bounds of such evidence, the Supreme Court of California has emphasized the fact that there is no bright-line rule concerning the admissibility of videotape evidence.[252] Yet, the court noted that:

> [c]ourts must exercise great caution in permitting the prosecution to present victim impact evidence in the form of a lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents.[253]

Courts have also permitted videos capturing a victim's funeral services and gravesite as victim impact evidence.[254] In South Carolina, the state court approved of the admission of a seven-minute videotape showing portions of a law enforcement officer's funeral, on grounds that the tape demonstrated the victim's uniqueness, displayed for the jury the impact of the

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Recently, the Supreme Court in Kelly v. California, 129 S. Ct. 564 (2008), and Kelly v. California, 129 S. Ct. 567 (2008), denied review of two capital cases, People v. Kelly, 171 P.3d 548 (Cal. 2007) and People v. Zamudio, 181 P.3d 105 (Cal. 2008), where the introduction of victim impact videos was challenged.

[251] *See, e.g.*, Hicks v. State, 940 S.W.2d 855, 857 (Ark. 1997) (affirming the admission of a videotape containing footage of the victim, his family, and friends with narration by his brother); People v. Bramit, 210 P.3d 1171, 1187 (Cal. 2009) (finding no undue prejudice in allowing a three-minute photomontage, "unenhanced by any soundtrack or commentary," that showed the victim at a young age, his family, his hometown in Mexico, and his family's residence); People v. Dykes, 209 P.3d 1, 47-48 (Cal. 2009) (approving the admission of an eight-minute videotape of a nine-year-old victim and family members on a trip to Disneyland, on grounds that it "was relevant to humanize the victim and provide some sense of the loss suffered by his family and society," and the video did not contain any "memorial," "tribute," "eulogy," "staged or contrived elements," "music," "visual techniques designed to generate emotion," "or background narration"); State v. Gray, 887 S.W.2d 369, 389 (Mo. 1994) (concluding that a video of victim's family at Christmas was proper victim impact evidence). *But see* Salazar v. State *(Salazar)*, 90 S.W.3d 330, 337-38 (Tex. Crim. App. 2002) (rejecting a seventeen-minute video montage emphasizing the childhood of an adult victim because it "was very lengthy, highly emotional, and barely probative of the victim's life at the time of his death"); Salazar v. State *(Salazar)*, 118 S.W.3d 880, 885 (Tex. App. 2003) (holding on remand, that the defendant was entitled to a new hearing since the admission of the memorial videotape of the victim's life was a harmful error).

[252] People v. Prince, 156 P.3d 1015, 1092 (Cal. 2007). The court in this case affirmed the introduction of a video that comprised a twenty-five-minute interview with the victim. *Id.* at 1091-93.

[253] *Id.* at 1093.

[254] *See, e.g.*, People v. Brady, 236 P.3d 312, 338-39 (Cal. 2010) (finding no abuse of discretion in allowing a six-minute videotape consisting of a deceased police officer's memorial and funeral services); People v. Zamudio, 181 P.3d 105, 134-37 (Cal. 2008) (allowing a fourteen-minute videotaped montage included three photographs of victims' grave markers); People v. Kelly, 171 P.3d 548, 570-72 (Cal. 2007) (allowing a videotape which ended with a brief view of the victim's grave marker).

victim's death on his survivors and the community, and showed footages of the victim's actual funeral.[255]

Some non-common forms of victim impact evidence have been approved by courts as well. For instance, in many jurisdictions, evidence in the form of letters,[256] poems,[257] and eulogy statements[258] has been deemed admissible. In Missouri, the state was permitted to present handcrafted items made by the victim as a part of victim impact evidence.[259] Additionally, the Supreme Court of California found no error in allowing songs performed by victim to be played from a cassette tape for the jury.[260]

d. Timing of Admitting Victim Impact Evidence

By stating that the Eighth Amendment does not bar "a capital sentencing jury from considering victim impact evidence . . . *at a capital sentencing hearing*," *Payne* suggests that the proper time to introduce victim impact evidence is during the sentencing phase of the proceedings.[261] As for the states, the vast majority of their statutes express that the right to

[255] State v. Bixby, 698 S.E.2d 572, 586-87 (S.C. 2010).
[256] *See, e.g.*, Kills On Top v. State, 15 P.3d 422, 437-38 (Mont. 2000) (citation omitted) (concluding that a letter from the victim's widow describing her thoughts about the impact the murder of her husband had upon her and her children was permissible as nontestimonial victim impact evidence); State v. Berget, 826 N.W.2d 1, 26-27 (S.D. 2013) (ruling that evidence consisting of letters from family members, friends, and co-workers "was appropriately offered to illustrate consequences of [defendant]'s actions").
[257] *See, e.g.*, Noel v. State, 960 S.W.2d 439, 446-47 (Ark. 1998) (holding that a poem written by the victims' mother about her three deceased children and read to the jury was relevant to "show the human cost of the murders" on the victims' mother); State v. Basile, 942 S.W.2d 342, 358-59 (Mo. 1997) (finding a poem read by the victim's sister proper impact evidence because it "was directed at defendant's moral culpability in causing harm to the victim and her family").
[258] *See, e.g.*, People v. Nelson, 246 P.3d 301, 317-18 (Cal. 2011) (concluding that admission of victim impact evidence of a eulogy statement written by two of victim's friends who did not testify at trial was a harmless error); State v. Storey, 40 S.W.3d 898, 908-09 (Mo. 2001) (held that eulogy about murder victim was properly admitted since it described the victim's uniqueness and her contributions to society, and the eulogy was read to jury by its author who could not have testified without the aid of her writing).
[259] State v. Roberts, 948 S.W.2d 577, 604 (Mo. 1997).
[260] People v. Verdugo, 236 P.3d 1035, 1064 (Cal. 2010).
[261] Payne v. Tennessee, 501 U.S. 808, 808 (1991) (emphasis added). *See also id.* at 827 (emphasis added) (noting that victim impact evidence is "relevant to the jury's decision *as to whether or not the death penalty should be imposed*); *id.* at 825 (emphasis added) ("Victim impact evidence is simply another form or method of informing *the sentencing authority* about the specific harm caused by the crime in question"); *id.* (emphasis added) ("[A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and

present victim impact evidence applies at the penalty stage of the defendant's trial.[262] Further, many courts have limited impact evidence to sentencing and emphasized that such evidence is not permissible at the guilt phase of death penalty cases.[263]

At the same time, a few courts have approved of some guilt stage impact evidence for its relevance. In *State v. Fautenberry*, the Supreme Court of Ohio found that "evidence which depicts *both* the circumstances surrounding the commission of the murder and also the impact of the murder on the victim's family may be admissible during *both* the guilt and the sentencing phases."[264] Similarly, in Wyoming, the state supreme court held that a guilt phase impact statement may not be relevant to prove the impact that the murder had on the victim's family, but might be relevant "if offered for another proper purpose."[265] According to the

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blameworthiness, it should have before it *at the sentencing phase* evidence of the specific harm caused by the defendant.").

[262] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-752(R) (2012) ("At the penalty phase, the victim may present information about the murdered person and the impact of the murder on the victim and other family members and may submit a victim impact statement in any format to the trier of fact."); ALA. CODE § 15-23-74 (1995); ARK. CODE ANN. § 16-90-1112(a)(1), (2) (2012); FLA. STAT. ANN. § 921.143(1) (2004); GA. CODE ANN. § 17-10-1.2(a)(1) (2010); IDAHO CODE ANN. § 19-2515(5)(a) (2011); KY. REV. STAT. ANN. § 532.055(2)(a)(7) (West 2006); MO. ANN. STAT. § 565.030 (2012); OKLA. STAT. ANN. tit. 21, § 142A-8(A) (1995); N.C. GEN. STAT. ANN. § 15A-833(a) (2005); N.H. REV. STAT. § 21-M:8-k(II)(p); OR. REV. STAT. ANN. § 163.150(1)(a) 2011); 18 PA. STAT. ANN. § 11.201(5) West 2001); S.D. CODIFIED LAWS §§ 23A-27-1.1, 23A-27-1.3 (2014); TENN. CODE. ANN. § 40-38-103(a)(2) (2010); UTAH CODE ANN. § 76-3-207(2)(a)(iii) (West 2010); WASH. REV. CODE. ANN. § 7.69.030(14) (2011).

[263] *See, e.g.*, Havard v. State, 928 So. 2d 771, 792 (Miss. 2006) (citing *Payne*, 501 U.S. at 808) ("[Victim impact evidence] is admissible at sentencing, though not at the culpability phase of trial."); Powell v. State, 906 P.2d 765, 777 (Okla. Crim. App. 1995) (citing *Payne*, 501 U.S. at 827) ("[w]hile victim impact evidence may be appropriate in the sentencing phase of trial, it is error to introduce victim impact evidence in the guilt/innocence phase."); Weeks v. Commonwealth, 450 S.E.2d 379, 389-90 (Va. 1994) (citation omitted) (noting that introduction of victim impact evidence in the guilt stage of capital trials was impermissible because such evidence does not assist in "determining either the guilt or the innocence" of the defendant); Armstrong v. State, 826 P.2d 1106, 1116 (Wyo. 1992) ("Consideration of victim-impact testimony or argument remains inappropriate during proceedings determining the guilt of an accused.").

[264] State v. Fautenberry, 650 N.E.2d 878, 883 (Ohio 1995) (emphasis in original). *See also* State v. Taylor, 669 So. 2d 364, 373 (La. 1996) (holding that the guilt phase impact testimony which proves an element of first degree murder "falls within the bounds of admissibility" for testimony in both the guilt and sentencing phase).

[265] Barnes v. State, 858 P.2d 522, 534 (Wyo. 1993). *See also* State v. Hayward, 963 P.2d 667, 676 (Or. 1998) (stating that based on Oregon Statute, "evidence that may be used as victim impact evidence during the penalty phase may have been introduced for some other purpose during the guilt phase of a capital trial").

Fourth Circuit, *Payne*[266] itself supports the possible admission of "limited victim background evidence" at the guilt stage of the proceedings since "the Court noted that various pieces of evidence regarding the victim's background probably would get presented during the guilt phase of the trial."[267]

Finally, in numerous capital cases, introduction of victim impact evidence at the guilt phase is deemed harmless error.[268] In Florida, the state supreme court held that that the admission of impact testimony from the victim's supervisor about victim's character and background as a law enforcement officer, at the guilt phase, was harmless error.

e. Procedures for Admitting Victim Impact Evidence

States have taken varying positions on procedures designed to prevent undue prejudice which may result from using victim impact evidence. These procedures include, for example, notifying the defendant of what evidence the state intends to introduce as impact evidence, holding a preliminary hearing for the admission of victim impact evidence, providing the jury with limiting instructions regarding the use of such evidence, and allowing cross-examination of the victim impact witness. Each procedure is discussed in more depth below.

[266] *See Payne*, 501 U.S. at 823 ("[E]vidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial.").
[267] Bennett v. Angelone, 92 F.3d 1336, 1348 (4th Cir. 1996) (citing *Payne*, 501 U.S. at 823, 840-41).
[268] Burns v. State, 609 So. 2d 600, 605-06 (Fla. 1992); *see also* Powell v. State, 906 P.2d 765, 777 (Okla. Crim. App. 1995) (regarding the prosecutor's victim impact remarks during the guilt phase as harmless error); State v. Bigbee, 885 S.W.2d 797, 808 (Tenn. 1994) (finding harmless error in admission of impact testimony by the victim's daughter and his manager at the guilt phase of the defendant's trial).

i. Notice

In a few states, notice of the victim impact evidence that the state seeks to present must be given to the defendant prior to trial.[269] According to the Supreme Court of Georgia, providing the defendant with a copy of the victim impact statement before the sentencing stage would give him or her "an opportunity to challenge the content of the statements to remove language that might inflame passion or prejudice."[270] In Oklahoma, however, a pretrial notice to the defense is only preferable not mandated.[271] In other jurisdictions, courts affirmed that the state gave an adequate notice for its use of victim impact evidence without explicit preference to such notice as a procedural requirement.[272] Some courts require a pretrial notice to the trial court as well. The Tennessee Supreme Court noted that an advanced notice is required to allow the trial court to "adequately supervise" the admission of victim impact evidence.[273]

ii. Pre-Admissibility Hearing

Several jurisdictions require a preliminary hearing to determine the admissibility of victim impact evidence.[274] For example, the Supreme Court of Georgia held "that the trial

[269] *See, e.g.*, VA. CODE ANN. § 19.2-299.1 (2006) ("[A copy of victim impact statement] shall be made available to the defendant or counsel for the defendant without court order at least five days prior to the sentencing hearing."); Livingston v. State, 444 S.E.2d 748, 752 (Ga. 1994) (ruling that the defense is entitled to notice of the particular victim impact evidence sought to be introduced by the prosecution at least ten days before trial); State v. Bernard, 608 So. 2d 966, 972-73 (La. 1992) (holding that the state must notify the defendant of its intent to produce victim impact evidence prior to the sentencing phase); *but see* Humphries v. Ozmint, 397 F.3d 206, 227 (4th Cir. 2005) ("[T]here is no law that clearly requires timely, specific, and express notice of victim-impact evidence.").

[270] Turner v. State, 486 S.E.2d 839, 841-42 (Ga. 1997).

[271] *See, e.g.*, Cargle v. State, 909 P.2d 806, 828 (Okla. Crim. App. 1995) (emphasis added) (stating that the State *should* file a Notice of Intent to Produce Victim Impact Evidence, detailing the evidence sought to be introduced").

[272] *See, e.g.*, People v. Mitcham, 824 P.2d 1277, 1302 (Cal. 1992); Bowling v. Commonwealth, 942 S.W.2d 293, 302 (Ky. 1997); State v. Bucklew, 973 S.W.2d 83, 97 (Mo. 1998); State v. Gentry, 888 P.2d 1105, 1136 (Wash. 1995).

[273] State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998); see also *Turner*, 486 S.E.2d at 841-42.

[274] *See, e.g.*, Livingston v. State, 444 S.E.2d 748, 752 (Ga. 1994) (finding that the trial court must hold a hearing to make a preliminary determination as to the admissibility of victim impact evidence that intended to be

court must hear and rule prior to trial on the admissibility of victim impact evidence sought to be offered," reasoning that holding a pre-admissibility hearing would "help ensure that victim impact evidence does not result in the arbitrary imposition of the death penalty."[275] The vast majority of states, on the other hand, have no such requirement. In California, for instance, the state court expressly ruled that the trial court is not required to conduct a hearing with live witnesses prior to admitting victim impact evidence at the sentencing stage of a capital murder trial.[276]

iii. Jury Instructions

Some jurisdictions require the trial judge to instruct the jury regarding the purpose of victim impact evidence.[277] The Georgia Supreme Court justified mandatory limiting instructions by noting that "because of the importance of the jury's decision, it is imperative that the jury be guided by proper legal principles."[278] The Court of Criminal Appeals of Oklahoma has held that the following instruction shall be used in every capital murder trial where victim impact evidence has been introduced:

> The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim's death on the members of the victim's immediate family. It is intended to remind you as the sentencer that just as the defendant should be considered as an individual, so too the victim is an individual whose death may represent a unique loss to society and the family. This evidence is simply another method of informing you about the specific harm caused by the crime in

introduced); State v. Bernard, 608 So. 2d 966, 972-73 (La. 1992) (ruling that the use of victim impact evidence requires, on request, a pretrial determination of its admissibility); Malone v. State, 168 P.3d 185, 212 (Okla. Crim. App. 2007) (finding plain error in the trial court's failure to conduct a hearing on the admissibility of victim impact evidence offered by the State); State v. Nesbit, 978 S.W.2d 872, 891 (Tenn. 1998) (asserting that the trial court must hold a preliminary hearing after receiving notification from the State regarding its intent to present victim impact evidence).

[275] *Livingston*, 444 S.E.2d at 752.

[276] People v. Montes, 320 P.3d 729, 784 (Cal. 2014).

[277] *See, e.g.*, Turner v. State, 486 S.E.2d 839, 842-43 (Ga. 1997); Cargle v. State, 909 P.2d 806, 828-29 (Okla. Crim. App. 1995); Commonwealth. v. Means, 773 A.2d 143, 158-59 (Pa. 2001).

[278] *Turner*, 486 S.E.2d at 842.

> question. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.
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> As it relates to the death penalty: Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence.[279]

In Florida, there are no apparent mandatory instructions, and yet, the courts have approved of the use of limiting instructions in numerous capital cases.[280] The California Supreme Court has found that the trial court is not required to instruct the jurors as to how they may consider victim impact evidence.[281]

iv. Cross-Examination of Victim Impact Witness

A handful of states provide capital defendants the right to cross-examine impact witnesses by either statute or court rulings.[282] In Oklahoma, the defense is allowed to show

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[279] Cargle v. State, 909 P.2d 806, 828-29 (Okla. Crim. App. 1995). *See also Turner*, 486 S.E.2d at 842-43; Commonwealth v. Williams, 854 A.2d 440, 447 (Pa. 2004).

[280] *See, e.g.*, Rimmer v. State, 825 So. 2d 304, 330-31 (Fla. 2002); Farina v. State, 801 So. 2d 44, 53 (Fla. 2001).

[281] People v. Valencia, 180 P.3d 351, 386 (Cal. 2008). In *Valencia*, the defendant argued that the trial judge had a duty to give the following requested instruction on victim impact evidence:

> [V]ictim impact evidence] had been introduced for the specific and limited purpose of showing the specific harm caused by the [defendant's] actions or the nature of the unique loss felt by each witness, and that the victim, like the defendant, was a unique individual; that it would be improper for the jurors to assess the comparable worth of [defendant] and [the victim] and his survivors; that their deliberations on the victim impact evidence must be limited to an unemotional, rational inquiry into [defendant's] moral culpability; and that it would be improper for [defendant's] sentence to be solely based upon the victim impact evidence.

Id. The court rejected the defendant's argument, stating that the "standard instructions adequately inform the jury of its duty," and the court was not obligated to give specific instruction regarding how the jury should consider "any particular type of penalty phase evidence." *Id.*

[282] FLA. CONST. art. I, § 16(b) (emphasis added) ("Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights *do not interfere with the constitutional rights of the accused*."); GA. CODE ANN. § 17-10-1.2(a)(1) (2010) ("[Victim impact evidence]

the victim's "bad" character on cross-examination. The Court of Criminal Appeals found plain error in refusing to allow cross-examination of a victim's family concerning the victim's drug use because being involved in such illegal activity "was relevant in giving the jury a complete picture of the entire crime and the uniqueness of the victim as a human being, providing a 'quick glimpse of the life' the defendant 'chose to extinguish'".[283] Yet, in California, the capital defendant is not "entitled to disparage the character of the victims on cross-examination."[284]

On the contrary, in other jurisdictions, victim impact testimony presented at capital sentencing proceedings is not subject to cross-examination.[285] The Supreme Court of Nebraska, for example, announced that a defendant was not entitled to cross-examine an impact witness because the right to confrontation is inapplicable to sentencing proceedings.[286] The court based its decision on the following reasoning:

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shall be given in the presence of the defendant and of the jury and shall be subject to cross-examination."); LA. CODE CRIM. PROC. ANN. art. 905.2 (2011) ("The victim or his family members, friends, and associates . . . , after testifying for the state, shall be subject to cross-examination."); OKLA. STAT. ANN. tit. 21, § 142A-8 (1995) ("Any victim or any member of the immediate family or person designated by the victim or by family members of a victim who appears personally at the formal sentence proceeding shall not be cross-examined by opposing counsel; provided, however, such cross-examination shall not be prohibited in a proceeding before a jury or a judge acting as a finder of fact."); Truehitt v. State, 916 S.W.2d 721, 723 (Tex. App. 1996) ("[W]e find nothing in [Texas statute] that prohibits appellant from exercising his right to confrontation and cross-examination by calling any victim impact statement author as a witness."). *See also* ARK. CODE ANN. § 5-4-602(4)(A) (2012) (emphasis added) ("If the *defendant* and the state are accorded an opportunity to *rebut the evidence*, in determining the sentence evidence may be presented to the jury as to any: . . . [o]ther matter relevant to punishment, including, but not limited to, *victim impact evidence*.").

[283] Conover v. State, 933 P.2d 904, 922-23(Okla. Crim. App. 1997) (quoting Payne v. Tennessee, 501 U.S. 808, 822 (1991)).

[284] People v. Boyette, 58 P.3d 391, 432 (Cal. 2002).

[285] ARIZ. REV. STAT. ANN. § 13-4426.01 (2012) ("[T]he victim's right to be heard is exercised not as a witness, . . . and the victim is not subject to cross-examination"); N.H. REV. STAT. ANN. § 21-M:8-k (2010) ("[No witness] shall be subject to questioning by counsel when giving an impact statement."); State v. Johnson, 284 S.W.3d 561, 584 (Mo. 2009) (quoting United States v. Fields, 483 F.3d 313, 326 (5th Cir.2007)) (concluding that victim impact statements are not subject to cross-examination on the grounds that the Confrontation Clause does not "operate to bar the admission of testimony relevant only to a capital sentencing authority's selection decisions"); State v. Galindo, 774 N.W.2d 190, 244 (Neb. 2009) (precluding cross-examination of victim impact statements); Summers v. State, 148 P.3d 778, 782-83 (Nev. 2006) (held that the defendant had no right to cross-examine victim impact testimony because "neither the Confrontation Clause nor *Crawford*" apply to evidence admitted in a capital penalty hearing).

[286] State v. Galindo, 774 N.W.2d 190, 244 (Neb. 2009).

> The Court in *Crawford*[287] did not address in what stage of the trial proceedings confrontation rights apply. It only considered to what type of evidence that right applies. As such, *Crawford* did not abrogate precedent that the right is inapplicable to sentencing proceedings. Indeed, as the Court in *Crawford* discussed, the concern of the Confrontation Clause is the right to confront one's "accusers." A defendant cannot be found guilty based on accusations of witnesses whom the defendant has not been able to cross-examine. In our bifurcated system of guilt and sentencing, however, there are no longer "accusers" at the sentencing stage. At the sentencing stage, the accusations have been resolved by the trier of fact against the defendant. The defendant is no longer the accused, but the convicted.[288]

As set forth above, *Booth*'s prohibition of victim impact evidence included survivors' sentencing opinions which the Court did not address in *Payne*. A victim's family members should be allowed to voice an opinion in favor or against imposing the death penalty in the sentencing proceeding. Survivors' opinions requesting that the defendant be sentenced to death will be analyzed first in the next portion of this Study.

B. Victim Sentencing Opinions Calling for Death Penalty (Death Recommendations)

In *Booth,*[289] since victim's family did not make specific recommendations on the proper sentence, the facts of the case "make it unclear whether the Court considered the effect of the Eighth Amendment on opinions regarding sentencing."[290] In *Payne*, however, the Court viewed *Booth* as prohibiting not only family members' opinions and characterizations, but also recommendations of the appropriate sentence.[291] Therefore, most jurisdictions prohibited victim's survivors from making death recommendations during capital sentencing

[287] Crawford v. Washington, 541 U.S. 36 (2004).
[288] *Galindo*, 774 N.W.2d at 244.
[289] Booth v. Maryland 482 U.S. 469 (1987).
[290] Lynn v. Reinstein, 68 P.3d 412, 416 n. 4 (Ariz. 2003) (citing Payne v. Tennessee, 501 U.S. 808, 830 n. 2 (1991)).
[291] *Payne*, 501 U.S. at 830 n. 2. *See also* Brian L. Vander Pol, *Relevance and Reconciliation: A Proposal Regarding the Admissibility of Mercy Opinions in Capital* Sentencing, 88 IOWA L. REV. 707, 719 n. 55 (2003) (noting that even though the only evidence mentioned in *Booth* were a family's opinions about the crime and the defendant, *Payne*'s interpretation of *Booth* indicated that opinions on sentencing are also covered by *Booth*).

proceedings.[292] Oklahoma, on the other hand, stood alone in allowing families' recommendations of death to be presented to capital juries,[293] until Tenth Circuit held that Oklahoma law permitting such recommendations at capital sentencing violated the Eighth Amendment.[294]

This section will begin with exploring the validity of family members' opinions requesting the death penalty during capital sentencing proceedings after *Payne*. Then it will explain why death recommendations should be permitted.

1. The Validity of Death Recommendations after *Payne*

Payne limited its holding to evidence concerning the victim's character and the impact of the crime on family members, and did not directly address victim opinion evidence.[295] Several states explicitly preclude the introduction of victim opinion evidence including sentencing recommendations in their statutes.[296] Other jurisdictions have precluded victim sentencing evidence through case law that discusses recommendations of death penalty, in

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[292] *See infra* notes 296-303 and accompanying text.

[293] Oklahoma statute explicitly provides that a victim impact statement may contain an "opinion of the victim of a recommended sentence." OKLA. STAT. ANN. tit. 21, § 142A-1(8) (1995). *See infra* notes 307-13 and accompanying text.

[294] Dodd v. Trammell, 753 F.3d 971, 994 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1546 (2014), *and cert. denied*, 134 S. Ct. 1548, (2014). *See infra* notes 315-21 and accompanying text.

[295] *Payne*, 501 U.S. at 830 n. 2 (citation omitted). The *Payne* Court states in a footnote that,

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

Id.

[296] *See, e.g.*, ARIZ. R. CRIM. P. 19.1(d)(3) ("The victim's survivors may make a statement relating to the characteristics of the victim and the impact of the crime on the victim's family, but may not offer any opinion regarding the appropriate sentence to be imposed."); FLA. STAT. ANN. § 921.141(7) (2004) ("Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence."); IDAHO CODE ANN. § 19-2515(5)(a) (2011) ("Characterizations and opinions about the crime, the defendant and the appropriate sentence shall not be permitted as part of any victim impact information.").

particular,[297] on the ground that *Payne* partially overruled *Booth*, but the portion of *Booth* that prohibited victim opinion testimony remains valid.[298] In *Ex parte Washington*,[299] for instance, the Supreme Court of Alabama concluded that it was plain error to admit the testimony of a victim's parents in which they recommended death as the proper punishment.[300] In that case, the victim's father stated, "[m]y son's life was taken from him in a brutal, evil, terrible way, by someone without a conscience. I think if you take a life, you should pay with a life and I ask the jury to sentence [the defendant] to death. I think it is the fair thing to do."[301] Similarly, the victim's mother testified that "[m]y son felt a fear that no person on this earth should feel, and he had a death that no person should have to go through, and I think that [the defendant] should have to suffer death as my son has suffered death."[302]

Importantly, several state courts disallowing opinions of the appropriate sentence have highlighted that in order for sentencing opinion evidence to be held improper, it should

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[297] Courts also confronted the validity of victim opinion statements in a number of cases where the family wanted the defendant to receive mercy instead of a death sentence. *See infra* notes 409-19 and accompanying text.

[298] *See, e.g.*, Ex parte McWilliams, 640 So. 2d 1015, 1017 (Ala. Crim. App. 1993) (finding that considering family's opinions requesting death by the trial court would have violated the defendant's Eighth Amendment rights). The court relied on the fact that "[t]he victim impact statements in *Payne* did not contain characterizations or opinions about the defendant, the crime, or the appropriate punishment. That portion of *Booth* that proscribed the trial court's consideration of that type of statement was, therefore, left intact by *Payne*." *Id. See also* People v. Taylor, 229 P.3d 12, 71 (Cal. 2010); Farina v. State, 680 So. 2d 392, 399 (Fla. 1996); Bryant v. State, 708 S.E.2d 362, 381-82 (Ga. 2011); State v. Payne, 199 P.3d 123, 148 (Idaho 2008); State v. Taylor, 669 So. 2d 364, 370 (La. 1996); State v. Goodwin, 703 N.E.2d 1251, 1262 (Ohio 1999); Juniper v. Commonwealth, 626 S.E.2d 383, 421 (Va. 2006). *Accord* State v. Bocharski, 22 P.3d 43, 56 (Ariz. 2001) ("Crime victims and/or their families have the constitutional right to be heard at sentencing. . . . [H]owever, the sentencing recommendation of a victim's family member is not relevant in a capital case."); State v. Gideon, 894 P.2d 850, 862-63, 864 (Kan. 1995) (noting that the trail judge should exercise control over a family's statements when presented to a jury, and that the statements should be directly related to the victim and the impact the crime had on the victim and the victim's family, as they may otherwise "range far afield" and result in "reversible error"); Rippo v. State, 946 P.2d 1017, 1031 (Nev. 1997) (citation omitted) (pointing out that victim's opinion as to the appropriate sentence to be imposed is only permissible in non-capital cases); State v. Stenson, 940 P.2d 1239, 1279 n.19 (Wash. 1997) ("It is clear neither the Defendant's family nor the victim's family may tell the jury what sentence should be imposed.").

[299] 106 So. 3d 441 (Ala. Crim. App. 2011).

[300] *Id.* at 447.

[301] *Id.* at 444.

[302] *Id.*

initially constitute an "opinion" as to what sentence the defendant should receive. In Missouri, for example, the state court found that a witness's testimony requesting justice in sentencing was admissible.[303] The court concluded that the following statement did not "recommend a specific sentence": "I believe this man has caused enough chaos and I ask he be fairly punished for what he has done."[304] The Supreme Court of Ohio has also rejected a defendant's claim that the testimony of victim's mother amounted to a recommendation of death.[305] The court noted that the witness "never specifically stated her opinion as to the appropriate punishment" in her statement in which she testified that, "'now we feel that the time has come for [the defendant] to be punished according to the law of Ohio.'"[306]

The state of Oklahoma, however, took an opposite position concerning the validity of victim opinion evidence recommending death penalty. Only one year after *Payne*, the Oklahoma legislature specifically allowed the admission of a family's sentencing recommendation, by defining victim impact statements to include "the opinion of the victim of a recommended sentence."[307] Accordingly, the Court of Criminal Appeals of Oklahoma held that the following witness sentencing recommendation did not violate the defendant's

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[303] *See* State v. Worthington, 8 S.W.3d 83, 89 n. 2 (Mo. 1999).
[304] *Id.*
[305] *See* State v. Chinn, 709 N.E.2d 1166, 1188 (Ohio 1999).
[306] *Id.*
[307] OKLA. STAT. ANN. tit. 21, § 142A-1(8) (1995). Victim impact evidence is defined as follows:

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

Id. "[V]ictim," in cases of homicide, means "a surviving family member." *Id.* § 142A-1(1). Interestingly, only death recommendations were held admissible by Oklahoma courts, even though the language of the statute stated above indicates that all sentencing opinions are permitted, regardless of whether they recommend death or life. *See e.g.*, Rebecca T. Engel, *"An Existential Moment of Moral Perception": Declarations of Life and the Capital Jury Re-Imagined*, 31 QUINNIPIAC L. REV. 303, 331 n. 152 (2013) (Oklahoma permits all opinion evidence "by statute"); Robert P. Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules*, 88 CORNELL L. REV. 543, 554 (2003) ("Given that Oklahoma permits opinions by victims that death is the appropriate sentence, . . . it would logically follow that opinions in opposition to death should also be admissible.").

