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Defense-Based Victim Outreach: Restorative Justice in Capital Cases

Kristen F. Grunewald*
Priya Nath**

I. Introduction

Cary Stayner ("Stayner") brutally murdered nature guide Joie Armstrong ("Joie") in Yosemite National Park in July, 1999. Stayner was hiking through Yosemite when he saw Joie outside of her cabin. He "duct-taped her and gagged her" and put her into his truck. Joie fought Stayner and, at one point, jumped out of the truck and attempted to get away from him. In response, Stayner took a knife from his bag, slit Joie's throat, and then decapitated her.¹

Stayner was apprehended shortly after killing Joie and confessed to her murder.² Stayner also confessed to the brutal murders of three female tourists outside of Yosemite.³ The national media focused its attention on the deaths of these four women and the public demanded a harsh punishment for Stayner.⁴ In the midst of this intense media attention, Joie's family sent a letter to the United States Government supporting a plea agreement for Stayner.⁵ Despite their anger, sorrow, and grief, the Armstrong family recommended a life sentence

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1. Stacy Finz, *The Case of a Lifetime*, S.F. CHRON., Dec. 15, 2002, at A1, 2002 WL 4038188.

2. *Id.*

3. *Id.*

4. *See id.*

5. E-mail from Tammy Krause, Associate, Institute for Justice and Peacebuilding, to Kristen Grunewald (Jan. 29, 2003, 15:39 EST) (on file with author) [hereinafter E-mail from Krause].

for Stayner.⁶ Through defense-based victim outreach, the Armstrong family looked past their emotions and used their power and influence to attempt to save the life of Cary Stayner.⁷

Part II of this Article explores the origins of defense-based victim outreach. Restorative justice focuses on the effects of a wrongdoing on the victim, the community, and the offender. Part II also examines earlier forms of criminal justice and the origins and basic principles of restorative justice. Finally, Part II identifies the benefits of restorative justice programs, such as defense-based victim outreach, for the capital defendant, the survivors of the victim, the defense, the prosecution, and the judicial system generally. Through an examination of the history, principles, and advantages of traditional restorative justice, Part II introduces one of the Western world's uses of restorative justice—defense-based victim outreach.

Part III of this Article outlines the practical and procedural implications of defense-based victim outreach. Moreover, Part III describes the work of a victim liaison, the relationships that a liaison develops, and the aspects of a defendant's case that a liaison's work may affect. In addition, Part III outlines the aspects of defense-based victim outreach that defense attorneys may practice without a victim liaison. Finally, Part IV provides a more detailed discussion of the effects of the victim liaison on Cary Stayner's case.

II. The Principles of Restorative Justice Give Life to Defense-Based Victim Outreach

Priya Nath

A. Introduction to the Principles of Restorative Justice

Learning to forgive is much more useful than merely picking up a stone and throwing it at the object of one's anger, the more so when the provocation is extreme. For it is under the greatest adversity that there exists the greatest potential for doing good, both for oneself and others.⁸

Channeling feelings of anger and resentment often remedies the infliction of pain, especially considerable pain.⁹ The need to hold someone accountable for a crime is as overwhelming as the need to equalize the harm done to us by imposing a counter-harm on another.¹⁰ A "political economy of relationship[s]" breeds the desire to ask someone to acknowledge the harm he or she did and to

6. See Daniel Vasquez, *Stayner Asked to See Porn*, SAN JOSE MERCURY NEWS, July 24, 2002, at B1, 2002 WL 24309574 (describing Stayner's case).

7. Richard Burr & Tammy Krause, Address at The Bryan R. Shechmeister Death Penalty College, Santa Clara University School of Law (Aug. 14, 2002).

8. Malcolm David Eckel, *A Buddhist Approach to Repentance*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 135 (Amitai Etzioni & David E. Carney eds., 1997) (quoting the Dalai Lama).

9. See DENNIS SULLIVAN & LARRY TIFFT, RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES 2 (Georgia Gray & Lyn Markham eds., 2001) (stating that "dealing with the pain another inflicts upon us" is one of the most difficult situations a person faces).

10. *Id.*

stop the harmful action and/or apologize for the damage done.¹¹ If apology and forgiveness follow a harm, then all individuals involved, including the community, begin the process of restoration.¹² Recognizing that this apology will never undo what is already done is an important step toward restoring the community and disabling the lack of restraint that allowed the harmful act to occur.¹³

Defense-based victim outreach programs stem from the restorative justice approach.¹⁴ Restorative justice and defense-based victim outreach programs embrace the concept that reactive, violent punishment, such as the death penalty, neither promotes restoration of personal well-being nor facilitates the re-connection of the harmed individual with the community.¹⁵ Such punishment attains submission, compliance, and sometimes a public acknowledgment of shame from the defendant, but because capital punishment has very little regard for the offender or the survivors of the victim, it often generates a void and resentment.¹⁶ An institutional bias in favor of the death penalty exists in our society.¹⁷ Thus, society embraces a "prescriptive attitude" towards survivors of murder victims that prescribes the execution of killers for recovery from the trauma of the murder.¹⁸ Defense-based victim outreach programs recognize that not all survivors want to impose the death penalty and that revenge in the form of capital punishment often exacerbates the emotional trauma survivors endure.¹⁹

11. *Id.* at 3.

12. *Id.* at 4.

13. *Id.*

14. Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity That Has Come from Payne v. Tennessee*, 88 CORNELL L. REV. 517, 527 (2003) (discussing defense-based victim outreach in the wake of *Payne v. Tennessee*, 501 U.S. 808 (1991)). In Burr's title, "victim" refers to the survivors of the person murdered.

15. SULLIVAN & TIFFT, *supra* note 9, at 4-5.

16. *Id.* at 5. In this Article, "survivors" and "survivors of the victim" refer to family members and friends of the murder victim.

17. See Renny Cushing, *A Welcome from Renny Cushing*, Murder Victims' Families for Reconciliation, ¶ 4, at <http://www.mvfr.org/welcome.html> (last visited Jan. 30, 2003) (explaining the basic premise of Murder Victims' Families for Reconciliation as a community and as a victims' rights movement against the death penalty).

18. *Id.*

19. See Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 479 (James R. Acker, Robert M. Bohm, & Charles S. Lanier eds., 1998) ("It is a great mistake to assume that all victims' families want the same thing from the criminal justice system.").

These programs aim to address the needs of the survivors of the victim as well as of the offender.²⁰

Subpart B of Part II of this Article examines the advantages of defense-based victim outreach programs and the evolution of such programs from restorative justice, including an exploration of earlier forms of criminal justice such as the battle between state and community justice. Subpart B also describes the development of restorative justice through various cultural viewpoints. Subpart C determines the advantages of restorative justice by exploring its basic principles and objectives. Subpart D examines the adversarial nature of our current criminal justice system and explains the various modifications that are necessary for defense-based victim outreach programs to flourish. Subpart E explains the benefits that may result from defense-based victim outreach programs.

B. Early Forms of Criminal Justice

Restorative justice is a process that benefits all members of society, yet it is a relatively new concept in the United States. Because of its Anglo-Saxon/European roots, when torts and crimes were separated, the United States criminal justice system was formed and founded on retributive justice. Retributive justice is a response to crime that fixes guilt to an individual and inflicts pain on this individual for committing a crime.²¹ While restorative justice aims to benefit society, retributive justice aims for offender accountability. Even though retributive justice developed during the same time as its restorative counterpart, it developed in different parts of the world and became a Western form of justice.²² Restorative justice, as it is practiced in the United States, has a distinctively Western flavor, but is based on cultures and religions that pre-date modern society.

1. Retributive Justice: A Historical Alternative

Early retributive punishment was more severe than its present form and a lack of guidelines often strained the relationship between the crime and the punishment.²³ For example, the Mosaic Law of the Old Testament recognized thirty-six capital offenses, ranging from adultery to murder, and called for

20. Interview with Tammy Krause, Associate, Institute for Justice and Peacebuilding, in Harrisonburg, Va. (Sept. 17, 2002) [hereinafter Interview with Krause].

21. HOWARD ZEHR, CHANGING LENSES 65-66 (1995).

22. JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 7 (2002).

23. ZEHR, *supra* note 21, at 92. The relationship developed from the Enlightenment notion that the punishment should fit the crime and, therefore, the relationship between the crime and the punishment should not be less arbitrary. *Id.*

execution by stoning, burning, decapitation, strangulation, and various other means.²⁴ Therefore, the punishment for murder could be the same as for adultery. The intermingling of religion and society meant that religious law was criminal law. The Old Testament describes that in God's covenant with Noah, God stated, "Whoever sheds the blood of man, by man shall his blood be shed, for God made man in His own image." ²⁵ This covenant conveys the notion that the death penalty was a fitting punishment for certain crimes that resulted in the death of the victim and that a crime was a sin not only against man but also against God.²⁶

The New Testament, in places, seems to assume that the State has the right to punish criminals with death if necessary and does not specifically state that Jesus denied the State the authority to exact capital punishment.²⁷ When Pilate calls attention to his power to crucify Jesus, Jesus states that God granted Pilate this power to punish.²⁸ This form of State-enforced punishment created conflict between the early Christian practice that emphasized forgiveness and "rulers who sought to signify their power" by inflicting physical, including capital, punishment.²⁹

a. State Justice vs. Community Justice

The history of criminal justice follows two developments—state justice and community justice.³⁰ An interpersonal violation is, and was in earlier times, a crime representing a wrong between people.³¹ In earlier times, justice also took the form of a kind of settlement, usually by converting the personal injury into a material compensation.³² Community justice allowed the offender and the person harmed to settle most harms outside of the courts with the aid of their

24. Avery Cardinal Dulles, *Catholicism & Capital Punishment*, First Things, ¶ 4, <http://www.firstthings.com/ftissues/ft0104/articles/dulles.html> (last visited Jan. 30, 2003).

25. *Id.* (quoting *Genesis* 9:6).

26. *See id.*

27. *Id.* at ¶ 5.

28. *Id.*; *see also John* 19:11 (King James) (stating: "Thou couldest have no power at all against me, except it were given thee from above . . ."). Pope Pius XII maintained that, when inflicting capital punishment, "[the State] does not exercise dominion over human life but only recognizes that the criminal, by a kind of moral suicide, has deprived himself of the right to life." *Dulles, supra* note 24, at ¶ 25. Pope Pius XII claimed that the State does not discard an individual's right to life but reserves the power to condemn a "person of the enjoyment of life in expiation of his crime when, by his crime, he has already dispossessed himself of his right to life." *Id.* at ¶ 26. Today, however, Pope John Paul II and the Catholic Church note that "modern improvements in the penal system have made it extremely rare for execution to be the only effective means of defending society against the criminal." *Id.* at ¶ 31.

29. BRAITHWAITE, *supra* note 22, at 7.

30. ZEHR, *supra* note 21, at 97-101.

31. *Id.* at 99.

