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WHEN VICTIMS SEEK CLOSURE: FORGIVENESS, VENGEANCE AND THE ROLE OF GOVERNMENT

*Susan Bandes**

As one who has always opposed the death penalty, I find that my principles are most sorely tested when I hear of the anguish of the parents of children who have been murdered. As a mother, I wonder how a parent goes on to live her life each day after such an unimaginable loss.

In 1996, I read several articles about the upcoming execution of William Bonin, also known as the Freeway Killer, in Southern California. Bonin had confessed to killing twenty-one boys and young men, and was sentenced to death for fourteen of those murders.¹ The victims were mostly hitchhikers Bonin had picked up, raped, brutalized and strangled.² He had exhibited no remorse, and indeed had seemed to delight in torturing the parents when they requested information from him about their sons' deaths.³

Sandra Miller, the mother of a fifteen year old boy who Bonin had raped, tortured and strangled sixteen years earlier, was one of several parents of victims who said she expected a sense of closure from Bonin's death. "At the moment before the injection," she said, she would be seeing her dead son, Rusty, in her mind, and thinking, "Rusty, it's almost over. He's finally going to pay."⁴ A victims' advocate who had worked with several members of the families said that "in the aftermath of the emotional devastation the murders wrought, some of the relatives had virtually put their lives on hold as the appeals process dragged out. 'Now,' she said, they hope the execution will 'open the door to being able to go on with the rest of their lives.'"⁵

Sandra Miller wrote a letter to Bonin which she hoped he would read just before his execution, which read, in part:

You taught me a few things: How to hate, that I feel I could kill you, little by little, one piece at a time. You'd best get down on

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1. See Carey Goldberg, *Families Hope Freeway Killer's Execution Ends Their Years of Pain*, N.Y. TIMES, Feb. 22, 1996, at A14.

2. See *id.*

3. See *id.*

4. *Id.*

5. *Id.*

your hands and knees and pray to God for forgiveness. I don't know if even He could forgive you. But I hope the Lord can forgive me for how I feel about you.⁶

The victims' rights advocate said that none of the family members she had spoken to had forgiven Mr. Bonin, and she did not advise them to try. She said "I tell them there are some things we aren't able to forgive and we should let God do that."⁷

A little more than a year ago, Aaron McKinney was spared the death penalty for the torture and brutal murder of Matthew Shepard, a gay college student McKinney and his friend Russell Henderson had abducted, beaten, burned, tied to a fence and left for dead.⁸ Prosecutors said they had wanted to seek the death penalty,⁹ but apparently the agreement to a sentence of life without parole came about largely at the insistence of Matthew Shepard's parents.¹⁰

Here is an excerpt from what Dennis Shepard, Matthew's father, said at McKinney's sentencing hearing:

I would like nothing better than to see you die, Mr. McKinney. However, this is the time to begin the healing process, to show mercy to someone who refused to show any mercy, to use this as the first step in my own closure about losing Matt Mr. McKinney, I'm going to grant you life, as hard as it is for me to do so, because of Matthew You robbed me of something very precious and I will never forgive you for that. Mr. McKinney, I give you life in the memory of one who no longer lives. May you have a long life and may you thank Matthew every day for it.¹¹

He also said that he and his wife had supported the plea agreement because it meant no drawn-out appeals process, no chance of walking free on a technicality or receiving a lighter sentence and no opportunity for McKinney to become a symbol. He said "[n]o years of publicity, no chance of commutation . . . just a miserable future and a more miserable end. It works for me"¹²

6. *Id.*

7. *Id.*

8. See Michael Janofsky, *Wyoming Man Get Life Term in Gay's Death*, N.Y. TIMES, Nov. 5, 1999, at A1.

9. See *id.* at A23.

10. See *id.* (citing David M. Smith, a spokesman for the Human Rights Campaign, which is described as the nation's largest gay rights group).

11. *Id.*

12. *Id.*

It is agonizing to read such statements. Despite the very different reactions of these parents, it is obvious that they are all living in a kind of hell, and are all seeking the elusive state they call “closure” to help them go on with their lives. Not that they seek to forget, or to stop grieving, but that they are frozen in a nightmarish, unbearable moment and must find a way to get beyond it, to achieve some respite from the images that haunt them. Their quotations are about forgiveness and vengeance — both Miller and Shepard talk about these, though they see the concepts very differently. Miller seeks closure in execution. She describes a sense that only capital punishment will come close to righting the moral equilibrium.¹³ She evokes her experience of the long wait for execution as another kind of torture, another barrier to closure.¹⁴ She sees forgiveness (both of Bonin and of the hatred in her own heart) as something that will have to come from God.

