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EMOTIONAL JUSTICE: MORALIZING THE PASSIONS OF CRIMINAL PUNISHMENT

Samuel H. Pillsbury†

Justice and injustice in criminal adjudication are more than abstract concepts; in modern America each term conjures up its own paradigm image. Justice occurs in a somber courtroom where a robed judge, sworn jurors and informed counsel calmly and deliberately apply their highest powers of reason to reach a legal decision. Injustice is a blood-thirsty mob bearing lit torches, pounding on the doors of the jail, desperate to wreak bodily revenge upon the suspected wrongdoer held within.¹

This image of injustice provides many normative insights. One which courts have frequently drawn is that in criminal adjudication Emotion is unalterably opposed to Reason and thus to Justice itself. Taking this principle a step farther, courts have urged that the more a legal issue might provoke popular rage, that hallmark of the lynch mob, the harder courts must work to insulate the legal decision from emotive influence. The classic example is capital sentencing, a matter which evokes strong emotions. Here the Supreme Court has worked to ensure that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or *emotion*."² The Court has, over a period of years, undertaken an extensive regulatory project aimed at suppressing emotive influence in capital cases by mandating rationalistic rules to guide sentencing.

This insistence upon the injustice of all emotion stems from a misconception of emotion and its influence upon criminal punish-

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¹ *E.g.*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (discussing risks of earlier town meeting form of adjudication: "that it might become a gathering moved by emotions or passions growing from the nature of a crime; a 'lynch mob' ambience is hardly conducive to calm, reasoned decision-making . . ."); *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (emphasizing the need for "solemnity and sobriety" in an adjudicatory "system that subscribes to any notion of fairness and rejects the verdict of a mob."); *Moore v. Dempsey*, 261 U.S. 86, 91 (1923) (arguing trials dominated by mobs "deprive the accused of his life or liberty without due process of law").

² *Furman v. Georgia*, 408 U.S. 238, 311 (1972) (Stewart, J., concurring) (emphasis added). *See, e.g.*, *Booth v. Maryland*, 107 S. Ct. 2529 (1987).

ment. Although the mob-at-the-jail scene illustrates that anger can lead to injustice, it does not support the proposition that all decisions influenced by anger are morally tainted. Anger can be justified and have moral content, as can many other emotions. The relationship between emotion and moral decisionmaking is complex; untangling it involves a closer examination of emotion than the law has generally undertaken.

My subject is the influence of emotions on sentencing under a retributive theory of punishment. When punishment is based on retributive principles, what are the moral risks presented by emotive influence and how may they be minimized? The context for this discussion is capital punishment, where the problems of emotive influence are most acute. My discussion of this problem rests on two basic theoretical assumptions: one concerning the justification of punishment and the other concerning the nature of emotion. I adopt rather than justify a Kantian theory of retributive punishment and a cognitive theory of emotion. Both represent the predominant theoretical explanations in their respective fields. I do not undertake their justification because that would require a work considerably longer than what follows, and what follows is quite long enough. It would also be beside the point. My main concern is the practical application of these theoretical constructs. My argument comprises the following basic propositions:

- (1) that punishment is justified when and to the extent it is deserved for responsible wrong-doing;
- (2) that this view of punishment flows from the general obligation to respect persons as autonomous moral beings, that is, the principle of respect for persons;
- (3) that accuracy in determining what punishment is deserved is all-important in the capital context and determinate rules cannot capture the complexities of this evaluation; therefore, sentencers must have considerable discretion in rendering life or death decisions;
- (4) that given discretion, sentencers will inevitably respond, consciously or unconsciously, to a range of emotions in their determination of what punishment is deserved;
- (5) that some of the emotions commonly implicated in decisions of deserved punishment encourage moral decisionmaking and others do not;
- (6) that emotions involve cognitive assessments and possess their own form of rationality;
- (7) that emotions and their influence may be controlled by deliberative rationality;
- (8) that respect for persons should be reconceptualized in

moral-emotive terms as a requirement that we care about persons for their moral capacities and actions;

(9) that the determination of deserved punishment should be reconceived as a moral-emotive dynamic involving outrage at the offender's acts of disrespect (moral outrage); and caring for the offender's positive moral qualities (empathy); and

(10) that courts should ensure that sentencers have the opportunity to hear evidence relevant to moral outrage and empathy, should advise sentencers of the legitimacy of both, and, to ensure that sentencer outrage remains moral, should advise sentencers of the need to empathize with the offender as a person.

Section I sets out a retributive theory of punishment. Based upon the Kantian principle of respect for persons, retribution involves a broad-scale evaluation of offense and offender. I then turn to the problem of emotive influence as it has been traditionally conceived by courts. I review the law's predominant strategy of attempting to suppress emotional influence through rules and depersonalized procedures, and point out the inadequacy of this approach in criminal sentencing. Finally, by examining the varieties of emotive influence, I show that not all emotional influence is dangerous and that the law's task must be to separate those emotional influences which are moral from those which are amoral or immoral.

Section II concerns the nature of emotion and our responsibility for it. Drawing on recent philosophic and psychological work on emotion, I set out a cognitive theory of emotion which posits that cognitive assessment is critical to emotion. Emotion represents a sensory experience arising out of a cognitive assessment of an event, person or situation, usually accompanied by a desire for action of a particular kind. The cognitive assessment upon which the emotion is based may be conscious or unconscious, mistaken or accurate, appropriate or inappropriate, but in all events constitutes an attempt to assess a situation by means which have their own internal rationality. Although emotions often resist deliberative influence, they are subject to rational control and we can be held responsible for them.

In Section III, I formulate a moral-emotive theory of retribution. I employ the Biblical concept of *agape*, a love for others based on their worth as persons, as an emotive counterpart to respect for persons and propose a moral-emotive principle called moral caring which values, and evaluates, the offender's exercise of morality. Moral caring constitutes an emotional dynamic for determining just punishment. It consists of moral outrage—anger at the offender's responsible disrespect for others—and empathy, caring for the offender's positive moral character. I examine the emotional temptations to decide punishment on amoral bases and conclude that the only cure for these is to require that, along with outrage for the

offender's evil choice, sentencers attempt to empathize with the offender.

Section IV concerns the application of moral-emotive precepts to capital punishment. The Supreme Court has made significant efforts to protect the opportunity to empathize in its capital jurisprudence, but has failed to see the need to affirmatively encourage sentencer empathy. I suggest several means of such encouragement, centering on jury instructions. Finally, in the context of a particular failure of empathy—the influence of racial bias upon sentencing—I note the limitations of moral-emotive principles in terms of standards for decisional review.

I

RETRIBUTION AND THE PROBLEM OF EMOTIVE INFLUENCE

In order to determine the moral impact of emotion on punishment, we need a moral theory of punishment. The moral theory upon which this Article is based is a Kantian view of retribution. While controversial (like all punishment theories), it has enjoyed wide scholarly acceptance in recent writings on punishment.³ I will not attempt a justification of the theory; instead, following a brief theoretical explication, I employ retributive theory to analyze how emotional reactions affect the moral decision that a particular punishment is justified. I then undertake a critical analysis of the law's traditional opposition of reason and emotion.

The selection of a retributive theory of punishment has the benefit of permitting analysis largely congruent with that of the Supreme Court in the context of capital punishment, where the problem of emotional influence arises most dramatically. While the Court has carefully avoided constitutionalizing a theory of punishment in its decisions on cruel and unusual punishments under the eighth amendment, the Court has, by its rhetoric and decisions demonstrated the preeminence of retributive justifications in its vision of what that constitutional prohibition means.⁴ This precedent neither justifies the retributive theory generally, nor validates the specific view of it I set out, but it does mean that in the capital context, my definition of justice is largely consistent with that of the

³ See Cederblom, *Introduction to JUSTICE AND PUNISHMENT* 1 (J. Cederblom & W. Blizek eds. 1977); G. FLETCHER, *RETHINKING CRIMINAL LAW* 416 (1978); Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 *WIS. L. REV.* 781, 781. See, e.g., A. VON HIRSCH, *DOING JUSTICE* (1976); J. KLEINIG, *PUNISHMENT AND DESERT* (1973); R. SINGER, *JUST DESERTS* (1979); MABBOT, *Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 165 (G. Ezorsky ed. 1972).

⁴ See *infra* notes 9 and 13.

Court. Our main differences lie in how to translate the aims of retribution into practice.

A. Retribution

Retributive punishment is the deliberate, official infliction of pain on an offender based on an assessment of the offender's moral responsibility for committing the offense. The theory holds that punishment is justified when it is deserved.⁵ Although retribution represents a deontological justification of punishment based on moral responsibility, it does not represent a first-order moral principle. Rather it derives from a more fundamental principle of moral conduct which dictates how persons should be treated generally, a principle known as respect for persons.

1. *Respect for Persons*

What is it about people that we must treat them well? What is it about persons, irrespective of their actions, that we must care about? Why don't we regard people like insects, encouraging those who benefit us and exterminating those who annoy us? The answer to this question is important, for if we know why we have a general obligation to treat persons well, we may also learn how it is we can treat them badly in the form of punishment. Respect for persons provides an answer.

The classical description of respect for persons comes from the work of Immanuel Kant.⁶ Persons, Kant held, are ends in them-

⁵ For general treatments of the theory, see H. HART, *PUNISHMENT AND RESPONSIBILITY* (1968); J. KLEINIG, *supra* note 3; C. TEN, *CRIME, GUILT, AND PUNISHMENT* (1987); MOORE, *The Moral Worth of Retribution, CHARACTER AND THE EMOTIONS* 179-219 (1987) in *RESPONSIBILITY* (F. Schoeman ed.) (forthcoming).

⁶ See generally I. KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS* (T. Abbott trans. 1987) [hereinafter *FUNDAMENTAL PRINCIPLES*]; *Doctrine of Virtue*, Pt. II of I. KANT, *THE METAPHYSIC OF MORALS* 131-40 (M. Gregory trans. 1964) [hereinafter *Doctrine of Virtue*]. Modern writers have applied their versions of the respect for persons theory to the eighth amendment, Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980); Note, *Creatures, Persons and Prisoners: Evaluating Prison Conditions Under the Eighth Amendment*, 55 S. CAL. L. REV. 1055 (1982); due process, Michelman, *Furman and Associational Aims in Procedural Due Process*, in *DUE PROCESS* 126 (J. Pennock & J. Chapman eds. 1977); privacy, Benn, *Privacy, Freedom and Respect for Persons*, in *PRIVACY* I (J. Pennock & J. Chapman eds. 1971); equal protection, Karst, *Foreward to Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Michelman, *Foreward to On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); the fifth amendment right against self-incrimination, Dolinko, *Is There A Rationale For the Privilege Against Self-Incrimination?*, 39 UCLA L. REV. 1063, 1137-47 (1986) (reviewing theories based on individual autonomy and personhood); and the first amendment, Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978). Interestingly, one Kantian scholar has recently suggested that although Kant's works provide essential clues for any justice, rights and desert-based punishment philosophy,

selves and may not be used merely as means to other ends.⁷ By this he meant that human individuals are not merely useful for certain purposes, but are valuable for themselves.⁸ His principle of respect entails a moral regard for persons based on the qualities which make them valuable. Kant held that the fundamental value of mankind lies in two human capacities: the rational will, the ability to reason and choose based upon reason, and the autonomy of the will, the ability to create and obey rules. Together they comprise the person's ability to make moral choices. Society must always respect these capacities, which are inherent in the human condition. Even the immoral person has a worth which must be valued.⁹

Kant himself did not have a coherent punishment philosophy. Murphy, *Does Kant Have A Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987).

⁷ FUNDAMENTAL PRINCIPLES, *supra* note 6, at 56-58; I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (J. Ladd trans. 1965); *Doctrine of Virtue*, *supra* note 6, at 131-40.

⁸ FUNDAMENTAL PRINCIPLES, *supra* note 6, at 58-59; see R. DOWNIE & E. TELFER, RESPECT FOR PERSONS 14-15 (1970).

⁹ I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, *supra* note 7, at 131-32; *Doctrine of Virtue*, *supra* note 6, at 132-34.

In their eighth amendment jurisprudence justices on the Supreme Court have followed respect for persons' principles. Justices have cited a fundamental worth in individual human existence, which they call "humanity" or "human dignity," and have held that courts must respect this worth in punishment. In *Trop v. Dulles*, 356 U.S. 86 (1958), Chief Justice Warren stated that the basic concept of the eighth amendment's prohibition on cruel and unusual punishment is the "dignity of man." *Id.* at 100 (plurality opinion). See also *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (reference to "the fundamental human dignity" that the eighth amendment protects). The Court has with some consistency protected the "uniqueness of the individual" in eighth amendment decisions, a value which appears consistent with the concept of human dignity. See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Burger, C.J., plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (Stewart, J., plurality opinion). Kant also described the value of persons in terms of their dignity. See FUNDAMENTAL PRINCIPLES, *supra* note 6, at 64-65. A further set of clues to the Court's vision of human worth lies in its historical view of cruel punishments. The Court has used certain past penal practices, particularly torture and severe corporal punishment, as paradigms of "barbarous" punishments. The Court sees in the historic rejection of these penalties evidence of a moral basis for the amendment. They provide a benchmark of cruelty from which we may measure "evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 100. Thus, Justices have argued, the meaning of cruel punishment today has something to do with the reason that we do not torture suspects, burn offenders at the stake, crucify or break them on the wheel, *O'Neil v. Vermont*, 144 U.S. 323, 363 (1892) (Field, J., dissenting), nor brand them, crop their ears, or nail them to the pillory. *Furman v. Georgia*, 408 U.S. 238, 384 (1972) (Burger, C.J., dissenting); *id.* at 430 (Powell, J., dissenting). See generally Murphy, *Cruel and Unusual Punishment*, in RETRIBUTION, JUSTICE AND THERAPY 223-33 (1979).

Consistent with this paradigm is the Court's recurring condemnation of deliberate infliction of physical pain as punishment. *E.g.*, *Wilkerson v. Utah*, 99 U.S. 130 (1879) (eighth amendment prohibits torture and torturous punishments); *In re Kimmler*, 136 U.S. 436, 447 (1880) ("Punishments are cruel when they involve torture or a lingering death."); *O'Neil v. Vermont*, 144 U.S. 323, 364 (1892) (Field, J., dissenting) ("A convict is not to be scourged until the flesh fall from his body and he die under the lash though he may have committed a hundred offenses . . ."); *Weems v. United States*, 217 U.S. 349 (1910) (violation of eighth amendment to punish offense of fraudulently altering an

Respect for persons is a first-order principle of moral treatment, setting a minimal code of conduct for human beings in all contexts. Respect for persons prohibits torturous punishments, even for the most heinous offenders, because such punishment reduces the punished to animal status, capable of physical sensation but not rational moral choice.¹⁰

2. *Deserved Punishment and Sentencing*

Kant's respect principle not only sets a standard for the minimal treatment of persons; within that framework it also provides a means for their evaluation. Because we value persons for their capacity to make moral choices, it follows that we should judge them (value them) according to their exercise of that capacity.¹¹ Society's right to punish a wrongdoer is based on the wrongdoer's ability to choose between right and wrong. We punish in order to demonstrate the offender's responsibility for making a bad moral choice.¹² As a person, the offender could recognize the difference between good and evil, yet choose evil over good. Punishment signifies our condemnation of that freely made, but morally wrong, choice.¹³

official document by fifteen years hard labor in chains); *Trop*, 356 U.S. at 101 (alluding to "physical mistreatment" and "primitive torture"); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (eighth amendment prohibits punishments which "involve the unnecessary and wanton infliction of pain," quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). This rejection of torture and severe corporal punishment on moral grounds may have its roots in the respect for persons principle. Torture is morally offensive because it represents the use of external force to destroy the offender's ability to think and communicate independently. Under the pressure of torture, a person is no longer a free-willed actor, responsible for his or her actions, but becomes a tool of the torturer, an experimental animal manipulated by the inflicter of pain and source of relief. Severe corporal punishment demonstrates a similar attitude toward its victim because it assumes that the offender is animalistic, sensitive only to physical pain. The punishment is designed to beat, by force, the inclination to offend out of the offender. The punishment ignores the rational capacities of the offender in favor of the sensual capacities.

Overall, the Court's rhetoric of dignity and uniqueness and its view of torture and severe corporal punishment suggest that the Court's concept of cruel punishment rests upon a notion that all humans possess a fundamental worth based on the capacity to reason and freely choose. This notion is consistent with the respect for persons principle.

¹⁰ Murphy, *supra* note 9, at 233-34.

¹¹ Grey, *Serpents and Doves: A Note on Kantian Legal Theory*, 87 COLUM. L. REV. 580, 583 (1987).

¹² Morris, *Persons and Punishment*, in ON GUILT AND INNOCENCE 31-58 (1976).

