

2009

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Susan A. Bandes, Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty, 33 Vt. L. Rev. 489 (2009).

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Wed Sep 18 10:44:55 2019

Citations:

Bluebook 20th ed.

Susan A. Bandes, Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty, 33 Vt. L. Rev. 489 (2009).

APA 6th ed.

Bandes, S. A. (2009). Repellent crimes and rational deliberation: Emotion and the death penalty. Vermont Law Review, 33(3), 489-518.

ALWD

Bandes, S. A. (2009). Repellent crimes and rational deliberation: Emotion and the death penalty. Vt. L. Rev., 33(3), 489-518.

Chicago 7th ed.

Susan A. Bandes, "Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty," Vermont Law Review 33, no. 3 (Spring 2009): 489-518

McGill Guide 9th ed.

Susan A Bandes, "Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty" (2009) 33:3 Vermont L Rev 489.

MLA 8th ed.

Bandes, Susan A. "Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty." Vermont Law Review, vol. 33, no. 3, Spring 2009, p. 489-518. HeinOnline.

OSCOLA 4th ed.

Susan A Bandes, 'Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty' (2009) 33 Vt L Rev 489

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REPELLENT CRIMES AND RATIONAL DELIBERATION: EMOTION AND THE DEATH PENALTY

Susan A. Bandes^{*†}

ABSTRACT

It is often assumed that the anger, outrage, and other strong emotions provoked by repellent crimes interfere with rational deliberation. There is some truth to the notion that heinous murders and other shocking crimes place an enormous strain on the criminal justice system and may exert a destructive influence on institutional process. Nevertheless, the argument that strong emotion interferes with rational deliberation begs the question: What is rational deliberation? In this article, I argue for an understanding of rational deliberation that recognizes its pervasive emotional content. I suggest that the legal system operates on certain misconceptions about emotion that are harmful to institutional process. The most pervasive misconception is that the very attempt to address emotion is destabilizing to the rule of law. Though the legal system rarely incorporates scientific or social-scientific knowledge of emotional dynamics, it nevertheless operates on its own assumptions about how emotions work. It tends to take three approaches to emotion: requiring it to be “set aside” (e.g., the antisympathy instruction), permitting it to be “introduced” (e.g., the victim impact statement), and ignoring it (e.g., the refusal to clarify the meaning of life without parole despite evidence that juries misunderstand the term).

I argue that the legal approach to emotion and rationality is based on three primary misconceptions about the nature of emotion: 1) that emotions are tangible objects with an identity independent of the person they are in or the institutional context in which they occur; 2) that emotions are private and internal feelings rather than processes that take shape in a social world; and 3) that emotions are bursts of uncontrollable passion that short-circuit rational deliberation. Using the example of capital punishment, I illustrate that these misconceptions have serious consequences for the structure and operation of the capital system.

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† I owe special thanks to Carol Sanger for inviting me to deliver the Barbara Black Spring Lecture on Women and the Law at Columbia Law School for which this article was originally written. I am also indebted to Scott Sundby and to the participants in the University of California, Berkeley Center for Law and Policy bag-lunch series, the New York University Law and Culture Colloquium and the Criminal Justice Forum at Cleveland-Marshall College of Law for insightful comments on earlier drafts, and to Kayleigh Van Poolen for excellent research assistance.

INTRODUCTION

Is there something about repellent crimes, such as heinous and brutal murders, that places a particular strain on the legal system? Scott Turow, who has both prosecuted and defended capital cases, observed that “it is . . . extreme and repellent crimes that provoke the highest emotions—anger, especially, even outrage—that in turn make rational deliberation problematic for investigators, prosecutors, judges, and juries.”¹

Scott Peterson was accused of killing his lovely young pregnant wife while he was having an affair;² Susan Smith of drowning her two toddlers in her car after strapping them into their car seats;³ John Lee Malvo of shooting randomly picked strangers in a series of murders that terrorized the Washington, D.C. area;⁴ and Karla Faye Tucker of killing Deborah Thornton with a pickaxe because she happened to be in the room.⁵ These cases evoked intense community-wide emotions including fear, anger, and grief, as well as a general sense of a rupture in the social fabric. The crimes sparked a media frenzy that heightened the emotional intensity and spread it well beyond the immediate locale. Not every heinous murder garners national attention, but death-eligible murders tend to be horrifying enough to rivet the attention of the local community. The community shares in the horror of the crime, the fear while the perpetrator is at large, the agony of the victims’ family and friends, the outrage at the accused, and the desire to see justice done—and swiftly. Yet somehow the legal system, charged with deciding the fate of the accused, is expected to float free of this emotional intensity—an island of pure deliberative reason.

