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The Role of Forgiveness in Capital Murder Cases

Paige McThenia

I. Introduction

Minutes before he was to be hanged in a public square in Iran, seventeen-year-old Morteza Amini Moqaddam ("Moqaddam") was forgiven by the father of his murder victim. Under Iran's Islamic legal system, the relatives of the victim determine whether or not a convicted murderer is to die. The Qur'an, Islam's holy book, states: "The recompense for an injury / Is an injury equal thereto / (In degree): but if a person / Forgives and makes reconciliation, / His reward is due / From Allah." After Moqaddam's family and many of the four-thousand spectators at the public hanging pleaded with the victim's family to forgive Moqaddam in the name of Islam, Ali Mohebbi, the victim's father, told authorities to spare the young man's life. The noose was then removed from Moqaddam's neck, and he was taken back to prison for later resentencing. Moqaddam was transported in the ambulance that had been waiting to take his body to the morgue. Mohebbi told reporters that he decided to forgive his son's killer for the honor of Islam: "If I forgave him, maybe millions of people who would watch the news would learn about forgiveness—and that is the message of Islam.... When I saw his hands cuffed behind him and the noose around his neck and everyone was waiting for my order, I thought that first of all if this boy is dead, it will not bring back my son." There is no similarly demarcated place nor such a formal mechanism in the Anglo-American criminal justice system, particularly in a capital murder proceeding, for forgiveness. In the United States, a crime is under-

* J.D. Candidate, May 2000, Washington & Lee University School of Law; M.A. Boston University; B.A., Evergreen State College.

2. The Qur'an, Ash-Shūra 42:40.
4. Id.
5. Id.
6. Id. (internal quotation marks ommitted).
stood in terms of “social harm,” and the injury suffered involves “a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity.” While civil law recognizes the rights of private parties to seek redress for harm suffered in the courts, our criminal law is public law, and a criminal wrong is prosecuted by a public attorney who represents the state rather than the victim. The criminal proceeding is brought to protect the public interest rather than to compensate the individual victim or the family of the victim. Given that we recognize crime as a public harm, how do we then account for the possibility of individual forgiveness on the part of the family of the victim, specifically in a capital murder case? Does the kind of forgiveness exhibited by Ali Mohebbi toward Morteza Amini Moqaddam exist in the Anglo-American criminal justice system? Does the victim’s family under our system have the same authority to affect change in the proceedings as did Mohebbi? At what point in the proceedings can or does such forgiveness enter into a capital case? Can evidence of forgiveness on the part of the victim’s family mean the difference between the death penalty and life in prison without parole for the murderer? Should such evidence be given a formal and uniform position in our criminal justice system? In seeking to answer the foregoing questions, this article will begin by tracing the roles of a number of victims’ families at different stages in capital murder cases as a means of understanding the nature of this involvement in terms of the criminal justice system. It will then explore the meaning of the term “forgiveness” and will distinguish this concept from the related concept of mercy. It will then examine the current state of victim impact evidence law at the national level and in Virginia specifically. Finally, this article will conclude with an evaluation of the ways in which forgiveness by a murder victim’s family might be used in defending a capital case in Virginia should such evidence be found.

II. Forgiveness on the Part of Victim’s Families

At a recent conference entitled “The Role of Forgiveness in the Law,” Jeffrie G. Murphy stated:

I think that one of the most insightful discussions of forgiveness ever penned is to be found in Bishop Joseph Butler’s 1726 sermon “Upon Forgiveness of Injuries.” In that sermon, Bishop Butler offers a definition of forgiveness that I have adapted in my own work on the topic. According to Butler, forgiveness is a moral virtue (a virtue of character) that is essentially a matter of the heart, the inner self, and involves a change in inner feeling more than a change in external action. The

7. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 1 (2d ed. 1995) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *5).
change in feeling is this: the overcoming, on moral grounds, of the intense negative reactive attitudes—the vindictive passions of resentment, anger, hatred, and the desire for revenge—that are quite naturally occasioned when one has been wronged by another responsible agent. A person who has forgiven has overcome those vindictive attitudes and has overcome them for a morally creditable motive—e.g., being moved by repentance on the part of the person by whom one has been wronged.9

There are certainly stories of the kind of forgiveness Murphy describes by murder victims’ family members in capital cases in the United States. Maria Hines, sister of murdered Virginia state trooper Jerry Hines, not only forgave her brother’s killer, Dennis Wayne Eaton, but also visited him in prison, corresponded with him, and lobbied on his behalf in his plea for executive clemency.10 Jerry Hines was shot during a traffic stop of Eaton and his girlfriend, Judy Ann McDonald, on Feb. 21, 1989.11 Hines pulled over the car in which Eaton and McDonald were riding on suspicion of drunken driving. He did not know that Eaton had killed two men the day before.12 Hines, forty-eight, was shot twice and died beside the highway.13 Eaton maintained that McDonald killed Hines, but a jury found Eaton responsible for the trooper’s death.14 After Hines was shot, McDonald and Eaton fled, leading Salem police on a high-speed chase that ended when Eaton crashed into a telephone pole.15 Eaton then shot and killed McDonald in what he later claimed was a suicide pact, and finally turned the gun on himself.16 Rather than killing himself, however, he succeeded only in


13. Id.

14. Chittum, supra note 11. Maria Hines also believes that Eaton killed her brother. She nevertheless forgave him:

It “really doesn’t make any difference to me who fired the gun. To me, he did the other murders that led to them [Eaton and McDonald] coming down (Inter-state) 81 when Jerry stopped them. So, ultimately, he’s involved in his death.” ... “And that’s what I have forgiven him for, all of that. Whether he actually fired the gun or not is irrelevant.”