Shepard is not opposed to execution on principle, but in the case of his son’s torturer and killer, he finds that there may be a more satisfying punishment in allowing him to live, knowing his life is a gift from his victim’s family. He finds healing will come more quickly if he forgoes the long appeals process in favor of a quick and certain final outcome. He, too, has no intention of forgiving, but his feelings about mercy and vengeance are more complicated.

What are we to make of these very different reactions? We may feel that one is more sympathetic,¹⁵ more in line with our spiritual or political beliefs, or more likely to lead to psychological healing; and we might know how we would hope to react if a child of ours is brutally murdered. More likely, though, it is something we try hard not to think about at all, and surely most of us cannot know how we would react. Therefore, it seems to me we ought to be very slow to judge what any particular individual in that position ought to feel or want.

But there is a separate question: the question of the law’s proper role in helping victims or survivors achieve the closure they need. This is where we do need to judge, and to decide. And where it becomes important to at least try to untangle what one’s religion

13. The parents of some of John Wayne Gacy’s victims described a similar conviction. See Larry Oakes, *For Parents of Son Murdered By Gacy, The Years of Waiting Are Finally Over*, MINNEAPOLIS STAR TRIB., May 11, 1994, at A1.

14. See *id.*

15. Jacoby and Murphy both note that people tend to feel more sympathetic toward the forgiving victim than toward the angry, resentful victim. See SUSAN JACOBY, *WILD JUSTICE: THE EVOLUTION OF REVENGE* 358 (1983); See also JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 16 (1988).

might urge, from what psychiatry might try to achieve, from what politics might dictate, and all of those from what the law can, should or even attempt to accomplish.

When we talk about emotion's role in law, a number of difficulties inevitably arise — many of them a function of the attempt to employ complex and fluid psychological or philosophical concepts for narrow and pragmatic legal ends. There is, for example, the difficulty of finding a fixed definition for any particular emotion, or emotional state—forgiveness, the desire for vengeance, closure. . . . There is the difficulty of attempting categorical judgments about whether a particular emotion ought to be encouraged or discouraged in the law, or even in a particular legal context. There is, finally, the difficulty of assigning a role to the legal system in achieving particular emotional states — for example in helping victims attain closure or defendants feel remorse.¹⁶ Yet the alternative to asking these daunting questions is not simply to ignore the emotional content of legal proceedings — the emotions, as the Shepard and Miller statements remind us, won't go away no matter what. So it is crucial, given the high stakes for victims, survivors, the accused, and society at large, that we examine and try to disentangle the questions.

We might begin by examining the question: what do victims require in order to achieve some measure of closure?¹⁷ Assertions about what victims need are often presented as if they are empirically based. If this is indeed an empirical question about what conditions are most likely to help, we ought to be looking for empirical answers, and there are surprisingly few out there.¹⁸ The quotations from Ms. Miller and Shepard indicate, anecdotally, that this is a question with variable and complex answers, as one might expect. The little empirical evidence of which I am aware supports the intuitively obvious view that different victims have different needs,

16. See *THE PASSIONS OF LAW* 1-15 (Susan Bandes ed., 2000).

17. This question, of course, must be distinguished from other questions that often come up in discussions of forgiveness, vengeance and punishment in general: such as the question of what will help the wrongdoer, the question of what will deter future potential wrongdoers, and the question of what will help bring a larger form of closure, or equilibrium, to society at large.

18. Alternatively, it might be a prescriptive question — an inquiry into the conditions we, as a society, believe are appropriate responses to victimization. I think this is a more accurate description of the traditional inquiry into victims' needs. However, the more recent trend has been to couch the inquiry in terms of what victims in fact require. See Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 551-52.

and that an individual victim's needs may change over time.¹⁹ Moreover, these studies deal with the victims themselves, for example in crimes like rape or robbery, and their findings, inconclusive at best, are also not necessarily applicable to the needs of those who have lost a close relative to murder.²⁰

Even if it were so that victims or survivors need certain emotional experiences in order to attain closure, what conclusions would this lead to? This is the point at which it becomes crucial not to fall into the trap of conflating two very separate questions: the question of what victims need and the question of what the legal system ought to provide.