32. *Id.*

community and church.³³ The administration of justice was a process of mediation and negotiation rather than the imposition of a punishment.³⁴ Wrongs against individuals collectively constituted a wrong against the community.³⁵ Even though community justice gave much respect to negotiated, extrajudicial settlements, an alternative approach—state justice—also developed.³⁶

Retributive punishment in the hands of authorities, or state justice, “represented the wave of the future.”³⁷ The Enlightenment ushered in a new, secular form of law based on rational principles and natural law.³⁸ Enlightenment thinkers formulated a new state and society based on an implied social contract.³⁹ They argued that the larger portion of society should construct the laws while the government administers them.⁴⁰ Thus, society came to view crimes as violations of the law rather than harms caused to individuals.⁴¹

The Enlightenment thinkers did not question whether pain should be administered when people committed wrongs.⁴² New mechanisms were introduced to induce the necessary pain.⁴³ As technology developed, so did the types and severity of the punishments administered.⁴⁴ Prisons became the perfect tool for delivering painful punishment without the physical harm.⁴⁵ Prisons allowed for graded terms according to the degree of the offense and became the primary form of punishment.⁴⁶ The establishment of public prosecutors, combined with the widespread use of prisons, demonstrated the necessity for offender account-

33. *Id.* at 100.

34. *Id.*

35. *Id.* at 101.

36. ZEHR, *supra* note 21, at 101.

37. *Id.* at 116.

38. *Id.* at 117.

39. *Id.*

40. *Id.*

41. *Id.* at 119.

42. ZEHR, *supra* note 21, at 119.

43. *Id.*

44. *Id.* at 120.

45. See Elizabeth Linehan, *Retribution and Restoration: The Two Paths*, in BLUEPRINT FOR SOC. JUST., Vol. LVI, No. 5, ¶ 2 (Jan. 2003), <http://www.loyno.edu/twomey/blueprint/Jan03.htm> (describing a prison that punished a prisoner's bad behavior by feeding the prisoner nutritious but bad-tasting food, thus depriving the prisoner of “even the simple pleasure of the good tastes of food”).

46. ZEHR, *supra* note 21, at 119.

ability.⁴⁷ This form of accountability, at best, allows an individual to take ownership for the wrongdoing through understanding the consequences of a crime.⁴⁸

b. The Present System of Retributive Justice

State justice prevails today. A "system of corrections," allocating pain in "units of misery in response to units of lawbreaking," evolved into modern retributive justice.⁴⁹ This system continues today as society views criminal punishment as justice intended to cause the criminal to suffer, particularly from an emotional standpoint.⁵⁰ Society is so accustomed to the assumption that criminal punishment should cause anguish to the criminal that the establishment considers itself a "paragon[] of social justice when . . . [it] object[s] to *excessively harsh* punishments."⁵¹

Our present system of retributive justice is one of "payback."⁵² The popularity of the system stems from its service of three values.⁵³ First, society views its ancient belief that an individual who wrongs another deserves to suffer a consequence for that offense as a matter of justice.⁵⁴ Second, society is concerned with victims taking private revenge that often is excessive and prone to retaliation by the offender.⁵⁵ Third, an expectation exists that society must take the side of the victim, and it does this through the severity of the punishment it inflicts on the wrongdoer.⁵⁶ Society believes this form of justice demonstrates respect for the victim and shows that it takes the offender seriously.⁵⁷

The idea that offenders must get what they deserve is so prevalent that our system absorbs the notion that the professionals, to whom we delegate the

47. See *id.* at 120-21 (examining presumptions of crime and justice and proposing a restorative model); Marty Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders*, DISP. RESOL. MAG., Fall 2000, at 8. The United States is the largest per capita jailer in the world. Price, *supra*, at 9. The United States also has the highest violent crime rate of any industrialized nation. *Id.* The prison culture in which offenders are immersed rewards meanness and denial. *Id.* The result is that ex-offenders, upon release, re-enter society as antisocial and bitter persons, which increases the probability of recidivism. *Id.*

48. ZEHR, *supra* note 21, at 78, 120. However, in our society, concepts of guilt and punishment not only fail to encourage ownership but also increase the difficulty of so doing. *Id.*

49. Linehan, *supra* note 45, at ¶ 3; ZEHR, *supra* note 21, at 120.

50. Linehan, *supra* note 45, at ¶ 3.

51. *Id.*

52. *Id.* at ¶ 24.

53. *Id.*

54. *Id.*

55. *Id.*

56. Linehan, *supra* note 45, at ¶ 24.

57. *Id.*

responsibility of punishment, understand what is “needed to settle the score.”⁵⁸ In turn, society encourages offenders to believe that punishment is their repayment to society.⁵⁹ However, according to Howard Zehr (“Zehr”), director of the Mennonite Central Committee, United States Office of Criminal Justice, offenders are rarely fulfilled with this form of repayment to our society.⁶⁰ The community rarely benefits because this repayment often does not include a public resolution.⁶¹

2. *The Materialization of Restorative Justice*

John Braithwaite argues that restorative justice is “a major development in human thought grounded in traditions of justice.”⁶² Ancient cultures produced traditions of justice that accepted restorative approaches to crimes, even crimes as grave as taking another’s life.⁶³ For example, the Sulha, an ancient Palestinian restorative justice institute still in operation today in Galilee, continues “the ideal of using the lesser evil of crime to build the greater good of a loving community.”⁶⁴ When a serious crime, such as murder, is committed, the Sulha follows specific steps that focus on repentance to remedy the situation and restore peace to the community.⁶⁵

The Vedic civilization (6000-2000 B.C.) of the Hindus provides another example. This civilization believed that forgiveness follows “he who atones.”⁶⁶ The principle of penance in Hinduism is derived from the laws of Karma, the principle of cause and effect.⁶⁷ The whole system of reincarnation rests on the principle of penance, which must be performed after every sin is committed.⁶⁸

58. ZEHHR, *supra* note 21, at 74-75.

59. *Id.* at 75.

60. *Id.*; see also *id.* at 279 (describing Zehr and his work).

61. *Id.* at 75.

62. BRAITHWAITE, *supra* note 22, at 3.

63. *Id.*

64. *Id.*

65. See *id.* at 4 (describing the steps of the Sulha). In the Sulha, the first step is that the offender’s family requests help from individuals known as peacemakers. *Id.* These peacemakers are respected for their mediation and peace-restoring abilities. The peacemakers visit the victim’s family and offer the repentance and sorrow of the offender’s family. *Id.* They also ask the victim’s family how they can restore peace. *Id.* After peace is attained between the two families, a ceremony is performed that signifies that the violence has brought the community closer together by channeling communication and sharing the suffering. *Id.* Cf. *infra* Part II.D (describing the role of the victim liaison in defense-based victim outreach).

66. BRAITHWAITE, *supra* note 22, at 3.

67. *How to Ease Karma*, HINDUISMTODAY, ¶ 3, at <http://www.hinduismtoday.com/2000/7-8/2000-7-10.html> (last visited Jan. 30, 2003).

68. *Id.* Ancient Scriptures stated that, through forms of penance such as confession and austerity, a sinner is freed from guilt. *Id.* at ¶ 8 (quoting Manu Dharma Shastras 11.228-34). When an individual repents for his sins, that individual is freed from the bad Karma associated with the crime committed. *Id.* However, unless an offender resolves not to commit further sins, he is not

Through penance, an individual can expiate his sins so that, when born again, the individual will not bear the disgraceful marks of the sin committed in a previous life.⁶⁹ The dharma shastras detail a long list of actions for which penance is advised; the list includes serious capital crimes such as murder.⁷⁰

In Hindu dharma, the law of Karma dictates that every action one commits, whether good or bad, has a consequence. This consequence may present itself in the lifetime in which the action occurred or in a subsequent lifetime. A transgression against an individual creates bad Karmic energy, negatively affecting the community and the transgressor. In order to prevent bad Karmic reaction, one must repent for the transgression he committed. However, some Hindu scholars argue that penance does not rid an individual of "bad Karma," but, rather, makes the offender "fit for transaction with society."⁷¹ Ancient Hindus believed that there were three sources of punishment: the king, an assembly of wise men, and the individual himself.⁷² Nonetheless, many communities recognized self-correction as the best form of punishment.⁷³ Therefore, the objective of repentance was to deter future bad Karma from one's act from pervading through the individual and entering the current of the community at large.⁷⁴

Through the Quran, Islam also discourages capital punishment for murder.⁷⁵ The tenet of strict equivalence between the crime committed and the punishment that follows has clear exceptions.⁷⁶ That is, the Quran prefers that the murderer compensate the victim's family and acknowledges that killing the murderer neither benefits the survivors nor brings the victim back.⁷⁷ The compensation must be sufficient to act as a deterrent for others.⁷⁸ Islam dictates that the victim's family judges the crime and decides a proper punishment with the help of an individual in the community who is well-versed in Islamic law.⁷⁹

purified; that is, the sin will follow him into the next lifetime. *Id.*

69. *Id.* (quoting Manu Dharma Shastras 11-54).

70. *Id.* at ¶ 6. Hindu Dharma is the oldest living religious philosophy and way of life. *Hindu and Hindu Dharma*, at <http://www.hindunet.org/quickintro/hindudharma/index.htm> (last visited Mar. 2, 2003).

71. *Karma*, *supra* note 67, at ¶ 7.

72. *Id.* at ¶ 9.

73. *Id.*

74. *Id.* at ¶ 12. *See generally id.* (discussing the power of penance to bring relief and solace to the offender).

75. *Quran* 2:179; *see also Qur'anic Criminal Justice System: Capital Punishment, Death Penalty in Islam, Submission*, at ¶ 1, at <http://www.submission.org/death5.htm> (last visited Jan. 30, 2003) (stating Islamic view of the imposition of death as an unsuitable penalty for murder) [hereinafter *Quran Justice*].

76. *Quran Justice*, *supra* note 75.

77. *Id.*

78. *Id.*

79. *Id.*; *see infra* note 171 and accompanying text (describing the work of the victim liaison

A similar system developed in Christianity with the universalization of personal penance. In Christianity, the institutionalization of restorative justice occurred in the late sixth century as Celtic monks developed a new approach of reconciliation with God.⁸⁰ The new method involved personal penance coupled with confession.⁸¹ This concept of private penance heightened notions of responsibility for one's actions and countered the idea that failure by the victim's family to exact revenge was shameful.⁸²

In modern times, restorative ideas persist in many non-European countries that remain untouched by central state power.⁸³ These ideas are a source of cultural diversity and counter the homogeneity found in nations of central state power.⁸⁴ For example, in 2001, white South Africans welcomed "a new youth justice bill" that included the "[i]ndigenous restorative notion of *ubuntu*—the idea that our humanity is relationally tied to the humanity of those we live with—as the fundamental objective of the legislation."⁸⁵ This notion of *ubuntu* allowed Nelson Mandela "to construe even the supporters of apartheid as inextricably its victims."⁸⁶

In Buddhism, rehabilitation is the primary focus of punishment.⁸⁷ Through rehabilitation, a convicted criminal defendant can realize his or her mistakes and attempt to avoid future crimes.⁸⁸ In Buddhist terminology, a rehabilitated offender will remember "Buddha-nature," which is the concept that all sentient beings are capable of realizing *bodhi*, an enlightenment and/or awakening.⁸⁹ Society benefits from a wrongdoer's rehabilitation because the wrongdoer becomes a productive member of society and contributes to the general welfare of the community.⁹⁰

Western cultures are in a process of relearning from Buddhists such as the Dalai Lama that the "more evil the crime, the greater the opportunity for grace to inspire a transformative will to resist tyranny with compassion."⁹¹ The implications of this teaching on our legal system are that, if crime is tackled with grace and compassion, the opportunity to transform lives prevents greater evils in the

and comparing it with the aid received from an individual well-educated in Islamic law).

80. BRAITHWAITE, *supra* note 22, at 5.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. BRAITHWAITE, *supra* note 22, at 5.

87. Damien P. Horgan, *Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty*, 41 AM. J. JURIS. 271, 282 (1996). See generally *id.* at 271-88 (discussing the Buddhist position on the death penalty based on Buddhist literature and the "experience of Buddhism as a living religion").