Eighth Amendment rights: "Yea, I can tell them the penalty I think is the only penalty that's appropriate would be the death penalty."[308] In *Conover v. State*,[309] the court found that, in addition to overruling *Booth*'s prohibition on evidence concerning the victim and the impact of the crime on his family, "*Payne* also implicitly overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence."[310] However, the same court in *Ledbetter v. State*,[311] set several limits to the use of opinion evidence by noting that such evidence would be viewed with a "heightened degree of scrutiny" as the court applied the "probative-value-versus-prejudicial-effect analysis."[312] Also, the court added that victim sentencing opinion, in particular, "should be given as a straightforward, concise response to a question asking what the recommendation is; or a short statement of recommendation in a written statement, without amplification."[313]

Recently, the United States Court of Appeals for the Tenth Circuit, in *Dodd v. Trammell*,[314] held that Oklahoma statute allowing sentencing recommendations violated the Eighth Amendment's prohibition on cruel and unusual punishment, and such constitutional violation was not harmless.[315] At the sentencing stage, the trial court found admissible statements of seven victim's relatives recommending the death penalty as the appropriate

[308] DeLozier v. State, 991 P.2d 22, 31 (Okla. Crim. App. 1998) (citation omitted).
[309] 933 P.2d 904 (Okla. Crim. App. 1997).
[310] *Id.* at 920. Prior to *Conover*, the court in *Ledbetter* discussed the issue of victim opinion evidence and concluded that, although *Payne* did not approach the admissibility of the "characterizations and opinions about the crime, the defendant and the appropriate punishment," a fair reading of *Payne*'s opinion indicates that the Eighth Amendment does not bar such evidence. *See* Ledbetter v. State, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997). *See also* Lockett v. State, 53 P.3d 418, 427 (Okla. Crim. App. 2002).
[311] 933 P.2d 880 (Okla. Crim. App. 1997).
[312] *Id.* at 891.
[313] *Id.*
[314] 753 F.3d 971(10th Cir. 2013), *cert. denied*, 134 S. Ct. 1546 (2014), *and cert. denied*, 134 S. Ct. 1548 (2014).
[315] *Id.* at 994. In several cases prior to *Dodd*, the Tenth Circuit declared a family's recommendations of the death penalty harmless. *See, e.g.*, Lott v. Trammell, 705 F.3d 1167, 1219 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 176 (2013); Welch v. Workman, 639 F.3d 980, 1004 (10th Cir. 2011); Hain v. Gibson, 287 F.3d 1224, 1240 (10th Cir. 2002).

sentence for the defendant.[316] On appeal, the defendant argued that admitting such statements was in violation of his Eighth Amendment rights. The Oklahoma Court of Criminal Appeals affirmed the death sentences.[317] The federal district court denied defendant's petition, finding error in permitting death penalty recommendations, but further holding that the error was harmless.[318] According to the Tenth Circuit, however, the error was found to be *not* harmless.[319] The court stated that "'*Payne* and our own post-*Payne* cases clearly establish that it is a violation of the Eighth Amendment to allow a victim or a victim's family member to comment, during second-stage proceedings, on the appropriate sentence for a capital defendant.'"[320] The Tenth Circuit concluded that the Court of Criminal Appeals of Oklahoma by ruling otherwise, had "reached 'a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States.'"[321]

Additionally, sentence opinion testimony is very often regarded as harmless error when it is heard before a trial judge, rather than a jury.[322] In one recent Ohio case, the state court held that "the trial court improperly permitted statements about punishment for the crime, specifically, statements recommending that capital punishment be imposed; however, these statements were presented to a three-judge panel, not a jury, and we have recognized that when an improper victim-impact statement is conveyed only to judges, 'it is not reversible

[316] *Dodd*, 753 F.3d at 994.
[317] *Id.*
[318] *Id.*
[319] *Id.*
[320] *Id.* at 996 (quoting Selsor v. Workman, 644 F.3d 984, 1026-27 (10th Cir.2011)).
[321] *Id.* (quoting 28 U.S.C.A. § 2254(d)(1)).
[322] *See, e.g.*, Lockhart v. State, 163 So. 3d 1088, 1138-39 (Ala. Crim. App. 2013); State v. Mann, 934 P.2d 784, 792 (Ariz. 1997); Smith v. State, 686 N.E.2d 1264, 1278 (Ind. 1997); State v. Taylor, 944 S.W.2d 925, 938 (Mo. 1997); Beck v. Commonwealth, 484 S.E.2d 898, 906 (Va. 1997).

error unless there is some indication that the judge actually considered it in sentencing the defendant to death.'"[323]

Finally, courts have also found that the prosecutor's reference to the opinion of the victim's family about the appropriate sentence during the penalty phase of a capital case, although improper, was harmless or not prejudicial.[324] In *State v. Scales*,[325] the prosecutor, in his closing argument, stated that the victim's survivors requested the death penalty. Nevertheless, the court held that, although such comment was improper, it was harmless considering the fact that the victim's family themselves gave no opinion about imposing the death penalty and the comment itself was brief.[326]

Next, it will be explained why a victim's family members should be allowed to communicate their death recommendations to the sentencing authority.

2. Arguments for Permitting Death Recommendations

This section argues that the surviving family members of a murder victim deserve greater involvement during the sentencing stage, by permitting them to communicate their desires that the sentencing authority impose the death penalty. Three arguments can be made

[323] State v. Wesson, 999 N.E.2d 557, 576 (Ohio 2013) (quoting State v. Franklin,776 N.E.2d 26, 48 (Ohio 2002)).
[324] In *Payne*, during closing argument, the prosecutor made the following comments regarding the family's view on the appropriate sentence: "[Nicholas, a survivor of the murders of his mother and sister,] is going to want to know what type of justice was done . . . . With your verdict you will provide the answer." *See* Payne v. Tenseness, 501 U.S. 808, 815. The Tenseness Supreme Court rejected Payne's contention that the State's closing comments violated *Booth.* State v. Payne, 791 S.W.2d 10, 18 (Tenn. 1990). The United States Supreme Court in *Payne* condoned the State's comments even though they implied that Nicholas wished to see the defendant to be sentenced to death. *See Payne*, 501 U.S. at 815-16. One commentator has noted that "the Court has sent an ambiguous message that a victim statement of opinion introduced by a prosecutor may be admissible." Kathryn E. Bartolo, *Payne v. Tennessee: The Future Role of Victim Statements of Opinion in Capital Sentencing Proceedings*, 77 IOWA L. REV. 1217, 1239 (1992).
[325] 655 So. 2d 1326 (La. 1995).
[326] *Id.* at 1336. *See also* State v. Middlebrooks, 995 S.W.2d 550, 558 (Tenn. 1999) (regarding the prosecutor's remark, "[The victim's] family asks [the jury] to impose the death penalty," as error because it expressed impermissible family opinion about the proper sentence, but concluding that such remark was not prejudicial error).

in favor of allowing death recommendations in capital murder cases. First, the potential risk of prejudice resulting from introducing death recommendations is reduced by *Payne*'s holding that victim impact evidence permissible in capital sentencing proceedings.[327] Second, recommendations as to the proper sentences are not prohibited in non-death penalty cases.[328] Finally, allowing sentencing opinion evidence, in general, provides a number of benefits in different aspects.[329]

a. Allowing Victim Impact Evidence Reduces the Prejudicial Effect of Death Recommendations

Allowing the jury to hear a concise statement by the victim's family recommending death sentence would not be overly prejudicial to the defendant, after the jury has heard the emotional testimony that describes a victim's good character and the harm suffered by his survivors.[330] Such a recommendation would not be a surprise to most jurors. The Oklahoma court found that a victim's wife's recommendation of the death penalty was proper because "a jury expects such a statement from the victim's family."[331] In an Alabama case, a similar notion was expressed by the court, stating that "[t]he jury surely recognized the testimony of the victim-impact witnesses as a normal, human reaction to the death of a loved one. That these witnesses wanted [defendant] to receive the death penalty would come as no surprise to the members of the jury."[332] Opponents of victim sentencing opinions argue that, if death

[327] *See* discussion *infra* pp. 57-62.
[328] *See* discussion *infra* pp. 63-65.
[329] *See* discussion *infra* pp. 66-67.
[330] *See supra* notes 184-88, 246-49, 254-60 and accompanying text.
[331] Wood v. State, 959 P.2d 1, 12 (Okla. Crim. App. 1998).
[332] Whitehead v. State, 777 So. 2d 781, 849 (Ala. Crim. App. 1999). *See also* State v. Taylor, 93-2201 (La. 2/28/96), 669 So. 2d 364, 371("[S]urely the jury regarded the testimony of these victim impact witnesses as normal human reactions to the death of a loved one. That the victim's survivors might have little or no sympathy for the defendant certainly would come as no surprise to a member of the jury").

recommendations could be expected by the jury, there would be no point in permitting them in the first instance.[333] The point, however, has to do with cases in which the family members do not want the defendant to be executed.[334] A victim's family should be allowed to voice a simple opinion as to whether or not the defendant should be sentenced to death. Otherwise, after hearing victim impact evidence, the jury may assume that the victim's family was in favor of putting the defendant to death.[335] In *State v. Glassel*,[336] the victim's husband recommended a life sentence for the defendant,[337] even though he had given emotional and tearful victim impact testimony at the sentencing phase of the trial.[338]

It is inconsistent to prohibit family members from making a death recommendation during sentencing when the floodgate of emotions has been already opened by *Payne*, in the form of victim's character and crime impact evidence.[339] For example, on the basis of

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[333] Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 545 (2000).

[334] Mercy opinion will be discussed at length. *See* discussion *infra* Part II.C.

[335] Allowing family members who do not want the death penalty to be imposed, to present victim impact evidence without allowing their life recommendations at the sentencing hearing does not serve the desires of the family because it "essentially endorses the State's effort to obtain the death penalty." Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 296 (2003).

[336] 116 P.3d 1193 (Ariz. 2005).

[337] *Id.* at 1215.

[338] The victim's husband said that:

> he had the privilege and honor to be married to [the victim] for nearly fifty years. He described how his children had been secretly planning an anniversary party but ended up using the money that they had saved for [victim]'s casket. He then told the jury how much he loved his wife and how much he missed her. He also told the jury about the day of the murder, when [the victim] begged him to help her as she lay dying. [The victim's husband] said that he had always been able to help her but was powerless to do anything that day.

Id. at 1213.

[339] *See Payne* 501 U.S. at 856 (Stevens, J., dissenting) (observing that victim impact statements likely increase the chance of a death sentence by inflaming the jury). Also, in *United States v. Johnson*, a federal district court judge said that:

> I cannot help but wonder if *Payne* . . . would have been decided the same way if the Supreme Court Justices in the majority had ever sat as trial court judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony in the *Honken* trial and the juror's sobbing during the victim impact testimony still rings in my ears.

362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005) *aff'd in part*, 495 F.3d 951 (8th Cir. 2007). Even the prosecution, according to the Seven Circuit, "should not be required to present victim impact evidence . . . that [is] devoid of all passion." Williams v. Chrans, 945 F.2d 926, 947 (7th Cir. 1991).

showing a victim's uniqueness, courts held as proper evidence videotapes of the murder victim before his or her death,[340] a cassette tape of songs performed by the victim played for the jury,[341] and a eulogy statement about the victim read to the jurors.[342] videos of a victim's funeral services and gravesite,[343] photographs of a memorial garden built in the victim memory,[344] and poems written about the deceased read to the jury[345] have also been found admissible for demonstrating the impact of a murder on the victim's survivors.

If victim sentencing opinion evidence was allowed under *Payne*, instead of victim impact evidence, the jury would hear testimony with less prejudicial effect than what is presently held permissible in courts.[346] In *United States v. McVeigh*,[347] the Tenth Circuit approved the following "emotional" testimony of a mother describing the loss of her fourteen-month-old child:

> I think that my fears of her dying when she was first born being—confirmed was the very worst thing for me. When we drove home that night, the highway overlooked the Murrah Building; and by that time, it was very dark and it was raining and it was cold. And I truly, truly believed that my daughter was alive. You know, you don't ever think-you don't ever think that your own child is dead. And at this point, I thought that maybe she was in fact still in the building. And I think my biggest fear at that point was that she sat there in this building and she'd been there for 12 hours, she was in a dirty diaper, she didn't have a bottle, she didn't have me to hold her, and she was afraid. And I could picture her just saying "Momma," and I felt so guilty leaving this place.[348]

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[340] *See* cases cited *supra* note 251.
[341] *See* People v. Verdugo, 236 P.3d 1035, 1064 (Cal. 2010).
[342] *See, e.g.*, State v. Storey, 40 S.W.3d 898, 908-09 (Mo. 2001).
[343] *See* cases cited *supra* note 254.
[344] *See Storey*, 40 S.W.3d at 908-09.
[345] *See* cases cited *supra* note 257.
[346] Similarly, it has been suggested that, while survivor opinion evidence should be allowed during the sentencing hearing, victim impact evidence should not be permitted until after the sentencing authority has already reached its decision. *See* Joseph L. Hoffmann, *Revenge or Mercy? Some Thoughts About Survivor Opinion Evidence in Death Penalty Cases*, 88 CORNELL L. REV. 530, 535-37 (2003). According to Indiana law, only "[a]fter a court pronounces sentence," victim impact statement may be presented. IND. CODE ANN. § 35-50-2-9(e) (2008).
[347] 153 F.3d 1166 (10th Cir. 1998), *disapproved of by* Hooks v. Ward, 184 F.3d 1206 (10th Cir. 1999).
[348] *Id.* at 1220-21.

In fact, disallowing opinion evidence has persuaded family members in some cases to use victim impact evidence as a tool to influence the jury to vote for death by invoking heartbreaking and angry statements.[349] Sentencing recommendations should be permissible, so that the survivors could voice their opinions as to what punishment should be imposed clearly, directly, and separately from victim impact evidence. In short, allowing victim impact evidence under *Payne* calls for reconsidering the validity of victim sentencing opinions.

Nevertheless, others may contend that, contrary to victim impact evidence, sentencing opinions violate the Eighth Amendment because they are irrelevant to capital sentencing decisions.[350] Death recommendations made by a victim's family during sentencing hearings should be treated like the prosecutor's recommendation which is considered permissible despite its lack of relevance to the aggravating factors. Further, no one would argue that the prosecutor's recommendation of death is unconstitutional. Similarly, there should be no such concern when it comes to allowing survivors to recommend a sentence of death. The relevance of capital hearing evidence in murder cases could and should be extended beyond

[349] Joseph L. Hoffmann argues that:

> [A]dmitting survivor opinion evidence would avoid the current hypocrisy that allows many survivors to deliver victim impact statements that are thinly disguised efforts to sway the jury's sentence without violating the letter of Payne. The current situation encourages survivors to conflate two separate goals: achieving personal catharsis by expressing their feelings about the victim and the crime to the defendant, and exercising some control over the defendant's fate by seeking to influence the jury. It would be preferable to keep these two goals truly separate by allowing the second one to be pursued directly, and in a less emotionally charged manner, while delaying pursuit of the first (if such pursuit is desirable at all) to a time when it would not produce the serious negative effects described above. Moreover, even if the practical benefits are small, intellectual honesty about such matters would seem to be an inherently worthwhile goal.

Hoffmann, *Revenge or Mercy*, *supra* note 346, at 539-40.

[350] Several scholars have pointed out that survivors' opinions are irrelevant to whether the offender deserves to be executed. *See, e.g.*, Joshua D. Greenberg, *Is Payne Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 IND. L.J. 1349, 1355 n. 38 (2000) (noting that the victim's views on the proper penalty are irrelevant because "[t]he adversaries in the criminal process" are the State and the defendant, and not the victim and the defendant, stating "ours is not a system of private prosecution"); Logan, *supra* note 333, at 539 ("A witness's opinion—even when the witness is a loved one of the murder victim—that a defendant deserves death in no way serves to aggravate a murder to death-worthiness. An opinion does not relate to the nature of the offense or the offender, the cornerstones of death penalty decision making.").

the blameworthiness of the defendant, so that the survivors' opinions could be permissible. Under *Payne*, for instance, information regarding the victim's character was deemed relevant to the capital sentencing proceedings even though such information does not reflect in any way the defendant's blameworthiness.[351]

Douglas E. Beloof, a proponent of victims' sentencing recommendations, has argued that the *Payne* case has changed the status of the crime victim from a witness giving information and opinion evidence to an active "participant" who has standing to make sentencing recommendations[352] and, thus, such recommendations are constitutional in death penalty cases.[353] He explained that:

> [a]rguments that the content of victims' sentencing recommendations violates the Eighth Amendment are unpersuasive. As long as the death penalty is constitutional, one cannot credibly argue that a public prosecutor's recommendation of death is cruel and unusual. The state is permitted to make a sentencing recommendation because the state is harmed by the criminal act. Ultimately, the propriety of a sentencing recommendation is determined by the recommender's status. Because the victim, like the state, is harmed by crime, the victim's status as an aggrieved person with participant rights to give a recommendation . . . obviates any Eighth Amendment concern.[354]

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[351] *See* Payne v. Tennessee, 501 U.S. 808, 827. The Court based its decision on the ground that such information would prevent tuning the murdered person into a "faceless stranger" during a capital trial, which provides the jury with "all the information necessary to determine the proper punishment for a first-degree murder." *Id.* at 825 (internal citation omitted).

[352] *See* Beloof, *supra* note 335, at 285. For more details about Beloof's theory, *see id.* at 283-87.

[353] *Id.* at 287.

[354] *Id.* at 293. Professor Beloof added:

> One could also argue that the content of a victim's sentencing recommendation is cruel and unusual because it is the recommendation of an individual person rather than of a state official. One could make a similar argument against victim sentencing recommendation using a due process analysis: victim recommendation is fundamentally unfair and arbitrary because it comes from a harmed individual rather than the harmed state. These arguments presume that only the collective harm of an entire state justifies any right of participation in the criminal process. However, to maintain the argument that individual victim harm is an illegitimate basis for participation rights would require the repeal of laws in all fifty states that grant participation rights to victims. Furthermore, defining crime victim harm as illegitimate is so profoundly contrary to the common human experience--that victims are actually harmed by criminal acts--that such a fragile fiction will ultimately fail.

Id. at 293-94.

Although murder is a crime against the state, it affects individuals as well. Capital juries should be permitted to hear survivors' recommendations because no one represents the murder victim other than the survivors. The public prosecution represents the state rather than the victim or the family of the victim, and the prosecutor's recommendation on the propriety of the death penalty may, or may not, agree with the recommendation of the victim's family members.[355]

Permitting opinion evidence, like permitting victim impact evidence, does not mean that it must be admitted—the evidence will be considered by a judge, and may or may not be deemed admissible.[356] Also, in addition to the tools provided by the current legal system to protect the defendant's constitutional rights, "[t]he States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs."[357] Therefore, there are multiple avenues to ensure that the use of victim opinion evidence does not unduly prejudice defendants.[358]

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[355] The report of the President's Task Force on Victims of Crime stated that:

> The prosecutor can begin to present the other side, but he was not personally affected by the crime or its aftermath, and may not be fully aware of the price the victim has paid. It is as unfair to require that the victim depend solely on the intercession of the prosecutor as it would be to require that the defendant rely solely on his counsel.

President's Task Force on Victims of Crime, Final Report, 78 (1982), http://ojp.gov/ovc/publications/presdntstskforcrprt/87299.pdf.

[356] *Payne* noted, "[w]e do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, the Eighth Amendment erects no *per se* bar." *Payne*, 501 U.S. at 831.

[357] *Payne*, 501 U.S. at 824-25.

[358] *See infra* notes 368-71 and accompanying text.

b. Sentencing Recommendations Are Already Admissible in Non-Capital Cases

In many jurisdictions that authorize death sentences, a victim of a non-capital crime can voice an opinion regarding the defendant's sentence,[359] and such approach should be applicable to capital trials. In homicide cases, all survivors suffer the loss of a loved one. Depriving only capital survivors from presenting a limited form of opinion evidence creates an unfair distinction between those survivors and families of other victims. What distinguishes a capital from a non-capital case has nothing to do with the victim's family—rather, the distinctions are the defendant's actions and the rules of law, such as the aggravating and mitigating factors.

Booth based its holding on the fact that victim impact evidence should be disallowed on the grounds that death penalty sentencing is different from other criminal sentencing, "and that therefore the considerations that inform the sentencing decision may be different from those that" apply to other punishments.[360] Nevertheless, *Payne* later allowed victim impact evidence in "capital" sentencing proceedings,[361] the reasoning of "death is different" used to justify the bar of sentence recommendations in capital cases no longer seems powerful or

[359] *See, e.g.*, IND. CODE ANN. § 35-38-1-8(b) (2008) ("A victim present at sentencing in a felony or misdemeanor case shall be advised by the court of a victim's right to make a statement concerning the crime and the sentence."); KY. REV. STAT. ANN. § 421.520(3) (West 2006) ("[A victim] impact statement may contain … the victim's recommendation for an appropriate sentence."); MONT. CODE ANN. § 46-18-115(4)(a) (2003) ("The court shall permit the victim to present a statement concerning . . . the victim's opinion regarding appropriate sentence."); S.D. CODIFIED LAWS §§ 23A-27-1.1, 23A-27-1.3 (2014) (Before sentencing the defendant, the victim has the right to present an oral/ written victim impact statement, and may comment on the sentence that may be imposed on the defendant). *See also* State v. Grant, 297 P.3d 244, 249 (Idaho 2013) ("[B]ecause Idaho Code . . . does not include any limitations that would prevent a victim of a non-capital crime from sharing his or her sentencing recommendation with the trial court, such a statement is permissible"); Rippo v. State, 946 P.2d 1017, 1031 (Nev. 1997) (noting that victim's recommendation for an appropriate sentence is only allowed in non-capital trials).

[360] Booth v. Maryland, 482 U.S. 496, 509 n. 12 (1987) (citation omitted).

[361] *See Payne*, 501 U.S. at 827.

persuasive.[362] One could respond that permitting death recommendation will lead jurors to make an arbitrary sentencing determination,[363] which is contrary to the Supreme Court's capital punishment jurisprudence.[364] However, it is not accurate that capital jurors reach their decision with no emotions involved.[365] For instance, in death penalty cases, when mitigating evidence is introduced, the determination of a sentencing judgment relies in part on whether the defendant has earned the empathy of the jury members.[366] The jurors' emotional and rational reactions are intertwined and cannot be easily separated. In addition, "[e]motions are not inimical to the reasoning process, particularly in a contextual decision-making

[362] *See, e.g.*, Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 133 (2004) ("[I]t is not going too far to say that Payne gave up on the notion that death deliberation can or even ought to be a matter for reasoned deliberation."); Engel, *supra* note 307, at 308 ("[In the wake of *Payne*,] the potential danger of creating arbitrary capital sentences has become acceptable once again in exchange for giving the jury a wider deliberative range for deciding life or death."); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 397 (1995) ("The Court echoed the 'death is different' principle in a number of subsequent cases, but close examination of the Court's decisions over the past twenty years reveals that the procedural safeguards in death cases are not as different as one might suspect."). *See also* Bartolo, *supra* note 324, at 1246 ("*Payne*'s open gate for admissibility of victim impact evidence invites more attempts to include victim statements of opinion."); Michael Ira Oberlander, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621, 1656-57 (1992) (*Payne* provided state courts the opportunity to allow the introduction of survivors' opinion as to the defendant's appropriate punishment).

The reasoning of "death is different" has been weakened by some the approaches of appellate courts, in which they have condoned families' characterizations of the murders and murderers in capital sentencing proceedings. For example, in a Mississippi case, the state court explicitly allowed "opinions of the victim's family members as to the crimes and the defendant as permissible victim impact testimony." Havard v. State, 928 So. 2d 771, 792 (Miss. 2006) (citing Wells v. State, 698 So.2d 497, 512 (Miss.1997)). *But see* State v. Grant, 297 P.3d 244, 249 (Idaho 2013) (citing State v. Payne, 199 P.3d 123, 148 (Idaho 2008)) (finding survivors' characterizations and opinions regarding the crime and the defendant inadmissible in a capital sentencing hearing); Bryant v. State, 708 S.E.2d 362, 382 (Ga. 2011) (same).

[363] *See, e.g.*, Logan, *supra* note 333, at 540-43 (arguing that sentence opinion testimony should be barred because it causes the jury to impose arbitrary sentencing decisions).

[364] *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

[365] *See, e.g.*, Greenberg, *supra* note 350, at 1367 (emphasis in original) ("Capital sentencing juries' decisions are *never* unaffected by emotion."); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 710 (1989) (pointing out that capital sentencing decisions always have some emotional grounds).

[366] *See* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 878 (1996).

situation. Rather, emotions, being partly cognitive, are partly intellectual and can serve as guides to reasoned decision making."[367]

It is undeniable that a death recommendation made by the victim's family members at capital sentencing would speak to one's emotions. The solution, however, is not to simply prohibit opinion testimony in death penalty cases. The emotional influence on the jury's judgment could be always diminished by requiring that such a recommendation be presented in concise and unemotional legal language.[368] Also, the trial judge could instruct the jurors that they may consider family sentencing opinions regarding the death penalty, but that it is ultimately the jurors who must make the decision of life or death.[369] Finally, as the defendant can seek relief under the Fourteenth Amendment's Due Process Clause when victim impact evidence is prejudicial enough to render the trial fundamentally unfair,[370] the same safeguard can be applied to cases of unduly prejudicial sentencing opinion evidence. [371]

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[367] Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 92. *See also* Gewirtz, *supra* note 366, at 878 ("[E]motions can open up ways of knowing and seeing, and can therefore contribute to reasoning . . . . Indeed, reasons are constituted in part by emotion, and are modifiable by emotion . . . . And emotions are often essential to the completion of a rational response.").

[368] For example, the Oklahoma court placed the following test: "Any opinion as to the recommended sentence should be given as a straightforward, concise response to a question asking what the recommendation is; or a short statement of recommendation in a written statement, without amplification". Ledbetter v. State, 933 P.2d 880, 891 (Okla. Crim. App. 1997).

[369] Joseph L. Hoffmann proposes that at the close of the penalty phase, the trial court should be obligated to inquire each member of the victim's immediate family about his or her opinion regarding the penalty to be imposed on the defendant. In the case of recommending death, the judge should then give the jury the following instructions:

> At the conclusion of the sentencing hearing, the victim's _____, Mr./ Ms. _____, was given the opportunity to make a gesture of mercy toward the defendant by asking that you, the jury, not sentence the defendant to death. Mr./Ms. _____ chose not to make such a gesture of mercy, and instead expressed support for sentencing the defendant to death. You may take the opinion of Mr./Ms. _____ into consideration in reaching your sentencing decision. Ultimately, however, the final decision concerning the defendant's punishment is up to you, the jury, and you must make whatever sentencing decision you believe is correct.

Hoffmann, *Revenge or Mercy? supra* note 346, at 536.

[370] *Payne*, 501 U.S. at 825 (citation omitted).

[371] *See, e.g.*, Malone v. State, 168 P.3d 185, 209 (Okla. Crim. App. 2007) (finding that the trial judge committed plain error at sentencing phase in allowing a victim's wife to present unduly prejudicial sentencing recommendation of death, in which she asked the jurors to show no mercy to the defendant and invoked the Bible suggesting that they had a religious obligation to give him a death sentence).

c. Permitting Sentencing Recommendations Serves Significant Interests

There are benefits that can be gleaned from giving family members of murder victims greater weight at the sentencing phase by allowing them to express their views on the proper penalty that the defendant should receive. First, this proposed approach would ensure adequate respect for those who are affected the most by the crime,[372] and would reduce their feelings of powerlessness in the justice system, which would fulfill one of the goals of the victims' rights movement.[373] Further, allowing surviving family members' voices to be heard may matter more to them than the outcome of the case itself, as it shows that the system cares enough to listen to them.[374] Such involvement also would reinforce citizens' reliance on the criminal justice process, about which the Supreme Court has expressed concern in a number of cases.[375] In *Gregg v. Georgia*,[376] the Court noted that capital punishment is "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."[377]

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[372] *See* Susan C. Hascall, *Shari'ah and Choice: What the United States Should Learn from Islamic Law About the Role of Victims' Families in Death Penalty Cases*, 44 JOHN MARSHALL L. REV.1, 2 (2010). *See also* Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 338 (2007) (Having suffered the most, [victims] have the most immediate and concrete interests in the outcomes of their cases . . . . Of course, the state and society are interested as well, but it is odd to deny the victim even a share of the punishment.")

[373] *See, e.g.*, Edna Erez, *Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, CRIM. L. REV. 545, 553 (1999) ("One of the major aims of the victim movement, and the driving force behind it, was to help victims overcome their sense of powerlessness and reduce their feelings that the system is uncaring."); Hascall, *Shari'ah and Choice*, *supra* note 372, at 2 (noting that giving victim's family the opportunity to provide their views about the appropriate sentence goes in line with the victim movement).

[374] *See* Hoffmann, *Revenge or Mercy*, *supra* note 346, at 537 (arguing that admitting survivor opinion evidence has "potential therapeutic effect" on the survivors).

[375] Logan, *supra* note 333, at 537 (pointing that advocates of victim sentencing opinion would likely make this argument).

[376] 428 U.S. 153 (1976).

[377] *Id.* at 183.

One could argue that the purpose of the criminal justice process is to serve the interests of the society as a whole, and that it is not obligated to meet all the needs of crime victims or their survivors.[378] However, "the 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 . . . sentences should matter to the system, even if similar opinions expressed by the rest of us do not."[379] Additionally, permitting survivors' death recommendations to be heard during sentencing phase does not usurp the sentencer's duty to determine what penalty should be administered.[380] This approach only suggests that the jury may take survivors' views into consideration, but it will always bear the responsibility of making the final decision.[381] At the same time, it should be explained to the family members that their sentencing opinions are only recommendations and the jury may not agree.[382]

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[378] *See, e.g.*, Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1606 (2000) ("Sometimes the legal system may be able to provide a punishment, or a result, that meets the individual's needs for vengeance, forgiveness, closure . . . . But the legal system cannot and ought not meet such needs on a case by case basis."); Hoffmann, *Revenge or Mercy*, *supra* note 346, at 541 (One objection can be made against opinion evidence on the ground that, because the justice system is supposed to "serve the interests of society as a whole," not the specific interests of victims or survivors, introducing victim opinion evidence during the penalty phase would not be proper).

[379] Hoffmann, *Revenge or Mercy*, *supra* note 346, at 541.

[380] *See, e.g.*, Hascall, *Shari'ah and Choice*, *supra* note 372, at 7-8 (pointing out that permitting victim opinion testimony is not intended to replace the state, courts, or jurors' authority--rather, it is intended to give survivors at least some say in the sentencing process by permitting their sentencing recommendations to be presented to the jury). *But see* Harris, *supra* note 344, at 93 ("[A]llowing the jury to hear families' opinions, characterizations, and recommendations might impermissibly encourage the jury to shirk its ultimate responsibility for the death decision and simply act as the agent of the grieving family."); Logan, *supra* note 333, at 544-45 (arguing that sentence recommendations in capital cases take over the role of the sentencing authority).

[381] Susan Hascall wrote:

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

Hascall, *Shari'ah and Choice*, *supra* note 372 at 39 n. 232.