15. Id.

16. Id.
blowing out his right eye." Eaton was found guilty of capital murder and was sentenced to death on January 10, 1990.

While Maria Hines had long been opposed to the death penalty, she did not become involved in Eaton’s case until 1997, when she decided to write Eaton to let him know that she had forgiven him. In a December 1, 1997 letter, Hines, a former Catholic nun, wrote:

[H]ell has been defined as the absence of love and, likewise, with hatred instead of love in my heart, my life would be a living hell. So forgiving you is not only for you but also for me—and what it would do to my own soul if I refused to forgive.

Hines said that she had forgiven Eaton because “killing is wrong, whether it’s a case of one individual killing another or if it’s a state killing one of its citizens. . . . I want other victims to know there is an alternative. That alternative is forgiveness and reconciliation.”

The adult children of murder victim Jose M. Cavazos also forgave their father’s killer, Lonnie Weeks, Jr. Cavazos, a Virginia State Trooper, was shot to death after he stopped the car in which Weeks was riding for speeding. Cavazos was hit by two nine millimeter hollow-point bullets, and like Jerry Hines, he too died at the side of the highway. Weeks was convicted

17. Id.
18. Green, supra note 14.
19. Id. (internal quotation marks omitted).
20. Hsu, supra note 12 (internal quotation marks omitted). Maria Hines has no illusions that her brother would have opposed capital punishment the way she does:

“Jerry was a police officer and many police officers do think that someone who kills a police officer should be executed.” But, she said, “The only reason that Dennis is being executed is because he did kill a police officer and it does not honor my brother to kill in his name. Rather it dishonors him.”

Green, supra note 14. Hines’s widow and children have not forgiven Eaton. Id. Marie Deans, founder of Murder Victims Families for Reconciliation, a national organization of family members of victims of both homicides and state killings who oppose the death penalty in all cases, states:

After a murder, victims’ families face two things: a death and a crime. At these times, families need help to cope with their grief and loss, and support to heal their hearts and rebuild their lives. From experience, we know that revenge is not the answer. The answer lies in reducing violence, not causing more death. The answer lies in supporting those who grieve for their lost loved ones, not creating more grieving families. It is time we break the cycle of violence. To those who say society must take a life for a life, we say: ‘not in our name.”


22. Id.
23. Id.
of capital murder and sentenced to death. Cavazos’s children joined in Weeks’s efforts to obtain clemency from Virginia Governor Jim Gilmore. The clemency petition Weeks filed was based largely on letters from the Cavazos children, who said that they forgave Weeks and were asking that the Governor commute his sentence to life in prison. In a letter to the Governor, Leslie Cavazos-Almagi, Jose Cavazos’s twenty-six-year-old daughter, wrote: “[P]lease take into consideration the feelings my brother and I have in this matter. We have thought about this very carefully. In our hearts we have forgiven all that has been done to our family.” To Weeks, Cavazos-Almagi wrote: “Lonnie, I forgive you for what you have done. Unfortunately, your fate is out of my hands.” Trevor Cavazos, Jose Cavazos’s twenty-two-year-old son, voiced his opposition to the death penalty in a letter to Governor Gilmore:

I truly believe that the state is making a “God”-like decision that in no way can be proven to be divine, or backed up by “God.” If we as human beings truly believe that killing is wrong, then how can we say that punishing a person accused of killing should be solved by killing that person?

There are also stories of forgiveness from places other than Virginia. Marietta Jaeger forgave the man who abducted from a tent, raped, and then killed her seven-year-old daughter during a family camping trip in Montana. Jaeger says:

I’ve come to understand that God’s idea for us is not vengeance but restoration. . . . Jesus came to forgive, to heal. . . . How do we best honor the memory of a loved one? Doesn’t she deserve a more beautiful memorial than killing a chained, restrained, defenseless person? How does that provide peace for the victim’s family?

Bud Welch’s twenty-three-year-old daughter Julie was killed in the Oklahoma City bombing in 1995, and he has forgiven Timothy McVeigh.
After nine months of wanting vengeance, Welch asked himself what the death penalty was going to do for him: "It wasn't going to bring Julie back. I recognized it was revenge and hate—and that it was revenge and hate that had killed Julie." So, too, has Sue Zann Bosler forgiven the man who stabbed her father, the Reverend Billy Bosler, to death in front of her and left her for dead. Ms. Bosler describes the day she forgave James Campbell, her father's murderer, as "the happiest day of my life. . . . I felt a sense of relief, and peace overcame me inside."