¹³ The Supreme Court's eighth amendment jurisprudence emphasizes a similar, retributive view of punishment. The Court has held that in order for the death penalty to be justified the defendant must deserve the penalty. Deterrence may play an important role, but it can not substitute for lack of desert. See *Spaziano v. Florida*, 468 U.S. 447, 461-62 (1984) (retribution more important than other punishment justifications in death penalty sentencing; incapacitation a relevant factor, but alone is not a sufficient justification); *id.* at 480-81 (Stevens, J., dissenting) (justification of particular death sentence depends on retribution—a judgment of defendant's moral guilt). A number of the Court's holdings support the preeminence of retribution in the death penalty. For ex-

To say that a punishment is deserved means more than that an offender was responsible for a crime and should be punished; it also means that the punishment matches the crime. For both liability and sentence, three basic components comprise the judgment of deserved punishment: harm, motive-intentionality and autonomy. First is an objective assessment of the harm done by the offender. For serious crimes this constitutes the extent of disrespect suffered by the victim of the offense and by society generally. For example, a rapist deprives the victim of bodily integrity and sexual choice, thus fundamentally disrespecting the victim's autonomy. The focus here is on the harm suffered, not what the offender had in mind in causing the suffering. The remainder of the culpability evaluation focuses on the offender's subjective decision to commit the offense.

Motive-intentionality examines only the conscious why of the offense. What was the offender's immediate purpose in his criminal act; what motivated him to act with such purpose? Motive-intentionality distinguishes liability for a premeditated killing from a spontaneous one on the basis of the offender's decision process. For sentencing purposes, motive-intentionality distinguishes a contract killing from a mercy killing, both of which may comprise the same legal offense. The contract killer acted with complete disregard for the respect principle; the mercy killer's act was consistent with at least some notion of respect for persons.

Autonomy measures the individual's capacity to make an independent moral choice. Its evaluation involves the tension between innate autonomy and those forces operating on the person which disrupt the normal reasoning or functioning process. The paradigm example of autonomy evaluation is the determination of

ample, in *Coker v. Georgia* the defendant was highly dangerous—he had committed two previous murders and after a year in prison, escaped and immediately committed a robbery and rape. Yet such dangerousness was not sufficient to justify his execution. 433 U.S. 584, 604-22 (1977) (Burger, C.J., dissenting). In *Sumner v. Shuman*, 107 S. Ct. 2716 (1987), the Court held that a state may not make death mandatory for a murder committed by a prison inmate under sentence of life imprisonment, rejecting the state's deterrent arguments. *Id.* at 2726. The Court has held that decisions to execute focus fundamentally on the blameworthiness of the offender in the harm caused. *Booth v. Maryland*, 107 S. Ct. 2529, 2534-35 (1987). In evaluating death penalties for offenders who did not personally kill, the Court has concentrated on the defendant's personal culpability in the killing. *Tison v. Arizona*, 107 S. Ct. 1676 (1987) (death penalty for accomplices to murder who were indifferent to great risk of death does not violate eighth amendment); *Enmund v. Florida*, 458 U.S. 782 (1982) (violation of eighth amendment to execute accomplice to robbery murder who lacked intent to kill). The Court has found that punishment is rooted in individual moral responsibility and that no person who has become morally irresponsible by virtue of insanity may be executed. *Ford v. Wainwright*, 477 U.S. 399, 401 (1986). The Court has found mandatory death statutes unconstitutional because they do not sufficiently distinguish between the varying culpability of offenders. *E.g.*, *Sumner v. Shuman*, 107 S. Ct. 2716, 2724-2725 (1987); *Roberts v. Louisiana*, 431 U.S. 633, 636 (1977).

whether (or how much) mental disease or defect created an irrational thought process concerning the offense or compelling its commission.

For a particular sentence to be deserved it must be proportional to the seriousness of the crime. Initially, the legislature must rank offense categories according to relative seriousness. Within this legislative ranking the sentencer must then rank particular instances of the same category of offense. Some first-degree murders are worse than others. Finally, the sentencer must match the ranking of offense severity with an equivalent ranking of punishment severity.¹⁴ The most serious crimes should receive the most severe punishments, and so on.

Evaluation of the seriousness of a particular crime requires an evaluation of the individual offender. The offender deserves a particular punishment not simply for an act which causes harm but according to his personal responsibility for committing the act.¹⁵ This evaluation necessarily includes a review of the broad array of forces operating upon the individual to ascertain the extent of the individual's responsibility. Both critics and proponents of retribution have long noted the difficulty of this individual culpability evaluation.¹⁶ At the liability stage, rough categorization may reduce the complexity of the task. Given the essentially binary responsibility question, we can separate all potential limitations on responsibility into two categories: sufficient and insufficient.¹⁷ At sentencing, however, the greater gradation of sentences means that we must also rank each instance of an offense. In deciding whether the sentence should be ten years or twenty, life or death, all variables must be measured.

Within a retributive penal system, concerns about system-wide accuracy may argue for a limitation on individualistic assessment of culpability at sentencing.¹⁸ We may decide that, overall, there will be fewer mistakes in desert assessment under a mandatory sentencing scheme, so that we can tolerate those few errors which result from the scheme's rigidity. This assumes that the consequences of

¹⁴ See J. KLEINIG, *supra* note 3, at 110-28; Pincoffs, *Are Questions of Desert Decidable?*, in JUSTICE AND PUNISHMENT, *supra* note 3, at 75-88.

¹⁵ See, e.g., J. KLEINIG, *supra* note 3, at 50-55; Gardner, *supra* note 3, at 804-05.

¹⁶ See, e.g., H. HART, *supra* note 5, at 161-63; M. MACKENZIE, PLATO ON PUNISHMENT 32-33 (1981); Bedau, *Concessions to Retribution in Punishment*, in JUSTICE AND PUNISHMENT, *supra* note 3, at 63-64. Cf. J. KLEINIG, *supra* note 3, at 110-14, 127-28; Pincoffs, *supra* note 14, at 75-88; Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 400-01 (1978); Murphy, *supra* note 6, at 513-15 (quoting I. KANT, CRITIQUE OF PURE REASON, IN FUNDAMENTAL PRINCIPLES and I. KANT, RELIGION WITHIN LIMITS OF REASON ALONE).

¹⁷ For a good overview, see Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091 (1985).

¹⁸ See R. SINGER, *supra* note 3, at 22-29.

an individual mistake will be tolerable. Where the paramount value in desert evaluation is accuracy, however, there can be no shortcuts in evaluating deserved punishment. Under these circumstances the principle of deserved punishment makes relevant virtually novelistic detail concerning the offender and offense. Anything which *might* tend to create irrationality or compel a particular act is relevant. Anything which points in the opposite direction, which indicates unimpaired, uncompelled choice, is relevant as well. We may distinguish between proffered "excuses," such as mental disease and alcoholism in the extent to which they affect culpability. We can argue about their relative impact on intentionality and autonomy and the fault the offender bears in their origin. We cannot exclude them from consideration, however. Even if alcoholism is an aggravating factor, making the offender more responsible, it is relevant. Where the accurate determination of desert is all-important, assessing the amount of punishment deserved will involve an inquiry of great breadth.

B. Retribution and The Problem of Emotive Influence

Having defined deserved punishment, we turn now to its relationship with common emotional reactions concerning punishment. Courts and commentators have traditionally viewed the assessment of deserved punishment as a dispassionate, deliberative judgment, untouched by emotion. In practice, however, the issue of punishment provokes a variety of emotions which frequently influence the penal decision. Recognizing the potential for unjust, emotional decisions, courts and commentators have urged the suppression of all emotion in sentencing. This strategy is based on a misunderstanding of the problem of emotive influence, a problem most starkly presented in capital sentencing.

1. *The Problem Illustrated*

Imagine the following two capital cases:

A murder takes place in a small, tightly-knit community. A young man, a stranger to the community, kidnaps, rapes, tortures and kills a woman librarian. He is quickly apprehended and charged with a capital offense. At trial he is convicted on overwhelming evidence. At the sentencing hearing the defendant expresses remorse and tells of being physically abused by his alcoholic father as a child growing up in a distant city. A social worker from the city tells the jury of the defendant's efforts to help other abused children. The state presents evidence of two prior sexual assaults by the defendant, each committed with great brutality. The judge instructs the jury that the decision between life and death is up to them.

The community is horror-struck by the crime and deeply angered by it. The residents feel personally violated by the evil perpetrated by the young man from the city. Those on the jury are part of the community and they also experience these feelings. They discuss their feelings about the case, the defendant's good points and bad points, but return always to the stark evil of the crime. The jury sentences the defendant to die.

Imagine the same crime in the same community committed by the same defendant, with one important difference in background—the defendant is not a stranger to the community but has lived there most of his life. Most in the community knew defendant's father, a drunken, vicious man. Instead of a social worker from the city, the head of the local orphanage where defendant spent his adolescence testifies about defendant's efforts to help young orphans. The state introduces the same evidence on the defendant's prior offenses—these occurred while defendant lived elsewhere. The court's instructions are the same and the jury deliberates along similar lines. Except that the jurors somehow feel differently about the offender; his face has an emotional pull on them which makes them come back again and again to his remorse and the pleas of community members on his behalf. The jury sentences the defendant to life in prison.

These cases, while fictional, illustrate a fundamental problem for the law of punishment: how can we ensure that penal judgments are based on moral reasons and not morally irrelevant, or even immoral, "feelings?" Under a retributive system of punishment both defendants deserve equal punishment. The factor that made the difference—where the defendant lived—is not morally relevant. The law must devise a way to minimize this kind of moral error.

2. *The Myth of Dispassion*

The law has its own culture and its own preferred means of discourse. The predominant culture of the law promotes formal, deliberative, and dispassionate decisionmaking. Its modern ideal is a complete rationalistic rule structure which determines results in an objective, i.e., impersonal, fashion. Legal adjudication centers around proceedings of religious solemnity according to principles of scriptural authority.¹⁹ The culture of modern law discourages informal, intuitive, personal, or passionate decisionmaking.²⁰ From

¹⁹ E.g., *Murphy v. Florida*, 421 U.S. 794, 799 (1975). See also cases cited *supra* notes 1 & 9.

²⁰ See cases cited *supra* note 1; *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940) (due process requires "a public tribunal free of prejudice, passion, excitement . . ."). See

this basic antipathy to personal and emotional approaches to law grows the myth of dispassion.

Because courts view the law as fundamentally dispassionate and competing adjudicative processes such as the lynch mob as highly emotional, courts have often concluded that lack of emotion is an essential attribute of justice.²¹ I call this the myth of dispassion because it rests upon two fictions: (1) that emotion necessarily leads to injustice, and (2) that a just decisionmaker is necessarily a dispassionate one.

In some contexts, courts have recognized the moral relevance of certain emotional reactions.²² This remains very much the exception, however. More commonly, the law's cultural bias against emotion has persuaded courts of the need to suppress all emotional influence on legal decisionmaking.

C. Strategies for Emotive Suppression—Depersonalization

Many aspects of modern criminal adjudication indicate a conscious strategy of depersonalizing adjudication in order to suppress the influence of emotions. As I discuss at greater length below,²³ emotions constitute a way of personalizing external situations. They bring home to the self what is happening outside it. Modern criminal justice functions to depersonalize the controversy for the decisionmaker. In contrast to earlier forms of adjudication, which featured direct confrontations between the parties,²⁴ modern law goes to great lengths to depersonalize the confrontation through the use of legal intermediaries who play carefully defined formal, adversarial roles. Lawyers, with only their professional pride at stake, act out the conflict. Likewise the decisionmakers—lawyers transformed into judges and citizens transformed into jurors—take their appointed positions and play formal roles that allow them, in theory at least, to detach their emotional selves from the proceedings. From this detached stance the decisionmakers may (theoretically) judge, not according to personal, subjective and emotional standards, but according to objective, collectively-resolved, rational principles.²⁵

generally J. SHKLAR, *LEGALISM* (1964); J. NOONAN, *PERSONS AND MASKS OF THE LAW* 3-15 (1976).

²¹ See cases cited *supra* notes 1, 9.

²² See, e.g., *infra* note 44 and accompanying text.

²³ See *infra* Section II.

²⁴ The early English criminal trial was a relatively informal process necessarily involving a citizen accuser and a defendant who appeared without counsel. Jurors could act as both judges and witnesses. See L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 19-32 (1968); 1 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 244-72 (1883).

²⁵ The formality of the courtroom setting encourages the expression of public val-

Reliance upon rationalistic rules also works to depersonalize adjudication. Resort to universal, rationalistic rules leaves little room for idiosyncratic approaches to decisionmaking. Modern criminal trials, because of expanded procedural regulation and substantive sophistication, increasingly have become legal as opposed to personal dramas.

In capital cases the Supreme Court has sought to depersonalize adjudication by encouraging a new legal production, the trial of the sentencing phase. This new "trial" replaces what had been a less ritualized, more informal sentencing proceeding. By formalizing the proceeding and, most importantly, by putting the issue of sentence in the same form as the issue of guilt, a decision to be rendered according to legislative rules, the sentencing process appears more "legal."²⁶ The Court has sought to preempt emotive influence by mandating that sentencers follow rules in reaching their decision. Ideally, sentencers would select an appropriate sentence by virtue of rationalistic considerations captured in rules. The jurors would have no opportunity to resort to their own personal ideas about justice and so would have no opportunity to be influenced by emotion. This regulatory effort has not, and can not, work, however.

When the Supreme Court, in the early 1970s, began to reexamine the constitutionality of the nation's capital punishment schemes, it viewed their basic flaw as granting the decisionmaker too much discretion. Sentencers such as those in the librarian murder case set out above, rendered life and death decisions without legal guidance. As a result they were rendering "arbitrary and capricious" decisions based on factors not relevant to punishment, such as geography, socio-economic background, or race.²⁷ Sentences were imposed "out of whim, passion, prejudice or mistake."²⁸

The Court's cure for excessive discretion was more rules. The Court required states to specify guidelines for which offenses were sufficiently aggravated to merit the death penalty.²⁹ Yet this structure had little meaning. As long as the state listed possible aggravating factors, and at least one of these was present in a particular

ues and discourages the expression of private bias. See Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-89.

²⁶ See Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 372-83.

²⁷ E.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 242 (1976). Cf. *McGautha v. California*, 402 U.S. 183 (1971).

²⁸ *Furman*, 408 U.S. at 311 (Stewart, J., concurring).

²⁹ *Lockett v. Ohio*, 438 U.S. 586 (1978); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg*, 428 U.S. at 153.

case, that was sufficient to justify death.³⁰ And even as the Court commenced its regulatory effort, it resolved that sentences could not be justly rendered solely by means of preset rules. Some discretion must be permitted.³¹ The Court has held that mandatory death sentences are unconstitutional and that what constitutes mitigation may not be restricted by rules.³²

In fact, after beginning its reform efforts in the apparent belief that regulation could work a significant improvement in sentencing, in recent years the Court increasingly has acknowledged the intractability of the tension between rules and discretion. The Court has confronted the discretion dilemma: while giving sentencers discretion allows them to render decisions on improper bases, regulation of sentencing leads to its own form of moral errors resulting from rule rigidity. The choice, therefore, is between two evils. Recognizing this, the Court has virtually abandoned the basic aims of its regulatory endeavor.³³

The present constitutional status quo favors elaborate procedural mechanisms for imposing death which do not clearly address the substantive issue of who should and who should not receive the maximum punishment.³⁴ In most jurisdictions, pursuant to statutory guidelines, the sentencer in the librarian murder cases would receive a list of aggravating and mitigating factors, similar in nature to the considerations the jurors originally weighed. While the residence of the defendant would not be among these, the guidelines

³⁰ *E.g.*, *California v. Ramos*, 463 U.S. 992, 1008-13 (1983); *Zant v. Stephens*, 462 U.S. 862 (1983). *See also* *Pulley v. Harris*, 465 U.S. 37 (1984) (no requirement of proportionality review); *Barclay v. Florida*, 463 U.S. 939 (1983) (no reversible error in consideration of nonstatutory aggravation where there is statutory aggravation); *Spaziano v. Florida*, 468 U.S. 447 (1984) (no requirement of jury sentencing); *cf.* *Godfrey v. Georgia*, 446 U.S. 420 (1980) (aggravating circumstance as defined by state invalid because did not restrict cases where death could be imposed).

³¹ *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

³² *E.g.*, *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). *See also* *Sumner v. Shuman*, 107 S. Ct. 2716 (1987).

³³ *Burt, Disorder In the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); *Gillers, The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037 (1985); *Weisberg, supra* note 26; *Note, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129 (1984). Empirical studies suggest that statutory factors do not guide decisionmakers; in fact, the most important factors to decisionmakers often are not included in statutory guidelines. *See Geiner & Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1987-88); *Barnett, Some Distribution Patterns for Georgia Death Sentences*, 18 U.C. DAVIS L. REV. 1327 (1985).