[382] Joseph L. Hoffmann stated that one objection to admitting survivor opinion evidence is that such evidence may "further victimize" the victim' family when the sentencing jury ignores their expressed view about the proper sentence. Yet, mitigating such victimization is partially possible by "requiring the trial judge to inform the survivors--both before and after they express their opinions about the sentence--that even if their opinions do not produce the desired sentencing outcome, they have nevertheless played an important role in the sentencing

While some families may want the defendant to be executed, others may be in favor of leniency. The next portion of the Dissertation focuses on mercy opinions in capital sentencing.

C. Victim Sentencing Opinions Calling for Life (Mercy Opinions)

Although families of capital murder victims know a common grief and pain, their views regarding the death penalty are not identical. Typically, survivors of murder victims want the person responsible for the death of their loved one to be executed. However, a significant number of surviving families are opposed to capital punishment for moral, religious, or personal reasons. According to the Tenth Circuit in *Robison v. Maryland*,[383] *Payne* did not broaden the scope of relevant mitigating evidence to include evidence of a family's opposition to the death penalty.[384] Courts in most jurisdictions have also refused to admit survivors' opinions advocating mercy towards capital defendants.[385]

This portion will first examine the validity of victim sentencing opinions that specifically call for leniency. Then, it discusses why such opinions should be allowed in capital trials.

1. The Validity of Mercy Opinions after *Payne*

The leading case addressing mercy opinions was *Robison v. Maynard* (Robison I), decided in 1987.[386] At that time, *Payne* had not been decided yet, and *Booth* was the controlling case law concerning the issue of victim impact evidence. In *Robison I*, an Oklahoma jury had convicted Olan Randle Robison of three counts of first-degree murder and

process by contributing their unique perspectives to that process." Hoffmann, *Revenge or Mercy*, *supra* note 346, at 541.

[383] 943 F.2d 1216, 1217 (10th Cir. 1991).

[384] *See infra* text accompanying notes 404-08.

[385] *See infra* notes 409-14 and accompanying text.

[386] 829 F. 2d 1501 (10th Cir. 1987), *overruled on other grounds by* Romano v. Gibson, 239 F.3d 1156 (10th Cir. 2001) (hereinafter *Robison I*).

sentenced him to death.[387] The trial judge held an in camera discussion with the prosecutor and the defense counsel prior to the sentencing stage of the trial.[388] The district attorney asked the court for an order instructing the victim impact witnesses not to "express any kind of an opinion, to be asked any kind of question or express any kind of opinion as to whether or not they feel the death penalty should be imposed."[389] In response, the defense attorney asserted that he had intended to call certain relatives of two victims who had "expressed to [him] a desire to ask the jury not to impose the death penalty in this case."[390] The defense claimed that such testimony would be proper evidence in mitigation of the death penalty.[391] The trial judge, however, denied his request for the reason that permitting this testimony "would be no more proper than allowing the State to put on testimony that the penalty should be invoked."[392]

Robison filed an appeal in the United States Court of Appeals for the Tenth Circuit, challenging Oklahoma's denial of state habeas relief for his three death sentences.[393] He contended that the trial court deprived him of the right to present mitigating evidence, by disallowing a victim's sister to testify that she did not wish the death sentence to be imposed upon him.[394] Robison argued that, because retribution is one justification for capital punishment, the testimony of a victim's relative opposing the death penalty would be a "strong" mitigating factor.[395]

[387] *Robison I*, 829 F.2d at 1502.
[388] *Id.* at 1503-04.
[389] *Id.* at 1504.
[390] *Id.*
[391] *Id.*
[392] *Id.*
[393] *Id.* at 1502.
[394] *Id.* at 1504.
[395] *Id.*

The Tenth Circuit found that the testimony in question was irrelevant mitigating evidence and thus was properly excluded.[396] The Tenth Circuit explained that under *Lockett v. Ohio*,[397] mitigating evidence is limited to factors that focus on the defendant's character or record, or any of the circumstances of the crime, and found that the proffered testimony related to neither.[398] The testimony offered by the defense, according to the Tenth Circuit, "would be a gossamer veil which would blur the jury's focus on the issue it must decide,"[399] and "was calculated to incite arbitrary response" from the jury.[400] The court also pointed out that even under *Booth v. Maryland*, where evidence unrelated to the culpability of the defendant is prohibited, victim opinion testimony would not be permitted.[401]

Four years later, after the Supreme Court reversed its position on victim impact evidence in *Payne*,[402] Robison decided to appeal his case again to the Tenth Circuit.[403] Yet, even in *Robison II*, the Tenth Circuit affirmed the trial court's refusal to allow the evidence of family members' opposition to the death penalty, by upholding the *Robison I* court's denial of habeas corpus relief.[404] The *Robison II* court held that *Payne* did not extend relevant mitigating evidence to opinions of victim's relatives that the defendant should not be executed.[405] The *Robison II* court observed that the Court in *Payne* allowed evidence concerning the harm resulting from the murder,[406] yet "the desire of the victim's relative in no

[396] *Id.* at 1504-05.
[397] 438 U.S. 586, 604 (1978).
[398] *Robison I*, 829 F.2d at 1504-05.
[399] *Id.* at 1505. *Robison I* also pointed out that the admission of victim opinion evidence "would interfere with the jury's performance of its duty to exercise the conscience of the community. Because the offense was committed not against the victim but against the community as a whole, . . . only the community, speaking through the jury, has the right to determine what punishment should be administered." *Id.*
[400] *Id.*
[401] *Id.*
[402] Payne v. Tennessee, 501 U.S. 808.
[403] Robison v. Maynard, 943 F.2d 1216 (10th Cir. 1991) (hereinafter *Robison II*).
[404] *Id.* at 1216.
[405] *Id.* at 1217.
[406] *Id.*

way constitute[d] relevant evidence because it [did] not relate to the harm caused by the defendant."[407] Contrary to what the petitioner had implied, the Tenth Circuit indicated that *Robison I* was not decided in reliance on *Booth*; *Booth* only "supported [the Tenth Circuit's] conclusion."[408]

In the twenty five years that have elapsed since *Robison II* was decided, many courts have followed *Robison I* and *Robison II* and precluded capital defendants from introducing evidence of a survivor's opposition to the death penalty during the sentencing proceeding.[409] For example, in *Kaczmarek v. State*,[410] at the penalty stage, the victim's daughter, Amanda, testified about her father's character and the emotional effect his death had upon her,[411] and intended to testify that she did not want the defendant to be sentenced to death.[412] Yet, the trial judge held that Amanda's opposition to the death penalty would be excluded.[413] On appeal, Kaczmarek claimed that he was denied the right to present evidence relevant to his defense.[414] The Supreme Court of Nevada disagreed, ruling that the trial court did not err in excluding the victim's daughter's opinion on sentencing.[415] In response to Kaczmarek's contention, the court noted that Amanda's opinion regarding the proper punishment could not

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[407] *Id*. at 1218.
[408] *Id*. at 1217.
[409] *See, e.g.*, United States v. Brown, 441 F.3d 1330, 1351 n. 8 (11th Cir. 2006) ('[I]t is immaterial that a family member's opinion would have been offered in opposition to the death penalty, just as it would be improper if the expressed opinion supported the application of the death penalty."); Ortiz v. State, 869 A.2d 285, 303 (Del. 2005) (finding inadmissible the victim's daughter's direct opinion regarding her opposition to the execution of her father's murderer); State v. Glassel, 116 P.3d 1193, 1213, 1215 (Ariz. 2005) (holding that the trial court did not err in precluding the victim's husband from testifying that he did not want the defendant to be put to death even after the husband was allowed to present an emotional victim impact statement at the penalty phase of the trial); Perez v. State, 919 So. 2d 347, 376 (Fla. 2005) (finding no error in disallowing the victim's family to testify that they opposed the capital punishment); Barbour v. State, 673 So. 2d 461, 468-69 (Ala. Crim. App. 1994) (upholding the exclusion of a letter written by the victim's brother requesting that the jury spare the defendant's life).
[410] 91 P.3d 16 (Nev. 2004).
[411] *Id.* at 22.
[412] *Id*. at 30-31.
[413] *Id.* at 31.
[414] *Id.*
[415] *Id.* at 31-32.

be admissible as mitigating evidence because it had no bearing on the defendant's character, his record, or any of the circumstances of her father's death.[416] The court added that, giving victim's family's views on sentencing continued to be barred under *Booth*, the trial court could not admit the proffered testimony as victim impact evidence, either.[417]

Similarly, in an Arkansas case, the state court refused to allow the defense to present a letter from the victim's wife expressing her desire to spare defendant's life.[418] In its analysis, the court stated:

> [I]f this court permitted forgiveness and penalty recommendations as victim-impact evidence, then it stands to reason that it must also allow any evidence of nonforgiveness by the victim's family and any recommendation of a harsher sentence such as death. We cannot condone either brand of testimony as both would interfere with and be irrelevant to a jury's decision on punishment. Indeed, such testimony would have the potential or reducing a trial to "a contest of irrelevant opinions."[419]

In addition to prohibiting evidence of family members' opposition to the death penalty, courts have also denied capital defendants' requests to introduce evidence relating to the murder victims' views against capital punishment, as related by their survivors.[420] In *People*

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[416] *Id.* at 32.

[417] *Id.* at 32-34. "We join our sister courts in rejecting the proposition that opinions in opposition to the death penalty fall within the parameters of admissible victim impact testimony or rebuttal thereto." *Id.* at 34. *See also* Engel, *supra* note 307, at 314 (noting that, in disallowing mercy opinions, courts have distinguished between victim impact evidence that "expresses 'fact,' on one hand," and victim impact evidence that "expresses 'opinion,' on the other").

[418] Greene v. State, 37 S.W.3d 579, 583, 586 (Ark. 2001).

[419] *Id.* at 586 (quoting Robison v. Maynard, 829 F.2d at 1504).

[420] *See, e.g.*, State v. Barone, 969 P.2d 1013, 1032 (Or. 1998) (holding that evidence of the victim's opposition to the death penalty was properly excluded during sentencing phase); Campbell v. State, 679 So. 2d 720, 725 (Fla. 1996) (ruling that the trial court did not err in excluding the testimony of the victim's daughter that the victim was opposed to the death penalty); State v. Pirtle, 904 P.2d 245, 269 (Wash. 1995) (finding inadmissible the victim's essay indicating her opposition to the death penalty because it did not qualify as mitigating evidence. nor as a victim impact statement).
Some scholars argue that a Declaration of Life (a document signed by a death penalty abolitionist requesting, in case he or she is murdered, that the killer not be put to death, and that the document be made available to the jury) is relevant evidence at the penalty phase and, thus, should be permitted under *Payne*. *See* Engel, *supra* note 307. The issue of whether the victim's own opposition to the death penalty should be admissible is beyond the scope of this Dissertation.

v. Lancaster,[421] the California Supreme Court precluded a murder victim's friend from testifying about the victim's own opposition to the death penalty.[422] The defendant contended that the victim's opinion on capital punishment should be admissible to rebut victim impact testimony provided by his mother, brother, and daughter describing the effects his death had upon them as family members.[423] The court, however, pointed out that rebuttal evidence must pertain to the content of the prosecutor's evidence.[424] "[T]here is no material, logical, or moral connection," the court stated, "between the effects of [the] defendant's crime on the victim's family and the victim's views on capital punishment, whatever they may have been."[425]

The next portion provides several arguments in favor of allowing mercy opinions in the sentencing phase of a capital trial.

2. Arguments for Permitting Mercy Opinions

This section proposes that mercy opinions should be allowed in court based on several grounds. First, a defendant's Eighth Amendment rights would not be harmed by granting a victim's family members a chance to express their views against death penalty.[426] Second, precluding a recommendation for a life sentence constitutes discrimination within the penal system against anti-death survivors in favor of pro- death survivors.[427] Third, calling for mercy before the jury can be a family member's best vehicle for achieving closure.[428]

[421] 158 P.3d 157 (Cal. 2007).
[422] *Id*. at 191-92.
[423] *Id*. at 191.
[424] *Id.* (citation omitted).
[425] *Id*. (citation omitted).
[426] *See* discussion *infra* pp. 74-79.
[427] *See* discussion *infra* pp. 79-84.
[428] *See* discussion *infra* pp. 85-90.

a. Mercy Opinions Do Not Harm the Defendant's Constitutional Rights

If the Eighth Amendment, by forbidding cruel and unusual punishments,[429] prohibits imposing the penalty of death in an arbitrary manner,[430] then it is clearly meant to protect the interest of capital defendants in the criminal justice system. And, because mercy opinions obviously work in their favor, it contradicts common sense to believe that admitting such evidence would violate their Eighth Amendment rights. The Court itself states that "nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."[431] In *State v. Glassel*,[432] the defendant wanted the jury to hear the victim's husband testifying that he did wish the defendant to be executed, claiming that even though that the Eighth Amendment prohibits death sentence recommendation "when the defendant objects to that recommendation," it "cannot bar a recommendation of leniency when the defendant affirmatively wishes the jury to hear it."[433] Glassel also noted that "rights under the Eighth Amendment are the defendant's to raise or waive, not for the trial court to impose against his will."[434] However, the Arizona Supreme Court did not find any difference between mercy opinions and those seeking death sentences, holding that "a victim's recommendation of what sentence should be imposed in a capital case, whether for or against the death penalty,

[429] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
[430] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 189 (1976).
[430] Gregg v. Georgia, 428 U.S. 153, 199 (1976); Furman v. Georgia, 408 U.S. 238, 310 (1972).
[431] *Gregg*, 428 U.S. at 199.
[432] 116 P.3d 1193 (Ariz. 2005). The *Glassel* court found no error in disallowing the testimony of the victim's husband in which he asked the jury to spare the defendant's life in a capital case. *Id.* at 1215.
[433] *Id.*
[434] *Id.*

is simply not relevant,"[435] and "the Eighth Amendment prohibits a victim from making a sentencing recommendation to the jury in a capital case."[436]

In capital cases, allowing the jury to rely on irrelevant evidence would inject an arbitrary factor into the sentencing decision.[437] Hence, the lack of relevance to the sentencing process might be the main obstacle that stands in the way of permitting mercy opinions in court. It is well settled that a death sentence must be based on factors that have some relevancy to the defendant's "personal responsibility and moral guilt,"[438] and the factors that a jury may take into consideration in determining that culpability involve his character and record,[439] the circumstances of the crime,[440] and the amount of harm done to the victim's family by his or her actions.[441] With respect to mercy opinion, it has been determined that such testimony has no relevancy to the harm caused by the defendant's crime and thus cannot be admitted as victim impact evidence.[442] It has also been held that opinions in opposition to death do not fit *Lockett*'s definition of permissible mitigating evidence, either.[443] A mitigating

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[435] *Id.*
[436] *Id.*
[437] *See, e. g.*, Booth v. Maryland, 482 U.S. 496, 502-03 (1987) ("[Victim opinion evidence] "is irrelevant to a capital sentencing decision, and . . . its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.")
[438] *See* Enmund v. Florida, 458 U.S. 782, 800-01 (1982).
[439] Lockett v. Ohio, 438 U.S. 586, 604 (1978).
[440] *Id.*
[441] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (holding that evidence relating to the impact the murder had on the victim's family is relevant to the jury's sentencing determination); *id.* at 825 ('[A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant."). It is important to note that, evidence of the victim's character is relevant under *Payne* even though it is unrelated to the blameworthiness of the defendant. *See id.* at 827.
[442] Robison v. Maynard, 943 F.2d 1216, 1218 (10th Cir. 1991).
[443] Robinson v. Maynard, 829 F. 2d 1501, 1504-05 (10th Cir. 1987), *overruled on other grounds by* Romano v. Gibson, 239 F.3d 1156 (10th Cir. 2001). Brian L. Vander Pol argues that:

> the exclusion of mercy opinions is not required by the rules of evidence regarding relevance. While the Court in *Lockett* did recognize the power of courts to exclude as irrelevant any evidence not relating to the character of the defendant or the circumstances of the offense, that courts possess this power does not answer the question whether they must exercise it. Simply because a court is not constitutionally required to admit mercy opinions does not mean that they may never be admissible.

Vander Pol, *supra* note 291, at 725-26.

factor, according to *Lockett*, is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[444]

In order to overcome the irrelevance obstacle, the definition of relevance should be expanded in capital sentencing proceedings. Many years ago, Justice O'Connor proposed a broader scope of relevance stating that "evidence, *even if not* relate[d] specifically to [defendant's] culpability for the crime he committed, must be treated as relevant mitigating evidence *if it serves as a basis for a sentence less than death*."[445] Accordingly, because the introduction of mercy opinion may provide a chance of a life sentence instead of death which obviously does not compromise the defendant's constitutional safeguards, such evidence should be considered relevant in capital trials.[446] The rules of evidence are not sacred and can

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It should be noted that testimony from a victim's relative, who had a *significant relationship* with the defendant asking the jury to spare his life might find its way to court as mitigating evidence *reflecting upon the character of the defendant*. *See, e.g.*, People v. Smith, 68 P.3d 302, 330 (Cal. 2003) (internal quotation marks citations omitted) ("[T]estimony from somebody with whom defendant assertedly had a significant relationship, that defendant deserves to live, is proper mitigating evidence as indirect evidence of the defendant's character. This evidence is admitted, not because the person's opinion is itself significant, but because it provides insights into the defendant's character.").

[444] *Lockett*, 438 U.S. at 604.

[445] Johnson v. Texas, 509 U.S. 350, 381 (1993) (O'Connor, J., dissenting) (internal citations and quotation marks omitted) (emphasis added).

[446] One scholar suggests that the defense counsel might argue that victim's family's forgiveness is relevant under Virginia law as either mitigating or rebuttal evidence, as:

> [m]itigation evidence is "any evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment." In Virginia, evidence of victim impact is relevant mitigating evidence. Section 19.2-299.1 of the Virginia Code states that the victim impact statement "may be considered by the court in determining the appropriate sentence." Evidence that the family of a murder victim has forgiven the defendant is evidence which may extenuate or reduce the degree of punishment. Thus, under *Lockett* and *Eddings*, such evidence is admissible.
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> Section 19.2-11.01 begins as follows: "In recognition of the Commonwealth's concern for the victims and witnesses of crime, it is the purpose of this chapter to ensure that the full impact of crime is brought to the attention of the courts of the Commonwealth." Although an understanding of "the full impact" of one crime might be had by means of testimony of the great impact the crime had on a family member of the victim, in another case such understanding might only be had by means of testimony of mitigation of impact as the result of forgiveness. The forgiveness of a family member is relevant to an understanding of "the full impact" of the crime, and thus defense counsel should seek to have it admitted as rebuttal evidence at the penalty phase of a capital case.

be revised. The Court itself has stated that, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"[447] The standard of relevance that excludes mercy opinions could be reexamined,[448] just as the Court reexamined and opted to change its position on the relevancy of victim impact statements to the sentencing phase in *Payne*.[449]

It is unquestionable that the risk of arbitrariness the Constitution intends to prevent in capital decisions arises when the evidence introduced is too prejudicial to the defendant. However, the risk of prejudice cannot exist with the testimony of a victim's family that calls for mercy. It makes no sense to surmise that when a victim's survivors testify that they do not wish to for the defendant to be executed, their testimony would likely encourage the jury to sentence him to death. Further, the absence of the element of prejudice calls into question courts' reliance on *Booth* in support of banning mercy opinions.[450] According to the *Booth* Court, victim opinion evidence is inadmissible because it "serve[s] no other purpose than to *inflame the jury* . . . ."[451] Nevertheless, such rationale applies only to opinions recommending death, not those that call for leniency. Further, courts seem to ignore the fact that *Booth* dealt with victim opinion evidence in favor of sentencing the defendant to death,[452] and that the

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Paige Mcthenia, *The Role of Forgiveness in Capital Murder Cases*, 12 CAP. DEF. J. 325, 340-42 (2000) (footnotes omitted).

[447] Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).

[448] *See* Vander Pol, *supra* note 291, at 726 n. 103 (suggesting a "lesser standard of relevance" to be applied by trail court in death penalty cases).

[449] *See Payne*, 501 U.S. at 817. Justice Stevens in his dissent to *Payne*'s holding, asserted that "the Court abandons rules of relevance that are older than the Nation itself . . . ." *Id.* at 858-59.

[450] *See, e.g.*, Lynn v. Reinstein, 68 P.3d 412, 416 (Ariz. 2003) (citing *Payne*, 505 U.S. at 830 n. 2) ("*Payne* did not overrule and indeed left intact that portion of *Booth* that the Court itself has characterized as prohibiting victims from recommending a sentence in a capital case."); People v. Smith, 68 P.3d 302, 330 (Cal. 2003) (same).

[451] Booth v. Maryland, 482 U.S. 496, 508 (1987) (emphasis added).

[452] In *Booth*, the victims' children did not make specific recommendations regarding sentencing. Yet, they indirectly hinted at the punishment the defendant should receive. The victims' son noted in his statement that he did not "'think anyone should be able to do something like [the murders at issue] and get away with it.'" The

Court's main concern was to avoid the "unacceptable risk that the jury may *impose the death penalty* in an arbitrary and capricious manner."[453] Thus, instead of creating a special rule for the "uncommon" case of a victim's family seeking forgiveness, jurisdictions have chosen to apply *Booth*'s ban to all sentencing opinions.

One could argue that perhaps mercy opinions cannot be inflammatory by logic, but it still can influence the jurors to make sentencing decisions on the basis of their emotions rather than their reasons, which would be inconsistent with the Court's requirement in capital cases.[454] Yet, the reasoned decision-making requirement is created to safeguard the defendant by precluding the jury from sentencing him to death based on emotion. Thus, if the jury decided to spare the defendant's life instead, he would not need obviously such protection. The Court itself has noted that "[i]t is of vital importance to the defendant . . . that any decision to *impose the death sentence* be, and appear to be, based on reason rather than caprice or emotion."[455] Moreover, as long as the defendant's constitutional rights are protected, a jury's emotional reactions to a family's recommendation of a life sentence should be considered reasonable, especially when the Court asserted that "'sympathy' is an important ingredient in the Eighth Amendment's requirement of an individualized sentencing determination."[456] In *State v. Glassel*, the Arizona Supreme Court found no unconstitutional prejudice in subjecting the jury to powerful and emotional victim impact statements provided by the victim's family who were "'weeping during their presentations'" which made "'at least half of the jurors come to tears,'" stating that it is not "unreasonable to expect that some jurors

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victims' daughter stated that she did not "'feel that the people who did this could [n]ever be rehabilitated and she [did not] want them to be able to do this again or put another family through this.'" *Id.* at 508.

[453] *Id.* at 503 (emphasis added).

[454] *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 358 (1977); California v. Brown, 479 U.S. 538, 545 (1987).

[455] *Gardner*, 430 U.S. at 358 (emphasis added).

[456] Saffle v. Parks, 494 U.S. 484, 513 (1990).

will . . . have emotional reactions when hearing the victims' families' accounts of the loss they have suffered."[457] Thus, if a jury's emotions are understandable and not "harmful" in cases involving victim impact statements that could implicitly favor a death sentence, the jury's emotions certainly would not be considered harmful when a capital defendant introduces evidence that a victim's family is calling for leniency.

b. Allowing Mercy Opinions Eliminates Discrimination Against Anti-Death Penalty Survivors

A victim's family members who oppose the imposition of the death penalty on a murderer are not given the same space in the criminal justice system as the family members who support it. First, while anti-death penalty survivors are prohibited from conveying their desire for mercy to the jury,[458] survivors who seek vengeance may use victim impact statements, which are intended to be another "method of informing the sentencing authority about the specific harm caused by the crime,"[459] to express implicit opinions in favor of the death penalty.[460] For instance, a victim's wife's impact statement in which she "demanded that the jury show no mercy to the defendant, and . . . informed the jury that she intended to do everything in her power to see that [the defendant] received no mercy" has been deemed admissible.[461] Also, in *Payne*, the State was allowed to make the following remarks about the

[457] 116 P.3d 1193, 1214 (Ariz. 2005). *See also* Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements Implications for Capital Sentencing Policy*, 10 PSYCHOL. PUB. POL'Y & L. 492, 504 (2004) ("Jurors may become emotionally aroused in the presence of [victim impact statement] but nevertheless remain capable of rendering judgments that are not influenced by these emotions.").
[458] *See supra* notes 409-19 and accompanying text.
[459] Payne v. Tennessee, 501 U.S. 808, 825 (1991).
[460] *See* Engel, *supra* note 307, at 330 (noting that courts' refusal to allow mercy opinion indicates to victims' families that their desires for mercy "means nothing" to the court, even if their desires for vengeance would).
[461] *See* Witter v. State, 921 P.2d 886, 895-96 (Nev. 1996). *See also* State v. Worthington, 8 S.W.3d 83, 89 n.2 (Mo. 1999) (approving the following victim impact testimony about the defendant: "I believe this man has caused enough chaos and I ask he be fairly punished for what he has done").

double murders' impact on Nicholas, the three-year-old survivor who lost a mother and a sister, during the closing argument, stating that:

> [t]here is nothing you can do to ease the pain of any of the families involved in this case . . . . They will have to live with it the rest of their lives . . . . But there is something that you can do for Nicholas.
>
> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.[462]

Depriving anti-death penalty survivors of voicing their opinions before the jury forces them into several hard choices.[463] They may provide victim impact information during the sentencing phase, to show the uniqueness of the victim and the how the murder of the deceased affected them, but without mentioning their opposition to capital punishment. Such participation, however, is almost always seen by the jurors as a way to support a death sentence, especially since the victim's family members are, after all, the state's witnesses.[464] Even a state supreme court has acknowledged this notion by stating that "[w]e are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question."[465] Thus, despite the survivors' desire for leniency, their involvement through the use of victim impact evidence would aid the prosecution's effort to persuade the jury to vote for the death penalty.

Another hard choice that anti-death penalty relatives may be forced to make is whether to refrain from testifying during the sentencing hearing as victim impact witnesses. Yet, the

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[462] *Payne*, 501 U.S. at 815.
[463] A number of commentators have addressed how victims' families have few good options with regard to their desires for leniency. *See e. g.*, Beloof, *supra* note 335, at 295-97; Blume, *supra* note 187, at 279-80 (2003); Vander Pol, *supra* note 291, at 725.
[464] *See* Engel, *supra* note 307, at 324 ("[T]he entire structure of the victim impact stage creates a presumption in the jury's mind that the victim prefers the death penalty.").
[465] State v. Koskovich, 776 A.2d 144, 177 (N.J. 2001).

surviving relatives' silence could make them feel disloyal to their loved one's memory by not exercising their responsibility toward the deceased, and could deprive them of their chances for healing which could be obtained from testifying and confronting the accused in court. Additionally, the family's silence also may be interpreted by the jury as in support for putting the defendant to death. One commentator has noted that "[a] procedure which inherently encourages one type of victim (who would recommend no death) to waive the right to participate in sentencing but not another (who would recommend death) is far from ideal."[466]

A third choice for the survivors is to take the stand and use their victim impact testimony to covertly convey their desires for mercy to the sentencing authority.[467] For example, to communicate her recommendation against death, one victim's daughter related the murder in a way that was devoid of all emotions, referring to the accused as a "gentleman," and mentioned her work as an advocate against capital punishment in response to a prosecutor's question regarding her job.[468] Although survivors who prefer to extend mercy to the defendant do suffer the same degree of pain for having lost a loved one as those who desire execution, according to the current system, they have to suppress their emotions in order to express their opposing view of the death penalty. On the other hand, family members favoring death do not experience the same difficulty in conveying their opinion because they do not need to hide their feelings of pain and suffering.[469] In fact, the more they express such feelings, the easier it is for them to communicate their desire for vengeance. Thus, it seems that "the constitutional exclusion of victim sentencing recommendations merely screen[s] out

[466] Beloof, *supra* note 335, at 296.
[467] *See id.* at 296; *see also* Vander Pol, *supra* note 291, at 725.
[468] *See* Beloof, *supra* note 335, at 296-97.
[469] *Id.* at 297.

those victims who are less capable of communicating their sentencing recommendations obliquely."[470]

Second, many jurisdictions that ban opinion evidence seem to tolerate views that explicitly support execution.[471] For example, in a case of a murdered police officer, the Alabama Court of Criminal Appeals found no plain error in the introduction of the following statements of the victim's relatives:

> When asked by the prosecutor whether [the victim's brother] was asking for the jury to recommend the death penalty for [the defendant], he stated that he was begging the jury—for himself, for his father, and for every police officer—to recommend a death sentence for [the defendant]. The victim's father . . . also testified at the sentencing hearing and also asked the jury to recommend a death sentence, not only to vindicate his son, but to vindicate every law enforcement officer in the country.[472]

In another case, the Tennessee Supreme Court held that the prosecution's statement to the jury that the victim's survivors "ask[] you to impose the death penalty" was improper, but further held that the statements had no prejudicial impact.[473]

Such tolerance toward death recommendations could be based on the fact that the jury expects a victim's family to advocate for a death sentence.[474] However, it should be imaginable that some family members may be against capital punishment and would not want the defendant to be executed. It is unfair to discriminate against anti-death penalty survivors experience in court and disallow their testimony on the basis of an assumption that all victims' families desire vengeance.

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[470] *Id.*
[471] For states that prohibit victim opinion evidence, *see supra* notes 296-96 and accompanying text.
[472] Whitehead v. State, 777 So. 2d 781, 845-46 (Ala. Crim. App. 1999).
[473] State v. Middlebrooks, 995 S.W.2d 550, 558 (Tenn. 1999).
[474] *See supra* notes 330-32 and accompanying text.

Third, victims' survivors who advocate leniency may face discrimination even before taking the stand as witnesses. The state often favors relatives seeking execution over those who want to spare the defendant's life.[475] Victims' families are not parties to the case, but are solely witnesses presented by the prosecution, meaning that the decision as to which family member will testify lies only in the hands of the prosecutor. Accordingly, while survivors who do not want the capital punishment imposed may be silenced or ignored because their interests are in conflict with the precaution's goal,[476] those who support execution will most likely be called to give victim impact statement.[477] For instance, Oklahoma bombing victims' families who opposed Timothy McVeigh's execution were excluded from his sentencing hearing, and only pro-death penalty survivors were allowed to testify because "the prosecution wanted an execution."[478] In another case, a prosecutor filed a motion to prevent the mother of a murdered six-year-old boy from presenting a victim impact statement, and even from taking the stand at all, because of her opposition to death penalty, but at the same time, while simultaneously calling the mother's bother, a death penalty supporter, to testify before the jury.[479] The Louisiana Supreme Court held that the victim's mother should not be

[475] *See, e.g.*, Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 STAN. L. & POL'Y REV. 447, 465 (2004); Robert Renny Cushing & Susannah Sheffer, *Dignity Denied: The Experience of Murder Victims' Family Members Who Oppose the Death Penalty*, MURDER VICTIMS' FAMILIES FOR RECONCILIATION, 8 (2002); Megan A. Mullett, *Fulfilling the Promise of Payne: Creating Participatory Opportunities for Survivors in Capital Cases*, 86 IND. L.J. 1617, 1639 (2011).

[476] Brian L. Vander Pol noted that:

> [w]ith prosecutors under acute (and ever intensifying) political pressure to seek the death penalty, the families of murder victims who oppose capital punishment are being ignored. Despite the recent emergence of the victim's rights movement, it appears such rights are recognized only when doing so would lead to harsher punishment for the capital defendant.