III. Forgiveness and Mercy

What these family members of murder victims describe is a change in their feelings about the person who committed the murder. At what point in the proceedings can such forgiveness enter into a capital case? Does our criminal justice system take into account forgiveness on the part of the victim's family? In order to ascertain whether family forgiveness plays a role in capital cases in the United States, it is first important to understand specifically what is meant by forgiveness and then to distinguish this term from the related concept of mercy. Jeffrie G. Murphy draws a distinction between forgiveness and mercy in terms of "feeling" and "treating" that is helpful in understanding how these two concepts operate in the Anglo-American criminal justice system. Murphy writes:

 Forgiveness is primarily a matter of changing how one feels with respect to a person who has done one an injury. . . . It is, in my view, particularly a matter of overcoming, on moral grounds, the resentment a self-respecting person quite properly feels when suffering such an injury. Mercy, though related to forgiveness, is clearly different in at least these two respects. First, to be merciful to a person requires not merely that one change how one feels about that person but also a specific kind of action (or omission)—namely, treating that person less harshly than, in the absence of mercy, one would have treated him. Second, it is not a requirement of my showing mercy that I be an injured party. All that is required is that I stand in a certain relation to the potential beneficiary.

4, 2000, at D1, available in 2000 WL 11981017. Belshaw reports on the forgiveness of Peter and Linda Biehl, who forgave the three men who beat and stabbed their daughter Amy to death in South Africa in 1993. The Biehls traveled to South Africa to testify in support of freeing the three killers, and during that trip they came to know not only the families of the men who had killed their daughter, but the men themselves. David Biehl stated:

We can speak only from our own experience, but I can tell you for an absolute fact that we have seen with our own eyes the importance of restorative rather than retributive justice. . . . We have been through it ourselves and personally experienced how liberating it truly can be to forgive and to attempt to reconcile.

Id.

33. Id. (internal quotation marks omitted).
34. Id.
35. Id. (internal quotation marks omitted).
of mercy. This relation—typically established by legal or other institutional rules—makes it appropriate that I impose some hardship upon the potential beneficiary of mercy.\textsuperscript{36}

While the family of a murder victim might forgive the person responsible for a family member’s death, mercy is that which is granted by the state. A murder victim’s family has “standing,”\textsuperscript{37} in Murphy’s terms, to forgive, but it does not have the legal authority to “treat” that guilty person in any way. Only the state has the authority to punish the murderer or to grant that murderer mercy. Thus, whereas Ali Mohebbi was able, in forgiving Morteza Amini Moqaddam, to trigger an automatic grant of mercy from the state in Iran, the family of the victim has no such certain power in the United States.\textsuperscript{38}

\section{IV. The Current State of Victim Impact Evidence Law}

It is not the case, however, that the family that forgives has no power in the Anglo-American criminal justice system. Support for victims’ rights has been growing over the past three decades, and as a result of the Victim Witness and Protection Act of 1982\textsuperscript{39} and the Victim’s Rights and

\begin{itemize}
  \item 36. JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 167 (1988) (emphasis added). Murphy writes:
  \begin{quote}
    Forgiveness is primarily a matter of how I feel about you (not how I treat you), and thus I may forgive you in my heart of hearts or after you are dead... I may think I have forgiven you; but, when old resentments rise up again, I may say, “I was wrong—I really have not forgiven you after all.” But if I have shown you mercy, it is not necessary that I—in showing it—must be the one wronged or injured by your wrongful conduct. (It is not even necessary that anyone be wronged.) All that is required is that you stand under certain rules and that I have authority to treat you in a certain harsh way because of those rules. But the matter is different with forgiveness. To use a legal term, I do not have standing to resent or forgive you unless I have myself been the victim of your wrongdoing.
  \end{quote}
  \textit{Id.} at 20-21.

  \item 37. \textit{Id.} at 21.

  \item 38. While it may not always be the case that forgiving families advocate against the death penalty, this article is concerned with cases of forgiveness that give rise to requests for mercy. According to Jeffrie G. Murphy, “the virtue of mercy is revealed when a person, out of compassion for the hard position of the person who owes him an obligation, waives the right that generates the obligation and frees the individual of the burden of that obligation.” MURPHY & HAMPTON, supra note 36, at 176. In relation to criminal law, Murphy asserts:
  \begin{quote}
    [Because] individuals may legitimately show mercy by waiving their rights, a judge or any other official may exercise mercy in a criminal case if (and this is a very big “if”) it can be shown that such an official is acting, not merely on his own sentiments, but as a vehicle for expressing the sentiments of all those who have been victimized by the criminal, and who, given those sentiments, wish to waive the right that each has that the criminal be punished.
  \end{quote}
  \textit{Id.} at 179-80. Mercy is triggered by forgiveness, but if the stories of forgiveness are not heard, then the court’s exercise of its power to grant mercy is restricted.

\end{itemize}
Restitution Act of 1990, victims of crime and their families now have a definite presence in criminal proceedings. The aim of the legislation on behalf of victims was to accord witnesses and victims a greater degree of rights and protections in the criminal justice system and to ensure that victims had the right to be notified of, and present at, court proceedings, to be kept apprised of the status of such factors as the defendant’s conviction, sentencing, imprisonment, and release, and to present evidence of the impact of the crime at trial. In Virginia, the “Crime Victim and Witness Rights Act,” passed in 1995, seeks to ensure that victims and witnesses “have the opportunity to be heard by law-enforcement agencies, attorneys for the Commonwealth, corrections agencies and the judiciary at all critical stages of the criminal justice process to the extent permissible under law.”