For example, what if, as Jean Hampton and others have suggested, victims need to be able to forgive in order to attain closure?²¹ There are a host of questions raised here: First, of what does forgiveness consist? Most of those who write in this field, including Jeffrie Murphy, Martha Minow, Susan Jacoby and Willard Gaylin, describe forgiveness as an internal change in the heart of the individual victim that doesn't necessarily bring any external or public consequences.²² Thus the victim's forgiveness may have no bearing on society's demand for punishment. Indeed, the victim herself might plausibly forgive and still desire punishment — as Jean Hampton suggests. The victim might choose to forgive, both to cleanse her own heart of hatred and because she is willing to believe the sinner is more than just the sum of his sins — yet also might desire retribution for the sins themselves.²³ Hampton tells the remarkable story of the practice in colonial New England of urging the criminal to repent, holding a reconciliation feast once he'd done so, and then hanging him the following day.²⁴

19. See, e.g., Edna Erez, *Victim Participation in Sentencing: And the Debate Goes On . . .*, 3 INT'L REV. VICTIMOLOGY 17, 21 (1994); Bandes, *Reply to Paul Cassell*, *supra* note 18, at 545; Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 964-66 (1985).

20. Bandes, *Reply to Paul Cassell*, *supra* note 18, at 550-51 (discussing problems with drawing conclusions about murder survivors from studies about victims of other crimes).

21. See MURPHY & HAMPTON, *supra* note 15, at 36-38.

22. See WILLARD GAYLIN, *THE KILLING OF BONNIE GARLAND: A QUESTION OF JUSTICE* 338 (1982); MURPHY & HAMPTON, *supra* note 15, at 21; JACOBY, *supra* note 15, at 334; MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 15 (1998). Jean Hampton, however, describes forgiveness as having an external component, in that it is "bestowed" upon the wrongdoer. See MURPHY & HAMPTON, *supra* note 15, at 36.

23. See MURPHY & HAMPTON, *supra* note 15, at 157.

24. See *id.* at 158.

Second, who has the right to bestow forgiveness? This question is a pervasive theme in Gaylin's book, *The Killing of Bonnie Garland*, in which he describes how many members of the clergy and community were willing to forgive Richard Herrin for his brutal murder of Bonnie Garland, and indeed, perhaps as a consequence he was ready to forgive himself — even before he had repented or accepted responsibility in any meaningful way.²⁵ Bonnie Garland's parents did not forgive him, and of course, Bonnie could not do so. Yet, as Gaylin describes it, the support and forgiveness of the religious community had a significant mitigating effect on Herrin's verdict and sentence.²⁶ Perhaps a parent can forgive her child's murderer for the pain the parent suffers, but can anyone other than the victim herself, or perhaps one's God, offer forgiveness for the entirety of the loss?²⁷ And what effect should the forgiveness of these others have in the courtroom?

Let's turn from forgiveness to vengeance. What if, as Jacoby and others suggest, and as the parents of the children killed by the California Freeway Killer so strongly believed, vengeance is necessary for a victim's or survivor's closure? This, too, raises a host of questions. What form ought that vengeance take? Is it based, in whole or in part, on what the individual survivor needs, or believes she needs at the time, or on some collectivized notion that takes these needs into account but doesn't acquiesce to them? And how ought we factor in the problem that certain punishments, such as the death penalty, bring with them an agonizingly long wait for survivors, one which they often describe as yet more torture? Should this wait be seen as another part of the wrong that needs to be avenged?

One difference between forgiveness and vengeance is immediately apparent. As I mentioned, forgiveness is often described as merely internal, a change of heart that doesn't dictate any course of conduct, and therefore doesn't implicate public justice at all. Frankly, I don't think this view can be wholly accurate — I believe

25. The notion of repentance as a condition of forgiveness raises another issue — that while forgiveness might be an internal emotional change, it might depend on an emotional change, and its external manifestation, in the wrongdoer. See, e.g., GAYLIN, *supra* note 22, at 118; MURPHY & HAMPTON, *supra* note 15, at 41.