Vander Pol, *supra* note 291, at 709 (footnotes omitted).

[477] "Without question, the powerful effect of victim impact evidence is an important tool for prosecutors to counterbalance mitigating evidence offered by the defense." Baird & McGinn, *supra* note 475, at 464.

[478] *See* Bruce Shapiro, *Victims' Rights-and Wrongs*, SALON.COM, (June 13, 1997), http://www.salon.com/june97/news/news970613.html.

[479] *See* Baird & McGinn, *supra* note 475, at 466-67 (2004) (footnotes omitted).

barred from testifying, but that her view of the appropriate sentence could not be allowed.[480] In a Texas case, the district attorney's office cut off communication with the mother of a murdered twenty-year old girl and withheld information from her concerning upcoming hearings after learning about her view against putting the defendant to death.[481]

Because of the fact that anti-death penalty families are in conflict with the prosecution's agenda, one commentator states that, "[i]t is too easy for such families to be relegated to the status of second-class victims. It is too easy for prosecutors to decide that such families are not really victims at all in the eyes of the law," which strips them of all rights victims should possess.[482] Accordingly, anti-death penalty survivors are being re-victimized—they are first victimized by the murderer, and later victimized by prosecutors and the criminal justice system.[483] This discriminatory treatment by the state is not solely based upon the fact that mercy opinions contradict the prosecution's typical agenda; it relies also on the courts' current position of disallowing such opinions to come before the jury. The state could have never ignored or "silenced" anti-death penalty survivors, but for the fact that they were precluded from voicing their opinions in court. Thus, considering mercy opinions as admissible evidence in capital cases would empower anti-death penalty survivors and strengthen their position before prosecutors.[484]

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[480] *Id.*
[481] *See* Cushing & Sheffer, *supra* note 475, at 11-12.
[482] *Id.* at 8. "In fact, some states explicitly grant prosecutors the right to determine who shall be considered a victim of a crime. In Maine, for example, the Victim's Bill of Rights states, 'A person who is certified by the prosecutor to be a victim shall be considered a victim.' In Oregon, the state Constitution defines 'victim' as 'any person determined by the prosecuting attorney . . . . '" *Id.* at 8 n. 2.
[483] *See, e.g.*, Baird & McGinn, *supra* note 475, at 447 (arguing that victim survivors who do not support capital punishment are being victimized again at the hands of the state and judges).
[484] *See* Bibas, *supra* note 372, at 338 (arguing that, even if the state holds the exclusive right to punish, it should take a victim's interest in forgiveness into consideration).

c. Permitting Mercy Opinions Helps Meet the Need for Closure

Allowing mercy opinions to come before capital juries is beneficial to victims' families with regard to the concept of closure.[485] Helping survivors achieve closure has been used as a rationale for imposing the penalty of death,[486] but not all families find healing in vengeance.[487] Some survivors may seek recovery through forgiveness and the opportunity to forgive the murderer by calling for mercy in the sentencing stage.[488] SueZann Bosler's father was killed in front of her.[489] Yet, she described the day she forgave her father's murderer as "the happiest day of [her] life," and added "I call that my day of victory. I pointed to [the defendant] and said, 'I forgive you.' I felt a sense of relief, and peace overcame me inside."[490] Similarly, Bud Welch, a father of a twenty-three-year-old victim, who was killed in the Oklahoma City bombing in 1995, has forgiven the defendant Timothy McVeigh.[491] Welch said that "I'm not going to find any healing by taking Tim McVeigh out of his cage to kill

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[485] Allowing murder survivors to make sentencing recommendations calling either for life or death provides several benefits in various aspects. *See supra* pp. 66-67.

[486] *See, e.g.*, Vik Kanwar, *Capital Punishment As "Closure": The Limits of A Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 216 (2002) ("[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."); Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 383 (2007) ("[T]he death penalty, though rarely implemented, is touted as bringing 'closure' to family members of homicide victims."). *See also* Mullett, *supra* note 475, at 1627 n. 75 ("[*Payne* quoted a] prosecutor's closing argument which specifically invoked the future needs of the surviving victim as a justification for imposition of a death sentence.").

[487] *See, e.g.*, Bandes, *supra* note 378, at 1599-1601 (noting that closure may be sought in different ways); Kanwar, *supra* note 486, at 245 ("[T]here is in practice no real distinction between families demanding execution so they can have closure and families demanding a different sentence so they can have closure.").

[488] *See, e.g.*, Hoffmann, *Revenge or Mercy*, *supra* note 346, at 539 (arguing that if it is accurate that "responding mercifully or forgivingly might be more conducive to the crime victim's psychological recovery than continuing to harbor feelings of vengeance and anger," then the family's choice of forgiveness should be given "some weight" by the sentencer at the penalty stage).

[489] David Pallister, *'Spare the Life of My Loved One's Killer': Murder Victims' Families Speak Out Against U.S. Death Penalty*, THE GUARDIAN, (Oct. 9, 1999), http://www.theguardian.com/world/1999/oct/09/davidpallister.

[490] *Id.*

[491] *Some Oklahoma City Bombing Families Fight for McVeigh's Life*, CNN.COM, (May 4, 2001), http://www.cnn.com/2001/US/05/04/mcveigh.families/index.html.

him. It will not bring my little girl back."[492] For other family members, merely advocating for mercy could bring them closure even with no forgiveness involved.[493] The parents of a murder victim, Matthew Shepard, made a request that the prosecutor give the defendant, Aaron McKinney, two life terms in prison rather than pursue a death sentence if McKinney relinquished his right to appeal.[494]After sentencing, the victim's father made the following statement to the court addressing the defendant:[495]

> I would like nothing better than to see you die, Mr. McKinney. However, this is the time to begin the healing process. To show mercy to someone who refused to show any mercy. To use this as the first step in my own closure about losing Matt . . . . Mr. McKinney, I'm going to grant you life, as hard as it is for me to do so, because of Matthew . . . . You robbed me of something very precious and I will never forgive you for that. Mr. McKinney, I give you life in the memory of one who no longer lives. May you have a long life and may you thank Matthew every day for it.[496]

It seems contradictory to deny anti-death survivors their chance to find healing by precluding them from communicating their desire of leniency to the sentencing authority, then trotting

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[492] *Id.*

[493] According to some scholars, forgiveness and mercy are two different concepts in terms of "feeling" verses "treating". *See, e.g.*, JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY, 167 (1988), *quoted in* Mcthenia, *supra* note 446, at 330-31. Murphy and Hampton wrote:

> Mercy, though related to forgiveness, is clearly different in at least these two respects. First, to be merciful to a person requires not merely that one change how one feels about that person but also a specific kind of action (or omission)-namely, treating that person less harshly than, in the absence of mercy, one would have treated him. Second, it is not a requirement of my showing mercy that I be an injured party. All that is required is that I stand in a certain relation to the potential beneficiary of mercy. This relation-typically established by legal or other institutional rules-makes it appropriate that I impose some hardship upon the potential beneficiary of mercy.

Id.

[494] Michael Janofsky, *Wyoming Man Get Life Term in Gay's Death*, N.Y. TIMES, (Nov. 5, 1999), http://www.nytimes.com/learning/students/pop/articles/matthew-shepard.html.

[495] *Id.*

[496] JUDY SHEPARD, THE MEANING OF MATTHEW: MY SON'S MURDER IN LARAMIE, AND A WORLD TRANSFORMED 133 (Hudson Street Press 2009). In another case of leniency without forgiveness, a victim's mother asked the prosecutor not to push for death penalty because she and the rest of the survivors did want a **"**sensational and lengthy capital murder trial. Instead, they wanted 'closure and to get on with [their] lives.'" Stephen Hunt, *Slain Son 'Deserves More Dignity'; Mother Says Killer Should Die, But Agrees to Life-Sentence Deal; Mother Accepts Life Sentence for Murderer*, SALT LAKE TRIB., Oct. 16, 1997, at B1, *quoted in* Mcthenia, *supra* note 446, at 339.

out a family's closure as one ground to justify the penalty of death. Some survivors renounce this reasoning by stating, "Do not kill in our names."[497]

Scholars have refused the closure argument by contending that the "purpose of a criminal prosecution is not to heal the wounds of the victim, but to punish the offender. Oftentimes the two may coincide, but that cannot be the sole mission of justice."[498] Interestingly, the legal system has recognized a family's need for closure when they desire vengeance, by permitting the family to witness the execution of the offender.[499] Yet, if the justification for such practice is that it delivers a sense of closure to the victims' families,[500] the same need should be considered in cases where families seek mercy, as well. In other words, if surviving families' relief is important, it should be important for all families, regardless of their stance on the death penalty. Accordingly, if voicing an opinion against imposing capital punishment is some survivors' route towards experiencing closure and moving on with their lives, they should be given the right to voice those opinions within the justice system.

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[497] *See, e.g.*, Thomas J. Mowen & Ryan D. Schroeder, *Not In My Name: An Investigation of Victims' Family Clemency Movements and Court Appointed Closure*, WESTERN CRIMINOLOGY REV. 12(1), 65 (2011), http://www.westerncriminology.org/documents/WCR/v12n1/Mowen.pdf; RACHEL KING, DON'T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY (Rutgers University Press 2003); *Not in Our Name: Murder Victims' Families Speak Out Against the Death Penalty*, MURDER VICTIMS' FAMILIES FOR RECONCILIATION, http://www.mvfr.org/no-not-in-our-names.

[498] Beth E. Sullivan, *Harnessing Payne: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601, 639 n.15 (1998). *But see* Governor Mario M. Cuomo, *The Crime Victim in a System of Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 1, 20 (1992) (concluding that criminal justice system should aim to deliver closure to victims).

[499] "[I]ndividual 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 . . . ." Kanwar, *supra* note 486, at 240 (quoting Paul Boudreaux, *Booth v. Maryland and the Individual Vengeance Rationale for Criminal Punishment*, 80 J. CRIM. L. & CRIMINOLOGY 177, 184 (1989)). In the Oklahoma City bombing case, more than 240 victims' survivors watched the exaction of McVeigh. *See id.* at 245.

[500] *See, e.g.*, Judy Eaton & Tony Christensen, *Closure and Its Myths: Victims' Families, the Death Penalty, and the Closure Argument*, INT'L REV. OF VICTIMOLOGY, 20(3), 327 (2014) (noting that the "common justification" for allowing surviving relatives to view the execution is to bring them closure); Kanwar, *supra* note 486, at 242 (arguing that witnessing executions are one of the most common routes that "courts and legislators, propelled by the Victims' Rights Movement, have formulated ever more elaborate[ly]" to give victims a sense of closure).

The closure argument becomes even stronger in cases where the offender and the deceased victim are related, where the relatives of both are one and the same. Cases involved children of parents who kill one another may be the best example.[501] Murder survivors in these types of case have already lost a loved one, and some of them may feel that the execution of another family member would make them suffer twice.[502] In such situations, it is not unusual for some family members to be against imposing death, and allowing them to, at the very least, express their desire to extend mercy to their "related" defendant might reduce their grief and bring them a degree of closure.

The possibility that survivors of one-victim crime or multi-victim crimes may be divided as to what sentence could give them closure is not a fatal objection to the approach of permitting mercy opinions.[503] Survivors do not need to agree on the same sentence, rather, everyone should be able to voice their own opinions regardless of the others' choices. At the

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[501] For instance,

> Felicia Floyd was [eleven] when her father murdered her mother in a drunken rage. Felicia's father was on death row in Georgia for [twenty-one] years, during which time the family was able to find some reconciliation. Felicia and her brother pleaded with the state not to execute their father, but were ignored. The execution left them orphans.

The Closure Myth, EQUAL JUSTICE USA, http://ejusa.org/learn/victims-families/. *See also* Ortiz v. State, 869 A.2d 285, 302-03 (Del. 2005). The victim's daughter wrote a mitigation letter to the trial judge for Ortiz, the killer of her mother, stating that "she would be in more pain if, in fact, he was put to death, and that taking another parent from her is not going to help her . . . . [H]e has been part of her life and, more or less, has been a father figure to her." The court, however, affirmed the trial judge's excluding of the daughter's opposition to capital punishment from her statement. *Id.*

[502] *See, e.g.*, Hascall, *Shari'ah and Choice*, *supra* note 372, at 44 ("Where the victim is killed by a family member, the negative consequences of the death penalty on the rest of the family are readily apparent.").

[503] *See, e.g.*, State v. Williams, 904 P.2d 437, 454 (Ariz. 1995) (involving murder survivors with conflicting recommendations on the appropriate sentence.) The victim's sister recommended a sentence of life in prison because "she did not want defendant's family to suffer the way her family had suffered." Yet, the victim's father and another sister requested death. *See id.*

Another possible objection to authorizing mercy opinion is that the survivors' need to heal is not always the reason behind requesting mercy. The survivors could have been influenced or even coerced by the defendant prior to sentencing. *See, e.g.*, Hoffmann, *Revenge or Mercy*, *supra* note 346, at 542 ("[Allowing survivors' opinion evidence] might provide a motive for the defendant (or a friend, family member, or the defendant's lawyer) to contact the survivors, either before or during the trial, in an effort to influence their opinions."). Capital defendants should be precluded from making any contact with the victim's family regarding their views on the proper sentence. *Id.* Further, the court has the authority to determine whether the survivor's testimony was voluntary or made under coercion. Vander Pol, *supra* note 291, at 729.

same time, it should not matter to the sentencer to hear survivors' conflicting views because they are, after all, only recommendations. Additionally, the dangers of presenting the jury with conflicting recommendations could be mitigated by instructing the jury that the evidence of survivors' opinions about the appropriate punishment should be taken into consideration, just as other evidence, and the jurors are the ones who are ultimately charged with making the final judgment.[504]

The criminal justice system should provide a place for mercy in the courtroom, and does not need to be "so cold, abstract, and impersonal."[505] In his dissent in *California v. Brown*,[506] Justice Blackmun embraced the element of mercy in the imposition of capital punishment by the sentencing authority, stating that "sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because, recognizing that the capital sentencing decision must be made in the context of contemporary values, we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value."[507] In any event, even if capital jurors were prejudiced by the surviving family's desire for leniency, the defendant would still be receiving a sentence of life imprisonment, which is inarguably a severe punishment as well.

Survivors of capital murder crimes deserve a stronger voice in the criminal system. One means toward accomplishing that end is to allow victim sentencing opinion evidence to be heard in court. Doing so would not only allow their views to be heard, but would further allow

[504] Hoffmann, *Revenge or Mercy*, *supra* note 346, at 540-41. *See also* Joseph L. Hoffmann, *Where's the Buck?-Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1157-58 (1995) ("[The trial judge should have] "a positive duty to try to impress upon death penalty jurors the responsibility they bear for the sentencing decision.")
[505] Bibas, *supra* note 372, at 333.
[506] 479 U.S. 538 (1987).
[507] *Id.* at 562-63 (Blackmun, J., dissenting) (internal citation and quotation marks omitted).

them to remind the prosecutors and sentencers that behind the state's case are real people--people who suffered the most from the murder.

Contrary to the minor role that capital murder survivors play in the United States justice system, victims' families under Islamic law control the decision making in murder cases. Part III examines the family members' participation in sentencing under Islamic law. It will explain in depth how it is the family's right to determine whether a murderer should live or die.

III. THE VICTIMS' FAMILIES CONTROL THE OUTCOME OF CAPITAL MURDER CASES UNDER ISLAMIC LAW

Islamic law is a religious law based on the Qur'an and the teachings of the Prophet of Islam, Muhammad ibn Abdullah[508] Peace Be Upon Him (PBUH).[509] Under Islamic law, homicide is a private claim between the victim's heirs and the offender. Under the doctrine of *qisas* (equality in retribution), the family members of the murder victim have the right to choose the punishment that is to be imposed. They may choose to have the offender executed. Or, they may choose to collect payment of blood money from the convicted person and, in some cases, his or her family. They may even forfeit both. Pardon is well encouraged based on the Holy Book of Islam.[510] Even though the victim's family may pardon the offender, in lieu of *diyya* or for free, the state maintains an interest in punishing the offender and may inflict any penalty other than death as a discretionary punishment.

The *Qisas* system of punishment existed in the pre-Islamic period (*Jahiliyah* (the Days of Ignorance)), where it was practiced by the Bedouin tribes on the Arabian Peninsula. However, Islam made some significant modifications to the old *qisas* system.[511] First, Islam limits *qisas* to the life of the killer alone and abrogates the prevailing practice in the per-Islamic era, in which other members of the killer's tribe were killed by the victim's tribe

[508] SAID RAMADAN, ISLAMIC LAW: ITS SCOPE AND EQUITY, 52, (1970).
[509] Whenever Prophet Muhammad or another prophet is mentioned verbally or in writing, it is traditional for Muslims to follow it with the phrase "Peace Be Upon Him," which is a prayer meaning "May the peace and blessing of God be upon him." Praying for others is encouraged in Islam and, in this his particular prayer, Muslims follow the tradition set by God in the Holy Qur'an. Verse 56 of chapter 33 states: "God and His angels bless the Prophet– so, you who believe, bless him too and give him greetings of peace." THE QUR'AN, *supra note* 23, 33:56 at 270.
[510] *Id.* 5:45 at 72; 3:133-34 at 44; 42:40 at 314.
[511] *See, e.g.*, JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 185 (Oxford Univ. Press 1982); RAJ BHALA, UNDERSTANDING ISLAMIC LAW (*Shari'a*) 1294-95 (LexisNexis 2011); MARKUS D. DUBBER & TATJANA HORNLE, THE OXFORD HANDBOOK OF CRIMINAL LAW 258 (Oxford Univ. Press 2014); Safia M. Safwat, *Offences and Penalties in Islamic Law*, 26 ISLAMIC QUARTERLY, 149, 171(1982).

which, in turn leads the killer's tribe to murder members of the victim's tribe in revenge. In other words, killing in tribal feuds was ultimately put to an end by the advent of Islam. As stated by one scholar: "The considerable restriction of blood feuds was a great merit of Muhammad's."[512]

Restricting the penalty of *qisas* to the murderer only is explicitly underlined by the Holy Qur'an where it states: "We [God] prescribed for them *a life for a life*."[513] In another Qur'anic passage, God prohibits the victim's family from being excessive in *qisas*; "Do not take life, which God has made sacred, except by right: if anyone is killed wrongfully, We [God] have given authority to the defender of his rights, *but he should not be excessive in taking life*, for he is already aided [by God]."[514] In addition, the principle of personality of punishment is well recognized in Islamic law. A criminal is responsible for his crime and his relatives or other people cannot be punished in his place. Verse 164 of chapter 6 provides that: "Each soul is responsible for its own actions; no soul will bear the burden of another."[515] Similarly, it was reported that the Prophet (PBUH) said: "No person will be punished because of another's crime."[516]

Second, prior to Islam, the Arab society did not observe equality in retribution--a stronger tribe would demand retribution in a form that it deemed more valuable, such as a man's life for a woman's, a free man's life for a slave's, or several poor men's lives for the life of one wealthy, high-born, or powerful man. On the contrary, *Shari'a* abolished such

[512] SCHACHT, *supra* note 511, at 185.
[513] THE QUR'AN, *supra* note 23, 5:45 at 72 (emphasis added).
[514] *Id.* 17:33, at 177 (emphasis added). *See also id.* 16:126 at 174 ("If you [believers] have to respond to an attack, make your response proportionate, but it is best to stand fast.")
[515] *Id.* 6:164 at 93.
[516] IMAM MUHAMMAD BIN YAZEED IBN MAJAH AL-QAZWINI, ENGLISH TRANSLATION OF SUNAN IBN MAJAH, vol. 3, *hadith* no. 2672, at 533 (Nasiruddin Al-Khattab trans., Riyadh: Darussalam 2007), http://www.kalamullah.com/ibn-majah.html [hereinafter SUNAN IBN MAJAH].

discrimination and insisted on equality. Verse 178 of chapter 2 from the Holy Qur'an reads: "You who believe, fair retribution [*qisas*] is prescribed for you in cases of murder: *the free man for the free man, the slave for the slave, the female for the female*."[517] Note, it should not be understood from this Qur'anic passage that a free man would not be killed for murdering a slave, nor that a man would not be punished for murdering a woman (or vice-versa). In order to appreciate the concept of *qisas* in Islamic law, all murder-related verses must be read together because they explain and complete each other. The Qur'an emphasizes that the soul of the human being is absolutely sacred in verse 151 of chapter 6, which states, "do not take the life God has made sacred, except by right."[518] Another passage from the Holy Qur'an provides that: "if anyone kills a person– unless in retribution for murder or spreading corruption in the land– it is as if he kills all mankind, while if any saves a life it is as if he saves the lives of all mankind."[519] Islam considers all lives to be equal, and whoever wrongfully takes the life of another person will be subject to a *qisas* punishment, based on verse 45 of chapter 5 which says: "We [God] prescribed for them *a life for a life.*"[520]

The third improvement Islam made on the pre-Islamic version of *qisas* was introducing the concept of pardon (*afw*).[521] The family of the murder victim may pardon the perpetrator by renouncing their right of *qisas* and take payment of blood money instead, or they may forgo both retributions.[522] Based on verse 178 of chapter 2, *qisas* punishment could

[517] THE QUR'AN, *supra* note 23, 2:178 at 20 (emphasis added).
[518] *Id.* 6:151 at 92.
[519] *Id.* 5:32 at 71.
[520] *Id.* 5:45 at 72 (emphasis added).
[521] *See* discussion *infra* Part III.C.
[522] The victim's family is entitled to give the killer total forgiveness which includes remitting the right to blood money as well. *See infra* text accompanying notes 795-96.

be mitigated to blood money when a pardon is granted which represents alleviation and mercy from God to humanity. It sates:

> You who believe, fair retribution [*qisas*] is prescribed for you in cases of murder: the free man for the free man, the slave for the slave, the female for the female. *But if the culprit is pardoned by his aggrieved brother, this shall be adhered to fairly, and the culprit shall pay what is due in a good way. This is alleviation from your Lord and an act of mercy*. If anyone then exceeds these limits, grievous suffering awaits him.[523]

Another Qur'anic passage indicates that forgiveness is better than demanding *qisas*, by providing that:

> We [God] prescribed for them a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, an equal wound for a wound: *if anyone forgoes this out of charity, it will serve as atonement for his bad deeds*. Those who do not judge according to what God has revealed are doing grave wrong.[524]

Also, as one commentator expresses, these "verses carry the spirit of reconciliation between the parties involved as opposed to the then prevailing custom in which everything, after the occurrence of murder, was calculated to escalate the enmity between the families involved."[525]

Finally, *qisas* was applicable to all homicide cases before the advent of Islam, which means it made no difference whether the victim had been murdered intentionally or by mistake. The *Shari'a* introduced the Arabians to the distinction between murder and manslaughter by establishing the element of intent (*niyya*).[526] *Qisas* in the light of Islam is only *implemented on* intentional killers; cases of unintentional homicide are sanctioned with blood money. The verse 92 of chapter 4 reads: "Never should a believer kill another believer,

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[523] THE QUR'AN, *supra* note 23, 2:178 at 20 (emphasis added).
[524] *Id.* 5:45 at 72 (emphasis added).
[525] EL-SHEIKH, *supra* note 21, at 97.
[526] *See* BHALA, *supra* note 511, at 1291 (noting that since Islamic law recognizes the distinction between deliberate murder and intentional killing, the levels of criminal culpability, by no means, were developed first in the United Kingdom or the United States).

except by mistake. *If anyone kills a believer by mistake* he must . . . pay compensation [*diyya*] to the victim's relatives, unless they charitably forgo it."[527]

In addition to classical Islamic law, this study uses the application of *qisas* in the state of Libya to emphasize that *qisas* is not a mere theory of the past.[528] Libya is a great example of a modern state that codifies and implements the law of *qisas* even though its legal system is largely influenced by Western legal concepts. The Libyan criminal justice system is mix of civil and religious legal systems.[529] Specifically, it is based on Italian, and Islamic Law.[530] The Libyan Penal Code[531] and Libyan Code of Criminal Procedure[532] were drafted based on Italian codes and issued in 1953. Islamic law was not adopted for homicide crimes until 1994, when Law No. (6) of 1994 on the Rules of *Qisas* and *Diyya* (Libyan Law of *Qisas* and *Diyya*) was enacted.[533]

Under the Libyan Law of *Qisas* and *Diyya*, intentional homicide (first degree murder) is punishable by death unless it is waived by the heirs of the victim, in which case the penalty is blood money and life imprisonment.[534] As for unintentional homicide (involuntary

[527] THE QUR'AN, *supra* note 23, 4:92 at 59 (emphasis added).
[528] There are several contemporary countries that do not regard *Shari'a* as something of the past and formally incorporate Islamic criminal law into their legal systems such as Saudi Arabia, Yemen, the U.A.E., Libya, Sudan, Pakistan, Iran, Qatar, Somalia, and Northern Nigeria. RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY–FIRST CENTURY ix-x (Cambridge Univ. Press 2005).
[529] *See generally* John L. S. Simpkins, *Libya's Legal System and Legal Research***,** HAUSER GLOBAL LAW SCHOOL PROGRAM, NEW YORK UNIV. SCHOOL OF LAW (Jan. 2008), http://www.nyulawglobal.org/globalex/Libya.html#_Legislation_(Codes,_Cases.
[530] Libya was an Italian colony from 1911 until 1943. Libya gained its independence on December 24, 1951. *See Id.*
[531] LIBYAN PENAL CODE (1953), https://www.unodc.org/res/cld/document/lby/1953/penal_code_html/Libyan_Penal_Code_Excerpts.pdf.
[532] LIBYAN CODE OF CRIM. PROC. (1953), https://www.icc-cpi.int/iccdocs/doc/doc1444332.pdf.
[533] LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, OFFICIAL JOURNAL, vol. 5/1994 at 118, *amended by* LAW NO. (7) OF 2000 ON REVISING SOME RULES OF LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, OFFICIAL JOURNAL, vol. 15/2000 at 513.
[534] LAW NO. (7) OF 2000 ON REVISING SOME RULES OF LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 1.

manslaughter), the punishment is blood money.[535] It is worth nothing that the Law of *Qisas* and *Diyya* repealed only Penal Code provisions that dealt with the punishment of two forms of killing mentioned above. Quasi-intentional homicide (second degree murder) is still covered by the Penal Code, for which the penalty is imprisonment for term not exceeding ten years.[536] The Penal Code is also the binding authority regarding legal concepts such as self-defense,[537] attempt,[538] and complicity.[539] Further, the Penal Code's classifications of murder as a felony and of involuntary manslaughter as a misdemeanor are still in effect.[540] Finally, the Law of *Qisas* and *Diyya* constitutes solely substantive rules. Courts interpret these rules by following regular procedures that are proscribed in the Libyan Code of Criminal Procedure.

Since this Dissertation examines the role of the victim's family in the punishment process, exploring the law of *qisas* in both Islamic and Libyan legal systems will not address aspects of the law that relate to criminalization It will concentrate, rather, on the punishment aspect of the law.

This Part starts with a main outline of Islamic law as an essential background to comprehend the *qisas* system of punishment. It will then explore the choice of *qisas*, in which the family of the murdered person wants the offender to be executed. The final portion of the Part will discuss pardon as the other option available to the victim's relatives, which they may exercise if they wish to save the offender's life. Each choice will be covered according to the

[535] LAW NO. (6) OF 1994 ON THE RULES OF *QISAS* AND *DIYYA*, art. 3.
[536] LIBYAN PENAL CODE, art. 374; Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 1268/44 (Dec. 8, 1998) (unreported) (Libya); Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 786/44 (Dec. 1, 1998) (unreported) (Libya). *See* discussion *infra* notes 801-07.
[537] LIBYAN PENAL CODE, art. 70-73.
[538] *Id.*at art. 59-60.
[539] *Id.*at art. 99-104.
[540] *Id.*at art. 53-54; Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 333/46 (April 30, 2002) (unreported) (Libya).

rules of *Shari'a* and the provisions of Libyan Law of *Qisas* and *Diyya* along with the Libyan Supreme Court's related rulings.

A. An Overview of Islamic Law (*Shari'a*)

The literal meaning of the word "*Shari'a*" is "a way to the watering-place or a path apparently to seek felicity and salvation."[541] By the advent of Islam, "*Shari'a*" has come to mean the way of life set by Allah (God) as the Qur'an itself indicates in an address to the Prophet Muhammad (PBUH): "Now We [God] have set you [Muhammad] on a clear religious path [*Shari'a*], so follow it. Do not follow the desires of those who lack [true] knowledge."[542] The Islamic *Shari'a* (*Al-Shari'a Al-Islamiyah*) refers to the divine law that is found in the verses of the Holy Qur'an and in the traditions (*Sunnah*) of the Prophet of Islam, Muhammad (PBUH).[543] Islamic law is often used as a synonym for *Shari'a*.[544] Yet, Islamic law is wider than *Shari'a* because, in addition to the Qur'an and *Sunnah*, Islamic law also encompass Islamic jurisprudence (*figh*), which consists of sets of guidelines, rules and regulations based on the Qur'an and *Sunnah*, made by successive generations of learned jurists, through interpretation, analogy, consensus, and disciplined research.[545] In the interest of simplicity, both terms will be used synonymously.

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[541] MOHAMMAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 14 (Oneworld Publications 2008).
[542] THE QUR'AN, *supra* note 23, 45:18 at 325. *See also* KAMALI, SHARI'AH LAW. *supra* note 541, at 14 ("In its common usage, *Shari'ah* refers to commands, prohibitions, guidance and principles that God has addressed to mankind pertaining to their conduct in this world and salvation in the next.").
[543] *See, e.g.*, RAMADAN, *supra* note 508 at 52; KAMALI, SHARI'AH LAW, *supra* note 541, at 16.
[544] *See, e.g.*, Michael J.T. McMillen, *International Legal Developments in Review: 2007 — Islamic law Forum*, 42 THE INT' LAW. 1017-32 (Summer 2008), *quoted in* (BHALA, *supra* note 511, at xix n. 8 ("[T]he *Shari'a* "is what commonly referred to as Islamic Law.").
[545] *See, e.g.*, Hascall, *Shari'ah and Choice*, *supra* note 372, at 56 ("The term Islamic law is broader than the term *Shari'ah*. Islamic law incorporates other sources of jurisprudence that include the works of the scholars interpreting the *Shari'ah*. This man-made gloss on the *Shari'ah*, is known as the *Fiqh*, or Islamic jurisprudence."); Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE, 27, 32 (2002) (The term "Islamic law" generally is used in reference to the entire system of law and jurisprudence).

To appreciate the mechanism of Islamic system and criminal law, specifically, four aspects will be discussed in the following sections: the sources of Islamic law, the Islamic Legal Schools of jurisprudence, the categories of offenses, and homicides.