Prior to 1991, victim impact evidence was not allowed in capital murder trials. In Booth v. Maryland, the United States Supreme Court held that the use of victim impact statements describing a victim’s personal characteristics, the impact of the crime on the victim's family, and the family members’ opinions and characterizations of the crimes was

43. VA. CODE ANN. § 19.2-11.01 (Michie 1999). Section 19.2-11.01(B) defines “victim” as the following:

(i) a person who has suffered physical, psychological or economic harm as a direct result of the commission of a felony or of an assault and battery in violation of §§ 18.2-57, 18.2-57.1 or § 18.2-57.2, stalking in violation of § 18.2-60.3, sexual battery in violation of § 18.2-67.4, attempted sexual battery in violation of § 18.2-67.5, maiming or driving while intoxicated in violation of § 18.2-51.4 or § 18.2-266, (ii) a spouse or child of such a person, (iii) a parent or legal guardian of such a person who is a minor, or (iv) a spouse, parent or legal guardian of such a person who is physically or mentally incapacitated or was the victim of a homicide.

44. 482 U.S. 496 (1987).
unconstitutional. The Court found that the admission of such evidence "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." In Payne v. Tennessee, however, the Court held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." The Payne Court overruled Booth to the extent that Booth prohibited the use of victim impact evidence describing the personal characteristics of victims and the emotional impact of the crimes on victims' families. Accepting the Payne Court's decision in Weeks v. Commonwealth, the Supreme Court of Virginia affirmed the trial court's admission of victim impact evidence. The court rejected Weeks's argument that the testimony was not relevant to the jury's sentencing decision. Citing Payne, the court held that "victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia." While Weeks held that such evidence was admissible because it was relevant, in Beck v. Commonwealth, the Supreme Court of Virginia held that such testimony is admissible if it is relevant. According to the Beck Court, victim impact testimony might come from persons other than family members. The court explained:

[T]he statutes [19.2-11.01, 19.2-264.5, and 19.2-299.1] do not limit evidence of victim impact to that received from the victim's family members. Rather, the circumstances of the individual case will dictate what evidence will be necessary and relevant, and from what sources it may be drawn. In a capital murder trial, as in any other criminal proceeding, the determination of the admissibility of relevant evidence is within the sound discretion of the trial court subject to the test of abuse of that discretion.

Evidence of victim impact should be distinguished from evidence of the opinion of a victim's family member that the death penalty should not be imposed. Evidence of a family member's opposition to the death penalty has been disallowed in capital cases in a number of jurisdictions. In Robison

46. Id. at 503.
49. Id.
50. 450 S.E.2d 379 (Va. 1994).
52. Id.
53. Id. (citing Payne, 501 U.S. at 808 (1991)).
54. 484 S.E.2d 898 (Va. 1997).
56. Id. at 905; see also Banghart, supra note 42 (explaining the interplay between Payne, Weeks, and Beck).
v. Maynard, the United States Court of Appeals for the Tenth Circuit considered whether Payne requires that testimony from a victim’s relative that she did not want the jury to impose the death penalty was proper mitigating evidence and admissible at the penalty phase hearing. The court held that Payne did not make such evidence proper or admissible:

Simply put, Payne merely put aside the bar to the introduction of and comment upon victim impact evidence which had been created in Booth and South Carolina v. Gathers, 490 U.S. 805, 104 L. Ed. 2d 876, 109 S. Ct. 2207 (1989). The Court did not expand the universe of admissible relevant mitigating evidence established by Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982). We cannot agree that Payne portends admissibility of any evidence other than that related to the victim and the impact of the victim’s death on the members of the victim’s family. Nothing said by the Court suggests the Court intended to broaden the scope of relevant mitigating evidence to include the opinion of a victim’s family member that the death penalty should not be invoked.

Similarly, in Barbour v. State, the Court of Criminal Appeals of Alabama held that the trial court had properly excluded from the jury’s consideration a letter from the victim’s brother requesting that the defendant be sentenced to life without parole rather than death. The trial court reasoned, in line with Robison, that the witness’s opinion of the appropriate punishment is not relevant because it is neither evidence of the defendant’s character nor of the circumstances of the crime.

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57. 943 F.2d 1216 (10th Cir. 1991).
59. Id.
60. Id. at 1217. Michael Vitiello argues:

Robison’s counsel might have attempted to introduce testimony that the execution of the defendant would not ease the pain of family members, but would increase their suffering. If applied consistently, Payne would make that evidence admissible in light of its express statement that evidence “about the impact of the murder on the victim’s family is relevant to the jury’s decision.” Robison suggests other possible cases. For example, one can imagine cases in which a murder victim has abused his family and rather than causing profound grief, the death has freed the family. If the victim’s family members were willing to admit that, Payne makes that evidence admissible.