88. *Id.*

89. *Id.* at 275, 282.

90. *Id.* at 282.

91. BRAITHWAITE, *supra* note 22, at 3.

future.⁹² Restorative justice takes a very different approach than traditional notions of justice that deal with deterrence, crime prevention, incapacitation, and rehabilitation.⁹³ By bringing the offender back into the community, the traditional goals of criminal justice are also fulfilled because the offender is less likely to commit additional crimes and may even give back to the community that he once harmed. Thus, the concepts of freedom, democracy, and community create a stage on which criminal jurisprudence is altered.⁹⁴

C. *The Principles of Restorative Justice*

1. *The Objective: Restoration of Violated Relationships*

Crime represents a broken relationship between a victim and an offender.⁹⁵ If a relationship did not exist prior to the crime, the crime creates a hostile relationship.⁹⁶ The hostility in the relationship affects the well-being of the victim and the offender.⁹⁷ Although crime causes injury to the victim, the offender also suffers.⁹⁸ Injury, whether physical or mental, breeds crime.⁹⁹ Many offenders seek ways to validate and empower themselves and view crime as a means to achieve those desires.¹⁰⁰ Often they commit harms because harm was perpetrated on them. The justice system in operation today may further their harm and, in turn, the injuries of crime on others.¹⁰¹

At the core of crime is a violation of a person by another person, who might be a victim or survivor himself.¹⁰² However, the victim and the offender are not the only people harmed; there exists "a larger social dimension to crime."¹⁰³ The ripple effect of crime demonstrates that society has an investment in crime and, therefore, a function to perform.¹⁰⁴ Restoration may define justice.¹⁰⁵ If crime is an injury to particular individuals and the community at large, then justice, or

92. *Id.*

93. *Id.*

94. *Id.* at 3-5.

95. ZEHR, *supra* note 21, at 181.

96. *Id.* at 181-82.

97. *Id.* at 182.

98. *Id.*

99. *Id.*

100. *Id.*

101. ZEHR, *supra* note 21, at 182.

102. *Id.* This statement can be true for many, if not all, crimes. While murder is an obvious example of a violation of a person by another person, Medicaid fraud is a less obvious example. When an individual commits Medicaid fraud, he or she is taking the benefits of medical services from individuals who are in need. This sort of fraudulent behavior affects those people who expect to receive Medicaid funding, and it also affects our health care system.

103. *Id.*

104. *Id.*

105. *Id.* at 186.

acts of restoration, will counterbalance the injury by promoting healing.¹⁰⁶ True justice aims to provide a context in which this process can begin.¹⁰⁷

The first goal of justice is to return emotional balance to the victims through healing.¹⁰⁸ Those who are violated must attain closure and begin to believe that they have control over their lives and their safety.¹⁰⁹ In addition, the violator needs encouragement to change.¹¹⁰ Ideally, he or she should have the freedom to start life again.¹¹¹

The second goal is reconciliation between the victim and the offender.¹¹² Reconciliation implies complete repentance and forgiveness and involves the development of a positive relationship between the victim and the offender.¹¹³ Zehr acknowledges that reconciliation in all circumstances is not feasible and that not all cases will result in positive relationships.¹¹⁴ All people involved must overcome the barrier of emotion in order for reconciliation to begin.¹¹⁵

Restoration for the community is also a necessary goal of justice.¹¹⁶ Crime erodes the community's sense of wholeness.¹¹⁷ The community has an integral role in the healing of the victim and, in turn, of itself.¹¹⁸ If an offender refuses to account for the wrongdoing, the community can provide "an experience of justice."¹¹⁹ The community can empathize with the victim and agree that the wrong was indeed harmful, in which case, at least partial justice can exist.¹²⁰

Restorative justice programs of this nature encourage the reintegration of an offender into society as a functioning citizen who will address the needs of the victims and the community.¹²¹ The current response to crime does not acknowledge the community as a victim, even though the community fabric is often harmed severely after crimes are committed.¹²² The community generally is not involved in creating appropriate resolutions.¹²³ The treatment of crime as an

106. *Id.*

107. ZEHR, *supra* note 21, at 186.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 186-87.

112. *Id.* at 187.

113. ZEHR, *supra* note 21, at 187.

114. *Id.*

115. *Id.*

116. *Id.* at 188.

117. *Id.*

118. *Id.*

119. ZEHR, *supra* note 21, at 189.

120. *Id.*

121. KAY PRANIS, U.S. DEP'T OF JUSTICE, ENGAGING THE COMMUNITY IN RESTORATIVE JUSTICE 19 (1998), <http://ssw.che.umn.edu/rjp/resources/documents/cpra98a.PDF>.

122. *Id.* at 3.

123. *Id.*

individual occurrence, instead of as a continuous pattern, ignores the long-term health of the community.¹²⁴

2. *Arguments for Restorative Justice Programs*

Proponents of restorative justice argue that it “reinforces the social cognitive principles that have been shown to be hallmarks of effective rehabilitation programs.”¹²⁵ Restorative justice aims to challenge harms caused by crime and to communicate why that action was wrong through a discussion of its consequences.¹²⁶ A pro-social alternative encourages family and friends of both the victim and the offender to take responsibility for such communications and to enlist the help of professionals who will foster a restorative approach.¹²⁷ This theory of rehabilitation theorizes that the combination of professional healing and community outreach will be more effective than professional help alone.¹²⁸

The current criminal justice system has components that weaken connections between the offender, the victim, and the community.¹²⁹ Proponents of this system argue that a “retributive justification for punishment respects limits,” but the reality is that “in practice it does not.”¹³⁰ This response to crime continues the cycle of isolation and weakens the community bonds described in the preceding subsection.¹³¹ The community deliberately severs ties with the offender and, through neglect, inadvertently cuts off ties with the victims.¹³² Our system “is approaching practical and moral bankruptcy” because it is unable “to meet the requirements of respecting criminal offenders as persons,” it fails to address the offender’s guilt, and the proportion between offense and punishment does not preserve human dignity throughout.¹³³

The first argument for proponents of restorative justice is that it is an “*alternative* to a system that does not work.”¹³⁴ While retributive justice views crime as a violation against the state, restorative justice views crime as a violation of relationships.¹³⁵ It seeks to repair relationships through reconciliation and reassurance.¹³⁶ Unlike retributive justice, restorative justice affords “‘all stake-

124. *Id.*

125. BRAITHWAITE, *supra* note 22, at 98.

126. *Id.* at 99.

127. *Id.*

128. *Id.*

129. Linehan, *supra* note 45, at ¶ 42.

130. *Id.* at ¶ 43.

131. PRANIS, *supra* note 121, at 3; *see supra* Part II.C.1 (discussing the objective of restorative justice).

132. PRANIS, *supra* note 121, at 3.

133. Linehan, *supra* note 45, at ¶ 43.

134. *Id.* at ¶ 44.

135. *Id.* at ¶ 46.

136. *Id.*

holders affected by a breach of the law . . . an opportunity to participate in deciding what to do about it.' ”¹³⁷ The present system discourages offender accountability by encouraging pleas of not guilty in capital cases.¹³⁸ Restorative justice requires accountability for the crime committed and the resulting harm. Therefore, it respects the victim and the offender and eventually repairs the damage suffered by the community.

D. The Adversarial Nature of the Criminal Justice System

Our society engages in an adversarial criminal justice system that encourages conflict between parties.¹³⁹ It assumes that, through conflict, the truth will emerge and the “interests of the parties will be safeguarded.”¹⁴⁰ This cultural view is traditional dispute resolution.¹⁴¹ Fundamental fairness and the truth are integral to the Anglo-American judicial process and are embraced in another, broader Anglo-American concept, “justice.”¹⁴² Traditional dispute resolution presupposes incompatible interests and intends for those interests to become reconcilable, thereby laying the cornerstones of fairness, truth, and justice.¹⁴³

The primary goal of the adversarial system is the determination of guilt and the imposition of punishment through rules and processes.¹⁴⁴ The rules and processes are dependent only on professionals who represent the defendant and the State.¹⁴⁵ As a result, individuals and communities are removed from the process.¹⁴⁶ Victims and survivors become bystanders because the State acts as the victim.¹⁴⁷ The State represents the community and assumes that its interests are served through the fixing of a punishment. The wounds of the community are not properly healed. The needs of the victims are thought to be met through the imposition of harsh sentences.

Prior to 1980, any victims’ rights programs operated through prosecutors who had the discretion to grant and enforce victims’ rights.¹⁴⁸ In the late 1970s,

137. *Id.*

138. The conventional wisdom within the capital defense bar is that capital defendants should never plead guilty absent an absolute assurance of a sentence less than death. JOSHUA DRESSLER & GEORGE C. THOMAS, III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 1014 (1999). The difficulty in obtaining such agreements frequently forces the defendant to plead not guilty and hope for a jury-imposed life sentence.

139. ZEHR, *supra* note 21, at 78.

140. *Id.*

141. Jeffery Scott Wolfe, *Across the Ripple of Time: The Future of Alternative (Or, Is It “Appropriate?”) Dispute Resolution*, 36 TULSA L.J. 785, 787 (2001).

142. *Id.*

143. *Id.*; ZEHR, *supra* note 21, at 78.

144. ZEHR, *supra* note 21, at 78.

145. *Id.* at 79-80.

146. *Id.* at 80.

147. *Id.* at 82.

148. Press Release, Murder Victims’ Families for Reconciliation, Dignity Denied: New Report

victims' rights movements gave rise to victims' rights programs, which made victims' rights a regular component of criminal proceedings.¹⁴⁹ The goal of these programs was to enable victims to be "informed, present, and heard throughout the criminal justice process."¹⁵⁰ Nonetheless, family members who oppose the death penalty may continue to feel that the criminal justice system does not meet their real needs and that they continue to be "silenced, marginalized, and abandoned, even by the people who are theoretically charged with helping them."¹⁵¹ They probably have these feelings because victims' rights programs are founded on the assumption that victims favor the imposition of death.¹⁵²

According to Renny Cushing, Executive Director of Murder Victims' Families for Reconciliation, when prosecutors learn that the family of a victim opposes the death penalty, prosecutors often deny the family information regarding court dates, upcoming hearings, or other important events.¹⁵³ The denial can be explicit or indirect, through incomplete, inaccurate communication.¹⁵⁴ Concern about prosecutor reaction stems arguably from the high degree of discretionary power prosecutors exercise when charging offenders with a crime.¹⁵⁵ Prosecutors may ignore the needs of victims who oppose the death penalty in order to bolster their conviction record, gain a political advantage, or satisfy a supervisor compelling them to seek death.¹⁵⁶ In such cases, prosecutors show more concern for a death verdict than for the victims or the community prosecutors are supposed to represent.

The framework of the system must become less adversarial and should work to address the needs of the victims, survivors, and even the offender.¹⁵⁷ In the case of capital punishment, studies indicate that the death penalty does not deter individuals from committing crimes.¹⁵⁸ Rather than teaching potential offenders that all killing is wrong, the criminal justice system sends the very different message that all murderers deserve to die.¹⁵⁹ "The message that

Reveals Bias Against Surviving Family Members Who Oppose the Death Penalty (Aug. 19, 2002), <http://www.mvfr.org/dignitydenied.html> [hereinafter *Dignity Denied*].

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Dignity Denied*, *supra* note 148.