1. Sources of Islamic Law

There are four sources of Islamic law. The first two form the primary sources which are the Quran[546] and the *Sunnah* (the traditions of the Prophet (PBUH)).[547] The Qur'an is the highest authority in *Shari'a* and, as such, it comes before the Prophet's (PBUH) *Sunnah*. The secondary sources include *Ijma* (consensus of opinion)[548] *and Qiyas* (analogical reasoning).[549] These supplementary sources derive from the Holy Qur'an and *Sunnah* and cover issues that are not explicitly regulated by the primary sources.

a. The Qur'an

The Qur'an is the Holy Book of Islam.[550] To Muslims, the Qur'an is the actual Word of Allah (God) as revealed directly by the Angel Gabriel to Prophet Muhammad (PBUH) over a period of twenty-two years from 610 A.D., when he was forty years old, until 632 A.D., when he passed away.[551] The Qur'an was revealed in pure and clear Arabic language, as testified by

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[546] The Holy Book of Islam conveyed to the Prophet Muhammad PBUH from Allah (God) through the angel Gabriel. *See* discussion *infra* pp. 98-99.

[547] The *Sunnah* is what the Prophet (PBUH) said, did, approved, or disapproved of. *See* discussion *infra* pp. 99-103.

[548] *Ijma* is an Arabic term referring to the consensus of the Muslim community on any matter. *See* discussion *infra* pp. 103-04.

[549] *Qiyas* is the deduction of rules by analogical reasoning. *See* discussion *infra* pp. 105-06.

[550] The term "*qur'an*" in Arabic is a noun which came from the verb "*qara'a*" which means "to read." So, the word "*qur'an*" refers to the concept of reading or recitation. *See* BHALA, *supra* note 511, at 292.

[551] About the staged revelation of the Qur'an, Professor Raj Bhala wrote:

> Why did Allah reveal the message to Muhammad in stages over the last 22 years of the life of Muhammad? Why not transmit it all at once? The human mind cannot possibly know the purpose of Allah for the progressive revelation, but one possible explanation may be Allah sent the revelations in bits to allow mankind to comprehend it rather than overwhelming everyone all at once.

BHALA, *supra* note 511, at 76.

Allah in the Qur'an where He said: "We [God] have made it a Qur'an in Arabic so that you [people] may understand."[552] Since the Qur'an is regarded as God's revelation, it is superior to all other sources of Islamic law, and it can never be altered or overruled. The Qur'an contains 114 *suar* (chapters) of unequal length and each chapter is composed of a number of *ayat* (verses). The Prophet Muhammad (PBUH) was illiterate, so prior to his death, he had every revealed portion of the Qur'an immediately recorded in writing by his Companions (*Sahabah*) who served as scribes.[553] Muslims believe that the current text of the Qur'an is what was revealed to Prophet Muhammad (PBUH) without any change based on following verse from the Holy Qur'an itself: "We [God] have sent down the Qur'an Ourself, and We Ourself will guard it."[554] To Muslims, the Qur'an is a timeless code of life.[555] Further, many Qur'anic passages are devoted to legal rules which cover various areas of law such as property, contract, family (including marriage, divorce, maintenance, and inheritance), and criminal law.

b. The *Sunnah*

The *Sunnah* denotes to the method or tradition of the Prophet Muhammad (PBUH).[556] Specifically, it encompasses his sayings, actions, approvals, and disapprovals.[557] The term "*Hadith*"[558] refers to the narration of what the Prophet (PBUH) said or did, or his reaction or

[552] THE QUR'AN, *supra* note 23, 45:3 at 316.
[553] *See* Abdal-Haqq, *supra* note 545, at 45; BHALA, *supra* note 511, at 80.
[554] THE QUR'AN, *supra* note 23, 15:9 at 162.
[555] *See* BHALA, *supra* note 511, at 78.
[556] In Arabic, the word "*sunnah*" means a path that people follow. *See* BHALA, *supra* note 511, at 302.
[557] There are three types of *Sunnah*. The first, *Sunnah Qawliyyah* (verbal tradition), which refers to the Prophet's (PBUH) statements. The second, Sunnah *Fiiliyyah* (practical tradition), denotes the practices, habits, and deeds of the Prophet (PBUH). The third, *Sunnah Taqririyyah*, comprises the approvals (or disapprovals) of Prophet Muhammad (PBUH) regarding the actions of the Companions, by remaining silent or appreciating them. *See* Mohamad K. Yusuff, *Introduction to the Development of Hadith Literature*, (March 19, 2004), http://www.forpeoplewhothink.org/Topics/Introduction_to_Hadith_Literature.html.
[558] The Arabic word "*hadith"* means speech or report. *See* BHALA, *supra* note 511, at 302.

silence to something said or done by others in his presence.[559] The *Sunnah* and *Hadith* are sometimes used interchangeably.[560] However, the term "*Hadith*" is technically narrower than "*Sunnah*." A *Hadith* is merely the recorded body of the *Sunnah.* Thus, every *Hadith* could be called *Sunnah*,[561] but following the method of life by which the Prophet (PBUH) lived can be called only *Sunnah*.[562]

The *Sunnah* constitutes the second primary source of Islamic law after the Qur'an.[563] The idea that the Prophet's (PBUH) tradition is a source of the *Shari'a* is supported by the Qur'an in several places. For instance, the verse 7 of chapter 59 states: "[S]o accept whatever the Messenger [Muhammad (PBUH)] gives you, and abstain from whatever he forbids you. Be mindful of God: God is severe in punishment."[564] Another Qur'anic passage shows the binding authority of the *Sunnah*, as it reads: "You who believe, obey God and the Messenger [Muhammad (PBUH)], and those in authority among you. If you are in dispute over any matter, refer it to God and the Messenger . . . ."[565] It should also be mentioned that the *Sunnah* has come to supplement the Holy Qur'an as a source of Islamic law, based on the fact that the Prophet (PBUH) had the authority to interpret and explain the text of the Qur'an.

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[559] *See, e.g.*, Abdal-Haqq, *supra* note 545, at 46; BHALA, *supra* note 511, at 302-03; Amin Ahsan Islahi, *Difference between Hadith and Sunnah*, http://www.renaissance.com.pk/jafelif986.html (last visited March 27, 2016); Yusuff, *supra* note 557.

[560] *See, e.g.*, EL-SHEIKH, *supra* note 21, at 32 (stating that *Sunnah* is synonymous with *Hadith*).

[561] The term "*Sunnah*" is used more to refers to the actions and practices of Prophet Muhammad (PBUH) and "*Hadith*" to point out to the Prophet's (PBUH) sayings. *See* BHALA, *supra* note 511, at 302-03.

[562] *See* Islahi, *supra* note 559 ("[T]he *Sunnah* of the Prophet [(PBUH)] . . . means the way of life which the Prophet [(PBUH)] taught the people in theory and practice and for which, in his capacity as a teacher of *Shari'ah* (Islamic Law) he laid down ideal standards leading to a life which one should meet to earn Allah's approval through complete submission to His Commandments.").

[563] EL-SHEIKH, *supra* note 21, at 31 ("Due to the characteristics of the Qur'an in terms of setting out general principles, many of its rules ought to be read in conjunction with the *Sunnah* in order to be put in their legal perspective.").

[564] THE QUR'AN, *supra* note 23, 59:7 at 366. *See also id.* 4:80 at 58 ("Whoever obeys the Messenger [Muhammad (PBUH)] obeys God.").

[565] *Id.* 4:59 at 56. *See also id.* 24:54 at 224 ("Say, 'Obey God; obey the Messenger. If you turn away, [know that] he is responsible for the duty placed upon him, and you are responsible for the duty placed upon you. If you obey him [Prophet Muhammad (PBUH)], you will be rightly guided, but the Messenger's duty is only to deliver the message clearly.'").

Such authority is established by the Qur'an itself, where it states: "We [God] have sent down the message [the Qur'an] to you too [Prophet], so that you can explain to people what was sent for them, so that they may reflect."[566] In other words, the *Sunnah* clarifies what the Qur'an leaves vague and further addresses some matters that are not mentioned in.[567] Nevertheless, the *Sunnah* cannot repeal or change a Qur'anic rule as explicitly stated by verse 15 of chapter 10 as follows:

> When Our clear revelations are recited to them, those who do not expect to meet with Us say, "'Bring [us] a different Qur'an, or change it.'" [Prophet], say, "'It is not for me to change it of my own accord; I only follow what is revealed to me, for I fear the torment of an awesome Day, if I were to disobey my Lord.'"[568]

The process of reducing the Prophet's (PBUH) *Sunnah* to writing did not take place until after his death.[569] To avoid the possibility of confusing the Qur'anic verses with his Prophetic traditions, Prophet Muhammad (PBUH) precluded his companions from writing down his teachings.[570] It was reported that the Messenger of Allah (PBUH) said: "Do not write down what I say, and whoever has written down anything from me other than the

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[566] *Id.* 16:44 at 168.

[567] *See e.g.*, Kamali explains that:

> As a source of *Shari'ah*, the *Sunnah* enacts its rulings in the following three capacities. . . . Firstly, it may simply reiterate and corroborate a ruling which originates in the Qur'an . . . . Secondly, the *Sunnah* may consist of an explanation or clarification of the Qur'an: it may clarify the ambivalent (*mujmal*), qualify the absolute (*mutlaq*), or specify the general (*'amm*) of the Qur'an . . . . Thirdly, the *Sunnah* may consist of rulings on which the Qur'an is silent, in which case the ruling in question originates in the *Sunnah* itself.

KAMALI, SHARI'AH LAW, *supra* note 541, at 24-25; EL-SHEIKH, *supra* note 21, at 33 (stating that *Sunnah* supplements the Qur'an in two ways; either by explaining an exciting Qur'anic passage, or establishing a new rule for an issue about which the Qur'an was silent).

[568] THE QUR'AN, *supra* note 23, 10:15 at 129.

[569] EL-SHEIKH, *supra* note 21, at 33.

[570] *Id.*

Qur'an, let him erase it."[571] The complete collection of the *Hadith* was written two centuries after the death of the Prophet (PBUH).[572]

To establish the authenticity of a particular *Hadith*, each one had to be linked to the Prophet through a chain of transmitters.[573] The chain of transmission accompanying each *Hadith* is called "*Isnad*."[574] *Hadiths* are ranked according to their degree of authenticity, which is based on several factors, such as how many transmitters were involved in reporting the *Hadith*, their accuracy, and the level of consistency in the wording of the *Hadith* in various narrations.[575] Several collations of the *Hadith* were formed-- the most famous books compiled by recognized scholars are: Sahih Al-Bukhari,[576] Sahih Muslim,[577] Sunan Abu

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[571] IMAM ABUL HUSSAIN MUSLIM BIN AL-HAJJAJ, ENGLISH TRANSLATION OF SAHIH MUSLIM, vol. 7, bk. 53, *hadith* no. 7510, at 400 (Nasiruddin Al-Khattab trans., Riyadh: Darussalam 2007), http://www.kalamullah.com/sahih-muslim.html [hereinafter SAHIH MUSLIM].

[572] *The History of Hadith*, TRUE ISLAM, http://www.quran islam.org/articles/part_1/history_hadith_1_(P1148).html (last visited March 27, 2016).

[573] BHALA, *supra* note 511, at 308.

[574] *Id.*

[575] *Id.* There are four ranks of *Hadith*:

> The highest rating for a *hadith*, "*mutawatir*," means that particular *hadith* is reported by many different sources. "*Mutawatir*" signifies the highest level of authenticity a *Hadith* can have. In effect, this denomination signifies the *hadith* has been highly corroborated. Thus, a *hadith* that is "*mutawatir*" also is known as "*sahih*," which means reliable. In contrast, "*hasan*" is good, and "*da'if*" is weak. "*Hasan*" connotes the second highest level of authenticity that a *hadith* can have, meaning that the *hadith* has been corroborated, but not as extensively as is the case with a *hadith* that is "*sahih*," and there are some discrepancies in the wording of the versions of the *hadith.* The third highest levels of authenticity, *da'if,* signifies a *hadith* that is weak. Such a *hadith* is not widely corroborated, and contains some uncertainty or flaw, such as an interruption in the chain of transmission *(isnad)* or a transmitter in it *(rawi)* is unknown. Finally, a *hadith* considered "*mawdua*" is fabricated.

Id. at 308-09.

[576] THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI (Muhammad Muhsin Khan trans., Riyadh: Darussalam 1997), http://www.kalamullah.com/sahih-bukhari.html [hereinafter SAHIH AL-BUKHARI].

[577] SAHIH MUSLIM, *supra* note 571.

Dawood,[578] Sunan Ibn Majah,[579] Jami' At-Tirmidhi,[580] and Sunan An-Nasa'I.[581] The first two compilations (Sahih Al-Bukhari and Sahih Muslim), though, are acknowledged by all Muslim scholars as the most accurate, authentic and reliable *Hadith* collections.[582]

c. The *Ijma* (Consensus of Opinion)

The fact that not all questions are answered in the Qur'an and the *Sunnah* raised the need for another source of Islamic law to face novel legal issues that arise over time. *Ijma* was developed to be the new secondary authority of the *Shari'a.*[583] The literal meaning of "*Ijma*" in Arabic is "unanimous agreement" or "consensus".[584] In the context of Islamic law, *Ijma* refers to the consensus of the Muslim community, specifically Muslim jurists on any Islamic principle.[585] When Muslim scholars reach a unanimous agreement on a matter, it becomes a

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[578] IMAM HAFIZ ABU DAWUD SULAIMAN BIN ASH'ATH, ENGLISH TRANSLATION OF SUNAN ABU DAWUD (Nasiruddin al-Khattab trans., Riyadh: Darussalam 2008), http://www.kalamullah.com/sunan-abu-dawood.html [hereinafter, SUNAN ABU DAWUD].

[579] SUNAN IBN MAJAH, *supra* note 516.

[580] IMAM HAFIZ ABU EISA MOHAMMAD IBN EISA AT-TIRMIDHI, ENGLISH TRANSLATION OF JAMI' AT-TIRMIDHI (Abu Khaliyl trans., Riyadh: Darussalam 2007), http://www.kalamullah.com/jami-at-tirmidhi.html [hereinafter, JAMI' AT-TIRMIDHI].

[581] IMIM HIFIZ ABO ABDUR RAHMIN AHMAD BIN SHU'AIB BIN ALI AN-NASA'I, ENGLISH TRANSLATION OF SUNAN AN-NASA'I (Nasiruddin Al-Khattab trans., Riyadh: Darussalam 2007), http://www.kalamullah.com/sunan-an-nasai.html [hereinafter, SUNAN AN-NASA'I].

[582] *See An Introduction To The Science Of Hadith, The Classification Of Hadith: According To The Reliability And Memory Of Reporters*, ISLAMIC AWARENESS, http://www.islamic-awareness.org/Hadith/Ulum/asb7.html (last visited March 27, 2016) (explaining that, among all of the *Hadith*'s collectors, *Imams* Al-Bukhari and Muslim were highly admired because of their effort not to add anything other than the *sahih* (sound or reliable) *Hadith* to their collections).

[583] *See e.g.*, MATTHEW LIPPMAN, SEAN MCCONVILLE & MORDECHAI YERUSHALMI, ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION 32 (1988) (asserting that *Ijma* is a very good source of law which makes it possible to apply *Shari'a* to contemporary situations); John Makdisi, *Islamic Law Bibliography*, 78 L. LIBR. J., 103, 106 (1986) ("[I]*jma* became a device for confirming a point of law not explicitly stated in the Koran and *sunna*."). *See generally* AHMAD HASAN, THE DOCTRINE OF IJMA': A STUDY OF THE JURIDICAL PRINCIPLE OF CONSENSUS (New Delhi, Kitab Bhaban 2003); Mohammad Omar Farooq, *The Doctrine of Ijma: Is there a consensus?* (2006); Ahmad Shafaat, *The Meaning of Ijma'*, ISLAMIC PERSPECTIVES (1984), http://www.islamicperspectives.com/meaningofijma.htm (last visited March 28, 2016).

[584] The word "*ijma"* is a noun derived from the verb "*ajma'a*," which has two meanings: to determine and to agree upon. Shah Abdul Hannan, *Ijma (Consensus Of Opinion)*, ISLAMIC JURISPRUDENCE, http://www.muslimtents.com/aminahsworld/islamic_jurisprudence_ijma.html (last visited March 27, 2016).

[585] *See e.g.*, MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 231 (Cambridge, The Islamic Text Society, 2003) ("[*Ijma* is] the unanimous agreement of the *mujtahidun* [highly educated individuals who are qualified to exercise *ijtihad* (independent reasoning) to interpret Islamic law in practical contexts] of the Muslim community of any period following the demise of the Prophet Muhammad [PBUH] on any matter.");

binding law after the Qur'an and the *Sunnah*. It should be noted that *Ijma* existed only after the demise of the Prophet (PBUH) because before that, the Prophet (PBUH) himself resolved any cases that required interpretation of God's Will.[586] Although *Ijma* is based on human analysis rather than divine revelation, it should be supported by the Quran or the *Sunnah*, or at least consistent with them. The legal precedents that are formed through *Ijma* must never violate rulings provided by the primary sources of the *Shari'a*.

Muslim jurists find basis for the Doctrine of *Ijma* in Qur'anic passages and Prophetic tradition. The Holy Qur'an, verse 110 of chapter 3, for instance, states: "[Believers], you are the best community singled out for people: you order what is right, forbid what is wrong, and believe in God."[587] Another Qur'anic verse provides: "Far better and more lasting is what God will give to those who . . . *conduct their affairs by mutual consultation* . . . ."[588] The Prophet Muhammad (PBUH) is also reported to have said: "My nation will not unite on misguidance [wrong or error.]"[589] Finally, as one commentator said:

> *[I]jma'* can be hard to pin-point, and even once it is identified, hard to find. *Ijma'* is not a statute that is codified in a library in Medina [the second-holiest city in Islam after Mecca which both are located in Saudi Arabia], it is the practice and the common, consistent application of Islamic norms to problems. Evidence of *[I]jma'* is found in rulings and possibly rationales of some courts, much like American case law.[590]

Makdisi, *supra* note 583, at 106 ("Although theoretically consensus was taken from the community of Muslims, it eventually devolved on the legal scholars to form the consensus.").
[586] BHALA, *supra* note 511, at 317.
[587] THE QUR'AN, *supra* note 23, 3: 110 at 42.
[588] *Id.* 42:37-38 at 314 (emphasis added).
[589] JAMI' AT-TIRMIDHI, *supra* note 580, vol. 5, bk. 36, *hadith* no. 3950, at 174-75.
[590] BHALA, *supra* note 511, at 319.

d. The *Qiyas* (Analogical Reasoning)

The forth source of Islamic law is *Qiyas*.[591] Like *Ijma*, *Qiyas* was adopted after the death of the Prophet (PBUH) to meet the rising needs of modern Islamic society, where there was no clear guidance available in the primary authorities of *Shari'a*. *Qiyas* is "the deduction of legal prescriptions from the Quran or *Sunnah* by analogic reasoning."[592] Expressed differently, *Qiyas* is a process of applying an established ruling from the Qur'an or *Sunnah* to a new problem that was not addressed by the revealed law, provided that the precedent and the new problem share the same legal reason called (*illa*).[593] The *illa* is legal rationale behind creating the rule.[594] A common example for *illa* and for the use of *Qiyas* is the expansion of the express Qur'anic prohibition against alcohol to narcotics.[595] Alcohol is banned because it intoxicates the mind and impairs the user's control of his or her actions. Since narcotic substances affect the human mind in the same way--thus, narcotics are also prohibited by the use of analogy. Technically, the method of *Qiyas* does not create law; it merely extends the existing textual ruling to the emerging cases. At least one Prophetic tradition has been invoked to support the use of analogical reasoning. It was narrated that:

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[591] *Qiyas* in Arabic is literally translated as measurement. *Id.* at 319. *See generally* TAJUDEEN MUHAMMED B. ADIGUN, THE RELEVANCE OF *QIYAS* (ANALOGICAL DEDUCTION) AS A SOURCE OF ISLAMIC LAW IN CONTEMPORARY TIME (Zaria, Ahmadu Bello Univ. 2004), http://kubanni.abu.edu.ng:8080/jspui/bitstream/123456789/3931/1/Relevance%20of%20Qiyas%20in%20Islamic%20Law%20in%20the%20Contemporary%20World.pdf; Mohammad Omar Farooq, *Qiyas (Analogical Reasoning) and Some Problematic Issues in Islamic law* (2006).

[592] *Qiyas*, OXFORD ISLAMIC STUDIES ONLINE, http://www.oxfordislamicstudies.com/article/opr/t125/e1936?_hi=0&_pos=4943 (last visited March 30, 2016). *See also* BHALA, *supra* note 511, at 319 ("[Qiyas is] the practice of 'measuring' a rule given in the Qur'an or *Sunnah* and applying it analogically to new, yet similar, set of facts.").

[593] *See also* MUHAMMAD MUSLEHUDDIN, PHILOSOPHY OF ISLAMIC LAW AND THE ORIENTALISTS: A COMPARATIVE STUDY OF ISLAMIC LEGAL SYSTEM 135 (Lahore, Pakistan, Kazi Publications 1985) ("The function of *qiyas* is to discover the cause or *illa[]* of the revealed law so as to extend it to similar cases.").

[594] *See also Qiyas*, OXFORD ISLAMIC STUDIES ONLINE, *supra* note 592 ("The *illa* is the specific set of circumstances that trigger a certain law into action.").

[595] *See* THE QUR'AN, *supra* note 23, 5: 90 at 76 ("You who believe, intoxicants and gambling . . . are repugnant acts– Satan's doing– shun them so that you may prosper.").

> A man came to the Prophet [(PBUH)] and said: "Messenger of Allah, my mother has died and she owed one month's fasting. Shall I make it up on her behalf?" He said: "Don't you think that if your mother owed a debt, you would pay it off on her behalf?" He said: "Yes." He said: "The debt owed to Allah is more deserving of being paid off."[596]

By using analogical deduction, the Prophet (PBUH) in the *Hadith* quoted above extended the obligation of paying a debt that was owed to a human to that owed to Allah (fasting). The Doctrine of *Qiyas* can be also supported by rational reasoning. As one scholar explained:

> The express textual injunctions in the Qur'an and the *Sunnah* are limited in number, while the incidents and problems of life are unlimited and unending. Hence, it would be illogical to assert that all the problems and exigencies of life will be covered by the textual injunctions. Reason demands that rules of law should be derived from the fundamental sources by means of exercising reason and individual opinion. *Qiyas* therefore is a mode of reasoning to legislate for novel questions, to reveal the divine rule of law, and to harmonize between divine legislation and human interests.[597]

Different understandings and analyzations of *Shari'a* sources by Muslim jurists have formed the body of Islamic jurisprudence. The next section provides a brief look at the major Islamic schools of jurisprudence.

2. The Islamic Schools of Jurisprudence

Not all revealed rules are clear and definite. The varying interpretations of the imprecise injunctions in the sources of *Shari'a* led to the development of Islamic jurisprudence, or in Arabic, "*fiqh.*" Islamic jurisprudence can be defined as "the body of rules and decisions deduced from the sources of the *Shari'a* by the jurists concerning matters of a complex nature."[598]

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[596] SAHIH MUSLIM, *supra* note 571, vol. 3, bk. 13, *hadith* no. 2694, at 216.
[597] ADIGUN, *supra* note 591, at 127.
[598] EL-SHEIKH, *supra* note 21, at 53-54.

Islamic jurisprudence is formed through several legal Schools of thought called "*madhahib*." A legal School or *madhhab* can be defined as:

> [A] body of doctrine taught by a leader, or *imam*, and followed by the members of that school. The *imam* must be a leading *mujtahid*, one who is capable of exercising independent judgment. In his teaching, the *imam* must apply original methods and principles which are peculiar to his own school, independent of others. A *madhhab* must also have followers who assist their leader in the elaboration and dissemination of his teachings. A *madhhab* does not imply, however, a definite organization, formal teaching, or an official status, nor is there a strict uniformity of doctrine within each *madhhab*.[599]

These Schools agree on the principles of Islamic law, but they differ in the way they apply them in reaching their decisions. Accordingly, each School has ended up with different rules and regulations. Muslims are free to follow the interpretations of any School.[600] Further, Muslim people may either stick to the teachings of only one School, or embrace different Schools for different issues. There are four major *Sunnite* Schools of thought established by four Muslim jurists who lived in the first three centuries of Islam:[601]

- *Hanafi* School, which was formed by Abu Hanifa Al-No'man (*Imam* Abu Hanifa) (699-787 A.D.);[602]
- *Maliki* School, which was founded by Malik ibn Anas Al-Asbahi (*Imam* Malik) (710-795 A.D.);[603]

[599] KAMALI, SHARI'AH LAW, *supra* note 541, at 68.
[600] *See* BHALA, *supra* note 511, at 391 (noting that Muslim people are entitled to follow the opinions of any School among the Four Schools, even if the school they choose was not adopted School by the jurisdiction in which they live).
[601] *See generally* KAMALI, SHARI'AH LAW, *supra* note 541, at 68-87; BHALA, *supra* note 511, at 388- 407; Abdal-Haqq, *supra* note 545, at 69-74; Safwat, *supra* note 511, at 149-53.
[602] BHALA, *supra* note 511, at 389, tbl. 16-1. The *Hanafi* School is predominant amongst the people of Afghanistan, Guyana, India, Iraq, Pakistan, Suriname, Syria, Trinidad, and Turkey. Abdal-Haqq, *supra* note 545, at 69.
[603] BHALA, *supra* note 511, at 389, tbl. 16-1. Followers of the *Maliki* School are found principally in Libya, Tunisia, Algeria, Morocco, Chad, Mali, Nigeria, Kuwait, and Qatar. Abdal-Haqq, *supra* note 545, at 70-71.

- *Shafi'i* School, which was established by Muhammad ibn Idris ibn Al-Abbas ibn Uthman ibn Al-Shafi'i (*Imam* Al-Shafi'i) (768- 820 A.D.)[604] and;
- *Hanbali* School, which was created by Ahmad ibn Hanbal (*Imam* Ibn Hanbal) (780- 855 A.D.).[605]

According to Muslim jurists, there are three types of criminal acts: the *hudud*, *qisas*, and *ta'zir*. The following section will briefly examine the taxonomy of offense in Islamic criminal law.

3. Classification of Crimes in Islamic Law

Under Islamic penal law, offenses are classified based on the applicable punishments. *Shari'a* recognizes three kinds of penalties: *hudud*, *qisas*, and *ta'zir.*[606] Therefore, crimes are divided into three categories known by the same terms.[607]

a. *Hudud* Crimes

Hudud crimes are those with fixed penalties as set forth in either the Qur'an or *Sunnah*.[608] The term "*hadd*" (the singular form of *hudud*) means "limit" which in the context of Islamic law refers to the limit set by the leveled law.[609] The *hudud* crimes are considered to be the most serious. They are perceived to be offenses that not only harm people and the public order, but more significantly, crimes against God, and punishing the offender is

[604] BHALA, *supra* note 511, at 389, tbl. 16-1. The adherents of this School are predominantly in Egypt, Indonesia, Kenya, Malaysia, Philippines, Sri Lanka, and Yemen. Abdal-Haqq, *supra* note 545, at, 71.
[605] BHALA, *supra* note 511, at 389, tbl.16-1. The *Hanbali* School is followed in Saudi Arabia. Abdal-Haqq, *supra* note 545, at 72.
[606] *See generally* NAGATY SANAD, THE THEORY OF CRIME AND CRIMINAL RESPONSIBILITY IN ISLAMIC LAW: SHARI'A 50-57 (Office of International Criminal Justice, Univ. of Illinois 1991); Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. INT'L & COMP. L. REV. 29, 38-45 (1989).
[607] "*Hudud*," for example, is uses to refer to "crimes" and "punishments." The same applies to "*qisas"* and *ta'zir*."
[608] *See generally* PETERS, *supra* note 528, at 53-65; Robert Postawko, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J. ISLAMIC & NEAR E. L. 269, 286-300 (2002).
[609] *See* BHALA, *supra* note 511, at 1175.

deemed as the claim of God, or "*haqq* Allah."[610] As such, the punishment proscribed for these acts cannot be amended, altered, commuted, substituted, or pardoned.[611] There are seven *Hudud* offences: adultery or unlawful sexual intercourse (*zina*), false accusation of unlawful sexual intercourse (*qadhf*), consuming alcohol (*shrub al-khamr*), theft (*sariqah*), highway robbery (*qat' al-tariq* or *hirabah*), apostasy (*riddah*), and rebellion (*Baghi*).[612] In the *hudud* crimes, if one or more of the requirements for imposing the fixed punishment are not fulfilled, the state may punish the offender with a *ta'zir (*discretionary) sanction.[613]

b. *Qisas* Crimes

The *Qisas* category encompasses offenses that have sanctions specified in the Qur'an and *Sunnah*, but are considered claims of man (privet claims)--known in Arabic as *haqq adami*-- rather than God's claims.[614] The penalties for such crimes are similar to *hudud* penalties, in the sense of being restricted in the reveled law, meaning that they cannot be changed. Yet, what distinguishes a *qisas* penalty from a *hudud* penalty is that it may be waived by the rightful claimant. *Qisas* are crimes against the individual, and include homicide and bodily injury.[615] After *hudud,* the category of *qisas* contains the most severe crimes;

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[610] *See* PETERS, *supra* note 528, at 54 ("Since the objective of *hadd* penalties is to protect public interest, they are labeled as claims of God.").

[611] As El-Awa wrote:

> In the penal context, a punishment which is classified as *haqq Allah* embodies three main aspects. The first is that this punishment is prescribed in the public interest; the second is that it cannot be lightened nor made heavier; and the third is that, after being reported to the judge, it is not to be pardoned either by him, by the political authority, or by the victim of the offense.

MOHAMED SALEM EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 1 (Indianapolis, American Trust Publications 1981).

[612] Safwat, *supra* note 511, at 154.

[613] *See* DUBBER & HORNLE, *supra* note 511, at 262. *See infra* text accompanying note 624.

[614] The word "*qisas*" in Arabic literally means "equivalence" or "equality." *See generally* Postawko, *supra* note 608, at 300-05; Lippman, *supra* note 606, at 43-44.

[615] Islamic law recognizes various types of homicide. *See* discussion *infra* pp. 111-14.

especially, murder, which is explicitly classified as a capital offense by the Holy Qur'an.[616] *Qisas* crimes harm the victims along with the community. Thus, in case of pardon by the victim (or their family), the state is entitled to execute a discretionary punishment (*ta'zir*) in the interest of maintaining public order.[617]

c. *Ta'zir* Crimes

The last category of crimes is *ta'zir*.[618] This category involves conducts that are not included under *hudud* or *qisas*.[619] The *ta'zir* offenses are wrongs against persons or society for which no penalty is set in the Qur'an or *Sunnah*; rather, it is left to the discretion of the state. Most crimes that *Shari'a* recognizes are *ta'zir* offenses.[620] At the present time, *ta'zir* crimes and punishments are regulated in a criminal code in nearly all Islamic countries.[621] *Ta'zir* offenses are generally forbidden by either the Qur'an or the *Sunnah*, such as perjury, sodomy, gambling, and bribery.[622] Further, transgressions that are not described in the Qur'an or *Sunnah*, yet have harmful effects on the community might also classified as *ta'zir* offenses.[623] Note that *ta'zir*, in the sense of discretionary punishment, can be inflicted for *hudud* and *qisas* crimes in certain situations, which means that there are four cases where a punishment of *ta'zir* may be imposed:

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[616] *See* THE QUR'AN, *supra* note 23, 5:32 at 71 (emphasis added) ("[I]f anyone kills a person– unless in retribution for murder or spreading corruption in the land– *it is as if he kills all mankind*, while if any saves a life it is as if he saves the lives of all mankind.").
[617] *See* Safwat, *supra* note 511, at 171-72. *See also infra* text accompanying notes 624, 834-35.