63. Id. at 22-24. In addition to denying evidence of a family member’s opposition to the death penalty, courts have also prohibited the introduction of evidence relating to the actual victim’s opposition to the death penalty. See, e.g., State v. Barone, 969 P.2d 1013 (Or. 1998); Campbell v. State, 679 So.2d 720 (Fla. 1996). In Campbell, a jury convicted James Bernard Campbell of murder in the first degree, and the jury sentenced him to death. Two
V. Victim Impact Evidence in Virginia

In virtually every capital case in Virginia, a defendant will be charged with at least one felony in addition to capital murder. For example, if a defendant is charged with capital murder under section 18.2-31.4 of the Virginia Code (willful, deliberate, and premeditated murder in the commission of robbery or attempted robbery), the defendant will also be charged with the robbery and with any other relevant felony violations, such as unlawful use of a firearm. (An example of the rare exceptions to the generalization that felony charges accompany capital murder charges in virtually every case would be a murder for hire committed with a knife.) If convicted of capital murder and at least one felony, the sentencing proceedings for the felony conviction(s) and the capital murder conviction are conducted separately.\(^6\) Sentencing for the conviction of a felony proceeds according to section 19.2-295.1 and is generally conducted first, while sentencing for the capital murder proceeds according to 19.2-264.4 and is generally held after the felony sentencing proceeding.\(^6\) Under section 19.2-11.01 of the Virginia Code, victim impact evidence only enters into the court proceedings after the determination of guilt or innocence has been made.\(^6\) Such evidence takes one of two forms in capital cases: victim impact evidence can enter into the capital case sentencing proceedings in the form of a written victim impact statement or as direct victim impact testimony.\(^6\)

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\(^6\) Sullivan, \textit{supra} note 41, 601-02 & nn.12-14 (internal citations omitted). At his third sentencing proceeding, Campbell was sentenced to life in prison. \textit{Id.}

\(^6\) Sentencing for both felony and capital murder convictions generally occurs in a separate proceeding from the determination of guilt or innocence. Both are bifurcated proceedings. \textit{VA. CODE ANN. §§ 19.2-295.1, 19.2-264.4} (Michie 1999).

\(^6\) \textit{Id.}

\(^6\) \textit{VA. CODE ANN. § 19.2-11.01} (Michie 1999). This is true in both felony and capital cases.

\(^6\) \textit{VA. CODE ANN. §§ 19.2-11.01, 19.2-299.1, 19.2-264.4, 19.2-264.5} (Michie 1999).
A. Victim Impact Statements

Under section 19.2-11.01(A)(4)(b) of the Virginia Code, victims shall be given the opportunity to prepare a written victim impact statement pursuant to section 19.2-299.1. According to section 19.2-299.1, in all cases involving offenses other than capital murder, the victim impact statement is included in the presentence report prepared by a probation officer. In capital murder cases, however, the victim impact statement is included as a part of the post-sentence report prepared according to section 19.2-264.5. After the capital sentencing jury has recommended death in a section 19.2-264.4 capital sentencing proceeding, the court reviews the post-sentence report prepared by a probation officer of the court, which includes the victim impact statement, before imposing sentence. According to section 19.2-264.5, "[a]fter consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life." Thus, although a murder victim’s family member shall be given the opportunity to prepare a written victim impact statement, that statement will never be seen by the sentencing jury.

B. Victim Impact Testimony

In addition to the victim impact statement included in the post-sentence report under section 19.2-264.5, section 19.2-11.01(A)(4)(c) provides that a victim’s family member shall be given the opportunity to testify prior to sentencing of the defendant regarding the impact of the crime at the section 19.2-264.4 capital murder sentencing proceeding. Under section 19.2-11.01(A)(4)(c) however, such opportunity shall be afforded only upon

68. §§ 19.2-11.01(A)(4)(b), 19.2-299.1.
69. § 19.2-299.1. A presentence report is never submitted to the court in a capital case.
Under section 19.2-299.1, a presentence report is only prepared in cases not involving the offense of capital murder. In all cases involving capital murder, victim impact statements "shall be prepared and submitted in accordance with the provisions of § 19.2-264.5." Section 19.2-264.5 sets forth the requirements for the post-sentence report to be prepared after the jury has elected the death penalty. In addition, despite the difference in terminology, neither the presentence nor post-sentence report is seen by the sentencing jury. Under section 19.2-299(A), the presentence report is submitted to counsel for the accused, the attorney for the Commonwealth, and the judge in chambers, "who shall keep the report confidential." VA. CODE ANN. § 19.2-299(A) (Michie 1999). The statute states that the probation officer shall be available to testify from the report in open court "in the presence of the accused, who shall have been advised of its contents and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter." Id. Like the post-sentence report described in section 19.2-264.5, the presentence report does not come before the sentencing jury. §19.2-299(A).
70. § 19.2-11.01(A)(4)(a).
71. § 19.2-264.5.
72. § 19.2-11.01(A)(4)(a).
73. §§ 19.2-11.01(A)(4)(a), 19.2-264.
motion of the Commonwealth.\textsuperscript{74} Section VI.B.2 of this article will explore alternative means of introducing victim impact evidence at a section 19.2-264.4 capital sentencing proceeding and at the judicial imposition of sentence proceeding that follows.

\textbf{VI. Evidence of Forgiveness Before and After Trial}

Despite the seemingly limited opportunity afforded defense counsel for the introduction of victim impact evidence under section 19.2-11.01 of the Virginia Code, there are a number of other ways counsel for the defendant might use such evidence prior to; at, and after, a capital trial.