³⁴ Scholarly comment has almost uniformly viewed the Court's efforts at regulating the death sentencing process as a failure in its own terms. *See Barnett, supra* note 33; *Radin, supra* note 6; *Zimring & Hawkins, A Punishment in Search of a Crime: Standards for Capital Punishment in the Law of Criminal Homicide*, 46 MD. L. REV. 115 (1986).

would not eliminate its tacit influence. The sentencer imposing death could easily believe that it found for death based on aggravating factors relating to the egregious nature of the offense, without ever recognizing the xenophobic influence of where the defendant came from. Meanwhile, a sentencer imposing life could believe that it was the evidence presented in mitigation that made the difference. Both decisions would be unimpeachable because the guidelines give courts no standards for weighing competing factors, yet the cases remain indistinguishable on moral grounds. Such disparity is no less likely and no more remediable with guidelines than without. If this is the best we can do, it is hard to argue with Justice Harlan who predicted eighteen years ago that any effort to regulate death sentencing by rules would come to nothing.³⁵

D. The Impossibility of Rule Regulation

The Supreme Court's regulatory campaign was doomed to failure for two reasons. First, the complexity of the desert evaluation makes a complete *a priori* rule structure virtually impossible. Second, no rule structure that overtly refers to retributive considerations can be effective in suppressing emotion because these considerations are inextricably intertwined with certain emotional reactions.

1. *Complexity of Evaluation*

The question of what punishment an offender deserves requires a complex factual and moral evaluation of the offender's action in the offense. As previously discussed, if accuracy in desert evaluation is paramount, as it is in the capital context, we must adopt a broad view of culpability that defies encapsulation in rules. A brief look at the basic components of culpability will illustrate the point. Consider a few of the eventualities which would have to be resolved on a legislative basis: harm—is it worse to kill one person by prolonged suffocation than two by gunshot; motive-intentionality—is it worse to kill for fun or for money; and autonomy—how much does a mental disturbance not causing insanity matter? Even if we could create a rule structure of sufficient sophistication to encompass all the complexities of each component by itself, we would need a further structure to evaluate them together. We would need a rule that would state, for example, whether the mentally disturbed killer of five deserves a harsher punishment than the contract killer of one. Unless we make these assessments crudely, i.e., in a way that ignores significant moral distinctions, it is impossible to imagine a rule

³⁵ McGautha v. California, 402 U.S. 183, 204-08 (1971).

structure sufficiently complete to assess deserved punishment without resort to nonrule considerations. Even the most determinate of recent sentencing schemes permit some sentencer discretion.³⁶

Finally, any strategy of emotive suppression through rules would fall prey to the limitations of language itself. No rule is entirely determinate; the application of rules to facts always requires some creativity and some independent consideration by the decisionmaker.³⁷ Human language is subject to variable interpretation; in this it fatally varies from the determinate computer language necessary for a rule structure that would preempt emotional influence.

2. *The Emotionalism of Retribution*

The emotional nature of retributive judgment presents an equally significant obstacle to the suppression of emotive influence by rule regulation. Deciding how much punishment a person deserves implicates emotions which cannot be suppressed as long as the question is put in terms of what he or she deserves. Retribution asks basic moral questions which often have emotional responses. As long as the question is what does an offender deserve, the answer is likely to be influenced by emotion.

a. *Anger—The Most Feared Emotion*

A victim's cry for bloody revenge disturbs us with its vitriol; a xenophobe's wild rage at a stranger defendant seems clearly excessive. The common man's rage at the offender, so reminiscent of the paradigmatic lynch mob appears to be the great emotive evil to be avoided in judgments of just punishment.³⁸ Thus the Court has held that sentencers may not utilize victim impact statements in sentencing because such "emotionally charged opinions," which provoke anger, are "inconsistent with the reasoned decisionmaking we require in capital cases."³⁹ Under this view, the law in criminal cases must act to suppress anger because anger expresses the in-

³⁶ *E.g.*, 18 U.S.C. § 3553 (Supp. IV 1986); CAL. PEN. CODE §§ 1170, 3040 (West 1985 & Supp. 1988).

³⁷ See Moore, *The Semantics of Judging*, 54 SO. CAL. L. REV. 151 (1981).

³⁸ *E.g.*, *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (need to channel society's "instinct for retribution"); *id.* at 344-45 (Marshall, J., concurring) (eighth amendment limits vengeance). See also *id.* at 254 (Douglas, J., concurring) (historical view that eighth amendment grounded in need to prevent punishment as political vengeance); *id.* at 304 (Brennan, J., concurring) (suggesting that no state sought "naked vengeance" in punishment); *Tison v. Arizona*, 107 S. Ct. 1701-02 (1987) (Brennan, J., dissenting) decision to execute "appears responsive less to reason than other, more visceral demands.").

³⁹ *Booth v. Maryland*, 107 S. Ct. 2529, 2536 (1987). This decision may be explained within the framework of this Article, however, as an effort to keep anger within moral bounds. See generally *infra* Section III.

stinctive and morally suspect urge for revenge. A classic statement of the need for such emotive suppression comes from Professor Henry Weihofen:

When a reprehensible crime is committed, strong emotional reactions take place in all of us. Some people will be impelled to go out at once and work off their tensions in a lynching orgy. Even the calmest, most law-abiding of us is likely to be deeply stirred. . . . It is one of the marks of a civilized culture that it has devised legal procedures that minimize the impact of emotional reactions and strive for calm and rational disposition.⁴⁰

Retribution as a justification for punishment has often been criticized as a cover for the emotion of revenge; after all, both find righteousness in another's suffering.⁴¹

And yet, what is wrong with feeling anger at one who has deliberately and without justification caused another's suffering? By virtue of the offender's freely made choice to inflict serious harm, we can blame him and release upon him the full force of our anguish at another's needless suffering.⁴² Because the victim's suffering was humanly willed, we reject tragic explanations and are filled with a God-like wrath at the offender.⁴³ We might say that we are angry because the offender deserves punishment. Indeed, justices have justified the death penalty in emotive-retributive terms as the community's expression of "moral outrage" at the offense.⁴⁴ The Court has approved a judge's expression and reliance upon emotions of shock and outrage as a basis for a death sentence.⁴⁵ In fact it is hard to imagine a sentencer finding that an offender deserves a severe punishment without that sentencer experiencing at least an undercurrent of anger at the offender.

As will become clearer when we take up the nature of emotion, retribution cannot be neatly divested of anger because both involve judgments of wrong, of condemnation, and of the need for punishment.⁴⁶ Anger is a basic means of personal understanding and ex-

⁴⁰ H. WEIHOFEN, *THE URGE TO PUNISH* 131 (1959).

⁴¹ See J. KLEINIG, *supra* note 3, at 50; Gardner, *supra* note 3, at 782. For a full discussion of the conceptual and emotive distinctions between retribution and revenge, see *infra* Section III(C)(3).

⁴² For traditional defenses of the anger of retribution, see I J. STEPHEN, *supra* note 24, at 478; SALMAND ON JURISPRUDENCE 120-21 (11th ed. 1957), quoted in AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* 21 (1971).

⁴³ For a psychoanalytic explanation, see Wilson, *Vengeance and Mercy: Implications of Psychoanalytic Theory for the Retributive Theory of Punishment*, 60 NEB. L. REV. 276, 287-92 (1981).

⁴⁴ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); *Spaziano, v. Florida*, 468 U.S. 447, 468-69 (1984) (Stevens, J., concurring in part and dissenting in part).

⁴⁵ *Barclay v. Florida*, 463 U.S. 939, 948-51 (1983).

⁴⁶ See *infra* Section III(C).

pression of moral wrong. The rationalistic judgment of retribution also describes a judgment which might trigger a form of anger. As a result, in practice at least, no absolute separation of the two can be accomplished.⁴⁷

b. *Sympathy*

We sympathize with the suffering of fellow human beings. When the object of sympathy is an offender, the emotion may have moral content in terms of retribution. We may sympathize with offenders for the mental disease which rendered them wholly or partially nonresponsible. Here, sympathy tracks considerations relevant to culpability. The Supreme Court has recognized that sympathy may be morally valuable in determining just punishment.⁴⁸ Just as it is hard to imagine a harsh sentence without imagining an undercurrent of anger, so it is hard to imagine a lenient sentence under a retributive theory that is not motivated in part by sympathy for the offender.⁴⁹

But sympathy can also distort culpability assessment. Sympathizing with an offender based on his suffering may lead to excusing an offense when little or no excuse should be available under retributive principles. A decisionmaker with a history of substance abuse problems may excuse an offense by an alcoholic based on sympathy for the condition of alcoholism when, under principles of personal responsibility, we may agree that the condition had little impact in the offender's responsibility. Sympathy for defendants based on race or socioeconomic status can also lead to unjustified verdicts or sentences. Courts expressly exclude sympathy from consideration in decisions of guilt or innocence.⁵⁰ To sympathize smacks of weak and amoral emotionalism at sentencing; its influence remains suspect.⁵¹

⁴⁷ This stands in contrast to other punishment theories. For example, the judgment that a particular punishment is needed to deter others involves an assessment of future impacts quite different from the assessments involved in anger or any other strong emotion.

⁴⁸ *California v. Brown*, 479 U.S. 538, 542-43 (1987). See *infra* text accompanying notes 142-49. See also *McGautha v. California*, 402 U.S. 183, 189 (1971) (capital sentencing instruction permitting jury decision based on "mere sentiment and sympathy for the defendants"). For a psychoanalytic view, see Wilson, *supra* note 43, at 292-94.

⁴⁹ By lenient I mean the opposite of harsh. If rendered under a retributive theory, the sentence, however light, must be deserved.

⁵⁰ E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 11.03 (3d ed. 1977) (The law does not permit jurors to be governed by sympathy, prejudice, or public opinion.); *CALIFORNIA JURY INSTRUCTIONS CIVIL 1.00* (7th ed. 1986) (Jurors "must not be influenced by sympathy, prejudice or *passim*").

⁵¹ See *infra* text accompanying notes 140-46. For an illuminating, though ambivalent, view of "emotion and sympathy" in judicial sentencing, see M. FRANKEL, *CRIMINAL SENTENCES* 79 (1973). In two recent eleventh circuit cases, the prosecutor utilized a nine-

E. Reconceptualization of the Problem—Moral Versus Amoral Emotion

Under a retributive system, the effort to suppress all varieties of decisionmaking anger or sympathy is neither morally justified, nor practically feasible. Emotional reactions to penal issues are part of basic human nature. They are also part of our moral experience. What we need is a reconceptualization of the problem. We need to discard the traditional opposition of Reason and Emotion and instead distinguish between emotions. In short, we need to distinguish those emotions which are morally appropriate from those which are not.⁵²

Instead of viewing the example of the librarian murders as a demonstration of the evil of emotive influence generally, we should see it as a demonstration of the need to discriminate between different sorts of emotive influences. Amoral and immoral influences must be identified and screened out, moral influences identified and utilized. Hostility to the stranger-defendant based on his status as an outsider is an amoral⁵³ influence on judgment, but hostility based on responsible wrongdoing is morally appropriate. Different sorts of sympathy must also be distinguished. Sympathy for the resident-defendant, based on residence, is amoral. I will argue, however, that that kind of sympathy defined as empathy, plays a morally essential role in discretionary sentencing, operating in a similar fashion to that sympathy in the case of the resident offender. It serves to open the decisionmaker's eyes to relevant factors which would otherwise remain unseen and unconsidered.

Having established that emotion is not a monolithic force for either justice or injustice, we must further explore its basic nature to

teenth century Georgia Supreme Court case where the court denounced "sickly sentimentality" and stated, "If this crime goes unpunished, let our skirts at least be free from the stain of blood guiltiness." In both cases, the eleventh circuit reversed based on the prosecutors' misleading implication that the sentencing jury could not consider mercy. *Wilson v. Kemp*, 777 F.2d 621, 623 (11th Cir. 1985), *cert. denied*, 476 U.S. 1153 (1986); *Drake v. Kemp*, 762 F.2d 1449, 1458 (11th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1020 (1986).

⁵² My purpose here is different from that of emotivists, who seek to define morality in terms of sensation statements. *E.g.*, cf. C. STEVENSON, *ETHICS AND LANGUAGE* (1944); G. MOORE, *PHILOSOPHICAL STUDIES* (1922); J. URMSON, *THE EMOTIVE THEORY OF ETHICS* (1968). The moral theories of eighteenth century philosophers David Hume and Adam Smith, both of which gave a central role to sympathy, are essentially emotivist. See P. MERCER, *SYMPATHY AND ETHICS* 20-96 (1972); D. HUME, *A TREATISE OF HUMAN NATURE* bks II & III (L. Selby-Bigge ed. 1967); A. SMITH, *THE THEORY OF MORAL SENTIMENTS* (1st ed. 1759). For a broad-ranging critique of emotivism, see A. MACINTRYE, *AFTER VIRTUE* 11-22 (2d ed. 1984).

⁵³ Hereinafter, for purposes of simplicity, when I refer to the problem of emotive influence I will call it amoral influence, as opposed to amoral and immoral. However, the phrase should be taken to include immoral influences as well.

understand the complex relation of emotion to the moral objectives of criminal sentencing.

II

RESPONSIBILITY FOR THE EMOTIONS

The law's general distrust of emotion comports with a venerable philosophic tradition that contrasts reason with emotion.⁵⁴ This view holds that justice is determined by moral reason uninfluenced by emotion. Under this view emotions are passive, irrational occurrences. The experience of emotion is an event beyond the individual's control which undermines rationality and impinges upon moral responsibility. In fact, emotion and reason have a far more complex relationship than this traditional view maintains. Our rational capacities are critical to both emotion and reason. And while there are limits to emotive self-control, there is no reason to believe that emotion lies beyond our control. Indeed, we commonly hold each other responsible for our emotions in both law and interpersonal relations. Recognizing the rationality of emotion and the extent of our responsibility for emotion provides the basis for understanding how we may "moralize" the emotions in a particular decisional context.

A. A Cognitive Theory of Emotion

Emotions have been variously categorized as purely physical sensations, as behavioral occurrences, as creatures of the unconscious, and as essentially cognitive evaluations.⁵⁵ The task of building and defending a complete theory to define, categorize and explain emotion is one which has been undertaken by philosophers dating back to Aristotle;⁵⁶ and by psychologist beginning with the

⁵⁴ E.g., PLATO, *THE REPUBLIC* bk V (P. Shorey trans. 1956); R. DESCARTES, *THE PASSIONS OF THE SOUL: A READING OF LES PASSIONS DE L'AME* (S. Voss trans. 1988); Seneca, *De Ira*, in *I MORAL ESSAYS* (J. Basore trans. 1928); *FUNDAMENTAL PRINCIPLES*, *supra* note 6, at 104-05. Even within this group, however, careful reading may discern passages compatible with a view of moral value in emotion. See De Sousa, *Self-Deceptive Emotions*, in *EXPLAINING EMOTIONS* 127 (A. Rorty ed. 1980) (suggesting that Plato saw emotion as compatible with rationality); *DOCTRINE OF VIRTUE*, *supra* note 6, at 115-30.

⁵⁵ For an overview of the various approaches, see Calhoun & Solomon, *What is an Emotion?* in *WHAT IS AN EMOTION?* 3-40 (1984); W. LYONS, *EMOTION* 1-52 (1980); W. SHIBLES, *EMOTION* (1974).

⁵⁶ E.g., ARISTOTLE, *RHETORIC* bk II, 1378a-380; *DE ANIMA* 403a-403b; ARISTOTLE, *NICHOMACHEAN ETHICS* 1125b-1126b. Aristotle developed a cognitive theory of the emotion much like the modern cognitive theories relied upon in this Article. See Calhoun & Solomon, *supra* note 55, at 3-8, 42-43. Aristotle's work also provides a classical example of the union of emotion and morality, which I support. Aristotle accomplished this through his development of the moral virtues. See generally A. MACINTRYE, *supra* note 52.

work of William James and C.G. Lange in the nineteenth century.⁵⁷ In both fields there exists an extensive literature on the theory of emotion. As with the selection of a theory of punishment, I do not attempt to justify my choice of a cognitive theory of emotion. Although I suggest why a cognitive theory explains emotion, my primary focus is on application of the cognitive theory of emotion to a particular legal context: judgments of retributive punishment.

1. *The Basic Elements of Emotion*

In recent years cognitive theories of emotion have dominated both the philosophical and the psychological literature on the subject.⁵⁸ Cognitive theories come in many varieties, but all share the idea that cognition is central to emotion. By cognition I mean a perception which we can determine to be correct or incorrect according to rational principles. A cognitive approach holds that emotion is a cognitive assessment⁵⁹ of a person or situation, which assessment is associated with a physiological sensation, normally accompanied by a desire to undertake a particular kind of action.⁶⁰ Consider the anger provoked by the discovery of a burglary of one's home. The object of cognition is the burglary. On seeing a shattered window and disordered home, the victim perceives that a great wrong has been done to her. A burglar has deliberately violated her private space. If the homeowner later determines, however, that the window was broken by a wind-blown tree limb and that there was no burglar, her anger will quickly dissipate because the cognitive assessment of wrong necessary for anger would have disappeared. Assuming a perception that a burglary has occurred, the cognitive evaluation of wrong leads to a sensation, the bodily

⁵⁷ See W. JAMES & C. LANGE, *THE EMOTIONS* (1st ed. 1890).