155. DRESSLER & THOMAS III, *supra* note 138, at 801.

156. *Id.*

157. Burr & Krause, *supra* note 7.

158. ZEHR, *supra* note 21, at 77 (examining presumptions of crime and justice and proposing a restorative model). See generally William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980) (studying the effect of the death penalty as a deterrent).

159. ZEHR, *supra* note 21, at 77.

offenders must get their due, and that what they are due is punishment, may teach a lesson quite different than what [society] intend[s]."¹⁶⁰

The current participation of survivors in capital cases is mostly passive, with the exception of a possible request by the prosecutor for victim-impact testimony.¹⁶¹ At best, victim impact testimony provides a sort of catharsis for survivors to voice their loss and feel less isolated from the community.¹⁶² In reality, victim impact testimony "exploits the immense pain suffered by survivors" in order to produce a death sentence.¹⁶³ Some capital defense practitioners challenge prosecutors' "lethal concession" that survivors want to impose the death penalty.¹⁶⁴ Many of these concessions are unverified and invoked hastily.¹⁶⁵ These realities should force capital defense attorneys to view survivors not as vindictive individuals, but as individuals deserving of compassion and inclusion.¹⁶⁶ Survivors need to be familiar with both the defense team and the prosecutorial team, because this familiarity will allow for working relationships to develop on both sides.¹⁶⁷

E. Defense-Based Victim Outreach

Defense-based victim outreach asks the principal questions of restorative justice: (1) "Who was hurt?" (2) "What are their specific needs?" and (3) "Who is obligated to meet those needs?"¹⁶⁸ In addition, this needs-based emphasis asks the survivors what is most important to them and what are their judicial needs.¹⁶⁹ It is the responsibility of the defense attorney to establish contact with the survivors of the victim.¹⁷⁰ The defense team can hire a victim liaison, who will meet with the survivors and learn about any questions that are on their minds.¹⁷¹ The victim liaison then meets with the defense attorney, who retrieves the answers to those questions from the defendant. The defense team may negotiate a plea agreement with the prosecution with the stipulation that, if the sentence

160. *Id.*

161. *See Burr, supra* note 14, at 517 (explaining the role of survivors in capital cases).

162. *Id.*

163. *Id.*

164. Interview with Krause, *supra* note 20.

165. *Id.*

166. Burr, *supra* note 14, at 517-18.

167. Burr & Krause, *supra* note 7.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*; *see supra* note 65 and accompanying text (describing the peacemakers of the Sulha and noting their similarity with victim liaisons). These roles bear a striking resemblance because both individuals accept "the anger of victims with love no matter what they do" and both "absorb that anger" which "may bring victims to a state of grace." BRAITHWAITE, *supra* note 22, at 4. *See also supra* text accompanying note 79 (describing the role of an individual who is well-versed in Islamic law in murder cases).

is reduced from death to a lesser punishment, then the defendant will provide the survivors with the answers to their questions.¹⁷² When the survivors receive the information they requested, then a plea agreement results.¹⁷³ Alternatively, as part of his restorative process, the defendant may provide answers freely, not as part of any agreement. When the survivors work with victim liaisons they can expect information about the case, the opportunity to be heard, input into the case, and a large scope of involvement.¹⁷⁴ Defense-based victim outreach requires accountability from the defendant in the form of commitments to address the harm caused to both the survivors and the community.¹⁷⁵

1. *Benefits of a Victim Liaison to the Survivor and the Defendant*

The benefits of victim liaison involvement extend to the survivors.¹⁷⁶ By seeking to learn the needs of survivors, the victim liaison offers an option for the survivors besides retribution through capital punishment.¹⁷⁷ The survivors gain a better understanding that their trauma often will continue even if the offender is punished with death.¹⁷⁸ The answers to the questions they ask the victim liaison bring a peace of mind that is seldom found after a court imposes a death sentence.¹⁷⁹

The interaction between the victim liaison/defense team and the survivors empowers the survivors and releases them from focusing on the morality of whether the death penalty is appropriate or heinous.¹⁸⁰ The survivors are released from the religious and political debate concerning the death penalty because restorative justice presents another option. They gain an understanding of, and can take an active role in, the judicial process.¹⁸¹ The creation of a professional relationship with the defense team allows the survivors to relate to both legal teams and affords the most beneficial result for all concerned.¹⁸²

172. See, e.g. Burr, *supra* note 14, at 528-29 (describing plea agreement in Cary Stayner's case).

173. See *id.*

174. *Id.* at 528.

175. See *id.* at 528-29.

176. Burr & Krause, *supra* note 7.

177. Burr, *supra* note 14, at 528.

178. *Id.* at 527; Burr & Krause, *supra* note 7.

179. Burr, *supra* note 14, at 527-28.

180. Burr & Krause, *supra* note 7; see Vandiver, *supra* note 19, at 498 (noting that some victims' families "absolutely reject the death penalty for their relatives' murders").

181. Burr & Krause, *supra* note 7.

182. *Id.*

A victim liaison also can benefit the defendant by forcing him to act responsibly and take accountability for his crime.¹⁸³ The defendant then can recognize and address the obligations and harms caused by his wrongdoing.¹⁸⁴ The defendant and his family also benefit from the defendant's acknowledgment that the crime he committed was morally reprehensible.¹⁸⁵ Additionally, defendants are more likely to evaluate their involvement in capital cases. Instances of ineffective assistance of counsel claims following capital trials may decrease if a victim liaison is hired.¹⁸⁶ When the defense team hires a victim liaison to facilitate a plea agreement, the defendant is active in reducing the sentence from capital punishment.¹⁸⁷ From the point of view of capital defense attorneys, the chances of ineffective assistance of counsel claims being raised decreases because the defendants are empowered and make decisions about their future.¹⁸⁸

2. Other Benefits Provided by a Victim Liaison

A victim liaison brings additional benefits to defense attorneys. The defense attorneys present themselves as models of compassion on behalf of the defendant and the survivors with whom they develop professional relationships.¹⁸⁹ The victim tells the story in a non-adversarial way, lessening the adversarial nature of the judicial process.¹⁹⁰

The prosecutors benefit because the ways in which survivors relate to the prosecution improves.¹⁹¹ Society may not only view prosecutors as defending "the people," but on a more individual note, prosecutors may be seen as defenders of those personally harmed.¹⁹² A plea agreement saves time and money for all parties and guarantees that the prosecutor receives a conviction.¹⁹³ The victim liaison also benefits the judicial system by facilitating an outcome of justice

183. *Id.*

184. *Id.*

185. *Id.*

186. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (holding that the defendant must show counsel's deficient performance and that counsel's performance prejudiced his defense before sentence or conviction will be overturned). From January 2002 to January 2003, the United States Court of Appeals for the Fourth Circuit denied ineffective assistance of counsel claims in five out of five petitions for federal habeas relief. See generally Priya Nath, Case Note, 15 CAP. DEF. J. 173 (2002) (analyzing *Booth-El v. Nuth*, 288 F.3d 571 (4th Cir. 2002)); Priya Nath, Case Note, 15 CAP. DEF. J. 183 (2002) (analyzing *Carter v. Lee*, 283 F.3d 240 (4th Cir. 2002)); Janice L. Kopec, Case Note, 15 CAP. DEF. J. 213 (2002) (analyzing *McWee v. Weldon*, 283 F.3d 179 (4th Cir. 2002)); Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 221 (2002) (analyzing *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002) and *Hunt v. Lee*, 291 F.3d 284 (4th Cir. 2002)).

187. Burr & Krause, *supra* note 7.

188. See *id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. See *infra* Part II.D (explaining relationships between prosecution and survivors of victims).

193. Burr & Krause, *supra* note 7.

tempered with compassion.¹⁹⁴ Defense-based victim outreach shortens the judicial process, and, if a plea agreement results, the court saves money and time spent on trials and appeals.¹⁹⁵

F. Conclusion

The possibility of engaging in restorative relationships exists in every situation and is not limited to those relationships created by crime or, more specifically, murder.¹⁹⁶ Responses to the world are based on choices made and reflect perspectives on justice and morality.¹⁹⁷ The pursuit of justice through a restorative process is a step toward the development of restorative communities.¹⁹⁸ These communities are those that neither shy away from power nor respond to violence with violence.¹⁹⁹ Capital punishment is one such violence. Inflicting death on an individual who murdered, only continues the cycle. What is achieved through restorative justice and defense-based victim outreach programs is not only a healing of severed relationships but also a serving of the needs of all members of the community.²⁰⁰

III. *The Capital Applications of Defense-Based Outreach Through a Victim Liaison*

Kristen F. Grunewald

A. *Introduction to Defense-Based Outreach in Capital Cases*

The family and friends of a murder victim have suffered an extreme trauma. They feel anger, sorrow, and fear. These emotions, especially this anger, can lead survivors in one of two directions. First, the survivors can seek vengeance on the offender. In the capital context, survivors can place all of their influence behind the imposition of the death penalty. Alternatively, survivors can seek restoration and reconciliation. They need not forgive the offender; they simply may recognize that killing the offender will not restore balance to their lives. A victim liaison, through the relationships that he develops with survivors, works to demonstrate to survivors the advantages that accompany the latter choice.

Victim liaisons possess an understanding of the procedural aspects of the capital criminal justice system. Liaisons also understand the emotional stresses

194. *Id.*

195. *Id.*

196. SULLIVAN & TIFFT, *supra* note 9, at 179. See generally *id.* at 179-87 (describing other situations in which restorative relationships can be used).

197. *Id.* at 179.

198. *Id.* at 187.

199. *Id.*

200. *Id.*

that survivors face after the loss of a loved one. This combination of skills allows a liaison to advise survivors and guide them through the capital justice system. The tenets of restorative justice and defense-based outreach guide a liaison's work at every stage.

Subpart B of Part III of this Article provides a basic definition of a victim liaison. Subpart C explores the advantages of a liaison's pre-trial work. Subpart D provides guidance for counsel drafting a Motion to Appoint a Victim Liaison. Subpart E describes the complexity of the relationships that develop between a liaison and the prosecution, the survivors, and the defendant. Subpart F analyzes a victim liaison's work toward a plea agreement. Subpart G describes the effect of a liaison's work on victim impact evidence. Finally, Subpart H outlines the aspects of defense-based outreach that can be applied without a victim liaison.

B. *What is a Victim Liaison?*

Defense-based survivor outreach, based upon the principles of restorative justice, asks a series of questions about a criminal offense.²⁰¹ It asks: (1) "Who was hurt?" (2) "What are their specific needs?" and (3) "Who is obligated to meet those needs?"²⁰² A victim liaison, as part of the defense team, uncovers the answers to these questions by reaching out to the survivors.²⁰³

Defense-based outreach takes on a number of forms. In its most basic form, defense counsel introduce themselves to the survivors and keep them informed as the judicial proceedings progress.²⁰⁴ When a victim liaison joins the defense team, however, defense-based outreach draws from the relationship between the liaison and the survivors. A victim liaison seeks to uncover the survivors' wants and needs by reaching out to them.²⁰⁵ A liaison may find that the survivors need an explanation or time line of the capital justice system.²⁰⁶ Survivors often want to know when they will have the opportunity to participate in the judicial process.²⁰⁷ They often want to know "what happened, why, and what is being done about it."²⁰⁸ On a more emotional level, a liaison may find that survivors want to meet with the defendant or have the defendant provide them with answers.²⁰⁹ An experienced victim liaison individualizes his approach

201. Burr, *supra* note 14, at 527-28.

202. *Id.* (citing Burr & Krause, *supra* note 7).