\textbf{A. Pre-Trial Use of Forgiveness Evidence}

Prosecutors are the “gatekeepers” of the criminal justice system, not only deciding whether to charge a suspect but determining what crime will be charged as well.\textsuperscript{75} Jonathan DeMay notes that “prosecutorial discretion encompasses the power to charge or refrain from charging an individual with a crime; to reduce charges to a lesser offense prior to trial; to not charge prior offenses; to dismiss or request court dismissal after a trial commences; or to recommend a lesser sentence.”\textsuperscript{6} While a prosecutor is a “gatekeeper” of the criminal justice system, he is also the representative of the state which has been harmed by the crime. In his remarks at a recent symposium on “The Role of Forgiveness in the Law,” David Lerman, an Assistant District Attorney in Wisconsin, stated:

I believe, first, that forgiveness should be seen as flowing from the victim, or a surrogate victim or a victim’s representative, or from the neighborhood most affected by a particular crime. To the extent that a prosecutor takes on the mantle of the community to effect justice, then I as a prosecutor may engage in forgiveness. . . . Otherwise, I think that what I engage in in plea bargaining or lowering a sentence is compassion or mercy. . . . You know, prosecutors are really the hub of the system. We control so much of what goes on in the criminal justice system; therefore, I think we play an absolutely vital role in advancing the notion of forgiveness in criminal justice processes. How should we be doing that? We should be allowing for practices which advance the possibility of forgiveness. This is what is most helpful to victims, I believe.\textsuperscript{77}

\textsuperscript{74} Id.

\textsuperscript{75} Jonathan DeMay, \textit{A District Attorney’s Decision Whether to Seek the Death Penalty: Toward an Improved Process}, 26 FORDHAM URB. L.J. 767, 772 (1999).

\textsuperscript{76} Id.

Given the power of the prosecutor as the "gatekeeper" of the criminal justice system and as someone who "takes on the mantle of the community," a murder victim's family that has a story of forgiveness to tell might be better served by the prosecutor prior to trial rather than in the courtroom. The choice is between life imprisonment and death at the sentencing phase of a capital case, whereas pretrial there is some possibility of a lesser charge. It seems likely that forgiveness evidence presented to the prosecutor at this stage in the proceedings, rather than after the trial commences, could have a potentially greater effect on the treatment the defendant receives.

Marietta Jaeger, the mother of the seven-year-old girl who was killed while camping with her family in Montana, sought the help of the prosecutor in having the life of her daughter's killer spared.78 Jaeger traveled to Montana to meet with the suspect and to tell him of her forgiveness. She then met with state prosecutors to tell them of her opposition to any move on their part to seek the death penalty, even if the suspect confessed.79 When the suspect learned of Jaeger's stance, he broke down and confessed to four murders including the killing of Jaeger's daughter. One cannot know whether prosecutors would have honored Jaeger's request that they not seek the death penalty because the defendant killed himself before he was charged, four hours after he confessed.80 The point is that Jaeger's forgiveness of the suspect prompted her to request a grant of mercy from the state.

In addition to those acts of mercy on the part of the prosecutor in charging an offense in response to stories of forgiveness from family members, similar decisions are made for reasons other than family forgiveness. The parents of Matthew Shepard made a request that the prosecutor give the defendant, Aaron McKinney, two life terms in prison rather than pursue the death penalty if McKinney relinquished his right to appeal.81 Shepard's father, Dennis Shepard, made an address to the court after the agreement was concluded.82 Turning to the defendant, he said:

McKinney, I am going to grant you life, as hard as it is for me to do, because of Matthew. Every time you celebrate Christmas, a birthday or
the Fourth of July, remember that Matthew isn’t. Every time you wake up in that prison cell, remember that you had the opportunity and the ability to stop your actions that night. . . . You robbed me of something very precious, and I will never forgive you for that. May you live a long life, and may you thank Matthew every day for it.

In a similar case of mercy without forgiveness, Sy Snarr asked that the prosecutor spare the life of her son’s killer because she and other family members did not want a “sensational and lengthy capital murder trial. Instead, they wanted ‘closure and to get on with [their] lives.” According to Snarr, Jorge Martin Bevenuto, her son’s killer, committed a “premeditated, evil act. He wanted to watch someone die. And I’ll never forgive him.”

In three recent cases in which the Virginia Capital Case Clearinghouse provided assistance, prosecutors sought family approval before accepting pleas that ended the possibility of death for the respective defendants. The families assented to the pleas for reasons other than forgiveness. In all of the cases described above, the prosecutor agreed to a lesser charge or sentence on the basis of the murder victims’ families’ wishes, and thus while the Shepard, Snarr, and the Virginia Capital Case Clearinghouse stories are certainly not about forgiveness on the part of the victims’ families, they do illustrate the power of prosecutorial discretion and the power that families potentially have to effectuate a grant of mercy. Given the current emphasis in our judicial system on victims’ rights, a prosecutor should be equally (if not more) moved to mercy by a plea for mercy based in forgiveness than a plea for mercy based in a desire for finality.