⁵⁸ For philosophically oriented views, see R. GORDON, *THE STRUCTURE OF EMOTIONS: INVESTIGATIONS IN COGNITIVE PHILOSOPHY* (1987); W. LYONS, *supra* note 55; R. DE SOUSA, *THE RATIONALITY OF THE EMOTIONS* (1987); R. SOLOMON, *THE PASSIONS* (1976); Roberts, *What an Emotion Is: A Sketch*, 97 *PHIL. REV.* 183 (1988). For psychological studies, see N. FRIJDA, *THE EMOTIONS* (1983); see generally *1 EMOTION: THEORY, RESEARCH, AND EXPERIENCE* (R. Plutchik & H. Kellerman eds. 1980).

⁵⁹ The exact nature of the cognition in emotion is a matter of some controversy among cognitive theorists. Compare R. SOLOMON, *supra* note 58, at 185-91 (cognition in emotions as a judgment); and W. LYONS, *supra* note 55, at 53-91 (cognition in emotions as a cognitive evaluation), with Roberts, *supra* note 58. Ronald De Sousa offers a complex cognitive view of emotion as its own distinctive form of rational interpretation of the world. R. DE SOUSA, *supra* note 58 (emotions as a cognitive construal). While important for a precise understanding of emotion, the exact nature of the cognition in emotion does not have great significance for its application to moral decisionmaking. Under all theories, cognition is a perception of the truth of a person or situation that is subject to examination. To make clear that I am not resolving the controversy, I have picked a neutral term, "assessment," to describe the cognition involved.

⁶⁰ W. LYONS, *supra* note 55, at 53-95; R. SOLOMON, *supra* note 58, at 172-182. See Irani, *Understanding Emotion*, in *EMOTION: PHILOSOPHICAL STUDIES* 1-19 (1983).

experience that we associate with the emotion of anger. This sensation of heightened tension, or, in psychological terms, arousal, probably represents a physiological change in the holder of the emotion, although this is not clearly so for all emotions. Finally, the emotion of anger characteristically involves a desire to engage in denunciatory and punitive action: in this instance to find and punish the burglar.⁶¹

Both the sensational and behavioral aspects of emotion have proven tempting candidates for differentiating the various emotions. Psychologists have, at various times distinguished emotions based on their characteristic behaviors or sensations.⁶² For researchers with a phenomenological focus, both aspects are attractive possibilities because both involve objective phenomena. Bodily changes can be measured, actions observed. If cognition distinguishes the emotions, however, objective testing is difficult because cognition is an internal, subjective phenomenon. Yet neither sensation nor behavior has withstood close scrutiny as the means for distinguishing emotions. Sensations are ambiguous indicators of emotions—the same sensation of sweat and tensed muscles may accompany anger and anxiety.⁶³ Similarly, the same behavior may accompany different emotions. We cry for joy and for sorrow.⁶⁴ Sensation and behavior are integral parts of emotion, but the cognitive element is what distinguishes one emotion from another.⁶⁵

2. *Emotion As World View*

Dissecting emotion into its component parts provides a beginning to emotive understanding, but full comprehension requires an understanding of the function of emotions. Emotions are funda-

⁶¹ For a full cognitive dissection of anger, see R. SOLOMON, *supra* note 58, at 283-86. For a social-constructivist view, see J. AVERILL, *ANGER AND AGGRESSION: AN ESSAY ON EMOTION* (1982).

⁶² See W. JAMES & C. LANGE, *supra* note 57.

⁶³ W. LYONS, *supra* note 55, at 607, 130-45; R. SOLOMON, *supra* note 58, at 150-58; Bergmann, *A Monologue on the Emotions*, in *UNDERSTANDING HUMAN EMOTIONS* 3-4 (F. Miller & T. Attig eds. 1979).

⁶⁴ See Cannon, *The James-Lange Theory of Emotions: A Critical Examination*, 39 *AM. J. PSYCHOLOGY* 106 (1927); Schacter & Singer, *Cognitive, Social and Physiological Determinants of Emotional State*, 69 *PSYCHOLOGICAL REV.* 379 (1962). For an insightful critique of James Schacter's influential work in psychology emphasizing cognition as the process by which physiological responses are "labelled" as emotions, see R. GORDON, *THE STRUCTURE OF EMOTIONS: INVESTIGATIONS IN COGNITIVE PHILOSOPHY* 86-109 (1987).

⁶⁵ See W. LYONS, *supra* note 55, at 2-25; R. SOLOMON, *supra* note 58, at 164-71; MacIntyre, *Emotion, Behavior and Belief*, in *AGAINST THE SELF-IMAGES OF THE AGE* 230-43 (1971). For a cognitive view that accords an important role to the biological aspects of emotion, see De Sousa, *The Rationality of Emotion*, in *EXPLAINING EMOTIONS* 47-106 (A. Rorty ed. 1980). In psychology, the debate over the primacy of the physiological and the cognitive continues. See Zajonc, *On the Primacy of Affect*, 39 *AM. PSYCHOLOGIST* 117 (1984); Lazarus, *On the Primacy of Cognition*, 39 *AM. PSYCHOLOGIST* 124 (1984).

mentally a way of making sense of the world. We use emotion to synthesize chaotic reality and give it personal meaning. Emotion provides the basic means for relating the inner subjective self to the outer objective world.⁶⁶ I can describe a friend in objective terms on which other observers could agree, but what my friend means to me is subjective and emotional. The way I experience my friend, as a friend, is by my caring about him or her. My subjective caring is a critical part of the friendship; there can be no friendship without it. Recognizing that I care allows me to recognize the importance of the relationship in my life.

Emotions also serve as a guide to rational inquiry. They provide a pattern of salience which helps order our thoughts and actions.⁶⁷ In our lives we accumulate enormous quantities of data. Emotions direct our attention to certain aspects of a situation, suggest certain approaches. Even philosophers may begin work on a difficult problem with a "gut" or emotional reaction.

Emotions do more than this, however. They make life interesting. They provide meaning in a way that reason cannot. We can not imagine achieving a personal goal without experiencing an emotional lift, or experiencing a personal failure without emotional consequences. Without the emotional component, we can not honestly say that these events mean anything to us. Our emotions constitute reality and give us the means for finding importance in our existence.⁶⁸

B. Responsibility For Emotions—Suggestions From the Common Law and the Commonplace

Under the traditional view, emotions "happen" to a person. They occur without being willed and tend to overwhelm all that we would will; they destroy rationality and responsibility.⁶⁹ If this is so, emotion presents a serious threat to rational, responsible decision-making. The traditional view, however, represents a fundamental misconception about emotion. Although there are significant obstacles to emotive self-control, self-control is possible. Both the formal rules of criminal law and the informal rules of interpersonal rela-

⁶⁶ See R. SOLOMON, *supra* note 58, at 16-20, 171-250; Calhoun, *Cognitive Emotions*, in *WHAT IS AN EMOTION?*, *supra* note 55, at 339. For the view that emotions provide the key to understanding the self, see Rosenthal, *Emotions and the Self*, in *EMOTION: PHILOSOPHICAL STUDIES*, *supra* note 60, at 164-91.

⁶⁷ R. DE SOUSA, *supra* note 58, at 190-203.

⁶⁸ See R. SOLOMON, *supra* note 58, at 15-16; D. VISCOTT, *THE LANGUAGE OF FEELINGS* 11-14, 19 (1976).

⁶⁹ For general statements of the traditional view and criticisms of it see Solomon, *Emotions and Choice*, in *EXPLAINING EMOTIONS*, *supra* note 54, at 251; Williams, *Morality and the Emotions*, in *PROBLEMS OF THE SELF* 207 (1973).

tions provide examples of how we commonly insist upon emotive self-control.

1. *Provocation*

At first glance the criminal law's distinction between a purposeful homicide committed with "malice aforethought" and one committed in a "heat of passion" might present an example of the traditional view of emotion.⁷⁰ Under the traditional view, the first offense is more evil because it represents a cooler, more rational choice to do evil. The second offense is mitigated by provocation—an onslaught of emotion which unhinges reason.⁷¹

The doctrine of provocation makes important concessions to emotive responsibility, however. First, provocation mitigates the offense from murder to manslaughter; it does not excuse it. The theory appears to be that even extreme emotions do not overwhelm reason; they make reasoned choice difficult, but not impossible.⁷² Second, provocation does not refer to a purely sensational state but to an emotional state based on a particular sort of cognitive assessment. The doctrine is available only for those situations where the provocation is reasonable — where we can understand and morally sympathize with, if not excuse, the motivation.⁷³ Provocation distinguishes between various cognitive assessments which give rise to passionate violent feelings. The law differentiates between a killing inspired by the sight of a spouse in bed with another partner from one inspired by a verbal slight. This distinction lies not in differences in the *feeling* of sudden anger but in the reason for such anger.

In conclusion, the doctrine of provocation is consistent with a cognitive view of emotion.⁷⁴ The doctrine recognizes that emotions often compete with deliberative rationality in the choice of conduct, but also recognizes the moral aspect of emotion. If the emotion is strong enough and its cognitive assessment of a morally relevant

⁷⁰ See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 7.7, 7.10 (2d ed. 1986).

⁷¹ The emotionalism of provocation makes it a somewhat controversial doctrine. It permits mitigation for losing one's temper, a character trait for which individuals are normally held responsible. See Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 751-52.

⁷² In a particular instance, we may be willing to concede that an extreme emotion did overwhelm reason and lower the offense from murder to manslaughter. However, the fact that we still hold the person culpable demonstrates that we find fault with the person for allowing himself or herself to be so vulnerable to emotion. In other words, we view responsibility for emotions over a broader chronologic span than the usual mental state analysis.

⁷³ W. LAFAVE & A. SCOTT, *supra* note 70, at § 7.10(b). *E.g.*, Commonwealth v. Flax, 331 Pa. 145, 149, 200 A. 632, 637 (1938) ("The law regards with some tolerance an unlawful act impelled by a justifiably passionate heart, but has no tolerance whatever for an unlawful act impelled by a malicious heart"); Williams, *supra* note 69, at 207-29.

⁷⁴ See generally J. AVERILL, *supra* note 61, at 103-25.

kind, the influence of emotion upon the criminal decision will mitigate culpability. Only the union of these two elements permits a reduction in responsibility. No emotion, regardless of strength, will supply an excuse unless it is based upon a cognitive assessment which has moral content.

2. *The Commonplace View of Emotion*

The commonplace view of emotions and our responsibility for them is equally complex. We commonly use emotions as an excuse from responsibility. A husband tells his wife he is sorry for yelling at her yesterday but he was "just so upset about everything" he could not help it. But do we really believe the husband is blameless if the shouting was not rationally justified? We generally blame others for acting on anger if the anger was unjustified, and in close relationships blame them for *being* unjustifiably angry because the experience of such strong emotion invariably affects the relationship. Emotional responses are a critical part of character evaluation. We praise the good samaritans among us who feel kindly to those in need and help them; we criticize those who view the needy with hostility and ignore their plight. In short, we judge ourselves as if we believe ourselves responsible for our emotions.

C. Deliberative and Emotive Judgments

The discussion so far suggests that emotive control is possible, but not that it is easy. In fact, the common use of emotion as an excuse both in the law and in everyday life suggests that emotive control is difficult. In order to deal with emotions in a decisional context we must understand the nature of this difficulty.

Even though emotions have their own cognitive rationality, this rationality is of a different order than that of deliberate, reflective judgments. One does not normally experience sadness, for example, because one (a) consciously observes that certain logical prerequisites for sadness are present, and then (b) decides, based on this, to feel sad. Instead, following some triggering event, one is likely to simply "feel" sad. The suddenness of the experience, its strength, and the lack of a deliberative trigger lead to the assumption that the emotion is a nonrational force that happens to us.⁷⁵ Cognitive theorists have suggested several ways of reconciling the apparently noncognitive experience of emotion with its cognitive nature.

Philosopher Ronald De Sousa has suggested that the cognitive assessment of emotion follows a set of internal paradigm scena-

⁷⁵ See Roberts, *supra* note 58, at 208.

rios.⁷⁶ For each emotion we have learned a paradigm scenario. We compare later situations to the paradigm to determine if the emotion is appropriate. Anger involves the imagining of a paradigm scenario of accusation and denunciation, perhaps taken from a paradigm scene of parental punishment. A situation that makes us angry is one which fits our paradigm scenario. Once we decide that anger is appropriate, we relive the scenario of accusation and denunciation with the appropriate alterations for the situation.

Robert Solomon presents a similar, but more active view of emotion, arguing that we use emotions to develop a constitutive mythology of the world.⁷⁷ Emotion transforms impersonal reality into personal myth. Anger involves transforming a situation involving a perceived wrong into a mythic confrontation between avenging victim and wrongdoer. The angry self becomes the accuser, the adjudicator and punisher; the wrongdoer becomes the accused and the convicted awaiting punishment.

Whichever version of the cognitive theory we use, the rationality of emotion operates at a different level than ordinary deliberative thought processes. Emotions are normally prereflective. Their cognitive assessment is normally made without conscious, deliberate effort. They may depend on cognitive sources of which the conscious mind is not otherwise aware.⁷⁸ They represent the intersection between the mind's subjective surreality and the objective reality of the world. Emotive cognitions may make sense in terms of the world view they presuppose, but not necessarily in terms of reflective rationality. A person may live in terror of ants, believing that even a single one might devour him. This belief does not comport with reality; it is irrational. But given this belief, fear provoked by the sight of an ant is entirely rational. It is the cognitive assessment which is mistaken. The problem which any theory seeking to employ emotions for rational goals must address is how to alter, or at least control, emotions that are based on mistaken cognitions.

D. Strategies For Emotive Control

The first step to emotive control is understanding emotion. Emotion generally constitutes a prereflective assessment and so does not involve our conscious, deliberative capacities. Yet the experience of having an emotion necessarily involves cognition and some level of self-awareness. The very denomination of a sensation

⁷⁶ De Sousa, *Self-Deceptive Emotions*, in *EXPLAINING EMOTIONS*, *supra* note 54, at 285; De Sousa, *The Rationality of Emotions*, in *id.* at 142-43; *see also* Solomon, *Emotion and Choice*, in *id.* at 275.

⁷⁷ R. SOLOMON, *supra* note 58, at 195-240.

⁷⁸ *See generally* Calhoun, *supra* note 66.

as a particular emotion entails rational analysis. To say that one is angry about something implies an evaluation of wrong in the provoking situation. Sometimes emotion appears without an immediate cause. I am angry or sad, but not sure why. I recognize the basic cognitive structure of the emotion, but its object remains hidden. I will attempt to find it by testing various hypotheses. Was it that person's manner, what she said, or my own sense of insecurity which provoked the sensation? We can not always resolve these questions ourselves but we live in the presumption that generally we can. If we were not capable of emotive self-analysis we could not claim to be self-aware or autonomous.

Emotions develop from and are subject to the rational process of learning, although in a more complex fashion than intellectual development. By cultural influence and direct education we learn which emotions are appropriate in particular situations and which are not.⁷⁹ We learn to regulate their degree and the manner of their expression.⁸⁰ Parents teach children to feel sorry when they do something wrong and to feel good at accomplishing good. The point of such moral education is less the inculcation of rules than the education of the emotions.⁸¹ Moral education, at its best, is directed toward character development rather than rule obedience.⁸²

Upon reasoned reflection, we can often change a mistaken emotion.⁸³ If I learn that what appeared to be someone stealing my car was in fact someone taking their own car that looks identical to mine, then the anger that accompanied the first perception disappears. The key is the new evaluation. Consider the example of a driver who feels terrible guilt following a car accident in which another was killed. Even without new information concerning the cause of the accident, with the proper reassurance from others, the driver may shed his guilty feelings and return to emotive equilibrium by reassessing his fault in the accident.

In criminal law, the doctrines of premeditation and provocation illustrate the moral significance of reasoned reflection upon emotion. A premeditated murder is one committed following reflective reappraisal of the situation. It represents a fully deliberated,

⁷⁹ See R. DE SOUSA, *THE RATIONALITY OF EMOTION*, *supra* note 58, at 181-84; Scruton, *Emotion, Practical Knowledge and Common Culture*, in *id.* at 519-31.

⁸⁰ See Averill, *Acquisition of Emotions in Adulthood*, in *THE SOCIAL CONSTRUCTION OF EMOTIONS* 113-14 (R. Harte ed. 1986).

⁸¹ Williams, *supra* note 69, at 225.

⁸² See generally A. MACINTYRE, *supra* note 52; Donagan, *Morality As A Disposition of Affection and Conduct*, in *THE THEORY OF MORALITY* 9-31 (1977).