203. *See id.*

204. *See* Russell Stetler, *Working with the Victim's Survivors in Death Penalty Cases*, THE CHAMPION, June 1999, at 44-45, LEXIS 23 Champion 42 (describing steps defense counsel can take to approach survivors).

205. *See* Burr & Krause, *supra* note 7 (discussing the "needs-based emphasis" that restorative justice places on each offense).

206. *See* ZEHR, *supra* note 21, at 203-04.

207. Interview with Krause, *supra* note 20.

208. ZEHR, *supra* note 21, at 194.

209. Burr, *supra* note 14, at 528.

to the survivors based on the individual circumstances of the case. Although restorative justice and defense-based outreach focus on restoring the lives of the survivors and the defendant, in order to best facilitate the needs of these individuals, the liaison also works to develop relationships with the prosecution and other members of the community.²¹⁰

C. *Advantages of the Early Entrance of a Victim Liaison*

A victim liaison works most effectively when brought into a case during its early stages.²¹¹ A liaison achieves greater results when the defense team provides him with sufficient time to connect with the prosecutors, the survivors, and, if appropriate, the defendant.²¹² The early entrance of a victim liaison influences plea agreements, victim impact evidence, and the overall effectiveness of restorative justice.²¹³ Due to the advantages of a liaison's early entrance, defense counsel should file a Motion to Appoint a Victim Liaison at the earliest possible opportunity.²¹⁴

The moment that a trial begins, the likelihood of the defendant receiving a plea agreement drastically decreases. A victim liaison who begins work pre-trial enjoys more time to develop relationships with the survivors and to determine whether a plea agreement meets their needs. By providing survivors with accurate information regarding the possible length of trial and subsequent appeals, along with other details about the judicial process, a victim liaison increases the likelihood that survivors will support a plea agreement.²¹⁵

If a victim liaison joins the defense team post-trial, he may be less effective for several reasons. First, the survivors may have watched a full trial and some may have testified. Second, the media may have begun to report the trial, and thus the details of the crime and the reactions of the survivors are placed in the spotlight.²¹⁶ This attention on the survivors may cause additional trauma or

210. Restorative justice seeks to reconcile all of the relationships that were damaged by the offender's actions, including the relationship between the community and the offender. *See* ZEHR, *supra* note 21, at 194 (explaining that communities are also affected by crime).

211. Interview with Krause, *supra* note 20. A liaison's early involvement with a case facilitates the development of a trusting relationship with the survivors. *Id.* Krause stated that she had a notably higher rate of success when she worked with a defense team beginning pre-trial. *Id.*

212. *Id.*; *see infra* Part III.E.1-3. In many cases neither the liaison, nor the survivors, meet with the defendant. *See* Marty Price, *Can Mediation Produce Restorative Justice for Victims and Offenders?*, Victim-Offender Reconciliation Program Information and Resource Center, ¶ 11, at <http://www.vorp.com/articles/crime.html> (last visited Jan. 14, 2003) (indicating that it is not always appropriate for the survivor and offender to meet).

213. *See infra* Part III.F.-G.

214. *See infra* Part III.D.

215. *See* Burr, *supra* note 14, at 528-29 (listing several of the reasons that the Armstrong family chose to support a plea agreement for Stayner).

216. *See* Burr & Krause, *supra* note 7 (presenting several quotes from the Armstrong family regarding their interest in having the case leave the media spotlight).

stress, which increases the level of emotion that they feel toward the defendant.²¹⁷ In addition, by the time the trial begins, the prosecution already may have promised the public that it would seek a death sentence. The prosecution likely worked for months to obtain the guilty verdict.²¹⁸ These factors each weigh against the survivors opposing the imposition of the death penalty or the prosecution respecting their opinion.

It should be noted that, while the early entrance of a victim liaison is particularly advantageous, the entrance of a liaison at any stage of the proceedings may benefit both parties. Post-conviction attorneys often assume that “too much water has gone under the bridge” by the time they represent the defendant, but victim liaisons have proven their work to be invaluable at any stage of a case.²¹⁹ The procedural posture of a case should not dissuade counsel from seeking the assistance of a liaison.²²⁰

D. Motion to Appoint a Victim Liaison

Capital defense attorneys have not applied the principles of restorative justice to capital cases with enough frequency for attorneys to assume that the trial judge will be familiar with the emerging field or the work of victim liaisons.²²¹ Thus, in order to be effective, a Motion to Appoint a Victim Liaison should include a general description of restorative justice followed by the more specific goals that defense counsel hope to achieve through the appointment of a victim liaison.²²² This motion should also include any available authority for the appointment of a victim liaison.²²³

In a Motion to Appoint a Victim Liaison, counsel may phrase the principles of restorative justice simply and concisely. This description should include the

217. Survivors often do not want the media to focus its attention once again on the victim and the survivors. In addition, survivors often want to avoid having to “re-live” the crime during a trial.

218. See Judith L. Maute, “*In Pursuit of Justice*” in *High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1747 (2002) (noting that when a case has caught the attention of the American public, the law-enforcement system feels pressured to obtain a conviction).

219. Telephone Interview with Richard Burr, Federal Death Penalty Resource Counsel (Jan. 29, 2003). According to Burr, many habeas attorneys believe that it is too late for defense-based outreach or a liaison to work effectively on their cases. *Id.*

220. *Id.* Although restorative justice may not affect the judicial disposition of the case as effectively post-trial, the survivors and the defendant may still be able to meet their mutual needs.

221. *Id.*; Interview with Krause, *supra* note 20.

222. See generally Stock Declaration in Support of the Appointment of a Victim Liaison (on file with Richard Burr) [hereinafter Stock Declaration] (explaining the principles and goals of restorative justice and detailing how a liaison puts them into effect). This declaration clearly explains the basic aspects of restorative justice and defense-based victim outreach. See *id.* Counsel may choose this framework for their Motion to Appoint a Victim Liaison if certain that the court is unfamiliar with a liaison’s role.

223. See Stock Motion to Authorize the Services of a Defense-Based Victim Liaison, at 5-6 (on file with Richard Burr) [hereinafter Stock Motion] (listing precedents for the appointment of a victim liaison).

basic principles of the field. These principles include: (1) restorative justice's focus on the harm caused by the crime, as opposed to the rule that the offender broke;²²⁴ (2) its encouragement of offenders to take responsibility for their actions;²²⁵ and (3) its goal of reconciling victim and offender in order to restore order to both lives.²²⁶ Other principles of restorative justice that may influence the court's decision include its consideration of the harm that the offense caused to the community and its empowerment of victims.²²⁷

Counsel should provide the court with the victim liaison's specific goals and the means by which the liaison applies the principles of restorative justice to capital cases.²²⁸ These goals may vary as the facts of the case demand. However, several aspects of restorative justice typically will apply to capital cases. First, a victim liaison provides the survivors with an advocate for those needs that only the defense team can address.²²⁹ The liaison, experienced in communicating with survivors, acts as an intermediary between the survivors and defense counsel.²³⁰ Second, a victim liaison provides the defense team with personal information about the survivors. This information allows defense counsel to avoid further traumatizing the survivors, whether on the witness stand or upon meeting in person.²³¹ Third, through his relationship with the survivors, a victim liaison may uncover needs or interests of the survivors that neither the defense nor the prosecution ever would have realized.²³² Counsel's phrasing of these goals

224. ZEHR, *supra* note 21, at 184.

225. *Id.* at 201-2.

226. *Id.* at 181.

227. *See id.* at 184, 204. Survivors are given few opportunities to play an active role in the judicial process. A victim liaison, by keeping the survivors informed and asking them about their needs, allows survivors to have their needs heard and recognized outside of these limited judicial opportunities.

228. *See* Stock Motion, *supra* note 223, at 5 (providing a basic description of the work of a victim liaison). Victim liaisons developed a mission statement that sets forth the general goals of a liaison in a capital case. *Id.* at 6-7. This statement succinctly presents the mission that a victim liaison hopes to accomplish. *See id.*

229. *See id.* at 4 (emphasizing that only the defense team can meet some of the survivors' needs).

230. *See* Tammy Krause, *Walking Through the Judicial System with Families of Murder Victims*, FOOTPATHS, Spring 2000, <http://www.emu.edu/ctp/footpaths/vol2no3/page4.html> (stating that "[a]ttorneys don't know how to deal with the emotions, so they force the proceedings on to the intellectual levels"). Attorneys usually are not trained to handle the level of emotion felt by the survivors. One goal of a victim liaison is to avoid traumatizing the survivors during the judicial process. By acting as an intermediary between defense counsel and the survivors, the liaison ensures that defense counsel do not approach the survivors in such a way that causes further trauma. The liaison, through training and experience, also can provide emotional support that defense counsel does not have the time or training to provide.

231. *See* Stock Declaration, *supra* note 222 (listing the avoidance of further traumatization of the victims as a goal of a victim liaison).

232. *See* Stock Motion, *supra* note 223, at 4. In addition, the stock declaration in support of the appointment of a victim liaison uses the example of the survivors' interest in avoiding trial. The

should illustrate the benefits that restorative justice and the work of a victim liaison bring to the survivors, the community, and the defendant.²³³

In addition to a general description of restorative justice and the goals of a victim liaison, counsel should include in the motion authority for the appointment or work of a victim liaison.²³⁴ If there are no cases from the jurisdiction in which the case will be tried, counsel may either outline the experience of the victim liaison whom they are requesting or include descriptions of high-profile cases in which a victim liaison worked with the defense team. For example, victim liaison Tammy Krause ("Krause") worked with the defense team of Timothy McVeigh, the man convicted of bombing the Alfred P. Murrah Federal Building in Oklahoma City.²³⁵ Additionally, Krause worked on the defense team of Cary Stayner.²³⁶ As part of a plea agreement, Stayner pleaded guilty to killing naturalist Joie Armstrong in Yosemite National Park in exchange for a life sentence.²³⁷ These high-profile examples, regardless of whether the liaison ultimately removed death from consideration, provide the court with cases in which the defendant utilized a victim liaison whose work was scrutinized carefully by the court and the media.²³⁸

The Federal Death Penalty Resource Counsel Project encourages both the use of victim liaisons and the application of the principles of restorative justice to capital cases.²³⁹ In addition, attorneys from the Federal Death Penalty Resource Counsel Project have worked to develop further the work of victim liaisons in the capital context.²⁴⁰ Richard Burr, a Federal Death Penalty Resource

declaration noted the traumatizing nature of trial. See Stock Declaration, *supra* note 222. It then stated that the work of a victim liaison allows defense counsel to better understand the survivors' positions, and thus be better "advocates with the prosecution for settling the case." *Id.*

233. See ZEHR, *supra* note 21, at 184.

234. Interview with Krause, *supra* note 20.

235. *Id.*; see Stock Declaration, *supra* note 222 (listing United States v. Timothy James McVeigh, No. 96-CR-68-M (June 6, 2001 D.Colo.) as a case in which a victim liaison was appointed).

236. Gaye LeBaron, *Mom's Strategy Closes Circle Around Joie's Killer*, THE PRESS DEMOCRAT, Oct. 4, 2000, at A2, 2000 WL 24340002; see *infra* Part IV.

237. Peter Hartlaub, *Yosemite Naturalist's Fight for Life Described: Court Ruling Unseals Stayner's Confession*, S.F. CHRON., Dec. 12, 2000, at A24, 2000 WL 6499669; see discussion *infra* Subpart D.