[618] The word "*ta'zir*" means disgracing the offender for their shameful conduct. *See generally* Postawko, *supra* note 608, at 300-308; Lippman, *supra* note 606, at 44-45.
[619] *See* DUBBER & HORNLE, *supra* note 511, at 262 ("Offenses which are punished neither with *hadd* nor with *qisas* and *diya* can only be punished with a *ta'zir* punishment.").
[620] Elizabeth Peiffer, *The Death Penalty in Traditional Islamic Law and As Interpreted in Saudi Arabia and Nigeria*, 11 WM. & MARY J. WOMEN & L. 507, 519 (2005).
[621] DUBBER & HORNLE, *supra* note 511, at 262.
[622] *See* SANAD, *supra* note 606, at 64 (providing some criminal acts that fall into the category of *ta'zir* crimes).
[623] Hascall, *Restorative Justice in Islam*, *supra* note 22, at 55. *See also* DUBBER & HORNLE, *supra* note 511, at 262 ("[*Ta'zir*] deals with conduct that is forbidden in the Quran but for which no punishment is provided as well as for conduct that contradicts general principles of Islam.").

> [(1)][A]cts that do not meet the technical requirements for *hudud* or *qisas*, such as attempted adultery; [(2)] offenses generally punished by *hudud* but involving extenuating circumstances or doubt; [(3)] acts condemned in the Qur'an or *Sunnah* or contrary to public welfare, but not subject to *hudud* or *qisas*, such as false testimony; and [(4)] acts which violate social norms, such as obscenity.[624]

Ta'zir sanctions in Islamic law typically takes the form of fines, imprisonment, or a combination of both.[625] Unlike *hudud* and *qisas* penalties, discretionary punishments are subject to wide judicial *discretion.* In deciding a *ta'zir* case, the judge may take into considering the circumstances relating to the offense and the offender, along with the interest of society.[626]

One category of crimes that the system of *qisas* governs is homicide. The following section deals with the varying degrees of homicide under the Islamic legal system.

4. Types of Homicide in Islamic Law

According to the Islamic penal system, not all killings are alike. Based on the intent of the killer, homicides are divided into three types: intentional, quasi-intentional, and unintentional.[627]

a. Intentional Homicide (*Al-Qatl Al-Amd*)

The most severe form of killing is *al-qatl al-amd* or intentional homicide (murder).[628] It exists when the perpetrator intends the act that leads to the death of another, and has the intention of killing.[629] The element of intent may be inferred from using a weapon that usually kills.[630] It is important to note that the concept of *amd* (intent to kill) in the *Shari'a*

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[624] Peiffer, *supra* note 620, at 518-19. *See also* Lippman, *supra* note 606, at 45.
[625] BHALA, *supra* note 511, at 1177. *See* Postawko, *supra* note 608, at 307 (noting that there is a disagreement among Muslim scholars about whether death penalty can be inflicted as a discretionary punishment).
[626] Peiffer, *supra* note 620, at 518.
[627] *See generally* BHALA, *supra* note 511, at 1291-1300; Lippman, *supra* note 606, at 43-44.
[628] Whenever the term "murder" is used, it refers to the intentional homicide.
[629] *See* BHALA, *supra* note 511, at 1294.
[630] *Id.*

does not necessarily mean that the killer planned or premeditated the killing. It refers to a level of intent which separates intentional homicides from other homicides, where there is no intention of killing whatsoever.

Intentional homicide is punishable by *qisas*. However, the penalty of death can be remitted. The victim's family is given a choice to demand execution of the murderer, pardon him and accept blood money (*diyya*) for their loss, or go even with outright forgiveness.[631] Once the *qisas* is waived, the murderer becomes subject to a discretionary punishment known as "*ta'zir*."[632] The authority of *qisas* in intentional killing stems from following verse: "You who believe, fair retribution [*qisas*] is prescribed for you in cases of murder."[633] Also, it was narrated that the Prophet Muhammad (PBUH) stated that "whoever is killed deliberately, then it is [*qisas*.]"[634]

b. Quasi-Intentional Homicide (*Al-Qatl Shibh Al-Amd*)

In quasi-intentional killing, or *al-qatl shibh al-amd*, the offender has a quasi-intentional intent (*shibh al-amd*), which means that he or she intended the act, but not the result (death).[635] Thus, quasi-intentional homicide embodies actions that resulted in the death of the victim when the intention of the offender was merely to cause harm. A killing that occurs without using a deadly instrument, such as punching the victim or hitting him with a stick, may prove the existence of quasi- intentional intent.[636]

According to the opinion of the *Hanafi*, *Shafi'i*, and *Hanbali* Schools, the quasi-intentional killer is not subject to the penalty of *qisas* and the primary punishment is the

[631] *See* discussion *infra* Part III.B-C.
[632] *See* discussion *infra* Part III.C.3.
[633] THE QUR'AN, *supra* note 23, 2:178 at 20.
[634] SUNAN ABU DAWUD, *supra* note 578, vol. 5, bk. 38, *hadith* no. 4539, at 126.
[635] PETERS, *supra* note 528, at 43.
[636] BHALA, *supra* note 511, at 1297.

payment of blood money (*diyya*).[637] These Schools formed their view in accordance with the saying of the Prophet (PBUH) that provides:[638] "The [*diyya*] for killing that resembles intentional (killing) [quasi-intentional homicide] is severe like that for deliberate killing, *but the perpetrator is not to be executed*."[639] The jurists also argued that it would be totally unfair to punish a quasi-intentional killer with the same penalty (death) an intentional killer receives when the quasi-intentional killer did mean to take the victim's life.[640] One scholar has attempted to explain the majority's approach regarding the penalty of quasi-intentional homicide by stating that:

> [i]t is remarkable that this point of view was adopted by the majority of Muslim jurists, possibly because of their desire to minimize the amount of death penalty in the society and to save as many as possible from the gallows. If one were to look at the ultimate goal of these jurists one would agree that the objectives of the Islamic legal system are exclusively directed toward saving people's lives.[641]

From the prospective of *Imam* Malik, on the other hand, there is no distinction between intentional (*al-qatl al-amd*) and quasi-intentional (*al-qatl shibh al-amd*) killings; rather both of them fall into the category of intentional homicide,[642] and thus, are punishable by *qisas* and alternatively, by blood money (*diyya*) in the case of forgiveness.[643] The argument introduced by the *Maliki* School is that only intentional and unintentional killings were mentioned by the Holy Qur'an.[644]

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[637] MAWAFFAQ AL-DIN ABDULLAH IBN AHMAD IBN QUDAMAH AL-MAQDISI (IBN-QUDAMAH), AL-MUGHNI, vol. 9, 337-38 (Beirut, Dar Al-Kilab Al-Arabi) [hereinafter, AL-MUGHNI].
[638] *Id.*
[639] SUNAN ABU DAWUD, *supra* note 578, vol. 5, bk. 38, *hadith* no. 4565, at 140 (emphasis added).
[640] *See* ABD AL-QADIR AWDAH, AL-TASHRI AL-JINAI AL-ISLAMI MUQARANAN BI-AL-QANUN AL-WADI [ISLAMIC CRIMINAL LAW COMPARED WITH POSITIVE LAW], vol. 2, 93 (Cairo: Dar Al-Turath 1985).
[641] EL-SHEIKH, *supra* note 21, at 145.
[642] *See* BHALA, *supra* note 511, at 1297.
[643] *See* AL-MUGHNI, *supra* note 637, at 337- 38.
[644] EL-SHEIKH, *supra* note 21, at 148. *See also* THE QUR'AN, *supra* note 23, 4:93 at 59 ("If anyone kills a believer deliberately . . . ."); *id.* 4:92 at 59. ("If anyone kills a believer by mistake . . . .").

c. Unintentional Homicide (*Al-Qatl Al-Khata*)

Unintentional homicide or "*al-qatl al-khata*" in Arabic, refers to killing by mistake. It occurs if the perpetrator had no intention of harm, but his conduct ended up killing another human being.[645] The mistake (*khata*) in this kind of homicide could be made in either the act or the intention.[646] A mistaken action occurs, for instance, when someone shoots at a target, yet he mistakenly kills a human. Error in intention occurs when a person shoots at another person thinking them to be an animal.[647]

Qisas is not applicable to unintentional homicide; rather, it is punishable by blood money (*diyya*).[648] The amount of blood money that is set for this type of homicide is less than what must be paid for quasi-intentional killing.[649] The family of the deceased person may pardon the killer as in all types of homicide.[650] The authority of *diyya* as the original punishment in cases of unintentional homicide originated from the Holy Qur'an, where it states: "Never should a believer kill another believer, except by mistake. If anyone kills a believer by mistake he must . . . pay compensation [*diyya*] to the victim's relatives, unless they charitably forgo it."[651]

Since the scope of this Dissertation covers death penalty cases, the focus will be mainly on intentional homicide (murder) where *qisas* is permissible. Because murder is a *qisas* crime, or a crime against individuals, the victims' families have the ultimate power to decide whether

[645] PETERS, *supra* note 528, at 44. *See also* BHALA, *supra* note 511, at 1297 (stating that in homicide by error, the killer does not act with clear, deliberate intent).
[646] Lippman, *supra* note 606, at 43.
[647] *Id.*
[648] *See* BHALA, *supra* note 511, at 1297.
[649] *Id. See supra* text accompanying notes 786-87.
[650] Lippman, *supra* note 606, at 44.
[651] THE QUR'AN, *supra* note 23, 4:92 at 59.

the offender will be given the *qisas* (death) penalty. The following part will delve into the details of the right to demand *qisas* in Islamic law.

B. *Qisas*

The term "*qisas*" in Arabic literally means "equivalence" or "equality" in general and also "equality in retribution."[652] In its technical sense, *qisas* means "legal" retribution by the infliction of equivalent harm. In other words, in a *qisas* crime, the punishment of the perpetrator corresponds in kind and degree to the injury he or she caused to the victim. Thus, in murder offenses, *qisas* punishment refers to death penalty. *Qisas* is ordained by the Holy Qur'an. Verse 178 of chapter 2 of the Qur'an reads: "You who believe, fair retribution [*qisas*] is prescribed for you in cases of murder."[653] The very next verse of the same chapter emphasizes that implementing such a severe penalty serves as deterrent to murder, stating that "[f]air retribution [*qisas*] saves life for you, people of understanding, so that you may guard yourselves against what is wrong.[654]

Additionally, several traditions of Prophet Muhammad (PBUH) determined *qisas* as the punishment for murder offense. For example, the Prophet (PBUH) said: "if somebody is killed, his closest relative has the right to choose one of two things, i.e., either the [b]lood money or [*qisas*] by having the killer killed."[655] In another *Hadith*, he stated that "whoever is killed deliberately, then it is [*qisas*.]"[656]

Exploring *qisas* as an option for victims' families in capital murder cases raises three issues; (1) who has the right to demand *qisas*, (2) must a demand for *qisas* be unanimous, and

[652] *See supra* note 21.
[653] THE QUR'AN, *supra* note 23, 2:178 at 20.
[654] *Id.* 2:179 at 20.
[655] SAHIH AL-BUKHARI, *supra* note 576, vol. 9, bk. 87, *hadith* no. 6880, at 21.
[656] SUNAN ABU DAWUD, *supra* note 578, vol. 5, bk. 38, *hadith* no. 4539, at 126.

(3) what is the procedural framework of imposing the penalty of *qisas*. Each issue will to be discussed in detail, first under classical Islamic law, then Libyan law.

1. Who May Demand *Qisas*

The person who has the right to demand *qisas* or offer pardon is called *wali al-dam* which means "guardian of blood". The Qur'an, in chapter 17, verse 33, says: "Do not take life, which God has made sacred, except by right: if anyone is killed wrongfully, We [God] have given authority to the defender of his rights, but he should not be excessive in taking life, for he is already aided [by God]."[657] The authority that God has granted through this verse is the authority to demand *qisas* or forgive. According to the majority of Islamic Schools, the heirs of the murdered person are the exclusive holders of this power regardless of their sex,[658] on the basis that they are supposedly the closest people to the victim.[659] Generally, the heirs in Islam include the spouse, parents, children, grandparents, grandchildren, and siblings.[660]

In addition to being the victim's heirs, these individuals must be adult who are mentally capable of exercising the right of demanding *qisas*.[661] Therefore, if some heirs of the murdered person were minors or mentally ill, then only the competent adult heirs would be entitled to call for *qisas*. The proper timing for meeting the requirements of coming of age and

[657] THE QUR'AN, *supra* note 23, 17:33, at 177.
[658] AL-MUGHNI, *supra* note 637, vol. 9, at 464. *See also* PETERS, *supra* note 528, at 44-45.
[659] *See* ABDEL GHAFFAR IBRAHIM SALEH, AL-QISAS FI AL-NUFS FI AL-FIGH AL-ISLAMI [QISAS IN MURDER UNDER ISLAMIC JURISPRUDENCE]: A COMPARATIVE STUDY 221 (2d ed. 1998).
[660] Under the Islamic system of succession, there are three classes of heirs: (1) Qur'anic heirs, who are relatives identified in the Qur'an (4:11-12,176) and to include the following: husband, wife, father, mother, grandfather, grandmother, daughter, son's daughter, full sister, half sister, and half brother (born of the same mother but a different father); (2) agnatic heirs, who are male relatives and include the son, grandson, brother, nephew (brother's son), paternal uncle, and cousin (uncle's son); (3) uterine heirs, who are other blood female and male relatives such as daughter's son and aunt. *See* Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*, 61 ALB. L. REV. 511, 529-31 (1997).
[661] This is the opinion of the *Maliki* and *Hanafi* Schools. AWDAH, *supra* note 640, vol. 2, at 146. Eighteen is the age of majority according to *Imams* Malik and Abu Hanifa. *See id.* vol. 1, at 602.

competence is when the penalty process commences, not when the crime is committed.[662] For example, an adult heir is entitled to elect the murderer's punishment even if he or she was a minor at the time of the murder.

If the deceased person left behind only minor or mentally ill heirs, this or her guardian (usually the parent) would be the person with the authority to determine the killer's penalty.[663] However, the guardian may not forfeit qisas without blood money (*diyya*), to avoid any harm to the heir's interest.[664]

In the case where the victim leaves either no heirs or heirs that could not be reached, the authority to execute or pardon the offender belongs to the head of the state, based on the following *Hadith*:[665] "the ruler is the guardian [*wali*] of the one who does not have a guardian [*wali*]."[666] The same rule applies if the victim was murdered by his only "heir."[667] Technically, the victim in such a case dies without heirs because the Prophet *Muhammad* (PBUH) said: "the murderer will not inherit [from their victim.]"[668]

In Libya, the Law of *Qisas* and *Diyya* does not identify *wali al-dam*, but the Libyan Supreme Court has specified the deceased's heirs as the ones who have the right to choose

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[662] OSAMA ADLI, DIYYA AL-QATL [BLOOD MONEY IN HOMICIDE] 16 (Cairo, Dar Al-Nahda Al-Arabia 1985).
[663] This is according to one approach in *Shari'a*. Other jurists provide that *qisas* is a right which belongs to the heirs only. Thus, the judge cannot award death until the minor heir has reached majority and the ill heir becomes well. AL-MUGHNI, *supra* note 637, vol. 9, at 460.
[664] *Id*. at 475. *Diyya* in murder cases is paid to the heirs of the victim. *See infra* text accompanying notes 727-74.
[665] AWDAH, *supra* note 640, vol. 2, at 142.
[666] SUNAN IBN MAJAH, *supra* note 516, vol. 3, bk. 9, *hadith* no. 1879, at 78.
[667] ADLI, *supra* note 662, at 11.
[668] JAMI' AT-TIRMIDHI, *supra* note 580, vol. 4, bk. 27, *hadith* no. 2109, at 172. With regard to this *Hadith*, Muslim jurists unanimously provide that the intentional killer of his testator would be deprived from the inheritance. Further, the vast majority of scholars believe that this rule is applicable to manslaughter cases as well. *Id.*

> This law compels the killer to ponder over various aspects of murder. A) He will not get the share of the inheritance. B) There is a possibility of the punishment of death. C) If he escapes the sentence, he will have to pay his share of blood money. In this way he will be in a state of loss. Therefore, he may avoid committing the crime.

SUNAN IBN MAJAH, *supra* note 516 vol. 3, at 522.

between the death penalty and forgiveness.[669] The law expressly states that the right to *qisas* vests in mentally capable and adult relatives of the victim.[670] The Libyan legislature did not make any provisions for cases involving only minor or mentally incompetent heirs in the Law of *Qisas* and *Diyya*, but the last article of the law indicates that "the rules of Islamic law (*shari'a*) which are most appropriate to this Law will be applied in the absence of a text."[671] Thus, in compliance with the *Shari'a*, the legal guardian may speak for minor or mentally incompetent heirs. According to the Libyan legal system, the guardian of a minor (or mentally disabled person) is the parent, then one of the minor's relatives based on their ranking in the inheritance and kinship, and, if he or she has no relatives, the court will appoint one for him or her.[672]

Finally, the Libyan Law of *Qisas* and *Diyya* provides that the right to *qisas* and pardon vests in the state in cases of no heirs and equivalent cases.[673] An equivalent case encompasses situations where the murder is committed by the victim's only "heir." According to several appellate courts' rulings, the public prosecution represents the state in exercising the right of demanding death or offering forgiveness.[674] Such an approach also can be supported by the Libyan criminal procedure law, which states that the public prosecution shall represent a crime victim if he or she has no one else to do so.[675]

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[669] *See, e.g.*, Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 376/44 (Feb. 6, 2003), (unreported) (Libya). The Supreme Court, In the Libyan court system, "[t]he legal principles adopted by the Supreme Court in its rulings shall be binding for all courts . . . ." LAW NO. (6) OF 1982 ON REORGANIZING THE SUPREME COURT, art. 31, OFFICIAL JOURNAL, vol. 22/1982 at 754, http://www.security-legislation.ly/node/31947.
[670] LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 2. The age of majority under Libyan law is eighteen. LAW NO. (17) OF 1992 ON ORGANIZING THE AFFAIRS OF MINORS AND EQUIVALENTS, art. 9, OFFICIAL JOURNAL, vol. 30/1992.
[671] LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 7.
[672] *See* LAW NO. (17) OF 1992 ON ORGANIZING THE AFFAIRS OF MINORS AND THEIR EQUIVALENTS, art. 32.
[673] LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 2.
[674] *See, e.g.*, Mahkmat Istinaf Trablous [Tripoli Court of Appeal], Criminal Chamber (Oct. 2, 1997) (unreported) (Libya); *id.* (Jan. 7, 1997) (unreported) (Libya); *id*. (Jan. 10, 1996) (unreported) (Libya).
[675] LIBYAN CODE OF CRIM. PROC., art. 6.

It is possible that not all of a murdered person 's heirs would want the offender to be sentenced to death. The case of heirs' disagreements as to the appropriate punishment is discussed next.

2. Conflicting Views

The views of the victim's heirs regarding the perpetrator's punishment are not always identical. In other words, it is imaginable that some could be against capital punishment and vote for pardon. According to the four Islamic Schools, demanding *qisas* must be unanimous in order to impose the penalty of death.[676] Thus, a pardon offered by one heir is sufficient to make the punishment of *qisas* inapplicable. The theory behind this rule is that the right to *qisas* is a joint right which cannot be divided, meaning that if one heir waives the *qisas* punishment by pardoning the murderer, his waiver applies to the rest of the deceased's heirs as well.[677] The unanimity requirement serves to reduce the implementation of death penalty in murder cases.

However, in the case of multiple victims murdered by the same killer, *qisas* does not have to be demanded by the heirs of all victims.[678] If the heirs of even one victim agreed on *qisas*, the offender would be put to death despite that fact that some or all heirs of the other victims decided to forgive the murderer.[679] Contrary to a one-victim crime where the murderer is subject to one *qisas*, the killer of two (or more) victims deserves two penalties of death.[680] Accordingly, the heirs of two murdered people have two separate rights of demanding *qisas*, and if one victim's heirs chose to pardon the offender, the heirs of the

[676] AL-MUGHNI, *supra* note 637, vol. 9, at 464.
[677] AWDAH, *supra* note 640, vol. 2, at 160.
[678] AL-MUGHNI, *supra* note 637, vol. 9, at 405.
[679] *Id.*
[680] AWDAH, *supra* note 640, vol. 2, at 163.

second victim would still be entitled to *qisas*.[681] In such a case, Islamic jurisprudence is divided over whether *qisas* which is demanded by one victim's heirs is the only punishment the killer should receive, or whether the other victim's heirs who express forgiveness may ask for blood money as well. In one approach, implementing capital punishment takes away the entitlement to *diyya*.[682] Otherwise, the offender will be over-punished by imposing double retribution upon him.[683] To other jurists, *qisas* and *diyya* may be combined as an exception in multi-victim cases since the murderer committed more than one crime.[684]

The heirs of the victim may also have conflicting views when the murder involves multiple perpetrators. The heirs in such cases have the full authority to elect either death for all criminals, or death for one criminal and pardons for the others.[685] Nevertheless, unlike *qisas*, the vast majority of Islamic jurists accept that, when the murder is committed by two or more people, the victim's heirs--in a case of pardon--are permitted to take only one *diyya* from the two (or more) of them combined.[686] Thus, if the victim's heirs renounce *qisas* for one perpetrator and decide to take blood money instead, those heirs will be entitled to only half of the amount of blood money. The justification for this rule is that while *qisas* is considered a punishment, such that it may be imposed on each perpetrator separately, *diyya* is an amount of money paid to the heirs in exchange for the victim's life, regardless if it was taken by one or several killers.[687]

[681] *Id.*
[682] AL-MUGHNI, *supra* note 637, vol. 9, at 405.
[683] *Id.*
[684] *Id.*
[685] *Id.* at 473.
[686] *Id.* at 476.
[687] *Id.*

In Libya, the law explicitly states that "if one of the victim's heirs grants a pardon, *qisas* is not applicable."[688] The lawmakers, however, did not address cases involving multiple victims or offenders in which where the heirs' opinions are divided between *qisas* and pardon.[689] Although the law of *Qisas* and *Diyya*, in Article (7), provides that the rules of *Shari'a* "which are most appropriate to this Law" shall be applied in the absence of text,[690] this provision does not resolve the issue. The Supreme Court held that, in compliance with Article (1) of the Libyan Penal Code which states "[n]o crime or punishment without law," Article (7) of the Law of *Qisas* and *Diyya* shall not govern criminalization and punishment matters.[691] Accordingly, since the issue of multiple victims or offenders involves penalties of *qisas* and *diyya*; it must be determined by a specific and explicit rule within the law of *Qisas* and *Diyya*.

The next section will shed some light on the process of imposing the penalty of *qisas* in both Islamic and Libyan systems.

3. Procedural Framework

a. In Islamic Law

Under Islamic law, homicide is a private claim between two parties; the victim's heirs and the offender.[692] During the early time of the Islamic state, there was no public prosecution representing the victims or the public in *qisas* offenses.[693] The heirs of the murdered person were the ones who brought the case to the *qadi* (judge) and even executed the judgment of

[688] LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 2.
[689] The only related issue addressed by the Law of *Qisas* and *Diyya* is the penalty of blood money in multi-victim crimes. It provides that *diyya* "is multiplied by the number of victims LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 4(1).
[690] LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 7.
[691] Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 1249/42 (Jan. 2, 2002 (unreported) (Libya).
[692] *See supra* text accompanying note 614.
[693] ADLI, *supra* note 662, at 5.

qisas themselves where no pardon was granted.[694] Muslim jurists held that the perpetrator must be executed by the sword,[695] supported by the *Hadith* of the Prophet (PBUH): "There is no [*qisas*] except with the sword."[696] However, *qisas* penalty was later carried out by a new institution called *Shurtah* (police), representing both the public and the government.[697] El-Sheikh clarified this development by stating that:

> [T]he lifetime of the Prophet was a period of outlining principles and settling the frontiers of the legal framework within which coming generations could enact what suited their needs according to their circumstances of place and time. That is why when the fully Islamic state was established during the during the time of the second Caliph, Umar [Ibn] [A]l Khattab,* such private vengeance was almost abolished and turned over to the hands of the official institution called *Shurtah* (police).[698]

Contemporary Muslim scholars have provided several bases to support the notion that nowadays the heirs' right of demanding the death penalty does not encompass the right to execute it. For instance, a contemporary scholar, Abd Al-Qadir Awdah, based his view on a *Hadith* that states:[699] "Allah has prescribed *Al-Ihsan* (proficiency) in all things. So if you kill, then kill well, and if you slaughter, then slaughter well. Let one of you sharpen his blade and spare suffering to the animal he slaughters."[700] Awdah has noted that the heirs were entitled to carry out the execution by sword, considering the fact that the sword was the most quick and

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[694] *Id.* at 6.
[695] This is the approach of *Hanafi* and *Hanbali* Schools. AWDAH, *supra* note 640, vol. 1, at 758.
[696] SUNAN IBN MAJAH, *supra* note 516, vol. 3, bk. 21, *hadith* no. 2667, at 532.
[697] EL-SHEIKH, *supra* note 21, at 107.
* Umar Ibn Al-Khattab was appointed as a Caliph by the first Caliph, Abu Bakr, who led the Muslim community after the death of Prophet *Muhammad* (PBUH) in 632 A.D. Umar served as Caliph from 634-644 A.D. *See* BHALA, *supra* note 511, at 122.
[698] EL-SHEIKH, *supra* note 21, at 107. Also, in the wake of the Abbasid Caliphate (750-1258 A.D.), a "chief of police" was created to control the investigating process along with the executing of the judgments due. ABD AR RAHMAN BIN MUHAMMED IBN KHALDUN, THE MUQADDIMAH, vol. III, 323 (Franz Rosenthal trans.), https://asadullahali.files.wordpress.com/2012/10/ibn_khaldun-al_muqaddimah.pdf.
[699] *See* AWDAH, *supra* note 640, vol. 2, at 154.
[700] SUNAN IBN MAJAH, *supra* note 516, vol. 4, bk. 27, *hadith* no. 3170 at 278. "If Islam could command its adherents to show such great compassion to even animals when they are being lawfully slaughtered, one could then imagine how compassionate it would be with human lives." JAMI' AT-TIRMIDHI, *supra* note 580, vol. 3, at 194.

efficient tool for taking life during the early time of Islam where almost everybody carried this weapon and knew how to use.[701] He argued that since this is not the case anymore in modern times, and since *qisas* must be executed without causing any torture to the killer, pursuant to the Prophetic saying quoted above, heirs of the murdered person should be precluded from executing the judgment of *qisas*, leaving such task to the government.[702]

According to another commentator, Mohamad El-Sheikh, in order to ensure the equality between the offense and its retribution in *qisas* crimes, an execution should be carried out by a third party (public authority) who is not influenced by the *loss* of a loved one.[703] Regarding the verse 33 of chapter 17: "if anyone is killed wrongfully, We have given authority to the defender of his rights, but he should not be excessive in taking life, for he is already aided [by God],"[704] El-Sheikh argued that this verse grants the heirs of the victim the entitlement to demand *qisas,* which is different from the right to execute it.[705] He concluded that "although in principle jurists continued to state that the injured party must execute [*q*]*isas*, in practice the right to execute vengeance became the right merely to request the public authority to do so."[706]

In *qisas*, exceeding the limit in the matter of taking life is forbidden by God which means that only the killer should be executed.[707] For example, pregnant women cannot be executed before giving birth.[708] Further, their execution is postponed until they nurse their

[701] *See* AWDAH, *supra* note 640, vol. 2, at 155.
[702] *See Id.* at 154-55. The government could use any other effective methods of capital punishment such as hanging or the electric chair. *Id.* at 155.
[703] EL-SHEIKH, *supra* note 21, at 108.
[704] THE QUR'AN, *supra* note 23, 17:33, at 177.
[705] EL-SHEIKH, *supra* note 21, at 108.
[706] *Id.*
[707] "[I]f anyone is killed wrongfully, We [God] have given authority to the defender of his rights, *but he should not be excessive in taking life*." THE QUR'AN, *supra* note 23, 17:33, at 177 (emphasis added).
[708] AWDAH, *supra* note 640, vol. 2, at 149-50.

infants sufficiently to keeps them alive, or at least find someone who can do so.[709] This rule reflects how preserving innocent souls takes priority over administering punishments. It also ensures that the penalty of *qisas* does not take a life in addition to the murderer's.[710]

b. In Libyan Law

The parties to a criminal trial under the Libyan legal system are the public prosecutor and the defendant. *Qisas* trials are not an exception. Even after the Law of *Qisas* and *Diyya* was issued in 1994, the lawmakers did not make any changes with regard to the parties of *qisas* cases. In other words, the heirs of a murder victim are not parties to the defendant's criminal case even though the decision of whether the offender should live or die lies in their hands.[711]

The power to bring the criminal case in a *qisas* crime belongs to the prosecution which represents the government, not the victims or their families.[712] Prosecutors have broad discretion in determining whether to prosecute a criminal defendant, and the heirs' right of demanding or renouncing *qisas* does not restrict that discretion in any way.[713] A prosecutor does not need the heirs to demand *qisas* in order to file charges, nor does the prosecutor need the heirs to pardon the murderer in order for him or her to drop the case. Simply put, the victim's heirs have no role until the trial stage of the proceeding.

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[709] *Id.*
[710] *See* PETERS, *supra* note 528, at 48.
[711] In case of pardon, the government will be in charge of punishing the defendant with a discretionary sanction in the form of life imprisonment. *See infra* text accompanying notes 836-38.
[712] LIBYAN CODE OF CRIM. PROC., art. 1 ("Only a public prosecutor shall file criminal charges . . . .").
[713] *See* Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 1002/46 (June 26, 2002) (unreported) (Libya) (noting that in *qisas* crimes, the public prosecution has complete power to prosecute a charge and decide whether or not to pursue the case).

Due to an amendment to the Law of *Qisas* and *Diyya*,[714] the mechanism of exercising the authority to demand the death penalty in court has changed. Originally, Article (1) provided: "Is punished with death whoever kills a person with intent, *if the heirs* [*of the victim*] *demand it. Qisas* is not applied if pardon is granted . . . ."[715] In compliance with the provision stating "if the heirs [of the victim] demand it," courts had to receive an explicit written statement calling for *qisas* from all of the victim's heirs in order to sentence the defendant to death. Several years later, the provision was omitted in the revised version of Article (1), which currently reads: "Is punished by death whoever kills a person with intent. If pardon is granted, the penalty is imprisonment for life and *diyya*."[716] The Supreme Court interpreted this amendment to mean that the written demand for *qisas* by the heirs is no longer required to impose the death penalty.[717] Therefore, once the defendant's guilt is proven, he or she would receive a death sentence even with no demand for *qisas* made, as long as no heir had offered a statement of forgiveness.