⁸³ W. LYONS, *supra* note 55, at 196-99; R. SOLOMON, *supra* note 58, at 375-85, 413-20.

although still emotionally influenced, decision.⁸⁴ As such it represents the most culpable form of homicide. Provocation on the other hand, by its emotive and chronologic restrictions, isolates certain prereflective decisions to kill. A person acting under the heat of passion has not had a good opportunity for reflective reappraisal of the provoking situation.⁸⁵ This lack of opportunity mitigates culpability.⁸⁶

Another form of reflective reappraisal is to employ the imagination to deliberately "try on" another emotion. Consider a wife who criticizes her husband for unjustifiably yelling at her the day before. The sincerity and depth of the wife's assertions persuade the husband to reimagine the situation of the previous day. The husband experiments with a new paradigm scenario, a new mythology of what occurred. The husband imagines himself as seen by his wife, that is, as insensitive brute rather than righteous critic. From this new perspective he sees the hurt he caused. The husband may not conclude from this effort that his shouting was wrong, but he still will have learned something of how this action was experienced by his wife. He will have obtained important moral insight.⁸⁷

To some extent, emotive testing is simply acting. The individual acts out a new role in his mind and, if it plays true, adopts it as the truth.⁸⁸ The process is rational but not necessarily deliberative. The judgment that the new role rings true may be an intuitive one, based on accumulated life experience, rather than an articulable, deliberative decision based on clear principles. The husband reimagine the situation under the mythology of guilt and sees the rightness of that view when compared with his original vision. Or the judgment may be quite deliberate. Imagining that he feels guilty, the husband reviews possible reasons for feeling that way and may, by a deliberative process, find those reasons compelling.

Changing the cognitive proposition upon which emotion is based is not the only means of emotional reappraisal. It may be that the cognition is correct but that the resulting emotion works against the person's interest. Here we must undertake a more ambitious reassessment. A soldier in battle may realize he is in danger but

⁸⁴ Thus the required mental state toward killing is "deliberate and premeditated." Deliberation "requires a cool mind that is capable of reflection" and premeditation that "the one with the cool mind did in fact reflect." W. LAFAVE & A. SCOTT, *supra* note 70, at § 7.7(a); *see* *People v. Anderson*, 70 Cal. 2d 15, 447 P.2d 942 (1968).

⁸⁵ Thus the doctrine concerning a "cooling off" period. W. LAFAVE & A. SCOTT, *supra* note 70, §§ 7.10(c), (d).

⁸⁶ Although only when it combines with a morally sympathetic cognitive source. *See supra* text accompanying notes 75-79.

⁸⁷ *See* R. SOLOMON, *supra* note 58, at 228.

⁸⁸ *See generally* C. STANISLAVSKI, *AN ACTOR PREPARES* (E. Hapgood trans. 1948).

attempt to re-envision the situation in terms of patriotic duty in order to combat the debilitating effects of fear.⁸⁹ A defense attorney who represents a defendant clearly guilty of a particularly heinous crime may feel personally horrified at her client's conduct. The attorney may alter her emotional approach, not by re-evaluating the client, but by re-envisioning the situation. Instead of viewing the defendant as the Criminal, the lawyer sees him as the Accused and instead of viewing herself as the Criminal's Representative, she becomes the Advocate for Justice, courageous in its most difficult service.⁹⁰

E. Obstacles to Emotive Understanding and Control

The forces that combine to create an initial emotional reaction are complex and often hidden. They include genetic makeup, cultural teachings, and personal background.⁹¹ As a result, we all experience emotions which we realize are unjustified, either in basis or degree, but which resist change. A person may conduct personal relationships in a manner destructive to those relationships because of deeply engrained emotive patterns, even while recognizing the destructive pattern and wishing to change it. Intellectual insight alone is often insufficient to alter the emotional dynamic.⁹² As modern psychology teaches, we learn, feel and act according to processes which vary in their accessibility to deliberative influence.

Those unwarranted emotions that resist our deliberative efforts at reform are not the most serious obstacles to emotive control in moral decisionmaking, however. The fact that we try to change the emotion or its conclusion signifies an awareness of the problem.

⁸⁹ See Roberts, *supra* note 58, at 190-201.

⁹⁰ See N. FRIJDA, *supra* note 58, at 429; *id.* at 401-50 (reviewing methods of emotion regulation).

⁹¹ See Rorty, *Explaining Emotions*, in EXPLAINING EMOTIONS, *supra* note 54, at 105-06. Many philosophers and psychologists have argued for the primacy of cultural aspects of emotion. See generally THE SOCIAL CONSTRUCTION OF EMOTIONS, *supra* note 80; R. DE SOUSA, THE RATIONALITY OF EMOTIONS, *supra* note 58, at 249-52.

⁹² See Calhoun, *supra* note 66, at 327-42. Calhoun discusses the distinction between intellectual knowledge, which is based on conscious, deliberative reasoning, and evidential knowledge, which is based on direct experience. Calhoun uses this distinction to explain, within a cognitive theory of emotion, the apparent paradox of persons simultaneously holding contradictory intellectual and emotional appraisals of a situation. See also Roberts, *supra* note 58, at 196-201; R. SOLOMON, *supra* note 58, at 421-22; *cf.* Rorty, *supra* note 91, at 103-26. This raises the central philosophical problem for a cognitive approach: how emotions are intentional, i.e., involve rational decisionmaking, yet remain submerged in consciousness. Many different explanations have been offered. See, e.g., R. DE SOUSA, THE RATIONALITY OF THE EMOTIONS, *supra* note 58, at 92-105; Rorty, *supra*; Warner, *Anger and Similar Delusions*, in THE SOCIAL CONSTRUCTION OF EMOTION, *supra* note 80, at 149-51. Most promising seem De Sousa's and Rorty's use of a multi-leveled, multi-faceted model of intentionality, suggesting a self influenced by many factors and only partially integrated at the level of highest consciousness.

Awareness, even if it does not lead to emotive change, presents the opportunity for separating emotional impulse from deliberate action. Even if a legal decisionmaker cannot suppress an unwarranted emotion, for example, she can work to insulate the decision from the influence of that emotion. If we can feel angry enough at another person to want to kill him and yet desist, surely we can experience certain emotions in a legal context and yet minimize their decisional impact. This is not an easy or optimal solution, but, in some instances, it may be the best we can do.

The more dangerous emotions in terms of amoral influence are those that the holder does not recognize: self-deceptive emotions.⁹³ If I act in a way that causes another pain, I may "decide" that I do not want to feel bad about it. As part of my strategy of avoiding guilt, I concentrate on all the ways that the victim is to blame for the situation until I feel anger at the victim and can act with an apparently free conscience. My anger is self-deceptive because it is built on a cognitive fiction.

The law's myth of dispassion encourages a kind of emotional self-deception. Here, the individual does not deceive himself as to the kind of emotion experienced but to the very fact of an emotional experience. In a context where all are emotionally torn, the decisionmaker may seek immunity from emotion. He concentrates so hard on rationalistic considerations that he denies having any feelings about the matter in dispute. Yet in reality emotional influence has not disappeared; it has merely gone underground, where its influence may remain substantial. In this situation, when the decisionmaker justifies his ruling by rationalistic reasons, he does not provide a moral, rational or causal explanation, he supplies a rationalization of an unexamined emotive conclusion.⁹⁴

Self-deception in the emotional arena is a basic fact of life and a major cause of the law's distrust of emotions. Yet we are not helpless to combat it. Self-deception thrives only where we lack a commitment to self-honesty. Honest reflective reappraisal will expose the deception, leaving it open to change.⁹⁵ If we have the courage to face our true selves, the dangers of self-deceptive emotions and self-deception about emotion will prove manageable.

⁹³ See generally De Sousa, *The Rationality of the Emotions*, *supra* note 58, at 147-48; De Sousa, *Self-Deceptive Emotions*, *supra* note 54, at 283-97; R. SOLOMON, *supra* note 59, at 287-88.

⁹⁴ See R. SOLOMON, *supra* note 58, at 395-412; De Sousa, *Self-Deceptive Emotions*, *supra* note 54, at 287-88.

⁹⁵ R. SOLOMON, *supra* note 58, at 413-26; De Sousa, *Self-Deceptive Emotions*, *supra* note 54, at 294-95.

III

RETRIBUTION IN EMOTIVE TERMS

We have established so far that, where accuracy is all-important, sentencing under a retributive theory requires sentencer discretion, that given discretion sentencers are necessarily subject to the influence of certain emotional reactions that may or may not be morally relevant, and that emotions are based on cognitive assessments and so are subject to rational control. The final step in the argument is to show how we may exercise moral control of the emotions so that decisions of deserved punishment will be morally justified, even if emotional. This will be accomplished in two stages: first, by constructing a moral-emotive theory of punishment; and second, by devising a means of translating that theory into meaningful and accessible emotive terms.

A. A Moral-Emotive Theory of Punishment

Emotions as they are commonly categorized do not comport with moral principles, or at least not with principles of deserved punishment.⁹⁶ As we have seen, the dominant emotions with regard to punishment—anger and sympathy—can be moral or amoral as they apply to the issue of what punishment is deserved. In order to bridge the gap between emotion and morality, we must translate our moral theory of retribution based on respect for persons into an emotional construct. We must find an emotive equivalent to the base-line principle of respect for persons and then determine how that principle applies to retributive punishment. I adopt the Biblical concept of agape as the emotive counterpart of the respect for persons principle. Agape encompasses the essence of respect for rational, moral persons but describes the respect principle in emotional terms.⁹⁷

⁹⁶ There may be a closer link between emotions and moral principles under other moral constructs, such as hedonism. For a discussion of emotivism which also posits a more direct relationship, see *supra* note 59.

⁹⁷ This move to theology may provoke at least two opposing objections which should be addressed. First, some may object that secular morality stands entirely apart from theological ethics and that the secular morality of law must remain free of theological influence. Yet morality is morality whatever its origins. The ethical principle of caring for others that I employ may be found in the work of Kant as well as in the Bible. See THE DOCTRINE OF VIRTUE, *supra* note 6, at 118. As I use this principle, it is secular, dealing only with human relations. I acknowledge its theological origins in order to emphasize the concept's emotive force, which is often lost in the translation to secular objects. Theologians embrace the emotions as critical to moral character; all too often philosophers treat the emotions as the stuff of moral heresy.

The second objection may come from theologians who object to severing a religious concept such as agape from its theistic roots. Within the Christian tradition, the ideal love of humans for each other flows from God's gift of love for all humans, even those who sin. *E.g.*, C. SPICQ, AGAPE IN THE NEW TESTAMENT 141-43 (M. McNamara &

1. *Respect For Persons and Agape*

Respect for persons holds that our fundamental obligation to other persons is to respect them because of their capacity to recognize and make free moral choices. The obligation of agape,⁹⁸ the Greek term used in the New Testament of the Bible to describe man's ideal love for his fellow man, provides an emotive counterpart to the respect principle.⁹⁹ Like respect for persons, the obligation of agape is to value all persons, but the valuing is stated in emotive rather than cognitive terms. Agape requires not that one respect one's neighbor, but that one "love thy neighbor as thyself."¹⁰⁰ Agape is "the basic 'law of life,' " based on man's distinguishing characteristic, his freedom to choose between good and evil.¹⁰¹ It is man's ability to choose his own moral destiny which makes the decision to feel agape for another a moral one.¹⁰² Agape's focus on essential moral worth distinguishes it from other kinds of caring for persons.

Agape contrasts with the other Greek word for love, "eros," which refers to passionate, romantic love.¹⁰³ Eros involves a personal, ego-based attachment to another; agape refers to an affection without ego or hope of personal gain.¹⁰⁴ Eros is a form of self-love, an attachment to another based on the lover's self-interest. Self-

M. Richter trans. 1963); *translator's preface to id.* at ix; C.S. LEWIS, *THE FOUR LOVES* 174-92 (1960). To wrest it from the theistic context necessarily alters the concept. This may be so, but the theistic origins of the concept are irrelevant to my present purposes. The principle is basic to our moral system and does not depend for its secular correctness on its theologic heritage. For purposes of this Article, I consider it as a secular moral principle.

⁹⁸ There are a number of different versions of agape. I have tried to work with the core concept here. For a survey of the many varieties of agape discussed by theologians and philosophers, see G. OUTKA, *AGAPE* (1972).

⁹⁹ R. DOWNIE & E. TELFER, *RESPECT FOR PERSONS* 29 (1970); MacLagan, *Respect for Persons as a Moral Principle—I*, 35 *PHIL.* 193, 207 (1960).

¹⁰⁰ *Matthew* 22:37-40.

¹⁰¹ Robertson, *Introduction to R. NIEBUHR, LOVE AND JUSTICE, SELECTIONS FROM THE SHORTER WRITINGS OF REINHOLD NIEBUHR* 12 (D. Robertson ed. 1957).

¹⁰² See IV K. BARTH, *CHURCH DOGMATICS* pt. 2, at 733 (G. Bromiley trans. 1958).

¹⁰³ See D. DE ROUGEMONT, *LOVE IN THE WESTERN WORLD* (M. Belgion trans. 1956).

¹⁰⁴ Some theologians have contended that agape is an ethical attitude rather than an emotion. See J. FLETCHER, *SITUATIONS ETHICS* 104-06 (1966). However, I cannot see how any term which translates as "love" and mandates caring for others can be defined as unemotional. See P. TILLICH, *LOVE, POWER AND JUSTICE* 3 (1954) (agape "elicits a feeling of warmth, of passion, of happiness, of fulfillment, whenever it is used."). In the effort to distinguish agape from such ego-based feelings as friendship and romantic love, Fletcher and others have confused distinctions relating to moral content with the distinction between an attitude and an emotion. Both agape and romantic love describe emotions; they cannot be distinguished by calling one a "feeling" and the other an "attitude." They are distinct from one another only because of the different moral content of the judgments upon which they are based. Romantic love is a love for personal gain, even if it is expressed as the union of the self with another, while agape is selfless love without any hope of personal gain.

interested love has its own value, as in friendship or family relations, but as long as the emotional tie depends upon a relationship special to the lover, it is an affection distinct from agape.¹⁰⁵ Agape represents an affection without hope of or need for personal return. Although agape may bring benefits to the one who feels it, that is not its motivation.

2. *Retribution As Moral Caring*

As we have seen, respect for persons constitutes a set of moral principles that operate differently in different contexts. It provides different answers according to the questions asked. As a base-line principle of moral treatment, respect for persons places an absolute limit on conduct harmful to others and an absolute limitation on the nature of punishment. Respect for persons also provides a principle of moral evaluation, directing the assessment of culpability and the determination of proportional punishment.

Agape also operates differently according to context. As a principle of universal and unvarying moral treatment, agape sets the basic moral and emotional obligation of humans in their personal relationships. Agape, like respect for persons, values the moral potential of all humans. Agape urges a uniform love for others regardless of individual characteristics, including moral conduct. Thus, theologians argue that to have agape for another means identification with another's interests "in utter independence of the question of his attractiveness."¹⁰⁶ Agape represents an absolute and unforfeitable affection for another person, independent of the person's demonstrated weakness or evil.¹⁰⁷

This requirement of universal love presents an obvious problem in the punishment context. How can the obligation to love all persons equally, regardless of wrongdoing, be squared with the retributive principle that persons must be punished in proportion to their wrongdoing? The answer lies in distinguishing contexts. We must distinguish agape as a first order moral principle that sets a universal standard for personal relations from agape as it operates within one subset of human relations: the formal, legal duties of citizens to each other. We must distinguish between a purely moral obligation informing all personal interactions and a more limited moral obligation which informs legal relations. The distinction parallels that previously made with respect for persons, between the principle as a standard of universal moral treatment and as a stan-

¹⁰⁵ See IV K. BARTH, *supra* note 102, at 730-36.

¹⁰⁶ *Id.* at 745.

¹⁰⁷ R. DOWNIE & E. TELFER, *supra* note 99, at 19-20.

dard of moral evaluation.¹⁰⁸

Because man's basic worth depends upon his the *capacity* to make moral choices, it follows that the *exercise* of morality is important. If the exercise of morality is important, it must have consequences. Both agape and respect for persons suggest, therefore, that bad moral choices should be punished and good choices rewarded. To put this valuing in emotional terms, we should hate bad choices and love good ones. This need not contradict the first principle of caring for all persons because we can still care for them as persons while hating their bad choices. As St. Augustine wrote, the moral person "ought to cherish towards evil men a perfect hatred, so that he shall neither hate the man because of his vice, nor love the vice because of the man, but hate the vice and love the man."¹⁰⁹

In retributive punishment, therefore, it should be appropriate—and sufficient—for the sentencer to hate the criminal deed. While the sentencer retains that agapic duty to care for the offender as another fellow human, that sort of caring appears irrelevant to the particular issue of the amount of punishment deserved. While, to paraphrase St. Augustine, the sentencer should love the offender but hate the offense, the law of punishment concerns only the latter of these obligations. Or so it would appear. The human reality of punishment decision is that the two obligations are closely related. Translating moral duties into emotional terms is not a mere exchange of words; it also involves confronting the way moral and nonmoral factors intertwine in real-life judgments of desert.

Within the framework of retributive punishment, the agapic obligation is narrowly defined. In the official (i.e. nonpersonal) context of a punishment decision the sentencer's obligation is to care about (love the good, hate the bad in) the offender's choice to offend and to evaluate the choice as conscientiously as possible. Instead of valuing what the offender might become, the valuing is of what the offender was. It means denouncing the evil in the offender's choice and caring for the good that was in the offender, even if it was good overwhelmed by evil. I refer to this obligation as moral caring in order to distinguish it from the broader, first-order principle of agape.