In order to use victim impact evidence as a shield in the hands of the defense rather than a sword in the hands of the prosecution, Randall Coyne suggests contacting family members before the trial begins: “Although the family’s initial reaction may be to avoid any contact with defense attorneys, one should not automatically assume that all family members will seek to have the client killed. Many family members may have strong religious

83. _Id._ (internal quotation marks omitted). While Matthew Shepard’s father has declared that he has not forgiven McKinney, Matthew’s mother’s motivation for accepting the plea was reportedly forgiveness. Prosecutor Cal Rerucha stated that he had reservations about the plea bargain, but that Matthew’s mother prevailed upon him to agree to it. Rerucha said that he “will never get over Judy Shepard’s capacity to forgive.” Julie Cart, _Killer of Gay Student Is Spared Death Penalty Courts: Matthew Shepard’s Father Says Life in Prison Shows ‘Mercy to Someone Who Refused to Show Any Mercy,’_ L.A. TIMES, Nov. 5, 1999, at A1, available in 1999 WL 26209605.


85. _Id._ (internal quotation marks omitted).

beliefs which are more evolved than *lex talionis.*”

According to Coyne, “[i]nitiating contact with the victim’s family may also open a dialogue which leads to a plea bargain. Obviously, a prosecutor is more likely to negotiate a plea bargain if the victim’s family members agree.” The point is that if the family of a victim agrees to a plea of capital life or first degree life for any reason, the prosecutor is freer to negotiate a lesser sentence for the defendant.

**B. Trial Use of Forgiveness Evidence**

1. **Obtaining Evidence of Forgiveness**

One commentator has suggested that the case of *Brady v. Maryland* may be helpful in obtaining potentially favorable victim impact evidence from the prosecution. In *Brady,* the Supreme Court of the United States held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Victor D. Vital asserts that defense counsel may use *Brady* to obtain evidence that, inter alia, casts doubt on the loss suffered by the victim’s family because such evidence could be favorable to the defense’s case.

2. **Using Evidence of Forgiveness at Trial**

Difficult though it may seem under section 19.2-11.01 of the Virginia Code to bring evidence of a victim’s family’s forgiveness before the court, there are three specific arguments defense counsel might make to have such evidence admitted either in the form of testimony on the part of a forgiving family member or as a written victim impact statement.

**a. Forgiveness Testimony**

Given that victims may have the opportunity under section 19.2-11.01 to testify prior to sentencing, and victim impact statements in capital cases

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87. *Id.* (emphasis added). *Lex talionis* is defined as “the law of retaliation; . . . an eye for an eye; a tooth for a tooth.” BLACK'S LAW DICTIONARY 913 (6th ed. 1990).
89. 373 U.S. 83 (1963).
93. See *supra* section V.
are presented to the court only after the jury has recommended death, it is clearly to the defense's advantage to introduce forgiveness testimony at the jury sentencing proceeding. While testimony on the part of a victim's family member is only upon motion of the Commonwealth pursuant to section 19.2-11.01, defense counsel can argue that evidence of forgiveness is relevant as either rebuttal to the Commonwealth's evidence of victim impact or as mitigation evidence.

Whether or not the Commonwealth presents victim impact evidence of its own, defense counsel can make the argument that evidence of forgiveness on the part of the victim's family is relevant as mitigation evidence. While the issue in Robison v. Maynard and Barbour v. State was whether evidence that the opinion of a member of the victim's family that the death penalty should not be invoked was admissible, the issue here is whether evidence of forgiveness on the part of a victim's family member is admissible. In Lockett v. Ohio, the Supreme Court of the United States held the following:

[T]he Eighth and Fourteenth amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Several years later, in Eddings v. Oklahoma, the Court, applying the Lockett rule, held that "[j]ust as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Mitigation evidence is "any evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment." In Virginia, evidence of victim impact is relevant mitigating evidence. Section 19.2-299.1 of the Virginia Code states that the victim impact statement "may be considered by the court in determining the appropriate sentence." Evidence that the family of a murder victim has forgiven the defendant is evidence which may extenuate or reduce the degree of punishment. Thus, under Lockett and Eddings, such evidence is admissible.

94. VA. CODE ANN. § 19.2-11.01 (Michie 1999).
100. VA. CODE ANN. § 19.2-299.1 (Michie 1999).
Should the Commonwealth decide to present victim evidence of its own, defense counsel can introduce evidence of forgiveness as rebuttal. Section 19.2-11.01 of the Virginia Code recognizes as relevant evidence of victim impact, and thus it must also be the case that evidence of lack of impact, or, more specifically, evidence of recovery from initial adverse impact derived from extending forgiveness, is relevant as well. Section 19.2-11.01 begins as follows: "In recognition of the Commonwealth’s concern for the victims and witnesses of crime, it is the purpose of this chapter to ensure that the full impact of crime is brought to the attention of the courts of the Commonwealth." Although an understanding of “the full impact” of one crime might be had by means of testimony of the great impact the crime had on a family member of the victim, in another case such understanding might only be had by means of testimony of mitigation of impact as the result of forgiveness. The forgiveness of a family member is relevant to an understanding of “the full impact” of the crime, and thus defense counsel should seek to have it admitted as rebuttal evidence at the penalty phase of a capital case.

b. Forgiveness Evidence as Part of a Victim Impact Statement

Forgiveness evidence might also enter into the sentencing phase of a capital murder case as a part of a victim impact statement. As stated above in Section V, should the jury in a capital case recommend the death penalty at the section 19.2-264.4 sentencing proceeding, the court must, pursuant to section 19.2-264.5, consider the post-sentence report, which “shall in all cases contain a Victim Impact Statement” before imposing sentence. According to the statute, “[a]fter consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.” Under the plain language of the statute, all post-sentence reports must contain a victim impact statement, and thus evidence of forgiveness may reach the court in this way. However, should a court interpret the language “a Victim Impact Statement” to mean that the report must include only one such statement, which may not contain

101. It might be the case in a capital murder proceeding that while some of the victim’s family members have forgiven the defendant, other have not. Such was the situation in both the Hines family and the Cavazos family. See supra nn.20, 25.