Actually, in a *qisas* trial, courts face one of three scenarios. First, when the heirs of the victim do not communicate their choice either for *qisas* or for pardon to the trial court, a death sentence is imposed. Here, the heirs' silence is translated into a desire for the accused to be executed; otherwise they would have invoked their right of leniency before the court. Second, if all heirs express their *qisas* choice in a written statement before sentencing, the defendant will be put to death. Yet, such statement has no legal weight since the trial court could impose

[714] Law no. (6) of 1994 on the Rules of *Qisas* and *Diyya* was amended by Law no. (7) Of 2000 on Revising Some Rules of Law no. (6) of 1994 on the Rules of *Qisas* and *Diyya*.
[715] LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 1, *amended by* LAW NO. (7) OF 2000 ON REVISING SOME RULES OF LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA (emphasis added).
[716] LAW NO. (7) OF 2000 ON REVISING SOME RULES OF LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 1.
[717] Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 1249/46 (Dec. 30, 2001) (unreported) (Libya).

the same judgment even if they were silent as to their desired outcome. The third scenario is one in which one or more heirs waive their right to *qisas* and grant the accused a pardon instead. The penalty of death will be inapplicable in such case, and the defendant will be punished with a life sentence and *diyya*.[718] Thus, the heirs of the murder victim still control the outcome of the *qisas* case. They do so either by staying silent if they seek *qisas*, or by renouncing their right of *qisas*-in writing-to save the defendant's life.

The *Shari'a* jurisprudence considers *qisas* a private right of the victim's family which cannot be altered or overruled by the decision of a judge or any other authority. Accordingly, the judge under the Libyan system has no right to change the penalty of *qisas*, which creates an exception to the general rule on judicial discretion that authorizes courts to award reduced sentences in the presence of mitigating circumstances.[719] Based on the same grounds, the law that permits amnesty or commutation,[720] which may be issued by the Supreme Judicial Council (the Supreme Council of Judicial Bodies),[721] does not apply to *qisas* punishment. Death sentences for intentional homicide cases can only be commuted upon the pardon of the victim's family.

Death sentences are executed by shooting the convicted to death, and such executions are carried out by the government.[722] Executions are not public.[723] The law specifies the

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[718] Note that the victim's heirs may waive *diyya* as well. *See infra* note 813 and accompanying text.

[719] The Libyan Penal Code, article 29 reads:

> [In the presence of mitigating circumstances,] the judge may substitute or reduce the sentence as follows:
> Imprisonment for life instead of death;
> Imprisonment instead of imprisonment for life;
> Detention for no less than six months instead of imprisonment;
> …, [generally in the presence of mitigating circumstances it,] the judge may reduce the sentence in the [case] of felonies and misdemeanors to half the minimum limit prescribed by law.

LIBYAN PENAL CODE, art. 29.

[720] *Id.* art. 124-25.

[721] LAW NO. (6) OF 2006 ON THE JUDICIAL SYSTEM, art. 4(3), http://www.security-legislation.ly/node/31538.

[722] LIBYAN PENAL CODE, art. 19 ("Any person sentenced to death shall be shot to death as legally prescribed.").

[723] LIBYAN CODE OF CRIM. PROC., art. 433("Death is to be executed inside the prison . . . .").

following individuals to be present during the execution: a prosecutor, the prison warden, the prison doctor, and the defense counsel (if he or she so requests).[724] Finally, pregnant women cannot be executed until two months after they have given birth.[725]

The punishment of *qisas* is waived in the case of pardon. The choice to pardon a murderer will be explored next.

C. **Pardon (*Afw*)**

Afw, in murder cases, means renouncing *qisas* either for free or for payment of blood money.[726] Sparing the murderer from death and accepting the blood money qualifies as a pardon. The heirs of the victim are entitled to for forgo *qisas* based on the following verse from the Holy Qur'an:

> You who believe, fair retribution [*qisas*] is prescribed for you in cases of murder: the free man for the free man, the slave for the slave, the female for the female. *But if the culprit is pardoned by his aggrieved brother*, this shall be adhered to fairly, and the culprit shall pay what is due in a good way. This is alleviation from your Lord and an act of mercy.[727]

In spite of the fact that this Qur'anic passage deals with *qisas*, by referring to the injured party (victim's relative) as a "brother" of "the culprit," this verse promotes a spirit of reconciliation and creates a good environment for the choice of mercy. *Afw*, in the context of *qisas* crimes is permissible based on *Sunnah* as well. It was reported that the Prophet Muhammad (PBUH) stated that "for whomever (one of his relatives) was killed, then he has two options to choose from: Either to pardon or that he be killed."[728] Further, some argue that giving the heirs the

[724] *Id.* art. 434.
[725] *Id.* art. 436.
[726] *Afw* is defined as such by *Shafi'i* and *Hanbali* Schools. AWDAH, *supra* note 640, vol. 2, at 157. According to *Imams* Malik and Abu Hanifa, waving *qisas* for free is called pardon (*afw*), but if the heirs waive it in lieu of accepting *diyya*; it is called settlement (*sulh*). *Id.* at 158.
[727] THE QUR'AN, *supra* note 23, 2:178 at 20 (emphasis added) (footnotes omitted).
[728] JAMI' AT-TIRMIDHI, *supra* note 580, vol. 3, bk. 14, *hadith* no. 1405, at 191.

power to demand *qisas* reduces the desire for revenge and enhances the prospect of leniency.[729] From a psychological point of view, a human being usually tends to forgive or renounce his or her right inflict punishment when he already knows that he does not have to.[730]

It is worth emphasizing that waiving *qisas* in Islam is not just an acceptable choice; rather, it is encouraged and strongly recommended. The Qur'an in chapter 5, verse 45, implies so:

> In the Torah We [God] prescribed for them a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, an equal wound for a wound: *if anyone forgoes this out of charity, it will serve as atonement for his bad deeds*. Those who do not judge according to what God has revealed are doing grave wrong.[731]

Pardon is encouraged by a Prophetic tradition as well. It was reported in the *Sunnah* on authority of Anas bin Malik said: "No case requiring [*q*]*isas* was ever brought to the Messenger of Allah [PBUH], but he would enjoin pardoning."[732] Islam also urges people to forgive one another in general and those who do are promised to be rewarded with paradise. Verses 133 and 134 of chapter 3 read: "*Hurry towards your Lord's forgiveness and a* [*Paradise*] as wide as the heavens and earth prepared for the righteous, who give, both in prosperity and adversity, *who restrain their anger and pardon people*–God loves those who do good–."[733] Similarly, another Qur'anic passage says: "Let harm be requited by an equal harm, *though anyone who forgives and puts things right* [*makes reconciliation*] *will have his reward from God Himself*–He does not like those who do wrong."[734]

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[729] AWDAH, *supra* note 640, vol. 1, at 549.
[730] *Id.*
[731] THE QUR'AN, *supra* note 23, 5:45 at 72 (emphasis added).
[732] SUNAN AN-NASA'I, *supra* note 581, vol. 5, bk. 45, *hadith* no. 4788, at 417.
[733] THE QUR'AN, *supra* note 23, 3:133-34 at 44 (emphasis added).
[734] *Id.* 42:40 at 314 (emphasis added).

Forgiving someone is a deed of great reward as noted above--which makes pardoning a killer preferable to demanding *qisas*. Thus, it is not against the rules of *Shari'a* for the offender's family (or counsel, in modern times) to approach the victim's heirs on behalf of the defendant to secure a pardon by persuading them to waive *qisas* and accept blood money instead. In Libya, for example, such practice is very common--which explains the fact that, in most cases, the heirs' statements of forgiveness find their way to court through the defense attorney. Yet, a pardon must be offered voluntarily and without duress. Otherwise, it will be held inadmissible.

The right to pardon vests in the one who holds the entitlement to demand *qisas*.[735] If the victim had a family, only adult, mentally--capable heirs may forgive the killer. One heir's forgiveness is sufficient to spare the offender's life.[736] If the deceased person left no heirs or they could not be reached, the right to waive capital punishment belongs to the head of the state.[737]

To provide a better understanding of the choice of pardon, three aspects will be examined next, the timing of pardon, the payment of blood money (*diyya*), and the discretionary punishment (*ta'zir*) as alternative retributions when pardon is granted. The discussion of each matter will begin with the rules of *Shari'a* and will be followed by the Libyan approach.

1. Timing of Pardon

Once pardon is expressed by at least one heir of the murdered person, capital punishment becomes inapplicable. Muslim scholars believe that the victim's heirs may

[735] *See supra* text accompanying notes 658-60.
[736] *See supra* text accompanying notes 676-77.
[737] *See supra* text accompanying notes 665-66.

exercise the right of pardon at any point in time from the commission of the crime until just before the execution.[738] Hence, forgiveness is fully effective regardless of whether it is granted before the case is brought to the judge, before the death sentence is imposed, or even after sentencing.[739] This policy is clearly intended to promote the concept of mercy.

Further, because pardon is preferable to *qisas*, the heirs of the deceased are entitled to forgive the murderer even if they initially demanded *qisas*.[740] Forgiveness, however, is final and cannot be withdrawn. The heirs may not change their minds about the pardon that once it is granted and decide to seek execution instead.[741] The victim's heirs are not allowed to claim *qisas* after renouncing it because once forgiveness is chosen; it permanently "immunizes" the killer's life against a death sentence for the murder in question.[742]

It is worth mentioning that the heirs are entitled to blood money in the case of forgiveness even if they elected *qisas* at first.[743] While it is true that the victim's heirs waive their right to claim *diyya* by demanding the death penalty in the beginning, such right is restored at the moment they decide not to pursue *qisas* and determine to pardon the murderer instead.[744] Otherwise, the heirs would be discouraged from offering forgiveness.[745] Moreover, since the punishment of death is hasher than the penalty of *diyya* (blood money), it would not be against the offender's interest to shift from harsh retribution (*qisas*) to a less harsh retribution (*diyya*).[746]

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[738] *See, e.g.*, SALEH, *supra* note 659, at 293.
[739] *Id.*
[740] ADLI, *supra* note 662, at 75.
[741] SALEH, *supra* note 659, at 293.
[742] *Id.*
[743] AL-MUGHNI, *supra* note 637, vol. 9, at 475. In another approach, by claiming *qisas*, the heirs waive the right to blood money for good. *Id.*
[744] ADLI, *supra* note 662, at 77.
[745] *Id.*
[746] AL-MUGHNI, *supra* note 637, vol. 9, at 475.

In Libya, the authority to choose between *qisas* and pardon is exercised at the trial phase.[747] Therefore, the heirs may grant the defendant a pardon as soon as the trial starts. The Law of *Qisas* and *Diyya* provides that "[p]ardon that is granted after the death judgment becomes final and before the execution shall be submitted to the attorney general."[748] The law implies that the heirs may forgive the defendant at any time before his execution; even after the death sentence becomes final.

The time at which the decision of forgiveness is made will determine the authority to which the heirs must submit their decision. Prior to the final sentence, a pardon statement must be presented through the defense counsel to the court that is deciding the case. Yet, if the heirs did not forgive the accused until his or her death sentence was final, the attorney general would be the person to whom the pardon statement would be directed. Then, the attorney general would need to send the case back to the court that granted the final judgment.[749] Finally, forgiveness is permitted even when a choice of *qisas* was made prior, and the heirs will be fully entitled to claim blood money in lieu of renouncing the death penalty.[750]

When the heirs of the deceased pardon the perpetrator, they may choose either outright forgiveness or the payment of blood money by the perpetrator. The retribution of *diyya* in murder crimes under *Shari'a* and Libyan law is explored next.

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[747] *See supra* text accompanying note 713.
[748] LAW NO. (7) OF 2000 ON REVISING SOME RULES OF LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 1.
[749] *Id.*
[750] *See, e.g.*, Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 453/46 (June 26, 2001) (unreported) (Libya); Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 1568/44 (June 9, 1998) (unreported) (Libya).

2. Blood Money (*Diyya*)

a. In Islamic Law

In homicide offences, *diyya* is the payment of money to the surviving heirs of the victim. *Diyya* drives its authority from the Holy Qur'an and the *Sunnah.* Verse 178 of chapter 2 set forth the proposition that, when the killer is forgiven by the relatives of the deceased person, he or she should make payment to the victim's heirs in a good manner. It reads:

> You who believe, fair retribution [*qisas*] is prescribed for you in cases of murder: the free man for the free man, the slave for the slave, the female for the female. *But if the culprit is pardoned by his aggrieved brother, this shall be adhered to fairly, and the culprit shall pay what is due in a good way*. This is alleviation from your Lord and an act of mercy.[751]

Also, the Prophet (PBUH) said: "if somebody is killed, his closest relative has the right to choose one of two things, i.e., either the [b]lood money or [*qisas*] by having the killer killed."[752]

Diyya is imposed as a substitute retribution for *qisas* in intentional homicide claims (*al-qatl al-amd*) where the victim's heirs, or some of them, remit their right of *qisas*. Malik's School does not differentiate between intentional (*al-qatl al-amd*) and quasi-intentional (*al-qatl shibh al-amd*) homicide, considering both of them to be intentional killing, and thus, punishable originally by *qisas* or alternatively by *diyya* in the case of pardon.[753] On the contrary, according to the *Hanafi, Shafi'i*, and *Hanbali* Schools, blood money is the original penalty for quasi-international intentional killing (*al-qatl shibh al-amd*) where *qisas* is not applicable.[754]

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[751] THE QUR'AN, *supra* note 23, 2:178 at 20 (emphasis added) (footnotes omitted).
[752] SAHIH AL-BUKHARI, *supra* note 576, vol. 9, bk. 87, *hadith* no. 6880, at 21.
[753] *See supra* text accompanying notes 642-44.
[754] *See supra* text accompanying notes 637-41.

The liability for blood money in murder (intentional homicide) is incurred by the offenders themselves out of their own wealth.[755] In a case where the offender was financially unable to make the payment of blood money, a contemporary scholar, Abd Al-Qadir Awdah, has argued the heirs should not choose to pardon the offender in lieu unless they are sure of the offender's financial ability to pay.[756] Otherwise, if the heirs opted for *diyya* instead of *qisas* and it later came to light that the offender was unable to pay the required amount of *diyya*, they would no longer be able to avail themselves of *qisas* and would ultimately be forced to pardon the offender with no further liability.[757]

The liability for *diyya* is governed by a different rule when murder is committed by a minor or someone who is not of a sound mind. Such persons cannot form the *intent* (*niyya*) necessary to commit an intentional crime, thus, their act of killing is deemed unintentional--payment of *diyya* replaces the penalty of *qisas*, and the *diyya* is payable by their *aqilah*:[758]

> *Aqilah* means the near male relatives on the father's side who are obliged to pay the blood money on behalf of any of the clan's members who kills a person. The first responsibility of the payment of blood money is with brothers and nephews, after them, the responsibility rests upon their son. Meaning the male members of one grandfather. After this, the responsibility goes to the brothers of the grandfather. Making blood money the responsibility of the *Aqilah* is to divide the due blood money into many easy shares, to lighten the burden of payment. In this way one person or one family is not overburdened. Another reason for collecting the blood money from the relatives is that they usually help each other in fights and disputes, they also understand that in case of bloodshed, they will have to pay their

Diyya is also the primary punishment for unintentional homicide (*al-qatl al-khata*). "Never should a believer kill another believer, except by mistake. If anyone kills a believer by mistake he must . . . pay compensation to the victim's relatives, unless they charitably forgo it." THE QUR'AN, *supra* note 23, 4:92 at 59.

[755] ADLI, *supra* note 662, at 66.

[756] AWDAH, *supra* note 640, vol. 1, at 675.

[757] *Id.*

[758] AL-MUGHNI, *supra* note 637, vol. 9, at 357. Minor and mentally incompetent murderers are not subject to either *qisas* or *diyya* based on the Prophet's *Hadith* (PBUH) in which he said: "The pen has been lifted from three [which means that there are three persons whose actions are not recorded]: from the sleeping person until he awakens, from the child until he reaches puberty and from the insane person until he comes to his senses." SUNAN ABU DAWUD, *supra* note 578, vol. 5, bk. 38, *hadith* no. 4403, at 44-45.

share of blood money, so naturally they will not allow any member of their tribe to commit this type of crime, rather they will stop him from doing such a crime.[759]

As for quasi-intentional homicide, since it is an intentional killing from the prospective of *Imam* Malik, the murderer is the one who is obligated to pay the blood money.[760] However, most jurists hold the view that blood money is the *aqilah*'s responsibility because, although the commission of the act was intended, the perpetrator did not mean to kill.[761] Those jurists have based their opinion on a saying of Prophet Muhammad (PBUH).[762] The *Hadith* involves two women from the tribe of Hudhail who were engaged in a fight with one another, one of whom threw a stone at the other and killed her.[763] The dispute was brought to the Messenger of Allah (PBUH), who gave judgment that *diyya* for the deceased woman was to be paid by the *aqilah* (family) of the killer.[764] According to the opinion of the majority of the jurists, if the *aqilah* was not able to pay or the killer had no *aqilah*, the payment of *diyya* would be owed by the state, specifically by an institution called *bayt al-mal* (the state treasury).[765]

Muslim jurists have also addressed the issue of whether *diyya* is automatically applicable to the offender--instead of *qisas*--if he or she dies before execution. *Imam* Ibn Hanbal and Shafi'i hold that *diyya* in such a case would be imposed and payable out of the

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[759] SUNAN IBN MAJAH, *supra* note 516, vol. 3, at 513. *See also* DUBBER & HORNLE, *supra* note 511, at 261 ("[The obligation of the *aqilah* of the perpetrator to pay *diyya*] is not regarded as a violation of the principle of personality of punishment but is seen as a consequence of the dual character of blood money as both punishment and compensation . . . . In modern times, this construction is sometimes used to establish the liability of insurers."). *See generally* PETERS, *supra* note 528, at 49-50.
[760] AWDAH, *supra* note 640, vol. 2, at 191.
[761] *Id.*
[762] *Id.*
[763] SUNAN ABU DAWUD, *supra* note 578, vol. 5, bk. 38, *hadith* no. 4576, at 145.
[764] *Id.*
[765] *See* AWDAH, *supra* note 640, vol. 1, at 674; DUBBER & HORNLE, *supra* note 511, at 261. *Bayt al-Mal* is literally translated as the "House of Money." It was the financial institution that controlled and managed the Islamic state's revenue and where the public funds kept. Mahmood Namazi, *Bayt al-Mal and the Distribution of Zakat*, AL-ISLAM.ORG, https://www.al-islam.org/message-thaqalayn/vol11-n2-2010/bayt-al-mal-and-distribution-zakat-mahmood-namazi/bayt-al-mal-and (last visited March 28, 2016).

offender's estate.[766] Jurists have argued that it is the same rule that is applied where the heirs of the victim waive *qisas* and select *diyya* instead, yet the offender dies before making any payments.[767] Scholars have further argued that a murderer must be subject to either *qisas* or *diyya*—therefore, if execution was impossible to be carried out due to the death of the killer, the other retribution should be imposed.[768]

In multi-victim murders, the offender (or the *aqilah*) is responsible for a full *diyya* for each victim.[769] If someone was murdered by more than one person, the blood money shall be divided equally in accordance with the number of killers involved.[770] Since the retribution of *diyya* is a payment for an innocent life that was wrongfully taken, only one *diyya* may be imposed per victim.[771]

The payment of blood money is made to the surviving relatives of the murder victim, particularly, the heirs, and is distributed among them in accordance with the law of succession.[772] The Holy Qur'an in verse 92 of chapter 4, provides: "If anyone kills a believer by mistake he must . . . pay compensation [*diyya*] to the victim's relatives . . . ."[773] There is also a saying of Prophet Muhammad (PBUH) which indicates that: "[t]he [*diyya*] is something to be inherited among the heirs of the slain, according to their relationship . . . ."[774] When the victim dies without heirs, *diyya* should be paid to the *bayt al-mal* (the state treasury).[775]

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[766] AWDAH, *supra* note 640, vol. 2, at 156.
[767] MUHAMMAD ABU ZAHRAH, AL-UQUBAH FI AL-FIQH AL-ISLAMI [PUNISHMENT IN ISLAMIC LAW] 473 (Cairo, Dar Al-Fikr Al-Arabi).
[768] AWDAH, *supra* note 640, vol. 2, at 156.
[769] ADLI, *supra* note 662, at 40.
[770] AWDAH, *supra* note 640, vol. 2, at 179.
[771] *See supra* text accompanying notes 586-87.
[772] About the Islamic law of succession, *see* BHALA, *supra* note 511, at 1127- 63.
[773] THE QUR'AN, *supra* note 23, 4:92 at 59.
[774] SUNAN ABU DAWUD, *supra* note 578, vol. 5, bk. 38, *hadith* no. 4564, at 138.
[775] AWAD AHMAD IDREES, AL-DIYYA BAINA AL-TA'WEED WA AL-UQUBAH FI AL-FIGH AL-ISLAMI AL-MUQAREN [BLOOD MONEY BETWEEN COMPENSATION AND PUNISHMENT IN ISLAMIC COMPARATIVE JURISPRUDENCE] 614-15 (Cairo Univ., School of Law).

Muslim scholars base this rule on the Prophet's *Hadith*, in which he said: "I am the heir of the one who has no heir, and I will pay the blood money on his behalf and inherit from him . . . ."[776] The meaning of the *Hadith* is that the Prophet (PBUH)--in his capacity as the head of the state--as he is responsible for the *diyya* in cases of minor and mentally incompetent murderers, or in cases of quasi-intentional killings where the offenders have no *aqilah* (family) to pay on their behalf,[777] he holds in return the entitlement to receive the payment of blood money where there are no heirs to do so.

According to the view of most jurists, *diyya* for murder must be paid immediately and without any delay unless the heirs of the victim agree otherwise.[778] The basis for this opinion is that, since *diyya* replaces *qisas, diyya* should have the same type of immediate effect that the original penalty of *qisas* would have had.[779] In addition, the intentional killers should not be granted any mitigation in the form of furnishing them with additional time to make the payment of blood money to the heirs.[780] In quasi-intentional homicide, however, *diyya* is due within three years.[781] The majority of jurists provide that the three-year period starts from the day of the victim's death, whereas, according to *Imam* Abu Hanifa, it begins on the date of sentencing.[782]

Diyya is a fixed pecuniary penalty, intended to assure that all lives have an equal value and to close the door on claiming an exaggerated amount of blood money as was practiced during the pre-Islamic era.[783] It is reported that the Prophet Muhammad (PBUH) wrote a letter

[776] SUNAN IBN MAJAH, *supra* note 516, vol. 3, bk. 21, *hadith* no. 2634, at 513-14.
[777] *See supra* text accompanying notes 758-65.
[778] AWDAH, *supra* note 640, vol. 2, at 181.
[779] EL-SHEIKH, *supra* note 21, at 171.
[780] ADLI, *supra* note 662, at 50.
[781] AWDAH, *supra* note 640, vol. 2, at 162.
[782] *Id.*
[783] ADLI, *supra* note 662, at 52.

to the people of Yemen concerning blood money (among other issues), in which he stated that "whoever kills a believer for no just reason is to be killed in return, unless the heirs of the victim agree to pardon him. For killing a person, the [*diyya*] is one hundred camels."[784] In another *Hadith*, the Prophet (PBUH) said: ". . . the [*diyya*] for a mistaken killing that appears purposeful [quasi-intentional homicide] . . . is one hundred camels.[785]

Although the amount of *diyya* is the same in all types of homicide; *diyya* may still vary in terms of the quality of the camels, which affects their value. Nearly all of the jurists hold that while the intentional and quasi-intentional murderer is responsible for "aggravated" blood money (*diyya mughalladah*) which is 100 high-quality camels, the "normal" *diyya* for accidental homicide is 100 regular camels.[786] The evidence of this rule is the following *Hadith* where it is reported that the Prophet (PBUH) said: "The [*diyya*] for killing that resembles intentional (killing) [quasi-intentional murder] is severe like that for deliberate killing, but the perpetrator is not to be executed."[787]

In addition to camels, prophetic traditions pointed out to other means in which *diyya* could be paid. In the same message to the people of Yemen about the rules of *diyya*, the Prophet concluded that "[a] man may be killed in return for (killing) a woman, and those who deal in gold must pay one thousand *Dinars* [a *dinar* is proximally 4.25 g. of gold]."[788] In another prophetic tradition, Ibn Abbas stated that "[a] man killed another man during the time

[784] SUNAN AN-NASA'I, *supra* note 581, vol. 5, bk. 45, *hadith* no. 4857, at 447-48.
[785] SUNAN ABU DAWUD, *supra* note 578, vol. 5, bk. 38, *hadith* no. 4547 at 130. The same number of camels is the penalty for an accidental killing. The Prophet (PBUH) "ruled that if a person was killed accidentally, his [*diyya*] was one hundred camels . . . ." *Id.* vol. 5, bk. 38, *hadith* no. 4541, at 127.
[786] *See* ADLI, *supra* note 662, at 53; PETERS, *supra* note 528, at 52. Nevertheless, *Imam* Malik argued that aggravated *diyya* applies to all categories of killing because "the guilty one has benefited by being granted the privilege of paying [*diyya*] instead of [*q*]*isas*, therefore, no more mitigations should be granted to him." EL-SHEIKH, *supra* note 21, at 172.
[787] SUNAN ABU DAWUD, *supra* note 578, vol. 5, bk. 38, *hadith* no. 4565, at 140
[788] SUNAN AN-NASA'I, *supra* note 581, vol. 5, bk. 45, *hadith* no. 4857, at 447-48.

of the Messenger of Allah, and the Prophet [(PBUH)] set the [*diyya*] at twelve thousand *dirhams* [a *dirham* is proximally 3.5 g. of sliver]."[789]

Some scholars argued that the assessment of *diyya* must be based on camels, only because *diyya* cannot be "aggravated or normal" unless it is given in the form of camels.[790] On the other hand, other scholars believed that the original blood money consisted of camels simply due to their accessibility to everyone during that period of time, and that it could be paid by means other than camels.[791] Further, in addition to the two above-quoted prophetic traditions, Umar Ibn Al-Khattab, the second Caliph, also indicated various items that could be used to make the payment of *diyya*. [792]It was narrated that, in one of his orations, Umar said: "'Camels have become expensive.' So, Umar imposed the [*diyya*] for those who owned gold as one thousand *Dinars*, for those who owned silver as twelve thousand *Dirhams*, for those who owned cattle as two hundred cows, for those who owned sheep as two thousand sheep, and for those who owned *Hullahs* [fabric] as two hundred *Hullah* [dresses]."[793]

Moreover, some scholars argue that the sum of 1,000 *dinars* or 12,000 *dirhams* stipulated by the Prophet (PBUH) as another form in which *diyya* could be given, was actually the price of camels during that period of time.[794] Therefore, especially in modern times, *diyya* may be paid with a fixed quantity of money which represents the prevailing cost

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[789] *Id.* vol. 5, bk. 45, *hadith* no. 4807, at 426.
[790] AL-MUGHNI, *supra* note 637, vol. 9, at 481.
[791] *See* EL-SHEIKH, *supra* note 21, at 173-74.
[792] *Id*. at 174-75.
[793] SUNAN ABU DAWUD, *supra* note 578, vol. 5, bk. 38, *hadith* no. 4542 at 127-28.
> Since there is no evidence from the Qur'an and Sunnah restricting the [*diyya*] payment on a sociological or occupational basis, it should be understood from the said oration that Umar meant to facilitate the process of [*diyya*] payment rather than impose a certain monetary unit on such a particular sector of the people. The option to pay [*diyya*] in whatever kind one chooses should remain open to everyone regardless of occupation.

EL-SHEIKH, *supra* note 21, at 175.
[794] *See* SUNAN AN-NASA'I, *supra* note 581, vol. 5, at 427.

of 100 camels at the present time. Also, with this approach, implementing "aggravated" or "normal" *diyya* is totally possible. When the victim's heirs are entitled to aggravated blood money, the offender is forced to pay the price of 100 camels determined to be of high quality, whereas the normal blood money would be the value of 100 regular camels.

Finally, the heirs of the murder victim may grant the offender a full pardon by forgoing both the *qisas* penalty and *diyya*.[795] The authority to remit blood money is determined by the Holy Qur'an itself in verse 92 of chapter 4, which reads: "If anyone kills a believer by mistake he must . . . pay compensation [*diyya*] to the victim's relatives, *unless they charitably forgo it*."[796] It is important to note that, even with outright forgiveness, the killer would be still subject to a discretionary punishment.[797] Yet, there is only one exception where blood money cannot be remitted. It is the case where the entitlement of choosing between *qisas* and *diyya* is held by the head of the state, due to the absence of heirs.[798] While the head of the state may waive the penalty of *qisas*, he or she may not forgo the payment of *diyya*, because it belongs to the public and remitting it would be against the community's interest.[799]

b. In Libyan Law

Diyya is the alternative retribution in murder (intentional homicide) according to the Law of *Qisas* and *Diyya* in revised Article (1), which reads: "Is punished with death whoever kills a person with intent. If pardon is granted, the penalty shall be imprisonment for life and *diyya*."[800] With regard to quasi-intentional homicide, the Law of *Qisas* and *Diyya* does not

[795] Payment of blood money can be either completely or partially waived. *Blood Money in Islam*, ABOUT RELIGION & SPIRITUALITY, http://islam.about.com/od/law/fl/6/Blood-Money-in-Islam.htm (last visited March 22, 2016).
[796] THE QUR'AN, *supra* note 23, 4:92, at 59 (emphasis added).
[797] *See* discussion *infra* Part III. C.3.
[798] *See supra* text accompanying notes 665-66.
[799] AL-MUGHNI, *supra* note 637, vol. 9, at 476.
[800] LAW NO. (7) OF 2000 ON REVISING SOME RULES OF LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 1.

address it. Before the Supreme Court addressed the issue of how to address quasi-intentional homicide after the issuance of the Law of *Qisas* and *Diyya*, courts handled it in three various ways. First, following the opinion of the three Islamic Schools of law, an offender with quasi-intent was treated the same as un unintentional killer who is punished with blood money only.[801] In the second approach, quasi-intentional killing was considered equivalent to intentional homicide, which is subject to either *qisas* or *diyya* if pardon was granted, in accordance with *Imam* Malik's view.[802] Both approaches relied on what the Law of *Qisas* and *Diyya* itself provides in Article (7), where it states that "[t]he principles of Islamic law (*Shari'a*) which are most appropriate to this Law will be applied in the absence of a text."[803] As a third method, some courts held that the Libyan Penal Code is still applicable to quasi-intentional homicide, on the grounds that this type of killing was not included by the Law of *Qisas* and *Diyya*.[804]

Four years after enactment the Law of *Qisas* and *Diyya*, the Supreme Court put an end to the appellate courts' conflicting rulings by upholding the last approach stated above.[805] The Court ruled that, since the Law of *Qisas* and *Diyya* addresses only intentional and unintentional homicide, it only invalidates only the part of the Penal Code that concerns the

[801] *See, e.g.*, Mahkmat Istinaf Misrata [Misrata Court of Appeal], Criminal Chamber (Feb. 25, 1997) (unreported) (Libya). The punishment for unintentional killing is specified by the Law of *Qisas* and *Diyya* in Article (3) as follows: "whoever kills a person or causes his killing without intent is punished by *diyya* . . . ."). LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 3.
[802] *See, e.g.*, Mahkmat Istinaf Trablous [Tripoli Court of Appeal], Criminal Chamber (March 16, 1995) (unreported) (Libya). In compliance with the Law of *Qisas* and *Diyya*, the penalty for murder (intentional homicide) is death or blood money and life imprisonment in the case of pardon. LAW NO. (7) OF 2000 ON REVISING SOME RULES OF LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 1.
[803] LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 7.
[804] *See, e.g.*, Mahkmat Istinaf Misrata [Misrata Court of Appeal], Criminal Chamber (June 6, 1998) (unreported) (Libya). Under the Libyan Penal Code, quasi-intentional murder "shall be punishable by imprisonment not exceeding ten years." LIBYAN PENAL CODE, art. 374.
[805] *See, e.g.*, Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 1268/44 (Dec. 8, 1998) (unreported) (Libya); Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 786/44 (Dec. 1, 1998) (unreported) (Libya).

penalty for those two forms of killing, meaning that the portion dealing with quasi-deliberate killing is still valid.[806] As for Article (7) of the Law of *Qisas* and *Diyya*—the section that directs the courts to apply the rules of *Shari'a* when there is no provision within the Qisas Law covering the matter--the Court has held that it is only applicable to cases of intentional or non-intentional homicide where there is no other provision of law, but is not applicable to quasi-intentional homicides.[807]

The Law of *Qisas* and *Diyya* contains very few rules for the retribution of *diyya*. Many of the rules the law does contain are identical to the rules about *diyya* set forth in Islamic law. Murder offenders have to pay the *diyya* themselves out of their own pockets.[808] Blood money is owed by the *aqilah* of perpetrator who is a minor or mentally incompetent,[809] and if there is no *aqilah*, the state will pay it.[810] In the case of multi-victims, *diyya* shall be multiplied by the number of victims.[811] Blood money is for the heirs of the murder victim and must be distributed according to the rules of succession.[812] The Law of *Qisas* and *Diyya* did not address the full pardon issue as to whether the victim's heirs may remit both the penalty of *qisas* and the payment of *diyya*. Yet, outright forgiveness has been granted by the appellate courts in many murder cases.[813]

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[806] Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 1268/44 (Dec. 8, 1998) (unreported) (Libya).
[807] *Id.*
[808] LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 4(1). The law did not address the issue of the defendant's inability to pay. In reality, a victim's heirs would rarely face such a problem, because typically they do not waive their right to *qisas* unless they receive the full amount of *diyya* in advance, or at least upon receipt of some proof demonstrating the financial ability of the defendant to pay.
[809] *Id.* art. 4(2).
[810] *Id.* art. 5.
[811] *Id.* art. 4(1).
[812] *Id.* art. 6.
[813] *See, e.g.*, Mahkmat Istinaf Trablous [Tripoli Court of Appeal], Criminal Chamber (Jan. 7, 1997) (unreported) (Libya); Mahkmat Istinaf Trablous [Tripoli Court of Appeal], (Oct. 4, 1994) (unreported) (Libya).