Moral caring means caring for the good *in* an offender rather

¹⁰⁸ I do not seek to prove the validity of agape as a first principle just as I do not seek to prove the validity of respect for persons. Rather, I employ agapic obligations as emotive analogues to respect for persons and retribution in an effort to translate rationalistic concepts into emotive terms. Although I believe my argument to be faithful to the fundamental tenets of agape, the overall validity of the argument does not rest on that basis; it stands or falls on the faithfulness of the translation of rationalistic concepts into the emotive.

¹⁰⁹ ST. AUGUSTINE, THE CITY OF GOD bk. XIV pt. 6 (M. Dods trans. 1950).

than caring for the good *of* him. It means caring for the way in which the offender has exercised his moral capacities in the past, rather than how he might become a more moral person in the future. Within a retributive framework, moral caring means caring about the past exercise of moral choice; it ignores the offender's potential future choices. If we cared only for the good of the offender, then our caring would prevent imposing punishment in many instances where it was deserved.

3. *Moral Outrage*

In the context of punishment, which focuses on responsible acts of disrespect for others, moral caring means being angry at culpable acts of disrespect. I will refer to this emotion as moral outrage.¹¹⁰ Moral outrage represents caring for the morality of persons by denouncing their demonstrated evil—their responsible disrespect for others.¹¹¹ We should feel angered by the deliberate choice of an offender to commit an act of severe disrespect. Such a feeling demonstrates our commitment to preserving moral order and to society which promotes respect and regard for others.¹¹²

If our outrage is to be moral, however, it must be morally bounded. The first order principles of respect for persons and agape dictate that all persons, including the worst offenders, have the capacity for good as well as evil. Offenders are necessarily moral persons, as much as they may have acted like animals. Regardless of the degree of their evil, the obligation to recognize some value in them remains. We may not deem any offender a nonperson. In the context of punishment, moral caring sanctions anger at the offender, but only in proportion to the offender's responsible act of disrespect. The effort to ensure that anger remains proportionate and therefore morally justified is the most important and difficult aspect of a moral-emotive approach to retributive punishment.

¹¹⁰ I am not entirely comfortable with the phrase "moral outrage" because the word "outrage" connotes a passion which knows few bounds and therefore goes beyond any moral justification. See *infra* Section III(C)(3). Nevertheless, the phrase describes most accurately the emotive but morally-restricted concept I wish to convey. While our language has a number of words to describe feeling for the good of others (e.g., sympathy, compassion, charity, benevolence, and empathy), we have no words for the feeling associated with judging others' evil. Perjorative terms, such as revenge, vengeance, retaliation, and reprisal, are the only words with an emotive flavor which involve the punitive impulse. There are, of course, rationalistic terms such as just desert and retribution, but these words fail to capture the emotive nature of the concept.

¹¹¹ See J. FLETCHER, *supra* note 104. But see Wertheimer, *Understanding Retribution*, in 2 CRIMINAL JUSTICE ETHICS 19, 33-37 (1983) (questioning whether the retributive motivation for punishment is consistent with the principles of either love or respect for others).

¹¹² See W. BERNIS, FOR CAPITAL PUNISHMENT 153-55 (1979).

B. Problems in Application—Making Outrage Moral

The concept of moral outrage is not one of easy, practical application. To tell decisionmakers confronted by a horrific deed that they may be angry at its perpetrator, but not too angry, will tell them nothing of any practical use. Worse, by giving moral authorization to anger, we unleash the strongest of all emotions in punishment decisions and the one least susceptible to control. Anger's volatility makes it the most dangerous of emotions in criminal law.

The greatest risk in the moral-emotive approach is that sentencers will confuse moral outrage with its amoral emotive cousin, the passion of vengeance.¹¹³ On a conceptual level we may distinguish the two on the basis of the cognitive assessments underlying each; the distinction, in other words, between retribution and revenge. Retribution involves a judgment of wrong to the society according to publicly agreed principles of morality.¹¹⁴ Retribution seeks another's suffering, not to satisfy a personal need, but for a principle of good—enforcing respect for persons.¹¹⁵ The suffering it seeks to inflict is likewise limited by notions of public morality. By contrast, revenge arises from a judgment of harm to self made according to personal principles. One may seek to avenge oneself for an accidental slight to one's honor as much as for a deliberate crime. Even if the revenge sought is ostensibly for another's loss, the revenge-seeker is driven by a personalized vision of victimization: if you hurt my friend, you hurt me. Vengeance seeks personal gain in the form of restored dignity or power from another's suffering.¹¹⁶ Overall, retribution and revenge bear the same relation to each other as do agape and eros. Retribution and agape describe motivations based on publicly declared moral principles. Eros and revenge describe nonmoral personal motivations for action.

The problem comes when we attempt to translate these theoretical distinctions into easily comprehensible, emotional terms. Consider again the librarian murders. In the case of the nonresident offender, moral outrage would not permit the sentencing ju-

¹¹³ The confusion of these two has been responsible for much criticism of retribution, see *supra* text accompanying note 40, and for what has been called a "revenge taboo," a condemnation of any practice which hints of the emotions of revenge. See S. JACOBY, *WILD JUSTICE* 1-13 (1983).

¹¹⁴ Other distinctions include the following: revenge, unlike retribution, can be for a harm other than a wrong; and revenge knows no principled bounds in the extent of suffering it inflicts, where retribution is bound by principles of proportionality. See R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366-67 (1981).

¹¹⁵ See generally Moore, *supra* note 5; see also 41 T. ACQUINAS, *SUMMA THEOLOGIAE* 2a, question 108 (T. O'Brien trans. 1971). That is, according to retributive principles. Cf. Wertheimer, *supra* note 111, at 35.

¹¹⁶ *Id.* at 34-35; see also Hunt, *Punishment, Revenge and the Minimal Functions of the State*, in *UNDERSTANDING HUMAN EMOTIONS*, *supra* note 63, at 83-86.

rors to vent their special horror of and anger at crimes by nonresidents because these emotions are based on an assessment of personal violation irrelevant to the offender's desert. As community members, the jurors felt a loss of personal integrity and a concomitant need to avenge that loss which was entirely apart from the demands of retribution. But how are we to communicate this idea to them? If we tell jurors that they may be outraged by the offender's wrong can we really expect them to limit themselves, emotionally, to the extent of the offender's responsibility? Something more is required for the moral regulation of anger. In order to determine what that something is we need to know more about the temptation to render punishment decisions on an amoral, emotional basis.

The greatest temptation in assessing what punishment is deserved is to oversimplify—to exaggerate the good, or, more commonly, to exaggerate the evil of the offender. Culpability is morally complex. To say how much a person is responsible for the harm he or she has caused can be very difficult, especially if one is conscientious in evaluating possible limitations on personal responsibility. It is a daunting task both in terms of factual and moral evaluation. The option of judging crudely, ignoring ambiguities, becomes increasingly attractive.

Emotional reactions heighten the urge to oversimplify. Emotions, as mythological structures, have a symbolic purpose. They transform complex reality into something simpler and more readily meaningful to the observer. They are like dramatic works, designed to make persons and events appear larger, and simpler, than life. If their mythologic functions go unchecked, the offender becomes a cardboard character in a B movie, a caricature instead of a character, a symbol instead of a person.

In many instances, the sentencer's personal situation determines the direction of the amoral emotive temptation. Whether the sentencer is inclined for or against the offender depends on how the offender fits into the sentencer's preexisting emotional mythology. If the decisionmaker, because of her own business background, believes that people in business are generally upstanding and righteous, she will be inclined to see the businessman offender as upstanding and righteous.

Those who speak for an offender at time of sentencing often provide a dramatic example of the same dynamic. Relatives of an offender often plead for mercy on the offender's behalf, while denying the evil of which the offender stands convicted. They cannot admit the offender's commission of evil, because it that would make the offender a Criminal and within the pleader's mythology he is a cared-for Husband or Son. To accept the criminal reality would de-

stroy the myth, an event with painful and far-reaching consequences.

In the case of a serious crime, the decisionmaker's amoral emotive temptation is normally the opposite—to condemn beyond what is deserved. When called upon to judge a stranger who is responsible, to some extent, for a serious harm, the decisionmaker's temptation is to ignore moral complexities and declare the person and his act entirely evil. The decisionmaker labels the offender a Criminal, remaining indifferent to the person (he being capable of both good and evil) behind that label.¹¹⁷ In this way, the offender is designated as "other." The more we can designate a person as fundamentally different from ourselves, the fewer moral doubts we have about condemning and hurting that person.¹¹⁸ We assign the offender the mythic role of Monster, a move which justifies harsh treatment and insulates us from moral concerns about the suffering we inflict. The offender guilty of a terrible offense, such as brutal, fatal abuse of his children, inspires rage at his terrible deed. The magnitude of the harm and the apparent evil necessary to accomplish it create the temptation to look no further, to declare the offender as monstrous as was his act, without conscientiously examining culpability. The idea that the offender might have some moral excuse, however small, is too painful to contemplate.

In our private lives, the fact that we otherwise value those we judge checks the temptation to exaggerate their wrongdoing. The people who hurt us are often friends, relatives, colleagues—individuals whose good points we acknowledge and value. Our judgment of them takes place within a context of caring. This emotional restraint appears less frequently in criminal punishment decisions, where offenders are normally strangers to the sentencer, made more strange by social, economic, racial or other group differences.

Differences in group membership between punisher and punished increase the risk of nonmoral judgment. Morally identical offenders are likely to receive different punishments based upon nonmoral group membership distinctions. In the case of the librarian murders, the two juries rendered different sentences because of an amoral emotional predisposition, what I call the otherness temptation. This is the inclination to feel warmly towards those who ap-

¹¹⁷ In this way, empathy expresses the active caring of agape, the opposite of which is not hate, but indifference. See J. FLETCHER, *supra* note 104, at 63; R. ROBERTS, *SPIRITUALITY AND HUMAN EMOTION* 109-11 (1982).

¹¹⁸ E.g., Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1584-92 (1987); Sapontzis, *A Critique of Personhood*, 91 ETHICS 607, 613 (1981); H. WEIHOFEN, *supra* note 40, at 144-45. Many commentators have recognized this problem in the death penalty context. Radin, *supra* note 6, at 1182 n.124; Zimring & Hawkins, *supra* note 34, at 129; Weisberg, *supra* note 26, at 361, 391.

pear similar to the decisionmaker, and hostile to those who appear different. In the case of the librarian murders the otherness trait was community residence. A similar temptation causes whites to judge crimes committed by blacks against whites more harshly than if they were committed by blacks against blacks.¹¹⁹ In our legal system, decisionmakers and offenders often come from different social backgrounds, making the offenders strangers to the sentencer. This makes the otherness temptation particularly dangerous.

In some instances, the otherness temptation may operate in the offender's favor. In cases where the offender and decisionmaker share important social or personal similarities but the victim is apparently "other," the decisionmaker will be tempted to disregard the seriousness of the crime. In such cases, emotive support should be lent to moral outrage.

Emotional reactions to crime provide tentative approaches to punishment. They also constitute motivations that influence the punishment decision. A sentencer's emotional reaction provides a picture of the crime which the sentencer must then articulate and justify. Thus anger may be seen as a prosecutor, dedicated to the exposure and condemnation of evil. We see harm done to an innocent person, become angry, and then seek a person or persons to blame. Anger fuels the search for culpability and predisposes us to culpable as opposed to nonculpable explanations.

Just as we may not rely solely on the advocacy of prosecutors to produce just determinations of guilt or innocence, so we should not rely solely on anger to resolve the question of deserved punishment. Just as we need defense counsel to expose the errors of the prosecution in liability determination, so we need an internal, emotional opponent to anger to ensure the morality of penal decisionmaking. The general emotion which motivates a nonculpable view of the offender is sympathy. We need to define a kind of sympathy, which focuses on the relevant moral issues, to serve as our internal defense counsel. Empathy will serve this function.

C. The Empathy Obligation

As part of evaluating the offender's offense the decisionmaker should try to empathize with the offender, that is, care for the good in his character. Because the focus of the sentencing decision is the offender's choice to offend, the object of caring is the offender's moral character at the time of that choice. Instead of anger's pre-

¹¹⁹ See *infra* Section IV(C). There is also evidence that American juries generally find black defendants unsympathetic, and that whether or not the defendant appears sympathetic to the jury is an important factor in jury decision. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 194-218 (1966).

sumption of evil, empathy's presumption is of good, that is, of a capacity for and desire to act with respect for others. Empathy values and seeks to find the good in the offender's character.¹²⁰ Thus the sentencer should be informed of the obligation to care about the offender as a morally worthy creature and should be given the opportunity to hear about his good deeds, his capacity for and desire to do good. Together these requirements constitute what I will call the empathy obligation.

Empathy leads to moral understanding by revealing another person's moral perspective.¹²¹ Yet empathy is more than imagining another's moral situation from that person's perspective: it is caring about that moral situation. A sadist imagines his victim's suffering but has no respect or love for the sufferer.¹²² Empathy expresses the active caring of agape, the opposite of which is not hate, but indifference.¹²³ If a decisionmaker feels empathy for the offender, the decisionmaker will care about potential limitations on culpability. Empathy does not preclude a judgment of culpability, however. Aimed at moral understanding, empathy does not require or imply forgiveness. It simply strips away nonmoral reasons for blame.

Although the determination of deserved punishment focuses upon the offender's evil choice, it necessarily implicates the positive moral qualities of the offender. Empathy directs the evaluation of positive morality, thus setting the context for a final judgment of desert. As previously discussed, deserved punishment comprises two components, motive-intentionality and autonomy. Motive-intentionality examines the nature and extent of the offender's desire to do evil. But a decisionmaker can only accurately assess motive-intentionality in the context of the offender's desire to do good. Consider the case of the father convicted of his child's deliberate murder, through a pattern of physical abuse. The nature and source of the desire to harm are illuminated not only by the acts of abuse, but also by acts of love for the child. If the offender never demon-

¹²⁰ For other, similar views of empathy applied to the law, see Henderson, *supra* note 118 and Black, *The Human Imagination in the Great Society*, in *THE HUMAN IMAGINATION* 4-6 (1986). For a similar definition under the designation of sympathy, see P. MERCER, *SYMPATHY AND ETHICS* 4-19, 82-134 (1972). See generally Blum, *Compassion*, in *EXPLAINING EMOTION*, *supra* note 54, at 507-16. Cf. L. BECKER, *RECIPROCITY* 157-60 (1986).

¹²¹ See Henderson, *supra* note 118, at 1576-79, 1650-52; Moore, *supra* note 5, at 41; P. MERCER, *supra* note 120, at 118-30; M. SCHELER, *THE NATURE OF SYMPATHY* 49 (P. Heath trans. 1954). For interesting applications of similar principles to medical diagnosis and health care, see Margolis, *The Relevance of Emotions for Medicine*, in *UNDERSTANDING HUMAN EMOTION*, *supra* note 63, at 56-64 (diagnosis) and Ardal, *Of Sympathetic Imagination*, in *UNDERSTANDING HUMAN EMOTION*, *supra* note 63, at 65-71 (health care).

¹²² See, e.g., M. SCHELER, *supra* note 121, at 5; P. MERCER, *supra* note 120, at 82-116; Williams, *Styles of Ethical Theory*, in *ETHICS AND THE LIMITS OF PHILOSOPHY* 91 (1983). Cf. M. JAGGER & K. RICHARD, "SYMPATHY FOR THE DEVIL."

¹²³ See J. FLETCHER, *supra* note 104, at 63.

strated any love for the child, but showed pleasure in its pain then the inference is strong that the crime represented an evil of the most awful sort—a decision to take joy in another's suffering. Such a crime deserves a place at the top of our culpability hierarchy. If the offender was a loving father in many instances, however, then the choice to offend appears less devilish and more tragic.

Autonomy relates to the offender's ability to choose between right and wrong, good and evil. Autonomy evaluates the offender's moral struggle—the extent to which forces beyond the offender's own desires impelled the choice to offend. Empathy supplies the motivation to take autonomy limitations seriously. In the case of the child-killer, an empathic approach seeks evidence that the offender's ability to choose may have been diminished. If the offender was himself abused as a child, and we know that such victims tend to become abusers themselves, that knowledge gives us a needed perspective on autonomy. Within the autonomy continuum this perspective suggests that the homicide was less the result of a free-willed desire to do evil and more a choice compelled by forces emanating from outside the offender. As was the case with motive-intentionality, the offender, from this perspective, is less a figure of evil and more a person for whom we may feel emotionally, more a person who has moral worth despite his horrible crime.

As an emotive experience, empathy itself cannot be required. Although there are ways to prompt emotional reactions through manipulation (hence the description of a movie or book as a "tear-jerker"), no rule can mandate feelings. We can require that decisionmakers follow certain rational principles, but we cannot force them to alter their subjective world view.¹²⁴ Even if we could mandate emotions, the principle of respecting persons' choice-making abilities would preclude the attempt. The most we can require of decisionmakers is that they make an empathic effort. Even an unsuccessful effort may provide moral insight, by revealing an alternative perspective which would otherwise be ignored.¹²⁵

1. *Empathy and Sympathy*

Ideally, we should distinguish empathy from caring for others based on considerations not relevant to moral assessment. Often we sympathize with others not because we care about them or their situation as a matter of morality, but because something about their situation reminds us of our own. Mothers sympathize with other mothers, or lawyers with other lawyers, because of self-love, not

¹²⁴ W. LYONS, *supra* note 55, at 181; Williams, *Deciding to Believe*, in PROBLEMS OF THE SELF (1973).