102. In Gardner v. Florida, 430 U.S. 349 (1977), the United States Supreme Court held that the petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of confidential information, which was in the presentence report but which was not disclosed to the petitioner or his counsel, so that the petitioner had no opportunity to deny or explain it. Id. at 362 (1977).

103. VA. CODE ANN. § 19.2-11.01 (Michie 1999) (emphasis added).

104. VA. CODE ANN. § 19.2-264.5 (Michie 1999).

105. Id.
evidence of forgiveness on the part of the victim's family, defense counsel might also present evidence of forgiveness as constituting the "good cause" referred to in the final sentence of the statute. While the phrase "upon good cause shown" has not been construed by a Virginia court, it is clear that this language permits the defendant to produce evidence showing good cause why the sentence of death should not be imposed. Given that section 19.2-299.1 recognizes the relevancy of victim impact evidence to sentencing, it is clear that such evidence might constitute good cause to set aside the sentence of death and impose a sentence of life imprisonment instead.

3. Post-Trial Use of Forgiveness Evidence

There is little evidence of mercy at the clemency stage, should that point be reached in a capital case. Since 1976, only forty-one death row inmates have been pardoned for humanitarian reasons in the United States. There are currently 3,625 inmates on death row. Virginia governors have commuted only six death sentences on humanitarian grounds since 1976, and as of April 12, 2000, seventy-six people have been executed in the Commonwealth. Despite Maria Hines's public plea that the Governor be merciful and spare the life of Dennis Wayne Eaton, the killer of Hines's brother, Eaton was executed on June 19, 1998. Hines was not allowed to speak at Eaton's clemency hearing. In the case of Lonnie

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106. This is a difficult reading to make under the plain language of the statute. The most obvious meaning of the phrase "a victim impact statement" is any victim impact statement in existence at the time the post-sentence report is prepared. It could be, however, that a court might interpret this to mean a single victim impact statement, in which case it might admit a statement from a non-forgiving family member and exclude a statement from a forgiving family member.

107. See, e.g., Hedrick v. Commonwealth, 513 S.E.2d 634 (1999) (finding that defendant failed to show good cause why the sentence of death should not be imposed).


110. Death Penalty Information Center, Facts About Clemency (visited April 12, 2000) <http://www.essential.org/dpic/clemency.html> ("Humanitarian reasons include doubts about the defendant's guilt, questions about the defendant's mental capacity, rehabilitation of the defendant, or the personal convictions of the governor.").

111. Id.

112. Id.

113. Frank Green, Governor Stands as Last Hope for Condemned Killer, RICH. TIMES-DISPATCH, June 18, 1998, at B3, available in 1998 WL 2038346. See also Green, supra note 27.
Weeks, the efforts of Jose Cavazos's children to obtain a grant of clemency were no more successful than was that of Maria Hines.114 Weeks was executed March 16, 2000.115 Governor Gilmore turned down the clemency petition two hours prior to the execution.116 Governor Gilmore issued the following statement:

Trooper Jose Cavazos died honorably in the performance of his duties while protecting the lives of the people of Virginia. . . . Weeks admitted to police that he murdered Trooper Cavazos . . . Upon a thorough review of the Petition for Clemency, the numerous court decisions regarding this case, and the circumstances of this matter, I decline to intervene.117

VI. Conclusion

In seeking to understand the role of forgiveness in capital proceedings, this article traced the roles of a number of victims' families at different stages in capital murder cases. It then explored the meaning of the term "forgiveness" and distinguished this concept from the related concept of mercy. This article next examined the state of victim impact evidence law both nationally and in Virginia specifically. It concludes with an evaluation of the ways in which forgiveness by a murder victim's family might be used in defending a capital case in Virginia should such evidence be found. Defense counsel should first seek to ascertain whether members of the victim's family have forgiven the defendant. Such evidence might be obtained by either approaching the family directly or by requesting the evidence pursuant to Brady v. Maryland from the prosecution. Defense counsel in possession of forgiveness evidence thus has four grounds for arguing for the admissibility of the evidence: 1) as rebuttal evidence to the prosecution's introduction of victim impact testimony by a non-forgiving family member; 2) as mitigation evidence; 3) under the plain language of the statute; and 4) as evidence constituting "good cause" under section 19.2-264.5. Victim's family members who forgive in the United States do not have the sort of power that Ali Mohebbi had to trigger automatically the state's grant of mercy on behalf of Morteza Amini Moqaddam. This does not mean, however, that they are entirely powerless. There are distinct points at which victims' stories are heard within our criminal justice system, and while the evidence of success in bringing about change is not overwhelming, those stories of forgiveness can save lives.

115. Id.
116. Id.
117. Id. (internal quotation marks omitted).