



# Crime & Punishment

James Alan Fox on criminal behavior and the justice system

## Deciding on death penalty in bombing case

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On a recent program, CNN's Piers Morgan asked Arnold Schwarzenegger his opinion on whether accused Marathon bomber Dzhokhar Tsarnaev should receive the death penalty. Although admitting that he was not fully informed about the case, the former Governor of California responded, "If convicted, I think that yeah, he should get the death penalty. Yes."

While Schwarzenegger, like the rest of us, is welcome to have and express an opinion, certainly the decision on such an important, life-and-death matter should not be based on what the majority of the public thinks or wants.

But what about the bombing victims and their families? Should their majority be a major factor on whether the Federal Government should seek the death penalty against Tsarnaev? And should their wishes be communicated to the jury?

Consistent with Justice Department procedure, U.S. Attorney Carmen Ortiz is in fact consulting with the victims and their families' families before making a recommendation to Attorney General Holder. Reportedly, she has distributed a questionnaire to hundreds of victims that includes the matter of capital punishment.

Hopefully, this part of the decision-making process is more about political correctness than public policy. It is absolutely appropriate for the victims to be kept informed about significant developments in the case. However, the preferences of victims should not guide either prosecutorial strategy or sentencing decisions.

Without diminishing our sympathy for those killed or maimed, it shouldn't matter what the victims and their families desire for punishment. Punishments for crimes should not vary based on victim preference or ideology.

It is, of course, standard practice for courts to permit input from victims prior to imposing sentence. These victim impact statements do serve some important functions: They provide victims the cathartic opportunity to describe in open court their pain and loss; they force the defendant to confront the full gravity of the crime; and, particularly in murder trials, they help to humanize the victim, who otherwise is present in the courtroom in name only.

A recent experiment by Raymond Paternoster and Jerome Deise of the University of Maryland demonstrated the potent effect that victim impact statements can have on jury recommendations and sentencing decisions. In this study, citizens selected for jury service were shown the penalty phase of a capital murder trial by video and then asked their opinion concerning the appropriate penalty, be it a sentence of life imprisonment, life without parole eligibility, or death. One group of jurors was shown courtroom arguments that included victim impact statements while the other group of jurors viewed the penalty hearing with the victim testimony removed.

Not surprising, seeing victims describe their pain in an appeal for a harsh sentence, even by video, had significant effect on the experimental subjects. The jurors who were shown the impact statements indicated far more sympathy for the

victim and hostility for the offender. More important, these jurors were significantly more likely to choose the death penalty as the just sentence.

The views and opinions of victims and their families, as well as their ability to influence the jury, should not be relevant in determining the appropriate penalty for a crime. It should not matter whether there are family members who wish to speak before sentencing. Nor should it matter whether those describing the impact the crime has had on them are especially articulate and convincing.

Prosecutors often use victim statements as a way to sway jurors. If the death penalty indeed becomes an option in the Marathon bombing trial and if Tsarnaev is found guilty, which of the hundreds of victims or family members would the Government put before the jury? Would the choice be based on the degree of injury, on the ability to give a heart-wrenching statement, or the need to tell their story in open court? If other cases serve as any precedent, the prosecution's choice would certainly depend on whether or not victims support the death penalty.

At the end of the day, or more accurately, the end of the trial, victims and their families should indeed have the opportunity to address the court. This should occur, however, only after the sentence has been determined. In that way, equal treatment for the defendant can be preserved even while victims are given a voice.