238. Other cases in which a victim liaison has worked include: United States v. Usama Bin Laden, No. 98-CR-1023(S-6) (S.D.N.Y. hearing denied Oct. 2, 2001); United States v. Christopher Dean, No. 00-1150 (2d Cir. affirming conviction and sentence Sept. 19, 2000); U.S. v. Kofi Orleans-Lindsay, No. 00-692M-01 (D.D.C. detaining defendant Dec. 1, 2000).

239. Telephone Interview with Richard Burr, *supra* note 219; see Stock Declaration, *supra* note 222, at 4. Currently, Richard Burr, David Bruck, and Kevin McNally serve as Federal Death Penalty Resource Counsel. These attorneys, experienced in capital defense, were retained by the Defender Services Division of the Administrative Office of the Courts to advise and consult with court-appointed and federal defender attorneys working with capital defendants. The Federal Death Penalty Resource Counsel Project began in 1992. David Bruck, Richard Burr & Kevin McNally, *Federal Death Penalty- An Overview*, Address at the National Seminar for Federal Defenders 4 (May 26-28, 1999), at <http://www.dcfpd.org/1999seminar/overview.pdf>.

240. Telephone Interview with Richard Burr, *supra* note 219.

Counsel since 1998, supports the use of victim outreach in every capital case.²⁴¹ Counsel may make reference to the Federal Death Penalty Resource Counsel Project's support of victim liaison work in a Motion to Appoint a Victim Liaison or may seek a declaration of support for such an appointment from a Federal Death Penalty Resource Counsel.²⁴²

The information included in a Motion to Appoint a Victim Liaison familiarizes the court with both restorative justice and the means by which a victim liaison applies its principles in the context of capital defense.²⁴³ Each time an attorney files a Motion to Appoint a Victim Liaison, regardless of its ultimate success or failure, he informs one more judge of the existence of such an application of restorative justice. As judges grow more comfortable with the work of victim liaisons and defense-based outreach, the appointment of liaisons to defense teams may become more common.²⁴⁴

Due to the initial reluctance of the court system to appoint victim liaisons, some individuals who work in the field have received grants or fellowships to develop their work and provide defense counsel with precedential authority.²⁴⁵ This funding allows liaisons to work without court appointment and, thus, without court funding. As victim liaisons' work with capital defense teams increases in frequency, and the courts become more familiar with their work, the need for such funding should decrease.

E. Relationships Developed by a Victim Liaison

1. Relationship with the Prosecution

Prosecutors' reactions to the involvement of victim liaisons in capital cases vary considerably from case to case. Prosecutors may be supportive, hostile, or, in the majority of cases, indifferent to the involvement of a liaison.²⁴⁶ Some prosecutors now realize that the defense team can meet some of the survivors' needs. This realization eventually will lead to increasing support for defense-

241. *Id.*

242. See Stock Declaration, *supra* note 222, at 4.

243. See generally Stock Motion, *supra* note 223.

244. As more victim liaisons are trained and attorneys become more familiar with their work, defense-based outreach may be employed in capital cases with increasing frequency. Currently, Tammy Krause and Richard Burr conduct annual defense-based victim liaison training sessions at Eastern Mennonite University. Stock Declaration, *supra* note 222, at 5.

245. For example, Tammy Krause received a Soros Justice Fellowship with the Federal Death Penalty Resource Counsel Project for 1999-2001. *Conflict Transformation Program Faculty*, <http://www.emu.edu/ctp/faculty.html> (last visited Jan. 30, 2003).

246. Telephone Interview with Richard Burr, *supra* note 219. According to Tammy Krause, prosecutors occasionally have instructed the survivors not to cooperate with her. E-mail from Krause, *supra* note 5. However, some prosecutors have encouraged the survivors to cooperate with her. *Id.* The level of support from the prosecution varies and is highly dependent upon the case and the specific interests of the prosecutor.

based outreach and the work of victim liaisons.²⁴⁷

Defense counsel working with a victim liaison may want to ensure that the prosecution understands the goals and strategies employed in defense-based outreach. A prosecutor who understands the benefits that restorative justice brings to the survivors, as well as to the community, may be more amenable to proposals of the victim liaison, the defense counsel, and the survivors. According to Tammy Krause, "[t]he organic relationship is between the defense and the victim, not between the prosecution and the victim. The prosecutors are, at best, very interested observers, who can do little to meet the survivors' needs within the criminal justice system without the interest and cooperation of the defense."²⁴⁸ A prosecutor may not recognize the needs of the survivors until the work of a liaison brings them to the prosecution's attention.²⁴⁹

Regardless of the interests of the survivors, the prosecution retains the right to seek a death sentence in a capital case.²⁵⁰ The importance of a working relationship with the prosecution is illustrated by a situation in which the liaison finds that the interests of the survivors would not be best served by a death sentence for the defendant.²⁵¹ A prosecutor who understands the work of a victim liaison and is kept informed about the needs of the survivors will be more likely to agree to a lesser sentence or a plea agreement if the survivors express an opposition to imposition of the death penalty.

Finally, a working relationship between the liaison and the prosecution decreases the likelihood that the prosecution will advise the survivors not to cooperate with the liaison.²⁵² Such advice from the prosecution creates an additional hurdle that the victim liaison must overcome in order to develop a working relationship with the survivors. Survivors may never fully trust the liaison if the prosecution, viewed by them as their advocate in the judicial system, has instructed them not to cooperate.²⁵³

247. Telephone Interview with Richard Burr, *supra* note 219.

248. Burr, *supra* note 14, at 527 (quoting Burr & Krause, *supra* note 7).

249. See Stacy Caplow, *What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 20-21 (1998) (discussing factors that affect the relationship between the victim and the prosecutor).

250. Interview with Krause, *supra* note 20. Due to the nature of the crime and the amount of media attention that Cary Stayner's case was receiving, former United States Attorney General Janet Reno insisted that she approve any proposed plea agreement for Stayner. *Id.*; see *infra* Part IV.

251. See LeBaron, *supra* note 236 (discussing the Armstrong family's decision to support a plea agreement for Cary Stayner).

252. See E-Mail from Krause, *supra* note 5.

253. See Caplow, *supra* note 249, at 21 (stating that "most victims cede control to their 'lawyer,' acquiescing to decision making by the authoritarian prosecutorial figure because they have no choice if they want their interests vindicated"). Caplow also noted that "[o]verworked prosecutors. . . rarely are trained in psychology or interpersonal sensitivity so they are discomforted by the intense feelings of some victims and cannot sensitively or effectively respond." *Id.* at 24. A victim liaison has experience dealing with the emotions of survivors. This experience allows survivors to speak to an individual who is comfortable with the level of emotion involved and may have the

2. Relationship with Survivors

Defense-based survivor outreach concentrates on the needs of the survivors.²⁵⁴ In order to uncover and meet these needs, a victim liaison must develop a trusting relationship with the survivors.²⁵⁵ Regardless of whether strong emotional bonds develop between the survivors and the liaison or whether their relationship focuses only on the survivors' practical needs, a victim liaison's work depends on effective communication with the survivors. Counsel must note, however, that a victim liaison cannot pressure survivors to cooperate with her.²⁵⁶ The cooperation of the survivors must be entirely voluntary.

The connection that a victim liaison develops between herself and the survivors of a crime is not established easily and requires a building of trust between the liaison and the survivors.²⁵⁷ Victim liaisons face a number of obstacles while building this trust. The first obstacle is that the liaison is a member of the defense team; this may cause survivors to question the liaison's true motives. Second, the prosecution may instruct the survivors not to cooperate with the liaison.²⁵⁸ The pain and anger felt by the survivors, whether expressed in the media, in trial testimony, or in victim impact evidence, increase the prosecution's chances of successfully imposing the death penalty.²⁵⁹ By opposing the survivors' cooperation with a victim liaison, the prosecution seeks to decrease the risk that the survivors will support a plea agreement or speak out against the imposition of the death penalty on the defendant.

As part of the trust-building process, survivors will often make requests of the liaison.²⁶⁰ According to Tammy Krause, survivors "will test the victim liaison and they have every right to do that. [Survivors] need to test the victim liaison because they have been so harmed by the crime and ignored by the court, and it is the defense team (who represents the person who harmed them) approaching them."²⁶¹ The natural hesitancy felt by survivors can be overcome by a liaison who is reliable and does not violate the trust that develops between the liaison and the survivors. In order to maintain this trust, a liaison must follow through

ability to help the survivors deal with their intense level of emotion.

254. Burr & Krause, *supra* note 7.

255. Interview with Krause, *supra* note 20.

256. See Stock Declaration, *supra* note 222, at 6 n.1 (noting that the liaison would refrain from contacting survivors if they desire no further contact).

257. Interview with Krause, *supra* note 20.

258. E-mail from Krause, *supra* note 5.

259. See Niru Shanker, *Getting a Grip on Payne and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy McVeigh Case and Various State Approaches Compared*, 26 HASTINGS CONST. L.Q. 711, 733-34 (1999) (discussing the effects that emotional victim impact testimony may have on a sentencing jury).

260. E-mail from Krause, *supra* note 5.

261. *Id.*

with his promises to the survivors.²⁶² Liaisons, as well as defense counsel, must always avoid violating the survivors' trust.

A victim liaison places no conditions on his relationship with the survivors. This relationship remains unconditional for its duration. A victim liaison does not approach the survivors with any type of agenda or for a hidden purpose.²⁶³ All encounters between the survivors and the liaison must be focused singularly on the needs of the survivors.²⁶⁴ As part of the defense team, however, the liaison remains aware of the needs and interests of the defendant and considers how these needs intersect with the needs of the survivors.

A survivor's decision to advocate for a life sentence for the defendant, forgive the defendant, or simply support the most efficient judicial resolution of the case, may not be met with great enthusiasm from the prosecution.²⁶⁵ Under these circumstances, a victim liaison's work becomes critically important to both the survivor and the defendant. A survivor, acting against the interests of the prosecution, often needs emotional support for his decision. A liaison can provide this support while also acting as a practical resource about the workings of the judicial system.²⁶⁶ A survivor may also be acting against the interests of other survivors. This makes the liaison's support for the survivor's decision even more essential.²⁶⁷

3. Relationship with the Defendant

Victim liaisons who work with capital defense teams do not always meet the defendant on whose behalf they are working.²⁶⁸ Such a meeting is not always appropriate or necessary.²⁶⁹ Whether or not the liaison develops a relationship

262. *Id.*

263. Telephone Interview with Richard Burr, *supra* note 219.

264. *Id.*

265. See Adrienne N. Barnes, *Reverse Impact Testimony: A New and Improved Victim Impact Statement*, 14 CAP. DEF. J. 245, 254-59 (2002) (describing the prosecution's reaction to a victim's mother who chose to oppose the imposition of the death penalty on the man who killed her daughter).

266. See *id.* at 254-60 (discussing a case in which the victim's mother looked to defense counsel for support after deciding to oppose the decision of the prosecution to seek the death penalty).

267. See Sara Rimer, *Victims Not of One Voice On Execution of McVeigh*, N.Y. TIMES, Apr. 25, 2001, at A1 (describing the views on the death penalty held by victims and survivors of the bombing of the Oklahoma City federal building). The majority of the victims and survivors of the bombing supported Timothy McVeigh's execution. *Id.* There were, however, very outspoken survivors who opposed the imposition of the death penalty on McVeigh. *Id.* Several of these survivors admitted that in the immediate aftermath of the bombing they would have wholeheartedly supported McVeigh's execution. *Id.* It took time for their emotions to calm and their moral beliefs and values to return. *Id.* Strong emotion, such as that felt after losing a family member, takes time to release. Due to this delayed release, a survivor's view of the death penalty may change in the time between the commission of the crime and its final judicial resolution.