Interestingly, the legislature left the assessment of *diyya* completely to the heirs,[814] which is inconsistent with the rules of *Shari'a* in this matter.[815] In other words, *diyya* is not a fixed pecuniary retribution under the Libyan *qisas* system. Rather, it is up to the victim's heirs to determine the amount of blood money for homicide crimes, and the court shall impose the penalty as is. In practice, the victim's heirs take the financial ability of the defendant into consideration when they set the amount of *diyya* they ask for. The above-mentioned approach regarding the payment of *diyya* has been subject to significant criticism by numerous Libyan scholars. For instance, prescribing *diyya* as a non-fixed amount of retribution clearly conflicts with the definition of *diyya* as a fixed pecuniary penalty in Islamic law.[816] Such an approach also does not comply with the notion of equality of punishment, considering that the Law of *Qisas* and *Diyya* itself describes *diyya* as a penalty.[817] Further, placing the assessment of *diyya* into the hands of the heirs may lead to an unfair situation on a practical level--there have been cases where the amount of *diyya* for unintentional killing was much greater than what an intentional murderer was obligated to pay.[818] Fairness requires that a killer that lacks intent should not be made to pay a higher penalty than a killer who acts with intent.

[814] LAW NO. (7) OF 2000 ON REVISING SOME RULES OF LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 3(bis) ("The monetary value of *diyya* shall be determined by the heirs [of the victim].").
[815] *See supra* text accompanying notes 783-84.
[816] *See, e.g.*, Elhadi Abu-Hammra, *Al-Mafhum Al-Qanuni lil-Qisas wa Al-Diyya in Al-Tashri Al-Jinai Al-Libi* [*The Legal Concept of Qisas and Diyya in Libyan Criminal Law*],15-16 (Feb. 29, 2004).
Mahmoud Suliman Al-Barasi, *Al-Diyya beina Al-Uqubah wa Al-Ta'weed [Blood Money between Punishment and Compensation]*, MAJALH IDARAT AL-QADAYA, vol. 3, 122 (2003).
[817] *See, e.g.*, Al-Mahdi Abdl-Fatah, *Drasah Taqimiyah li-baad Ahkam Qanun Al-Qisas wa Al-Diyya* [*Evaluation Study of Some Rules of Libyan Law of Qisas and Diyya*], 7 (2002).
[818] *Compare* Mahkmat Istinaf Trablous [Tripoli Court of Appeal], Criminal Chamber (March 5, 2003) (unreported) (Libya) (regarding an unintentional homicide trial, where the victim's heirs demanded a sum of 100,000 Libyan Dinar (approximately $85,000)), *with* Mahkmat Istinaf Trablous [Tripoli Court of Appeal], Criminal Chamber (March 20, 2003) (unreported) (Libya) (in which the victim's heirs demanded a sum of 60,000 Libyan Dinar (approximately $45,000) for intentional killing).

Although the retribution of *diyya* is classified as a penalty, it has the characteristics of compensation.[819] Therefore, after the Law of *Qisas* and *Diyya* was adopted in Libya in 1994, a question was raised as to whether a victim's heirs may combine remedies between the payment of *diyya* through the criminal case and financial compensation on the basis of tort liability by filing a civil lawsuit for the same conduct (civil compensation).[820] Some appellate courts saw the blood money as a punishment solely, thus, held that it was appropriate for the victim's heirs to seek both blood money and civil compensation at the same time and for the same act.[821] Other courts, refused to grant the heirs of the murdered person financial compensation in addition to *diyya*, deciding that *diyya*, in fact, was the compensation and that the injured party was entitled to make only one compensation claim for the same damages.[822]

The Supreme Court has ruled that neither *diyya* nor *qisas* shall be combined with civil compensation.[823] In other words, the heirs may not seek blood money and civil compensation

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[819] *See, e.g.*, DUBBER & HORNLE, *supra* note 511, at 261 (pointing out to the "dual character" of *diyya* as both penalty and compensation); Safwat, *supra* note 511, at 173 ("[*Diyya*] or blood-money has two aspects: first, it is a punishment inflicted on the offender for his crime. Second, it is a compensation to the victim or his representative."). *See also* Hascall, *Restorative Justice in Islam*, *supra* note 22, at 60 (arguing that blood money "can also be seen as restitution").

[820] Pursuant to Article (163) of the Libyan Civil Code, "every fault, which causes an injury to another, imposes an obligation to pay compensation upon the person by whom it is committed." LIBYAN CIV. CODE (1954), https://archive.org/stream/LibyanCivilCode1954/LibyanCivilCode_djvu.txt. Under the Libyan justice system, a civil lawsuit for damages resulted from a criminal conduct could be filed in the criminal court that hears the criminal case instead of the civil court. LIBYAN CODE OF CRIM. PROC., art. 224.

[821] *See, e.g.*, Mahkmat Istinaf Misrata [Misrata Court of Appeal], Criminal Chamber (March 25, 1997) (unreported) (Libya); Mahkmat Istinaf Trablous [Tripoli Court of Appeal], Criminal Chamber (Dec. 17, 1996) (unreported) (Libya); Mahkmat Istinaf Trablous [Tripoli Court of Appeal], Criminal Chamber (April 5, 1996) (unreported) (Libya).

[822] *See, e.g.*, Mahkmat Istinaf Misrata [Misrata Court of Appeal], Criminal Chamber (Nov. 11, 1997); (unreported) (Libya); Mahkmat Istinaf Trablous [Tripoli Court of Appeal], Criminal Chamber (March 28, 1997) (unreported) (Libya).

[823] Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 1394/43 (Feb. 9, 1999) (unreported) (Libya); Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 731/44 (June 17, 1998) (unreported) (Libya). *See also* Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 441/44 (March 10, 1999) (unreported) (Libya) (holding that the heirs of the murder victim are precluded from seeking *qisas* and civil compensation for the same crime, because it would be no differente than asking the court to impose the death penalty upon the defendant and also order the defendant to pay *diyya*); Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 661/44 (Dec. 13, 2000) (unreported) (Libya) (the same).

together, nor can they cannot demand death and file a claim for compensation for the same crime. In a lengthy rationale, the Court noted that *diyya* is clearly a penalty, but it is also civil compensation in the sense of making a payment to the heirs of the victim for their loss and suffering.[824] Accordingly, the Court found that the legislature, by adopting the retribution of blood money in the Law of *Qisas* and *Diyya*, made an exception to the general rule that governs the compensation system in tort law and, as such, if the heirs in homicide cases want to be compensated, they can only achieve that by claiming "*diyya*" in criminal court.[825] Further, the Court explained, the demand for a *qisas* penalty may not be combined with a claim for civil compensation, because otherwise the heirs could put the defendant to death by choosing *qisas* and also secure payment of "blood money" in the form of civil compensation.[826] Such situation, the Court concluded, circumvents the Law of *Qisas* and *Diyya*, and conflicts with the rules of Islamic law.[827]

However, several Libyan scholars disagree with the Supreme Court's decision, suggesting that victim's heirs should be allowed to seek the payment of *diyya* along with the civil compensation for the same case.[828] One argument for this approach is that *diyya* is not

[824] Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 731/44 (June 17, 1998) (unreported) (Libya).
[825] *Id.* It is worth noting that the Supreme Court's ruling about not combining *diyya* with civil compensation applies only to murder survivors who are the legal heirs of the victim. As for non-inheritors of the victim's family, because they are not entitled to blood money in the first place, they may file claims for civil compensation if they suffered any harm from the crime.
[826] *Id.*
[827] *Id.* The Supreme Court held that when the victim's heirs seek execution and file for civil compensation before the criminal court, they are considered to be seeking both *qisas* and *diyya*. In such case, the trial court shall not impose either one until asking the heirs to specify their choice; then the court will sentence the defendant accordingly. Al-Mahkamah Al-Uliya [Supreme Court], Criminal Appeal No. 441/44 (March 10, 1999) (unreported) (Libya).
[828] *See, e.g.*, Abdl-Fatah, *supra* note 817, at 13-14; Al-Barasi, *supra* note 816, at 118-20. Consistently with the Court's approach, others believe that the victim's heirs should not be compensated in addition to taking blood money, to prevent the heirs' unjust enrichment at the expense of the defendant. Sa'd El-Abbar, *Altakeef Al-fighi li-Diyya* [*The Jurisprudential Classification of Blood Money*], MAJLAH AL-BUHOTH AL-QANUNIYA, vol. 1, 236 (2002). Further, the retribution of *diyya* is closer to a compensation system since the Libyan lawmakers left the assessment of blood money to the heirs of the murder victim in Article (3) of the Law of *Qisas* and *Diyya*. ABU-BAKER EL-ANSARI, MOHADHRAT FI MADHIT QANUN AL-UQUBAT [LECTURERS IN CRIMINAL LAW] 136-37 (2004-2005).

compensation, rather, it is a penalty as explicitly described by of the Law of *Qisas* and *Diyya* itself in Article (1): "Is punished with death whoever kills a person with intent. If pardon is granted, the penalty shall be imprisonment for life and *diyya*."[829] Moreover, the blood money is paid in lieu of the victim's life, yet it does not compensate victim's heirs for their physical or emotional harm that resulted from the defendant's action.[830] Another commentator has argued that *diyya* is a punishment in the sense that it replaces *qisas* in the case of pardon as an alternative penalty.[831]

Without delving into the *diyya*'s legal classification, victim's heirs should not be entitled to have both blood money and civil compensation for the same homicide case. Even assuming that there were no strong justifications for allowing a victim's heirs to collect both *diyya* and civil compensation, there are clearly justifications for barring a victim's heirs from combining *qisas* with civil compensation. In line with the Supreme Court's observation, if the heirs were allowed to seek compensation and elect *qisas* at the same time, there would not be any motivation for them to forgive the offender by renouncing *qisas* and taking blood money instead, which is contrary to the whole concept of *qisas* system in Islam.[832]

When the heirs of the murder victim choose to forego *qisas*, either for payment of blood money or not, the murderer is also subject to a discretionary punishment called "*ta'zir*." The following section examines the *ta'zir* punishments in murder cases.

3. Discretionary Punishment (*Ta'zir*)

The primary punishment for murder offenses is death penalty. However, if the victim's heirs did not demand the death penalty and chose the *diyya* instead, the head of the state has

[829] Al-Barasi, *supra* note 816, at 118-20.
[830] *Id.*
[831] Abdl-Fatah, *supra* note 817, at 13.
[832] *See supra* notes 823-27 and accompanying text.

the power to inflict an appropriate discretionary sanction (*ta'zir*) against the killer. Literally, the term "*ta'zir*" means disgracing the offender for their shameful conduct. *Imam* Malik believes that an intentional murderer must face a *ta'zir* punishment in the case where the victim's heirs renounce *qisas*, whereas, according to the other three Islamic Schools, *ta'zir* is allowable not mandatory.[833] The majority of jurists provide that there is no specific *ta'zir* punishment in murder cases; rather, it is to be decided by the ruler of the state or the *qadi* (Islamic judge).[834]

Punishing a murder offender with *ta'zir* when the original fixed penalty (*qisas*) is remitted is an exception to the general rule that prescribes *ta'zir* punishments only for offenses with no divinely-specified penalties.[835] The reason behind this exception is that the crime of murder harms the victim's family and also violates the public order and threatens the security of the whole community. Therefore, when the private individuals who are the victim's heirs choose to forgive the offender, their forgiveness does not affect the state authority to impose any other penalties in the public interest. Further, the victim's heirs in murder cases pardon the punishment (*qisas*) and not the crime itself, which legally justifies the infliction of a *ta'zir* sanction upon the killer even after waiving the penalty of *qisas*.

In Libya, an intentional murderer receives a life sentence as a *ta'zir* punishment in the case of forgiveness, pursuant to Article (1) of the Law of *Qisas* and *Diyya*, which provides: "Is punished with death whoever kills a person with intent. If pardon is granted, the penalty shall be imprisonment for life and *diyya*."[836] It is important to note that the legislature did not

[833] AWDAH, *supra* note 640, vol. 2, at 183-84.
[834] *Id.* at 184.
[835] *See supra* text accompanying notes 623-24.
[836] LAW NO. (7) OF 2000 ON REVISING SOME RULES OF LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 1.

impose any *ta'zir* punishment in the original version of Article (1) that was enacted in 1994.[837] Six years later, life imprisonment was added to *diyya* upon realization that, given the seriousness of the crime, *diyya* (which can be even remitted) would not have sufficient deterrent effect and would not satisfy these heirs who did not waive their right to *qisas*, which could drive those heirs to take revenge on the defendant.[838] Some scholar think, however, that the legislature chose a very harsh discretionary punishment so that it would not be much less severe than the original penalty.[839]

Unlike *qisas* punishment, *ta'zir* is not divinely prescribed and it is left in the hands of the government, which raises the issue of whether the penalty of life imprisonment inflicted by the Law of *Qisas* and *Diyya* could be commuted or changed in compliance with the general rules of criminal law.[840] For instance, under the Penal Code, the existence of mitigating factors permits the trial judge to reduce the sentence of imprisonment for life to imprisonment,[841] which ranges from a minimum of three years to a maximum of fifteen years.[842] Also, defendants who receive life sentences are eligible for parole under certain conditions after serving twenty years of their prison term.[843] The Supreme Court has not addressed the issue, yet the Misrata Court of Appeal has ruled, that since the legislature did

[837] LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA, art. 1, *amended by* LAW NO. (7) OF 2000 ON REVISING SOME RULES OF LAW NO. (6) OF 1994 ON THE RULES OF QISAS AND DIYYA ("Is punished with death whoever kills a person with intent, if the heirs [of the victim] demand it. *Qisas* is not applied if pardon is granted, in which case the penalty is the *diyya*.").
[838] Unanimous pardon is not required for *qisas* to be waived. Thus, the majority of the victim's heirs may demand capital punishment, yet the defendant would not be executed if the rest of heirs decide to forgive. *See supra* text accompanying notes 676-77.
[839] Abdl-Fatah, *supra* note 817, at 22.
[840] *See supra* note 719 and accompanying text.
[841] LIBYAN PENAL CODE, art. 29.
[842] *Id.* art. 21.
[843] LIBYAN CODE OF CRIM. PROC., art. 450.

not explicitly state otherwise, judicial discretion is not to be exercised with regard to the discretionary punishment imposed by the Law of *Qisas* and *Diyya*.[844]

Some scholars believe that applying modern rules for *mitigating punishments* to *ta'zir* is consistent with the Islamic prospective on *ta'zir* as a non-definite punishment.[845] Another commentator provides the same rationale for arguing that the general rule of parole eligibility for life-sentenced prisoners, as set by the Code of Criminal Procedure should be applicable to convicted murderers as well.[846] It is reasonable that *qisas* and *diyya* cannot be altered or commuted because, aside from the fact that they are specified by God, the right to either belongs to the heirs of the murder victim. This is not the case with the discretionary punishment where the state is the one who holds the entitlement to inflict a *ta'zir* sanction, and it is done in the interest of society. Therefore, as soon as the *qisas* penalty is waived by the heirs, judicial discretion should dictate the discretionary punishment, and life-sentenced defendants should not be excluded from the parole system.

According to the Islamic criminal law, families of murder victim are given the power to control the outcome of the victim's case by deciding whether death will be executed, without denying the government the right to punish the offender with a discretionary punishment for threatening the public peace and security. Inspired by the Islamic approach, the following chapter proposes a broader involvement for murder survivors in the United States criminal justice process by permitting victim opinions concerning the appropriate punishment in a capital sentencing proceeding.

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[844] Mahkmat Istinaf Misrata [Misrata Court of Appeal], Criminal Chamber (Oct. 18, 2001) (unreported) (Libya).
[845] *See, e.g.*, ABDL-AZIZ AMER, TA'ZIR FI AL-SHARI'A AL-ISLAMIYA [TA'ZIR IN ISLAMIC SHARI'A] 493 (Cairo, Dar Al-Fikr Al-Arabi 5th ed. 1976).
[846] Abu-Hammra, *supra* note 816, at 17; *see* LIBYAN CODE OF CRIM. PROC., art. 450.

IV. PROPOSAL FOR ALLOWING VICTIM SENTENCING OPINION IN CAPITAL MURDER CASES

The author does not suggest that United States should adopt the Islamic approach by allowing a victim's family to have the final say in choosing the accused's punishment in a capital murder case. Rather, the Islamic approach could inspire the United States to consider the possibility of extending the family's participation in capital murder sentencing by permitting them to advise the sentencing authority of their preferred sentence. In this way, victims' families will not control the sentencing outcome, but at the same time, they will have the opportunity to play a significant role in the sentencing process by contributing their unique perspectives. However, in order for victim sentencing opinion to be permissible, the standard of relevance should be expanded.

A. Proposal for Applying a Broader Standard of Relevance in Capital Murder Sentencing

The views of a victim's family on the proper sentence should be considered relevant to the capital sentencing decision, even if they do not relate to the defendant's moral culpability and blameworthiness.[847] The mere fact that victim impact statements were found to be as relevant evidence in *Payne*--after they were held otherwise by *Booth*--is the perfect example of how the rules of evidence could be changed and the scope of relevance could be extended to permit victim sentencing opinions.[848] Evidence demonstrating the impact of the murder on the victim's family became relevant under *Payne* on the basis that the amount of harm done by the defendant's action has some relevancy to the defendant's

[847] The Supreme Court ruled that imposing death penalty must be based on circumstances that are relevant to the defendant's "personal responsibility and moral guilt." *See* Enmund v. Florida, 458 U.S. 782, 800-01(1982).
[848] *See* Payne v. Tennessee, 501 U.S. 808, 825-27 (1991); Booth v. Maryland, 482 U.S. 496, 496 (1987).

blameworthiness.[849] Yet, evidence of the victim's personal character is also found relevant, even though it has nothing to do with determining the defendant's moral culpability for the crime committed.[850]

The relevance of capital hearing evidence in murder cases should be extended beyond the blameworthiness of the defendant without threatening his or her constitutional rights. Mercy opinions, for instance, could be viewed as a relevant factor because they provide the defendant the prospect of receiving a life sentence instead of death.[851] Such an approach clearly serves the defendant's interest and causes no harm to his or her Eighth Amendment's rights. As for family's opinion that calls for death, a concise statement recommending capital punishment for the defendant would not be more prejudicial than probative because, after giving emotional impact testimony describing the good character of the victim and the impact of the crime on the family, most jurors would assume that the victim's family wanted the defendant to be executed.[852] While it might be true that victim impact evidence is constitutionally relevant to the harm caused by the defendant, it is significantly more emotional and prejudicial than a simple "irrelevant" death recommendation. Therefore, the Supreme Court should reexamine its position in *Payne* by allowing juries to hear and consider victim sentencing opinions in reaching the proper punishment for capital murder.

B. Proposed Framework for Victim Sentencing Opinion

Victim sentencing opinion should be allowed at the sentencing hearing of capital murder cases. State legislatures should redefine victim impact evidence in their sentencing

[849] *See Payne*, 501 U.S. at 825, 827.
[850] *See id.* at 827.
[851] *See* discussion *supra* notes 437-49 and accompanying text.
[852] *See* discussion *supra* notes 330-32, 339-48 and accompanying text.

statutes to encompass survivors' opinions regarding the sentence that a defendant should receive. States could follow the Oklahoma model, where by victim impact statements are defined as "information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, *and the opinion of the victim of a recommended sentence*."[853] A victim's family should be allowed to recommend either a death or life sentence as the proper punishment during sentencing.[854] Victim sentencing opinion should be presented orally or in writing. The law should require such recommendation to be given in concise, unemotional legal language, and without expressing any reason for it.[855] The defendant should still be allowed to ask the court to exclude unduly prejudicial sentencing opinion evidence that renders the trial fundamentally unfair based on the Fourteenth Amendment's Due Process Clause. Finally, sentencing opinions, especially those that call for mercy, should be admissible only if they were made voluntarily. Thus, the court may determine whether the survivors truly desire a life (or death) sentence and whether any form of coercion was involved.

The victim's immediately family--his or her spouse, children, mother, father, sister or brother--should be the only individuals who are entitled to offer sentencing opinions.

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[853] OKLA. STAT. ANN. tit. 21, § 142A-1(8) (1995) (emphasis added). Note that recently, in *Dodd v. Trammell*, the United States Court of Appeals for the Tenth Circuit held that the Oklahoma statute allowing victim sentencing opinions to be included in victim impact evidence violates the Eighth Amendment. 753 F.3d 971, 994 (10th Cir. 2013) *cert. denied*, 134 S. Ct. 1546 (2014), *and* 134 S. Ct. 1548 (2014). *See supra* notes 315-21 and accompanying text.

[854] For arguments in favor of death opinions, *see supra* Part II.B.2.a-c. For arguments in favor of mercy opinions, *see supra* Part II.C.2.a-c.

[855] *See, e.g.*, Ledbetter v. State, 933 P.2d 880, 891 (Okla. Crim. App. 1997) ("[A victim sentencing opinion] "should be given as a straightforward, concise response to a question asking what the recommendation is; or a short statement of recommendation in a written statement, without amplification.").

Another provision should indicate that if the murder victim has no immediate family, members of his or her extended family may offer sentencing opinions, provided that they had sufficient contact with the victim. Each of the survivors should be allowed to opine regarding the sentence to be imposed during the sentencing phase. Also, family members should be allowed to present conflicting views about the appropriate punishment the defendant should receive.

At the conclusion of the sentencing hearing, the trial judge should be required to give jury instructions to guide the jury's use of the sentencing opinion evidence and to ensure that the jury gives such evidence appropriate consideration. These instructions should explain that each survivor's expressed view on the appropriate sentence for the defendant is simply a recommendation, and the jury may take those views into consideration in reaching the final sentencing judgment. The instructions should emphasize that, ultimately, the jurors must make whatever decision they believe is appropriate regardless of the survivors' recommendations. Importantly, by instructing the jury that sentencing opinions are merely recommendations, it would not matter to the jury if all of a victim's survivors recommended the same sentence or expressed differing opinions on the proper punishment that should be imposed. In addition to instructing the jury, the trial judge should be also required to inform the survivors, before and after they voice their opinions about the sentence, that their sentencing opinion is only a recommendation and the jurors may decide otherwise.

V. CONCLUSION

If the United States consider the family's involvement under Islamic law, it can at least try to allow them to express their opinions as to the proper sentence to be imposed, especially when they speak in favor of mercy. The United States legal system recognizes murder as a crime against the state and cannot allow a victim's family to have the final say in selecting murderer's punishment. However, authorizing families of murder victims to voice an opinion at the sentencing hearing would not turn the crime of murder into a private wrong, nor would it in any way impinge upon the jury's power to decide whether the defendant should be sentenced to death. Although courts have determined that victim sentencing opinions are irrelevant at the sentencing phase of a capital murder trial, the rules of evidence are not sacred. The standard of relevance can be always reconsidered without violating a defendant's constitutional rights, as the Court did in *Payne* fifteen years ago.

Currently, a victim's family is precluded from voicing an opinion either against or in favor of imposing capital punishment. Until two years ago, death recommendations by victim's family were permissible in Oklahoma courts pursuant to a state statute allowing sentencing recommendations to be included in victim impact evidence. Nevertheless, the United States Court of Appeals for the Tenth Circuit in *Dodd v. Trammell* found that Oklahoma statute that allows sentencing recommendations as part of victim impact statement violates the defendant's Eighth Amendment right and held that the violation was not harmless.[856] State courts also disallow mercy opinions by following *Robison*, where the court

[856] 753 F.3d 971, 994 (10th Cir. 2013) *cert. denied,* 134 S. Ct. 1546 (2014), *and* 134 S. Ct. 1548 (2014).

found that *Payne* did not extend relevant mitigating evidence to encompass a family's opinion in opposition to the death penalty.[857]

It contradicts logic to prohibit family members from making a death recommendation at the sentencing hearing after *Payne* has opened the floodgate of emotions by permitting victim impact evidence. A simple statement of one's preference that the defendant be sentenced to death would not prejudice the defendant more than statements describing the victim's good character or the crime's impact on his or her family, particularly in light of the fact that most jurors would expect that the family would want the defendant to be executed. Further, victim sentencing recommendations are already admissible in non-capital cases. Considering victim sentencing opinion as permissible evidence would demonstrate respect to a victim's family members who suffer the most from the murder and serve the goals of the victims' rights movement.

As for mercy opinions, they should be allowed based on several grounds. There is no constitutional violation in allowing a victim's family members to ask the jury to spare the defendant's life. Even if the jurors were influenced by a family's call for leniency, the defendant would still be receiving life imprisonment, which is a severe punishment itself. Moreover, the criminal justice system unfairly favors pro-death penalty survivors over anti-death penalty survivors. The permissible use of victim impact statements in sentencing proceedings has already provided a family who seeks vengeance with a way to express an implicit opinion in favor of a death sentence. In addition, while anti-death penalty survivors are being silenced or ignored by the prosecution because they do not serve its agenda, those who advocate for capital punishment as the proper penalty will most likely be called to testify

[857] Robison v. Maynard, 943 F.2d 1216, 1217 (10th Cir. 1991).

about the victim's good quality and the harm they suffered from the murder. Furthermore, the legal system recognizes pro-death penalty survivors' need for closure by permitting them to witness the murderer's execution. It should be recognized that not all families find healing in vengeance; some may seek closure through forgiveness or at least by refraining from putting another human being to death.

In contrast, under Islamic law, a victim's heirs have a say in whether the offender should live or die, because Islam never overlooked the fact that victim's family members are the ones who have suffered the most from the loss of a loved one. Moreover, Islamic law recognizes that while some families want the offender to be executed, others may have a desire for mercy and want to spare the offender's life. Therefore, in addition to granting the heirs of the victim the right to demand death (*qisas*), Islam provides a place for mercy by giving the heirs the authority to renounce capital punishment, either in favor of receiving blood money or for free. Importantly, Islamic law allows the victim's family to have a say in a matter that directly concerns them, without sacrificing the community's interests. In *Shari'a*, the classification of murder as a private claim between the offender and the family of the victim changes when the penalty of death is waived in lieu of *diyya* or for free. At that time, a free murderer would threaten the whole community, and thus, the state is charged with punishing the defendant by any penalty other than death.

In Islam and in Libya, as a contemporary state that implements the law of *qisas* through the issuance of the Law of *Qisas* and *Diyya* in 1994, the heirs of the murdered person are the ones who have the exclusive authority to decide whether to execute or forgive the offender. In a case where the victim leaves no heirs or they cannot be reached, such authority will belong to the state as a representative of the victim. Moreover, in order for the death

penalty to be imposed, all heirs must demand *qisas*. If one heir decides to pardon the offender, the punishment of *qisas* becomes inapplicable. Under classical Islamic law, the claim of murder is brought to the judge by the victim's heirs who execute the judgment of death as well. In modern time, the heirs are entitled to merely demand *qisas*, but the state will be in charge of the execution. In Libya, murder is prosecuted by a public attorney who represents the state and when the victim's heirs demand *qisas* unanimously, execution is carried out by the government.

In Islamic law, the door for pardon stays open until the time of carrying out the execution, even if the heirs previously have invoked their right to *qisas*. Likewise, in Libyan law, the heirs of the victim may forgive the defendant even after the death sentence becomes final. The victim's heirs may pardon the defendant in exchange of an amount of *diyya* fixed at 100 camels or other objects of the same value. The offender has to pay the *diyya* himself or herself, unless he or she is minor or mentally ill, in which case; it must to be paid by the *aqilah* (family) of the offender. Under the Libyan Law, however, the amount of *diyya* is determined by the heirs of the murder victim. Finally, waiving the *qisas* penalty by the victim's heirs does not save the murderer from a discretionary punishment called (*ta'zir*), which the state is allowed to inflict on the defendant to reduce crimes and provide a safe environment for the community. The Libyan Law of *Qisas* and *Diyya* prescribes life imprisonment for murder as a *ta'zir* punishment.

The recognition that the crime of murder as a public harm in the United States should not underestimate the fact that the family members of the victim are the ones most personally affected by the grief of a murder. In appreciation of this fact, and inspired by Islamic jurisprudence, a victim's family members should be entitled to play a larger role at the

sentencing phase by allowing them to communicate their opinion on the appropriate sentence to the jury, particularly when they wish to advocate for mercy.

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