26. See GAYLIN, *supra* note 22, at ch. 4.

27. This is also a central question of Sue Miller's recent novel, *While I Was Gone*, in which the murderer of the protagonist's close friend both asks her forgiveness for the murder and makes clear that he has been generous in his willingness to forgive himself, evidently without fully repenting or even accepting responsibility for the act. See SUSAN MILLER, *WHILE I WAS GONE* (1999).

that notions of forgiveness, mercy and compassion are inextricably part of the process of setting norms for what is criminalized and how it is punished.²⁸ Nevertheless, vengeance presents a far less ambiguous case — it clearly is not an internal process. To the extent a survivor requires a measure of vengeance for closure, either the legal system is implicated, or we are talking about vigilante justice, which the legal system was set up to supplant.²⁹

Assumptions about survivors' need for retribution or vengeance are often explicitly invoked in legal decision making. The failure to sentence a particular defendant to death or to a long prison term is often experienced as a devaluing of the worth of the victim's life, and thus another infliction of pain upon the victim's family,³⁰ and indeed prosecutors explicitly call upon juries to return death sentences in order to affirm the victims' worth.³¹ One implicit assumption of introducing victim impact statements in capital cases seems to be that they will make the jury more likely to give a death sentence to help ease the survivors' evident pain.³²

In addition, the lengthy appeals process is seen as an affront, an additional punishment, to survivors needing closure. Governor Jeb Bush of Florida, for example, in his current campaign to truncate the death penalty appeals process in that state, has "emphasized the suffering of victims' families and complained that inmates spend about fourteen years on death row before they are executed."³³ To what extent, then, should the needs of these families influence policymaking?

I raise this long list of daunting questions, not because I have answers to them, but in the hope that we can discuss them further.

First, let us be careful to distinguish the question of what victims need from the question of what the legal system ought to provide. Some of what individual victims or survivors need to attain closure must come from psychological, religious and social support systems. Such systems have greater ability to individuate among vic-

28. See THE PASSIONS OF LAW, *supra* note 16, at 1-15; Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 366-71 (1996).

29. See CHARLES REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 92-99 (1980); Bandes, *Empathy, Narrative*, *supra* note 28, at 407 n.230.

30. See JACOBY, *supra* note 15, at 237; GAYLIN, *supra* note 22, at 347.

31. See, e.g., State v. Elliott, 475 S.E. 2d 202, 222 (N.C. 1996); Welsh S. White, *Prosecutors' Closing Arguments at the Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 297, 306-08 (1990-91).

32. See generally Susan Bandes, *Reply to Paul Cassell*, *supra* note 18 (discussing Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479).

33. Jim Yardley, *A Role Model for Executions*, N.Y. TIMES, Jan. 9, 2000, at 5.

tims and to accommodate the shifting and complex needs of particular victims. They are not obligated to reach a fixed and categorical judgment, or any legal judgment at all. Moreover, they are not obligated to weigh a host of other factors against the victim's needs, including the rights of the defendant and the good of society as a whole.

Second, let us be very careful when we talk about what victims need, and perhaps especially about their perceived need for closure. The legal system does demand certain kinds of closure, but they may not track the sorts of therapeutic or spiritual closure victims seek. Sometimes the legal system may be able to provide a punishment, or a result, that meets the individual's needs for vengeance, forgiveness, closure. Such people are fortunate (at least in that limited respect) because the burden of individual forgiveness or vengeance is heavy indeed, and a public, collectivized resolution at least may remove some of this weight from the victim's shoulders. But the legal system cannot and ought not meet such needs on a case by case basis.

Legal closure is, at some point, necessary — at some point the law needs to act definitively.³⁴ But given the terrible stakes involved, an essential part of *its* closure is that it incorporate notions of fairness and due process. Given the law's many limitations, it also ought to incorporate a large measure of humility. It needs humility about the possibility of error,³⁵ and also about the impossibility of knowing the secret heart of either the wrongdoer or the victim.

Closure is too easily transformed, particularly in capital cases, into an ending that forecloses, too early, the societal obligation not to put an accused to death until he has a fair chance to show himself unworthy of the conviction and sentence. My own view is that a capital sentence is a sort of closure we are ill equipped to command, since it reflects our unwarranted claim that we can judge who is irredeemable, without humanity or value. Just as we might show more humility before claiming to know what victims need, we might show more humility in declaring ourselves worthy to judge not just the sin but the sinner, and to decide who is deserving of that terrible and irrevocable form of closure.

34. See Bandes, *Empathy, Narrative*, *supra* note 28, at 389-90.

35. See Steve Miller & Ken Armstrong, *Another Death Row Inmate Cleared*, CHI. TRIB., Jan. 19, 2000, at 1 (reporting that Illinois has cleared more death row inmates [13] than it has executed [12] since it reinstated capital punishment in 1977).