268. Interview with Krause, *supra* note 20.

269. *Id.*

with the defendant, counsel must inform the defendant of the work of the liaison for several reasons.

First, as a result of the work of a liaison, a defendant may be asked to provide information, consent to restrictions on his freedom, or agree to the specific request of a survivor.²⁷⁰ More emotionally, the survivors may seek an apology or an expression of remorse.²⁷¹ The gravity of these requests demands that the defendant possess an understanding of the possible implications of the liaison's work. By keeping the defendant informed as the case progresses, the defendant will be better prepared to participate in making critical decisions about his case. Information about the survivors, the impact of the offense on the survivors' lives, and the needs that the offense created for the survivors, even if presented through an intermediary, may cause the defendant's restorative process to begin.²⁷² The defendant's healing process may parallel that of the survivors.

Second, as an ethical matter, defense counsel have an obligation to inform their client about developments in his case. Rule 1.4 of the Virginia Rules of Professional Conduct requires defense counsel to keep the defendant "reasonably informed" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions."²⁷³ As discussed, survivors may have requests for the defendant that may limit his freedoms in the future.²⁷⁴ For the defendant to determine the course of action that is in his best interest, he must have all of the necessary information. Information that a victim liaison uncovers through his work may affect a defendant's decisions and thus should be shared with the defendant.

When defense counsel informs the defendant that a victim liaison has joined the defense team, he should present the goals of the liaison very practically.²⁷⁵ Counsel should explain to the defendant that if the defense team does not reach out to the survivors, then the prosecution will be the only party reaching out to

270. See LeBaron, *supra* note 236 (stating that Joie Armstrong's survivors had input into the conditions of the plea agreement under which her killer served his life sentence).

271. Telephone Interview with Richard Burr, *supra* note 219.

272. See ZEHR, *supra* note 21, at 197 (remarking on the reluctance of offenders to accept responsibility and the importance of "strong encouragement or even coercion to accept their obligations"). Zehr notes that offenders cannot be forced to accept responsibility. *Id.* at 198. However, ensuring that the offender realizes the full impact of his offense may lead him to acknowledge his obligations.

273. VA. SUP. CT. R., Part 6, § II VIRGINIA RULES OF PROFESSIONAL CONDUCT, R. 1.4 (Michie 2002) [hereinafter VA. R. PROF'L CONDUCT].

274. For example, defendants have been asked to cease making public statements or giving interviews, to give up the right to make any money from the commission of the offense, and to provide information for the survivors on demand. See Burr, *supra* note 14, at 529; Burr & Krause, *supra* note 7.

275. Telephone Interview with Richard Burr, *supra* note 219.

them and looking out for their interests.²⁷⁶ A defendant may find this presentation persuasive.

F. Plea Agreements

If the prosecution and the defense agree upon a plea bargain, it is unlikely that a survivor will receive an apology from the offender, reconcile with the offender, or receive restitution from the offender.²⁷⁷ Thus, in order to reconcile the needs of the survivors and the defendant and gain support from the survivors, a plea agreement should balance their respective interests. The relationship that the liaison develops with the survivors gives him an understanding of the survivors' needs. As a part of the defense team, the liaison also understands the needs of the defendant. The liaison possesses a unique understanding of both parties' needs, including conflicts and common ground. The liaison brings this invaluable perspective to the negotiation of a plea agreement that best serves the parties' respective interests.²⁷⁸

Through his relationship with the survivors, a victim liaison has the opportunity to highlight pertinent information about the capital criminal justice system that may affect the survivors' decision whether or not to support a plea agreement. For example, a liaison may explain that a plea bargain will bring finality and closure to a process that would otherwise continue for years.²⁷⁹ Death row inmates executed in 2000 served an average of eleven years and ten months on death row before they were finally executed.²⁸⁰ The average length of stay on death row for the years 1977-2001 was 123 months.²⁸¹ By providing survivors with this information, liaisons allow them to make a fully informed decision regarding whether to support a plea agreement for the defendant.

In certain capital cases, survivors may have an interest in avoiding trial to

276. *Id.*

277. Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 166 n.150 (1984). See generally Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987).

278. Neither the prosecution, representing the state, nor the liaison, representing the defendant, consider only the interests of the survivors. It has been proposed that the victims of a crime be provided with independent counsel to ensure that their interests are represented in plea negotiations and other strategic decisions. See generally Walker A. Matthews, III, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1998).

279. Stetler, *supra* note 204, at 45.

280. Bureau of Justice Statistics, *Capital Punishment 2001*, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf> (last visited Jan. 30, 2003). Ten percent of the inmates on death row between 1977 and 2001 were executed, three percent died of other causes, and thirty-two percent received other dispositions. *Id.*

281. *Id.*

protect the reputation of the victim.²⁸² The public release of personal information regarding the victim's life or the circumstances that surrounded the victim's death may destroy the reputation of the victim.²⁸³ The survivors may prefer to avoid trial so that this information either remains private or does not re-enter the media spotlight during trial.²⁸⁴ In cases in which the victim's reputation is not at risk, the survivors may still want to avoid trial so that they will not be subjected to the public release of details surrounding the offense, both in the courtroom and in the media.²⁸⁵ If either of these circumstances exists, a liaison can explain to survivors that a plea agreement may best protect both their interests and the interests of the victim.

If survivors agree to support a plea agreement for the defendant, they often have input into its content.²⁸⁶ Survivors typically request that the defendant act for their benefit.²⁸⁷ Alternatively, they may ask that he cease certain actions that cause them grief or pain.²⁸⁸ Provisions that survivors have requested in the past include: (1) the defendant must cease giving public statements or interviews; (2) the defendant must relinquish his right ever to make a profit from the crime; and (3) the defendant must agree to meet with a family member of the victim if that family member should ever want to meet.²⁸⁹

282. Interview with Krause, *supra* note 20.

283. *Id.*

284. A case in which the survivors hoped to avoid trial and, thus, the increased publicity, was the so-called "bodies-in-barrels" case. *Id.* John E. Robinson Sr. lured women to his home to become his "sex slaves" and engage in sadomasochistic sexual relations. *Jury Sees Sex-Slave Tape*, ORLANDO SENTINEL, Oct. 15, 2002, at A13, 2002 WL 100896127. During his trial, jurors watched a video of a sex session between one of the victims and Robinson. *Id.* Despite some of the survivors' wishes, Robinson was tried, convicted, and sentenced to death in Kansas for killing two women and stuffing their bodies into barrels. See Lara Weber & Mike Morgan, *Death Penalty for Man Who Killed 2 Women*, CHI. TRIB., Jan. 22, 2003, at 8, 2003 WL 9695181 (describing method of murder). Robinson was also convicted of first-degree murder for killing a third woman whose body was never found. *Id.*

285. Burr & Krause, *supra* note 7 (quoting the letter from the Armstrong family in regard to Stayner's plea agreement).

286. Telephone Interview with Richard Burr, *supra* note 219.

287. *Id.*

288. *Id.*

289. Burr & Krause, *supra* note 7; Interview with Krause, *supra* note 20; Telephone Interview with Richard Burr, *supra* note 219. Burr foresees that the provision that the defendant agree to meet with the family of the victim, if the family ever so chooses, will become a mainstay provision in plea agreements in which the survivors' interests have been taken into consideration. Telephone Interview with Richard Burr, *supra* note 219. Such a provision does not require any immediate action by either defendant or survivor. *Id.* It simply leaves open the opportunity for future action. *Id.*

G. Victim Impact Evidence

Victim impact testimony can be “lethal for capital defendants and often illusory for the witnesses who provide it.”²⁹⁰ Survivors often view this testimony as their opportunity to participate in the judicial process, their opportunity to be heard, and their opportunity to finally express their anger or sorrow in the presence of the defendant.²⁹¹ As a practical matter, defense counsel cannot ignore the influence of victim impact evidence on a capital sentencing jury.²⁹²

In Virginia capital murder cases, victim impact evidence enters the penalty phase through a victim impact statement and victim impact testimony.²⁹³ First, victims have the opportunity to prepare a written victim impact statement.²⁹⁴ The sentencing jury, however, will not see this statement.²⁹⁵ Under Virginia Code Section 19.2-264.5, the impact statement is included in the post-sentence report that is reviewed by the court after a jury has sentenced a defendant to death and prior to the court’s imposition of a sentence.²⁹⁶ In addition, Section 19.2-11.01(A)(4)(c) provides that, upon motion by the Commonwealth, a survivor will be given the opportunity to testify at the sentencing proceeding regarding the

290. Burr, *supra* note 14, at 517; see also Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 90 (1999), WL 25 NENGJCCC 21 (discussing the effect of victim participation on a victim’s satisfaction with the offender’s sentence and the criminal justice system generally).

291. See Burr, *supra* note 14, at 517 (stating that “victim impact testimony provides a momentary opportunity for survivors to give voice to their loss, be heard, and feel less isolated”). The provision of victim impact evidence may be the survivors’ only opportunity to participate actively in the judicial process. Survivors are typically passive observers of the remainder of the system. Interview with Krause, *supra* note 20.

292. See Burr, *supra* note 14, at 517 (discussing the importance of overcoming the “instinct that survivors are unreachable and inherently joined to the prosecution”). It should be noted that in addition to survivors providing victim impact evidence, members of the community may seek the opportunity to address the court regarding the impact that the offense had on their lives. Katie Long, Note, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 195-96 (1995) (discussing the recent increase in communities’ participation in the sentencing of defendants); see also Shanker, *supra* note 259, at 728-29 (describing McVeigh’s challenges to the classes of individuals the court permitted to provide victim impact testimony).

293. See VA. CODE ANN. § 19.2-11.01(A)(4)(c) (Michie Supp. 2002) (allowing victims the opportunity to testify as to the impact of a crime prior to the defendant’s sentencing); VA. CODE ANN. § 19.2-264.5 (Michie 2000) (stating that the post-sentence report of a defendant whose punishment has been fixed at death shall include a Victim Impact Statement); VA. CODE ANN. § 19.2-299.1 (Michie 2000) (describing the preparation and submission of a Victim Impact Statement).

294. §§ 19.2-264.5, -299.1.

295. See § 19.2-264.5 (stating that the Victim Impact Statement shall be included in the post-sentence report for review by the court).

296. *Id.*

impact of the crime.²⁹⁷

The work of a victim liaison may critically influence both victim impact statements and victim impact testimony. A liaison reaches out to the survivors and asks them what they need and what they want.²⁹⁸ This provides them with a “forum for the expression of their suffering.”²⁹⁹ This release of emotion to a member of the defense team can impact the tone and content of the victim’s impact statement or testimony.³⁰⁰ This emotional release prior to the provision of impact evidence may decrease the level of emotion in the evidence, thus decreasing the emotion felt by the judge or jury when presented with the impact evidence.

In Virginia, statutes preclude a victim from recommending a specific sentence, life or death, for the defendant in the victim impact statement.³⁰¹ However, survivors can make their interest very clear without specifically stating the sentence they consider proper. Realistically, if the prosecution calls the survivor to testify at sentencing, then jurors can assume that he supports the imposition of the death penalty.³⁰² The wide leeway that courts grant victims in their impact evidence re-emphasizes the potential influence of the survivors’ release of emotion to the liaison.³⁰³

H. Application of the Principles of Restorative Justice by Defense Attorneys

Defense counsel should apply the principles of restorative justice with or without the assistance of a victim liaison. “Every capital defense team, at whatever stage of litigation, has a responsibility to approach the victim’s survivors.”³⁰⁴ Counsel should not look at the survivors as “impassioned and embittered

297. §19.2-11.01(A)(4)(c); see Paige McThenia, *The Role of Forgiveness in Capital Murder Cases*, 12 CAP. DEF. J. 325, 337-44 (2000) (outlining several strategies for bringing before the court evidence that the victim’s family has forgiven the defendant).