¹²⁵ See generally *supra* Section 1(B).

moral caring. Empathy, by contrast, promotes feeling for another as good in itself, not because it makes the empathizer feel good.

Empathy as it has been defined here is not an everyday emotion. We cannot point to a common emotional situation and definitively state: "there it is." That is because, in practice the emotions of empathy and sympathy based on personal identification are often inextricably intertwined. It may be that the best we can do is to encourage caring and then seek to turn that caring to moral purposes. A return to the librarian murders will illustrate. The second jury, the one deciding the fate of the resident-offender, saw the offender as a member of their community and so cared about him. This reaction appears to have been a matter of self-love, not moral valuing under respect of agapic principles. But the practical effect was similar to that of empathy. Because jurors sympathized with the offender, they regarded him as person of value and took seriously the mitigating evidence he presented.¹²⁶

There can be no definitive determination that the decision of the jury in the second librarian murder case was correct while the first was not. The juries considered the same evidence in both cases. In both cases nonmoral influences involving the personal situations of the jurors and the offender played a role. Nevertheless we must decide which of these basic approaches we prefer. In this context, the law's ideal of an impersonal, dispassionate decisionmaker must be a dangerous illusion.

To insist that sentencers have no personal (as opposed to agapic) feelings about the punishment issue, would come close to prohibiting the decision itself. Virtually all decisionmakers bring some personal, emotional perspective to their decision. If we ignore this fact, but promote the impersonal approach through the myth of dispassion, we ignore the real problem of emotive influence. We condone nonmoral results, such as the disparate outcomes of the librarian murder cases, as long as the decisionmakers are not obviously biased.

Given that we must choose between imperfect methods of decisionmaking, the example of the second jury comes closer to the ideal of moral caring than does the first. The second set of jurors began with a sense that the offender had value; that valuing made them struggle with the extent of culpability. It provided an emotional anchor for their proportionality determination. The first jury

¹²⁶ Although beyond the scope of this Article to consider, philosopher Ronald De Sousa presents an intriguing argument for expanding the ethical view of emotions to include self-related emotions. He argues that these have moral content in that they are important to human thriving and that relations of the self to others provide the basis for ethical principles of general application. DE SOUSA, *supra* note 58, at 308-14.

arguably cut short its evaluation process as a result of nonmoral influence. It lacked the personal incentive to find mitigation which characterized the second jury. As previously stated, we cannot definitively state which of these decisions was right. In the capital context, however, we can express a preference for a process where the risk of error is borne more by the prosecution than by the defense. That may be the strongest reason to use the second jury as our model.

2. *Empathy and Moral Outrage—The Emotional Dynamic of Deserved Punishment*

Because of the magnitude of the capital decision, its complexity, and the degree of discretion enjoyed by sentencers,¹²⁷ sentencing decisions are likely to be emotional as well as rationalistic. Emotions help sentencers “fill the gap” in their moral reasoning.¹²⁸ Decisionmakers may rely less upon punishment theory than a pragmatic weighing of conflicting emotional accounts of the offense. The prosecution will tell a story designed to provoke anger; the defense will respond with one to evoke sympathy. The sentencer must choose between or among them. As the law now stands, this gives the prosecution a significant advantage at the punishment stage. The law’s sanction of retribution, and the fact of criminal conviction, give weight and legitimacy to the prosecution’s angry appeal. The defense needs a similar, legally authorized, emotional appeal to check that anger, to keep the debate within moral bounds. The empathy obligation fulfills this function. Empathy ensures due process by requiring that all offenders, attractive or unattractive, be judged according to the same desert scale. It is because we do not normally care about all persons but only those who are like us that articulating the empathy obligation is critical.

Sir James Fitzjames Stephen’s classic statement on punishment and revenge provides another way of seeing the dynamic of empathy and moral outrage. Stephen wrote: “The criminal law stands to the passion of revenge in the same relation as marriage to the sexual appetite.”¹²⁹ Few would argue that marriage is based entirely upon sexual attraction, just as few would argue that marriage generally works without it. The institution of marriage works by encouraging certain expressions of sexual desire and restraining others. If we redefine Stephen’s “passion of revenge” as anger at wrongdoing, we see it is a proper, and probably inherent, part of retributive punishment. Yet the morality of the penal decision depends on whether

¹²⁷ See *supra* Section I.

¹²⁸ See R. DE SOUSA, *supra* note 58, at 195.

¹²⁹ J. STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863).

anger is morally directed. The obligation to empathize helps ensure that it is. As in the relation between marriage and sex, empathy regulates a basic human instinct so that it may be expressed, but only within moral bounds.¹³⁰

This formulation of desert may appear intellectually "soft." It lacks the hard lines of rules or principles upon which both lawyers and philosophers generally insist. The traditional view would blame this on the emotive approach. Emotions are mushy, irrational influences which impede rational analysis. Speaking in terms of emotions does not promote conceptual clarity. The intellectual temptation is to declare the emotive approach incoherent and dangerous. But what is the alternative? Is taking emotion seriously worse than allowing decisionmaking based on a fiction of dispassion?

Moreover, if the version of desert employed here appears vague, we must ask whether that is because of its emotive terminology, or because of the vagueness of the desert concept. Perhaps the notion of a deserved punishment is itself a more intuitive, i.e., emotional, prereflective, judgment than its proponents acknowledge. If so, the "softness" of the emotive approach has the great advantage of candor.¹³¹

IV

EMOTIONAL JUSTICE—THE CAPITAL CONTEXT

We turn finally to the task of applying moral-emotive principles

¹³⁰ Although Stephen's statement may be interpreted consistently with the empathy obligation, he probably would not have subscribed to that interpretation. His brother and biographer wrote of Stephen: "His mode of passing sentence showed that his hatred of brutality included the hatred of brutes. He did not affect to be reluctant to do his duty. He did not explain that he was acting for the moral good of the prisoner or apologize for being himself an erring mortal. He showed rather the stern satisfaction of a man suppressing a noxious human reptile." L. STEPHEN, *LIFE OF JAMES FITZJAMES STEPHEN* quoted in Golding, *Criminal Sentencing: Some Philosophical Considerations*, in JUSTICE AND PUNISHMENT, *supra* note 3, at 103. See also 1 J. STEPHEN, *supra* note 24, at 478 (analogizing execution of criminals to extermination of dangerous animals such as wolves or tigers) and vol. 2, at 81-82 (urging the hatred of criminals).

¹³¹ This sort of conviction is essential to our personal morality, although its application to public morality is problematic. Bernard Williams writes:

[T]he intuitive condition is not only a state which private understanding *can* live with, but a state which it must have as part of its life, if that life is going to have any density or conviction and succeed in being that worthwhile kind of life which human beings lack unless they feel more than they can say, and grasp more than they can explain.

Conflict of Values, in MORAL LUCK 82 (1981). Williams contrasts private understanding of morality, which is generally comfortable with the idea of conflicting values and intuitive resolutions, with public life, which requires a reasoned explication or moral decisions and cannot easily accommodate the idea that moral values may irreconcilably conflict. See also Donagan, *supra* note 82.

to sentencing in capital cases. Before proceeding, I must offer an important caution, however. In this Article I take no position for or against the death penalty. The moral principles which justify and define punishment must be brought to bear directly on that question.¹³² For purposes of this Article, I consider death as the law's maximum punishment, similar to other punishments except for the requirement of maximum accuracy in culpability evaluation. Death is significantly more severe than any other punishment and is irreversible; for both reasons, accuracy is all-important. Otherwise, although the emotive issues are more dramatic and the case law concerning them richer in the capital context than elsewhere, the problem of emotive influence is essentially the same in any punishment context which permits sentencer discretion.

A. The Supreme Court, the Death Penalty and the Empathy Obligation

At the sentencing phase of a capital case prosecutors and defense attorneys frequently do battle over the "otherness" of the offender. Prosecutors seek to dehumanize defendants¹³³ while defense attorneys attempt the reverse.¹³⁴ Yet the battle itself is illegitimate. The legal categories of aggravating and mitigating factors do not concern the essential humanity of the offender. And any sentence based on a judgment that the offender is "other" must violate the basic principle of human worth upon which retribution is based.

The litigation over otherness in capital cases illustrates the point made at the outset—where the law permits sentencing discretion, emotions are necessarily implicated and if they are not ad-

¹³² Likewise, I take no position on the question of whether the moral principles of respect for persons or agape upon which I base my arguments support the death penalty either in theory or as it is now practiced. I step around this concededly vital issue in order to address problems of application which otherwise might not be examined. For better or for worse, capital punishment is presently lawful and, barring major unforeseen political or judicial upheavals, will remain so for the near future. Given that people will be executed, I believe lawyers, particularly academic lawyers, have a responsibility to consider not only the issue of justification but also the pragmatic issues of application. Although I advocate a method of improving capital sentencing, I should not be taken as endorsing the concept of capital punishment itself.

¹³³ *E.g.*, *Darden v. Wainwright*, 477 U.S. 168, 180 nn.11, 12 (1986) (prosecutor calls defendant an "animal" who "shouldn't be let out of his cell unless he has a leash on him and a prison guard at the other end of that leash."). See also *United States v. Cook*, 432 F.2d 1093, 1106-08 (7th Cir. 1970) (defendant termed "subhuman"), *cert. denied*, 401 U.S. 996 (1971); *Elvaker v. State*, 707 P.2d 1205, 1207 (Okla. Crim. App. 1985) (prosecutor refers to defendants as "creatures").

¹³⁴ J. CARROLL & D. BALSKE, *TRIAL OF THE PENALTY PHASE 2*, 8-9 (1984); Weisberg, *supra* note 26, at 361; Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 321, 338 (1983); White, *Juror Decisionmaking in the Capital Penalty Trial, An Analysis of Crimes and Defense Strategies*, 11 LAW & HUMAN BEHAV. 113, 115 (1987).

dressed, can cause significant moral error. The Supreme Court has in a number of decisions recognized different aspects of this problem, but has failed to develop a coherent method of addressing it. It has recognized only part of the empathy obligation.

1. *The Opportunity to Empathize*

In order to care about another person, we need to know something positive about him or her. Even assessing deserved punishment involves an evaluation of capacities for good as well as evil.¹³⁵ The modern tradition of presenting a wide range of information about offender and offense at sentencing has supported this kind of evaluation.¹³⁶ In capital cases, the Court has constitutionalized the sentencer's opportunity to consider offender's character. In a series of decisions based on the "uniqueness of the individual," the Supreme Court has tacitly approved part of the empathy obligation by prohibiting most restrictions on mitigating evidence and barring mandatory death penalties.

a. *Global Mitigation*

Regardless of a jurisdiction's capital punishment statute, the Court has held that the sentencer must be allowed to consider all "compassionate or mitigating factors stemming from the diverse frailties of humankind" that the defendant may offer in support of life.¹³⁷ The Court has struck down death sentences where trial courts either expressly or implicitly excluded from consideration a defendant's upbringing¹³⁸ or his adjustment to life behind bars.¹³⁹

The Court's decisions may be explained according to deterrent or rehabilitative theories of punishment. The decisions are also consistent with a broad view of retribution, however. Information considering the offender's moral decisionmaking before and after

¹³⁵ See *supra* text accompanying notes 120-31.

¹³⁶ Although it has probably done so for rehabilitative and deterrent reasons more than retributive. See *Williams v. New York*, 337 U.S. 241, 248-49 (1949).

¹³⁷ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (Stewart, J., plurality opinion). See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Burger, C.J., plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 276 (1976). In this respect, the statutory mitigating factors are essentially irrelevant; even if the proposed mitigation evidence does not implicate a statutory factor, it cannot be barred. *Hitchcock v. Dugger*, 481 U.S. 393 (1987); see *McCleskey v. Kemp*, 107 S. Ct. 1756, 1773 (1987). Yet the Court has continued to hold that mitigating evidence must be "relevant" and has allowed statutory schemes which restrictively define mitigation. *E.g.*, *Jurek v. Texas*, 428 U.S. 262 (1976); *Franklin v. Lynaugh*, 108 S. Ct. 2320 (1988). Thus, although juries may hear a wide range of mitigating evidence, the Court has not made clear what the jury must be told concerning its legal relevance. See *Franklin*, 108 S. Ct. at 2320.

¹³⁸ *Hitchcock*, 481 U.S. 393; *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

¹³⁹ *Skipper v. South Carolina*, 476 U.S. 1 (1986); see also *Sumner v. Shuman*, 107 S. Ct. 2716, 2724-26 (1987).

the offense sheds light on the moral decision that was the offense. This approach to mitigation permits the defense to present evidence supporting the moral worth of the offender. The jury is given a reason to care about the offender and resist the temptation to condemn without making a conscientious desert evaluation. In this way, the Court has worked to guarantee a defendant's ability to appeal to jury empathy, an important part of the empathy obligation.

b. *Prohibition On Mandatory Sentences.*

The Court has also protected the empathy obligation by prohibiting mandatory death sentences. In part for reasons of factual and evaluative complexity reviewed earlier,¹⁴⁰ the Court has determined that no legislative scheme can accurately distinguish offenders deserving death from those who do not. The Court has struck down all mandatory schemes it has reviewed, finding them "unduly harsh and unworkably rigid."¹⁴¹ Mandatory schemes categorize offenses in the abstract; they cannot evaluate the particular offense committed by the offender. Thus, a mandatory death sentence "treats all persons convicted of a designated offense not as uniquely human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of death."¹⁴² Mandatory sentences preclude empathy because they preclude individual offender consideration.

The Court has invalidated mandatory penalties for narrow sub-categories of first-degree murder such as a purposeful killing in commission of an armed robbery,¹⁴³ premeditated killing of a police officer in the performance of his official duties¹⁴⁴ and mandatory death for first-degree murder committed by a prisoner under sentence of life imprisonment.¹⁴⁵ The Court has held that, regardless of deterrent concerns which might support such penalties, "the fundamental respect for humanity underlying the Eighth Amendment requires that the defendant be able to present any relevant mitigating evidence that could justify a lesser sentence."¹⁴⁶ The defendant has a constitutional right to appeal to empathy.

¹⁴⁰ See *supra* Section I(D)(1).

¹⁴¹ *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (Stewart, J., plurality opinion).

¹⁴² *Id.* at 304; *accord*, *Roberts v. Louisiana*, 428 U.S. 325 (1976).

¹⁴³ *Roberts*, 428 U.S. 325; *Woodson*, 428 U.S. 280.

¹⁴⁴ *Roberts v. Louisiana*, 431 U.S. 633 (1977).

¹⁴⁵ *Sumner v. Shuman*, 107 S. Ct. 2716 (1987).

¹⁴⁶ *Id.* at 2727.

2. *The Obligation to Make an Empathic Effort*—California v. Brown

While the Supreme Court has constitutionalized the opportunity for empathy, the empathy obligation requires more than mere opportunity; the decisionmaker must make an affirmative effort to empathize. Despite some gropings in this direction, the Court has largely missed the importance of encouraging the empathic effort.

In *California v. Brown*¹⁴⁷ the Court demonstrated an understanding of empathy's relevance, but showed little insight into the problems of application. In *Brown* the trial court gave a capital sentencing jury the standard antisympathy instruction used in guilt phase proceedings. The trial court warned the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."¹⁴⁸ A four-justice plurality of the Supreme Court held that the instruction did not violate the eighth amendment because in context a reasonable jury would interpret the instruction "as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase."¹⁴⁹ Justice O'Connor, concurring, held the instruction permissible because the sentence imposed "should reflect a reasoned *moral* response to the defendant's background, character and crime rather than mere sympathy or emotion."¹⁵⁰ The plurality and Justice O'Connor were apparently concerned with distinguishing nonmoral emotional bonds between sentencer and offender, which should not affect the sentencing decision, from those morally based feelings which are permissible.¹⁵¹

The *Brown* case turns on the problem of translating moral terms into the emotive. The issue was not whether the instructions could be reasonably interpreted in a way consistent with constitutional principles; rather, the question was what the jurors probably understood by those instructions. As the *Brown* dissenters pointed out, the most likely interpretation of the instructions by the jury, in the context of the case, bore little resemblance to the interpretation of either the plurality or of Justice O'Connor.

Justice Brennan argued in dissent that they jury might well have interpreted the instruction as prohibition against any emotional re-

¹⁴⁷ 479 U.S. 38 (1987).

¹⁴⁸ *Id.* at 539. *McGautha v. California*, 402 U.S. 183 (1971) provides an interesting contrast. The trial court told the sentencing jury in a discretionary capital punishment situation, "in this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case." *Id.* at 189.

¹⁴⁹ *Brown*, 479 U.S. at 542.

¹⁵⁰ *Id.* at 545.