298. Burr, *supra* note 14, at 528.

299. *Id.* at 526-27.

300. See Stetler, *supra* note 204 (concluding that giving the survivors an opportunity to vent “rage away from the courthouse—and the eyes and ears of jurors—facilitates a fairer trial”).

301. See § 19.2-264.4 (limiting a victim’s testimony at a sentencing proceeding to the factors set forth in § 19.2-299.1); § 19.2-299.1 (limiting the scope of victim impact statements).

302. Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 25 (1999), WL 3 BFCRIMLR 3 (noting that while a victim is precluded from recommending a death sentence or a life sentence for a defendant, his opinion is clear by virtue of whether the defense or the prosecution called the victim to testify).

303. See Burr, *supra* note 14, at 520-21 (discussing a court’s failed efforts to control the level of emotion presented in victim impact testimony).

304. Stetler, *supra* note 204, at 42.

adjuncts to the prosecution team.”³⁰⁵ In defense-based survivor outreach, the defense understands that it is the party that can most effectively determine and respond to the needs of the survivors.³⁰⁶ Much like a victim liaison, defense counsel is capable of providing the answers and explanations that survivors seek.³⁰⁷ The prosecution or the media may have misinformed or underinformed the survivors regarding the capital criminal justice system.³⁰⁸ Alternatively, the survivors may not have been given any explanation of the capital system. Defense counsel, by reaching out, has an opportunity to develop a relationship with the survivors through very simple gestures.³⁰⁹ Such acts may soften the anger that the survivor commonly feels.³¹⁰ This softening allows survivors to consider their wants and needs in a more rational manner.

Simple gestures by defense counsel may impact the resolution of their client’s case.³¹¹ Through a simple introduction or an inquiry into the needs of the survivors, defense counsel may uncover interests that the prosecution may have known, but that the defense may never have discovered. For example, the survivors may want the judicial proceedings to end quickly in order to avoid the years of trauma that accompany trial and appeals.³¹² If defense counsel reaches out to the survivors, counsel will be aware of this interest in efficient judicial closure and they can work toward fulfilling this need because it is likely in the best interest of both the survivors and the defendant.³¹³ Despite counsel’s lack of formal sensitivity training, small gestures can create a relationship between the survivors and the defense team and impact the lives of all parties involved.

If defense counsel chooses to apply the principles of restorative justice, counsel must “understand the principles and that reaching out to people is not a means to an end, it is the end in itself.”³¹⁴ Defense counsel, like victim liaisons, must not reach out with any hidden agenda.³¹⁵ Counsel should let survivors know that they are available to them but should not pressure them into developing a relationship.³¹⁶ Defense counsel may be tempted to reach out to survivors with the interests of their client in mind. Attorneys should not seek a relation-

305. Burr, *supra* note 14, at 526.

306. *Id.* at 527.

307. Stetler, *supra* note 204, at 46.

308. *Id.* at 45.

309. *Id.* at 44.

310. *Id.*

311. Burr, *supra* note 14, at 528.

312. *See id.* (citing the Armstrong family’s desire to avoid the trial and appeals process).

313. *See id.* at 528-29 (describing the wishes of the Armstrong family).

314. Telephone Interview with Richard Burr, *supra* note 219.

315. *Id.*

316. *See* Stock Declaration, *supra* note 222, at 6 n.1.

ship with survivors for this reason. The survivors have endured a tremendous loss and defense counsel should not approach them for any reason except to meet the survivors' needs. Ideally, by meeting the needs of the survivors, the needs of the defendant, whether they be support for a plea agreement or softened victim impact evidence, will be met as well.

The relationship between defense counsel and the survivors must be unconditional, but defense counsel cannot forget their ethical obligation to act as a zealous advocate for their client. True "diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties."³¹⁷ The goals of restorative justice parallel this aspect of the Virginia Rules of Professional Conduct. The strategy that best serves the interests of the defendant is often the same strategy that serves the interests of the survivors and the community.³¹⁸ Counsel should recognize this parallel and consider how their strategies affect these other parties.

IV. Case Study: *United States v. Stayner*

Cary Stayner murdered naturalist Joie Armstrong ("Joie") in Yosemite National Park in July, 1999.³¹⁹ As part of Stayner's defense team, victim liaison Tammy Krause contacted Joie's mother, Leslie Armstrong ("Armstrong").³²⁰ When Krause originally called Armstrong to speak about restorative justice, Armstrong said, "Whatever the hell that is . . . not that I even believe there can be justice in Joie's case. Nothing will bring her back."³²¹ Despite protests from Joie's father and from her friends, Armstrong agreed to meet with Krause.³²² Krause visited Armstrong at her home in Florida.³²³ After speaking to Krause about the wants and needs of Joie's family and whether a plea bargain for Stayner met any of these needs, Armstrong claimed that she " 'didn't want anything at that point, except to have Joie back.' "³²⁴

After careful research and several conversations with Krause, Armstrong

317. VA. R. PROF'L CONDUCT R. 1.3, cmt. [1a].

318. See VA. R. PROF'L CONDUCT, Preamble (stating that a "lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious"); VA. R. PROF'L CONDUCT R. 1.3, cmt. [1a].

319. Kevin Fagan, *Plea Bargain in Slaying of Yosemite Naturalist: Motel Handyman to Take Life Term to Avoid Death Penalty*, S.F. CHRON., Sept. 13, 2000, at A3, 2000 WL 6491306.

320. LeBaron, *supra* note 236.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

penned a letter to the rest of Joie's family, including Joie's fiancé.³²⁵ She also sent this letter to the Carringtons, Sunds, and Pelossos—the families of Stayner's other victims.³²⁶ In this letter, Armstrong described the statistical odds of Stayner's actual execution, the potential length of Stayner's trials and subsequent appeals in state and federal courts, and the conditions that the families could request in addition to the assurance that Stayner would remain in prison for life.³²⁷ The Carringtons, Sunds, and Pelossos chose not to support a plea agreement for Stayner in California state court.³²⁸ However, most of the Armstrong family did support a plea agreement for Stayner in federal court, and a letter from the family accompanied Stayner's plea bargain to then-Attorney General Janet Reno.³²⁹

The Armstrong family's letter in support of a plea agreement for Stayner stated: "Joie's death at the hands of Cary Stayner cannot be changed. Given this reality, we find the media attention centered on Stayner unbearable."³³⁰ It also stated: "[w]e want Cary Stayner to agree to cease making public statements or giving interviews."³³¹ In addition, the Armstrong family included the condition that Stayner meet with any family member that wished to meet with him and

325. *Id.*

326. LeBaron, *supra* note 236.

327. *Id.* The judicial disposition of Stayner's crimes would continue for longer than the average capital case due to the fact that Joie's murder, because it occurred in a federal park, was a federal offense and the murders of the other three victims were state offenses. *See id.* In her letter to the rest of Joie's family, Armstrong estimated that it might take up to twenty-five years to reach a final decision. *Id.* Between 1977 and 2002, seventy-two California death row inmates had their sentence overturned, were resentenced, or released; thirteen inmates committed suicide. Death Penalty Focus, California Death Penalty Statistics, at http://208.55.30.156/facts/other/facts_statistics.shtml (last visited Jan. 31, 2003). Nineteen inmates died of other causes. *Id.* California executed ten inmates during this twenty-five year span. *Id.*

328. A California jury found Stayner guilty and sentenced him to death for the murders of Carole Sund, Juli Sund, and Silvina Pelosso. Stacy Finz, *Yosemite Killer Sentenced to Death; Terrible Details of Stayner Case Stun Even the Judge*, S.F. CHRON., Dec. 13, 2002, at A1, 2002 WL 4037993. The families of these victims did not support a plea bargain for Stayner. In fact, these families supported the imposition of the death penalty. Interview with Krause, *supra* note 20. Carole Carrington, the mother and grandmother of two of Stayner's victims said, "[i]n the world there are a few people who don't deserve to be around, and I think he's one of them." Burr & Krause, *supra* note 7 (quoting A.C. Thompson, *Is it Worth \$3 Million to Kill This Man?*, S.F. BAY GUARDIAN, Apr. 24, 2002, http://www.sfbay.com/36/30cover_carystayner.html (last visited Mar. 24, 2003)). Krause did communicate with the Carrington, Sund, and Pelosso families. Interview with Krause, *supra* note 20. However, they resisted cooperation and Krause was unable to develop the type of trusting relationship that she developed with Leslie Armstrong. *Id.*

329. LeBaron, *supra* note 236.

330. Burr & Krause, *supra* note 7.

331. *Id.*

that any such meeting be kept confidential.³³² The wants and needs of the Armstrong family shaped the plea agreement under which Stayner pleaded guilty in federal court in November, 2000.³³³

At Stayner's sentencing, Stayner apologized to Joie's family. According to the Los Angeles Times, "a weeping Cary Stayner turned to face the family, friends, and fiancé of Joie Armstrong . . . to seek their forgiveness." Stayner and Leslie Armstrong held each other's gaze while Stayner said:

If there is a God in heaven, I pray for his forgiveness. I cannot expect any forgiveness from Mrs. Armstrong or her family for taking Joie from them. . . . I cannot even ask forgiveness from my own family who I have hurt so deeply and who have already suffered so much. I have to live with the terrible reality of what I have done. I am very sorry that everyone else must live with it too.³³⁴

Stayner's plea agreement and apologies illustrate the dual-focus of restorative justice. First, by choosing to support a plea agreement for Stayner, the Armstrong family took an active role in the judicial process and gained judicial closure. Second, the Armstrong family demonstrated their ability to channel their anger and resentment into a fulfillment of their practical and emotional needs.³³⁵

V. Conclusion

Defense-based victim outreach focuses on the emotional and judicial needs of the survivors. This approach empowers the survivors and provides them with an active role in the judicial process. Defense-based victim outreach also helps the defendant to take responsibility for his crime, thereby beginning the restorative process for both the defendant and the survivors.

A victim liaison assists the defense team by developing relationships with the survivors, the prosecution, and, when appropriate, the defendant. These relationships provide the liaison with a unique perspective on the needs of these groups and the ideal means of meeting these needs. Defense counsel, even in the

332. *Id.*

333. Christine Hanley, *At His Sentencing, Yosemite Killer Apologizes To Family; Court: The Victim's Mother Says She Accepts the Apology of Cary Stayner, Who Gets Life in Prison Without Parole*, L.A. TIMES, Dec. 1, 2000, at A3, 2000 WL 25923638.

334. *Id.*

335. See text accompanying notes 329-35 (describing the contents of Stayner's plea agreement). The Armstrong family received judicial closure through the assurance that Stayner would remain in prison for life. Emotionally, Leslie Armstrong stated that she would never have "closure" because that term implies that she could move on and forget about what happened. Hanley, *supra* note 333. However, she did state that she would "save room in her heart to forgive him some day." *Id.*

absence of a victim liaison, should consider the effect that the survivors may have on the disposition of each case. Counsel should always consider approaching the survivors, both for the benefit of the survivors and for the benefit of their client.