¹⁵¹ *See supra* Section III.

sponse to the evidence.¹⁵² He noted that the prosecutor cited the instruction in his final argument as part of a general antisympathy plea. The prosecutor argued that the defense mitigation evidence "was a blatant attempt by the defense to inject personal feelings in the case, to make the defendant appear human, to make you feel for the defendant and . . . you ladies and gentlemen must steel yourselves against those kinds of feelings in reaching a decision in this case."¹⁵³ The prosecutor's argument was designed to establish the irrelevance of the mitigation evidence and to promote the myth of dispassion. The prosecutor sought to prevent the jury from empathizing with the defendant.

The *Brown* Court misunderstood the full dimension of the problem of emotional influence in death cases.¹⁵⁴ In a context where juries have broad discretion in rendering a decision that is by nature emotional, the law must address the jurors' emotions clearly and directly. Instructions which seem to encourage the myth of dispassion are especially dangerous because they discourage emotional self-examination and therefore increase the chance of amoral emotional influence. The courts have an obligation to minimize such moral error by informing juries of their obligation to try to empathize with the offender as part of assessing deserved punishment.

B. Proposals

Where jurors perform a major sentencing function in capital cases, I propose the following jury instruction on moral-emotive principles. This instruction would provide the basic means of translating moral-emotive principles into action. Moral-emotive principles should also inform other aspects of litigation, including jury selection, admission of evidence at the sentencing phase and, of course, arguments at sentencing.

1. *Jury Instruction*

Courts should instruct capital juries on moral outrage and empathy as follows:

The sentencing decision which lies before you is one of the most important you will ever make. Although you should ap-

¹⁵² *Brown*, 479 U.S. at 550 (Brennan, J., dissenting).

¹⁵³ *Id.* at 553 (quoting from the record, Brennan, J., dissenting).

¹⁵⁴ The Court similarly missed or chose to ignore a violation of the empathy principle in *Johnson v. Oklahoma*, 108 S. Ct. 35 (1987) (Marshall, J., dissenting from denial of certiorari). The trial court had instructed jurors at the penalty phase, "you should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence." *Id.* at 36-37. The prosecutor, in closing argument, had disparaged the import of defendant's mitigation evidence concerning his background.

proach the decision rationally, your emotions—your feelings—will necessarily be involved as well. You should not let your emotions decide the case but rather should use your emotions to help you decide.

The crime of which [name of the defendant] stands convicted is one of great evil, and to the extent you feel anger at the wrongs to others for which the defendant is legally responsible, there is nothing wrong with feeling such anger. But anger can overwhelm proper judgment. To ensure that it does not, I suggest you try to care for the good in [name of the defendant].

As a human being [name of defendant] is a person who has done some good as well as bad and is capable of good as well as bad. Set aside your feelings about the crime for a moment and consider the defendant as you might a neighbor, a colleague at work, or a social acquaintance, someone that you know and care about. Consider the extent to which [name of the defendant] has done and is capable of doing good. Then reconsider what [name of the defendant] did in this case.

If, while keeping in mind all that is positive about [name of the defendant] you determine that [he or she] deserves the maximum penalty, then, and only then, should you vote to impose it.

In cases where the jurors and the defendant come from different social groups, the following instruction should be included:

When judging people, we all tend to be more sympathetic who are like us. This is a particular problem in our society which is made up of so many different groups. You have a responsibility to care about [name of the defendant] to the same extent as if [he or she] were like someone you know. Only if you can do that, can you fairly decide what punishment [he or she] deserves.

In those cases where the situations of the victim and the decisionmaker make it appropriate, an additional section on caring for the victim should be added along the following lines.

Some of what you have heard about the character of the victim in this case may lead you to view the offense as less serious than you might otherwise. Perhaps you might regard the offense more seriously if the victim were someone more like yourself or someone you know. You should remember that every human being has a basic worth and no one deserves to be killed without justification. In judging the seriousness of the offense imagine that the victim in this case was someone you might know—a colleague, a neighbor or the like—who acted as did the victim in this case and suffered a similar fate.

2. *Judges and the Empathy Obligation*

The obligation to make an empathic effort is at least as impor-

tant for a sentencing judge as it is for a jury. By virtue of position and experience, judges are probably less likely to react to the offender as a fellow human being and more likely to find maximum culpability than are jurors.¹⁵⁵ More than any other sort of lawyer, judges have promoted the myth of dispassion. The myth provides judges with tangible benefits; justice as dispassion allows judges to depersonalize (apparently) what would otherwise be painful personal decisions. Judges personify and gain prestige from the ideal of dispassionate justice. To persuade them that they are inevitably creatures of emotion and that they must take some special measures to deal with their emotions in certain cases, will be difficult.

a. *Judicial Training and Legal Culture*

Judicial education in the inevitability of emotion and the morality of empathy may serve as the first step in our moral-emotive endeavor. As part of their professional training judges should learn to recognize and confront their own emotional natures, so that they may better understand their own penal intuitions. Such education cannot succeed in a cultural vacuum, however. To be effective, this educational approach should occur as part of a general reexamination of dispassion in the law. Scholars, and others concerned with the broad shape of the law, must explore the complex relation between emotional reactions and legal policy in many different areas of the law. A general reconsideration of law and emotion will better define the limits of rationalistic rules and permit improved moral decisionmaking where rule regulation is difficult. The effort, if successful, will subtly alter the culture of law so that Emotion is no longer viewed as Evil, but a broad category of reactions whose natures and origins we must distinguish.¹⁵⁶

This describes a rather grandiose and long-term project. In the short run, even if moral-emotive principles win legal recognition, most judges will view them with skepticism, at least as they apply to judicial decisionmaking. Yet simple legal recognition will work its own cultural changes. If officially recognized, emotions can be the subject of direct legal argument. Lawyers will have the right to confront judges on the issue of emotional influence. Emotion will become a legitimate topic of discussion in the courtroom. Although only a first step, it is crucially important one.

¹⁵⁵ In general, jurors are less likely to condemn offenders to death than are judges. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1413 (1985). Judges are also less representative of the community. *Id.* at 1425-26; Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 47-48 (1985).

¹⁵⁶ See J. AVERILL, *supra* note 61, at 114-15.

b. *Rule Regulation—The Jury Override*

As a general proposition, moral-emotive principles do not lend themselves to strict rules for evaluating the correctness of decisions. One exception is where a judge overrides a jury's recommendation of a life sentence and imposes death. Here the law should translate the empathy obligation into a strong presumption against override.¹⁵⁷ Where a judge overrides a jury's recommendation of life, the empathy obligation requires that the judge explicitly credit, by formal written opinion, all good in the offender. This is especially important because that good may have persuaded the jury to vote for life. If nonstatutory mitigation was presented to the jury, the sentencing judge must consider this as well. The judge must demonstrate that he or she understands the inclinations which prompted the jury to recommend life and must, in a morally principled way, explain why the jury was wrong.

In reviewing jury overrides, the Supreme Court has paid lip service to the idea of additional scrutiny but, in its holdings, has resorted to law's usual deference to discretionary decisions by judicial officers. Instead of confronting the special institutional pressures on judges not to empathize, the Court has upheld overturned jury recommendations by means of two strategies for avoiding examination of the decisional merits: 1) that state appellate courts have already performed the strict scrutiny necessary; and 2) that a decision in conformance with sentencing guidelines is unimpeachable.¹⁵⁸ An examination of the first proposition lies beyond the scope of this Article.¹⁵⁹ As to the second, sentencing guidelines are clearly inadequate to ensure just results.¹⁶⁰ By treating the guidelines as virtual guarantors of a just result the Court has elevated the myth of dispassion to dangerous heights.

¹⁵⁷ This is aside from any arguments about the justification for the practice of allowing jury overrides.

¹⁵⁸ See *Spaziano v. Florida*, 468 U.S. 447 (1984) (no constitutional violation in jury override); *Barclay v. Florida*, 463 U.S. 939 (1983) (no constitutional violation where judge overrode jury recommendation and in so doing misapplied in part state law on aggravating and mitigating factors); see also *Dobbert v. Florida*, 432 U.S. 282 (1977) (trial court overrides 10-2 jury recommendation for life).

¹⁵⁹ For critical views of one state's experience, see Radelet, *supra* note 155; Mello & Robson, *supra* note 155. The Florida Supreme Court has justified jury overrides in part by the argument that judges are less susceptible to emotional influence than juries. *Porter v. State*, 429 So. 2d 293, 296 (Fla.), *cert. denied*, 464 U.S. 865 (1983); *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). This Article has raised a number of questions about the moral presuppositions of such an argument.

¹⁶⁰ See *supra* Section 1(C); Mello & Robson, *supra* note 155, at 60-62.

C. *McClesky v. Kemp*—Empathy, Race and the Limits of Moral-Emotive Guidance

The Supreme Court's recent decision in *McClesky v. Kemp*¹⁶¹ serves as a fitting recapitulation of many of the themes of this Article. The case illustrates the amoral emotive temptations to which discretionary sentencers are prone; it demonstrates the Court's commitment, nevertheless, to discretionary capital sentencing and underscores the need for moral-emotive guidance in that context. Finally, the case should stand as a caution that moral-emotive guidance, while important in encouraging moral decisionmaking, has severe limitations as a means of ensuring moral results.

1. *Race and Otherness*

The most dangerous otherness problem for a heterogeneous society is otherness based on group affiliation. Whenever a member of a group that is commonly designated as "other" by the majority population commits a crime, the majority psychologically attributes the crime to the other group. The crime becomes more frightening because committed by "another" and harsh punishment appears more warranted. This was the cause of the disparity in sentences in the hypothetical librarian murders. In a society such as ours, where race is an obvious and deeply-rooted source of social differences, race presents the most serious otherness problem. *McClesky v. Kemp* supplies an all too familiar illustration.

McClesky, a black man convicted and sentenced to die in Georgia for the murder of a white policeman, challenged his death sentence on grounds of racial discrimination. He presented statistical evidence showing that in Georgia, blacks convicted of killing white victims were 22 times more likely to receive the death penalty than if their victims were black.¹⁶² The statistical evidence also demonstrated that whites who killed whites were significantly more likely to receive the ultimate penalty than blacks convicted of killing blacks.¹⁶³ The strong inference from the statistics was that Georgia juries found white lives more valuable than black and were most frightened or incensed by cross-racial killings where blacks killed whites. Although the majority noted the trial court's criticisms of defendant's statistical studies,¹⁶⁴ the majority did not deny that McClesky had presented disturbing evidence of systemic racial bias.¹⁶⁵

¹⁶¹ 107 S. Ct. 1756 (1987).

¹⁶² *Id.* at 1785 (Brennan, J., dissenting); *id.* at 1763-64 (Powell, J., majority opinion).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1764-65 n.6.

¹⁶⁵ One scholar has argued that the most disturbing aspect of this statistical showing is not discrimination against black defendants, but discrimination against black victims,

McClesky's statistics demonstrated a familiar psychological tendency: that predominantly white decisionmakers tend to sympathize more with whites than blacks.¹⁶⁶ Whites recognize other whites as part of the commonality; they regard blacks as other.

2. The Discretion Dilemma

In *McClesky* the Court again faced the discretion dilemma: discretion is necessary to justice because rigid rules cannot capture the moral complexities of individual cases, yet discretion makes decisionmaking vulnerable to amoral, here racial, influence. The Court felt it had to choose between two evils: too-rigid rules or too-broad discretion. The Court chose the latter.

By a five to four margin, the Court found that mere statistical disparity is insufficient to challenge a system based upon discretion, because as long as discretion is permitted, statistical disparities are inevitable.¹⁶⁷ Accepting the defendant's claim, the Court argued, would devastate death penalty prosecutions and might lead to the abolition of discretion in a wide variety of legal contexts.¹⁶⁸ The Court assumed this would constitute a cure worse than the disease.¹⁶⁹ Having rejected the systemic challenge McClesky presented, the Court denied his appeal, finding that he had failed to demonstrate prejudice affecting his particular sentence.¹⁷⁰

In dissent, Justice Brennan noted that the statistics presented by McClesky showed race was a significant criterion for sentencers and argued: "[c]onsidering the race of a defendant or victim in deciding if the death penalty should be imposed is completely at odds with [the] concern that an individual be evaluated as a unique human being."¹⁷¹ Such moral error should not be permitted, regardless of the consequences of its elimination, Brennan argued.¹⁷²

The Court's treatment of racial bias in other criminal contexts underlines the consequentialist nature of the *McClesky* decision. Where the sought-for remedy does not threaten the basic legal structure, the Court has taken the problem more seriously. The

whose victimization is, in a relative sense, minimized by a criminal justice system which does not treat them as seriously as if the victims were white. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 439-47 (1988).

¹⁶⁶ Here, juror sympathy operates most strongly with regard to the race of the victim, rather than the race of the defendant. See Dane & Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts*, in *THE PSYCHOLOGY OF THE COURTROOM* 104-06 (1982).

¹⁶⁷ *McClesky*, 107 S. Ct. at 1777-81; see also *id.* at 1769-70.

¹⁶⁸ *Id.* at 1779-81.

¹⁶⁹ *Id.* at 1767-69. See Burt, *supra* note 33, at 1794-98.

¹⁷⁰ *McClesky*, 107 S. Ct. at 1766-67, 1777-79.

¹⁷¹ *Id.* at 1790.

¹⁷² *Id.* at 1791-94.

Court has required careful scrutiny for racial bias in the selection of grand jurors¹⁷³ and held that the right to a fair trial includes a right to a fair cross-section of the community in the prospective jury pool.¹⁷⁴ This requires representation of all distinctive groups within the jurisdiction's population, including blacks and women.¹⁷⁵ The Court has held that in capital trials of interracial crimes, defendants must have the opportunity to question jurors on racial attitudes.¹⁷⁶ And in all cases, in the selection of a jury the prosecution may not exercise its peremptory challenges on a racial basis.¹⁷⁷

3. *The Limits of Moral-Emotive Guidance*

I have argued that where the usual stuff of law—rules distinguishing situations based on objective criteria—is too crude a means of regulation, decisions are likely to be emotional. In such cases, decisionmakers should receive moral-emotive guidance, particularly in the form of the empathy obligation. This means that, given a commitment to retaining capital punishment, the best means of eliminating racial bias in capital sentencing would be to give the empathy obligation the force of law. I believe this proposition to be true, but that should not obscure the larger truth that in terms of *ensuring* just results, moral-emotive guidance has severe limitations.

Moral-emotive guidance assists decisionmakers with their own decision processes; it provides few means for after-the-fact evaluation of their decisions. We can tell whites not to regard blacks as “other” but in individual instances of the exercise of discretion we cannot tell whether they have followed that advice. Given our nation's history, it would be naive to suppose that a few well-chosen words of advice will solve the problem. Where we rely primarily on moral-emotive guidance, we rely primarily on the moral character of the sentencer.

All of which leads to two basic points about capital punishment. First, given that the American people and their courts have demonstrated a commitment to capital punishment and that discretion is required for accurate assessment of whether death is deserved, moral-emotive guidance is necessary and should prove helpful in minimizing moral error from emotional influences. Second, the provision of moral-emotive guidance will not ensure that sentences will be just. Instead, it represents a frank acknowledgement that the

¹⁷³ *E.g.*, *Rose v. Mitchell*, 443 U.S. 545 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977).

¹⁷⁴ *E.g.*, *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

¹⁷⁵ *Taylor*, 419 U.S. at 527-28, 531-38.

¹⁷⁶ *Turner v. Murray*, 476 U.S. 28 (1986).

¹⁷⁷ *Batson v. Kentucky*, 476 U.S. 79 (1986).

choice of life or death is essentially entrusted to the moral judgment of a few.

CONCLUSION

Like most fields of thought, the law has developed its own vocabulary for expressing concepts and promoting values. The language of law is the language of rationality, of the cool and the deliberative. While this insistence upon rationalistic expression has general merit in the elucidation of critical issues, in some instances it obscures more than it reveals. Where, as in criminal punishment, the influence of emotions is too fundamental to ignore or entirely condemn, the law's vocabulary requires expansion to permit emotive discourse.

Bringing emotions into legal discourse has its risk. We must take care that decisionmakers' personal, nonmoral inclinations do not substitute for legal principles in the resolution of controversies. Thus, where we can devise rules sufficiently determinate to minimize emotional influence, we should do so. When we reach the limits of law, when we enter those areas where rules lose their power to direct us toward just results, however, recognition of and struggle with emotional influence becomes necessary. In these mysterious places we need to reconcile thoughts and feelings.

In the seventeenth century Blaise Pascal wrote in his *Pensees*: "La coeur a ses raisons, que la raison ne connait [pas.]"¹⁷⁸ The heart has its reasons, which reason knows not. In our everyday lives we know what is right not only because we think it, but because we feel it. It is our challenge as lawyers to make the law see the sense of that insight.

¹⁷⁸ B. PASCAL, *PENSEES* 343 (H.F. Stewart ed. 1950). Pascal also wrote: "Two excesses: to exclude reason, to admit nothing but reason." *PENSEES* 85, ¶ 183 (A. Krailsheimer trans. 1966).