Brutal and shocking crimes exert enormous pressure on the criminal justice system. There is evidence that, despite the layers of process for which the capital system is well known, the investigation and prosecution of such crimes exerts a destructive influence on institutional process.⁶ It is not just the jury that may allow revulsion to overwhelm judgment; every legal institution charged with implementing the death penalty wrestles with the passions such

1. SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER’S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 34 (2003).

2. Nick Madigan, *California Man Arrested in Death of Wife*, N.Y. TIMES, Apr. 19, 2003, at A8.

3. *Woman Held in Drowning of Two Sons is Arraigned*, N.Y. TIMES, Jan. 17, 1995, at A10, available at 1995 WLNR 3784856.

4. Lynette Clemetson, *Retracing a Trail: A Troubled Youth; For Teenager, Troubling Bond in Chaotic Life*, N.Y. TIMES, Oct. 27, 2002, § 1, at 1, available at 2002 WLNR 3543739.

5. Sue Anne Pressley, *Pro-Death Penalty but Chivalrous Texans Debate Fate of Karla Faye Tucker*, WASH. POST, Jan. 25, 1998, at A3.

6. See generally JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995*, pts. I & II (June 12, 2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (finding error of “epidemic proportions” throughout the capital system).

crimes evoke. My focus is, in part, on the emotional dynamics that contribute to these extraordinary strains on the capital system.

However, I have broader ambitions for the article as well. The legal system's treatment of capital crimes provides a window into a larger discussion about the intersection of emotion and legal process. Capital punishment is both the best and worst starting point for such a discussion. It provides fertile terrain for discussing emotion in part because its emotional content is so salient⁷ and so obviously difficult to excise from the decision-making process. Strong emotions are expressed in the courtroom and the jury room; words like "mercy," "sympathy," and "vengeance" even creep into the official discourse. But the focus on the death penalty also lays a trap for those interested in the broader questions of emotion's role—the problem of death penalty exceptionalism. Capital punishment is depicted as an exceptional challenge to the system, implicitly positing a criminal justice system that is capable of acting rationally, but that is sorely tested, and sometimes overwhelmed, by the passions evoked in death penalty cases. But this formulation is misleading. It begs the antecedent question: What does rational deliberation consist of?

To focus solely on the intense passions elicited in death penalty cases is to mistake the pervasive and often invisible influence of emotion on every aspect of the decision-making process. The challenges that capital punishment poses for the criminal justice system, or for the rule of law generally, are not unique. Even in the capital context, the focus on salient emotions is dangerously misleading. This article discusses our system of capital punishment both as an institution in which emotional salience poses special challenges and as a pathway to the larger questions of emotion's role in the law.

I. THE LAW'S ATTITUDE TOWARD EMOTION: COULD WE PLEASE NOT TALK ABOUT THIS?

Decision-making in capital cases calls upon a complex blend of explicit rules, appeals to moral intuition, and abstract principles (like "cruel and unusual punishment" or "evolving standards of decency") that implicate a variety of cognitive, moral, and emotional processes. What is the institutional role in ensuring that this complex blend of rules and principles is designed to promote good decision-making? In other words, to what

7. Salience is a term in technical use in psychology, neuroscience, semiotics, and other disciplines. Although there are variations in meaning across and even within these disciplines, the term generally refers to the accessibility, intensity, or attention-getting properties of an event or other entity. Shih-Chen Yen & Leif H. Finkel, *Salience*, in 4 *ENCYCLOPEDIA OF THE HUMAN BRAIN* 237, 237 (2002).

extent should the criminal justice system incorporate knowledge of how decisions are in fact made? This question is a familiar one. The legal system is continually confronted with rapidly evolving scientific and social-scientific knowledge, and with difficult questions about how to evaluate and respond to it. For example, how should law incorporate evolving scientific knowledge about climate change or lie-detection techniques? Or evolving social-scientific knowledge about comprehension of jury instructions or the psychological effects of spousal abuse? However, legal professionals generally do not view information about emotion the way they view other interdisciplinary knowledge. Instead of worrying about what the legal system ought to do with new information about emotional dynamics, they worry about whether it is advisable to start down this path of inquiry at all.

Questions about the role of emotion meet with somewhat less resistance when they are couched in other terms. The debate about morality's role in law continues unresolved, but its status as a proper subject of debate is unquestioned.⁸ It is acceptable to talk about human behavior, judgment, and cognitive bias. And it has become much easier to talk about emotion itself now that cognitive neuroscience has begun to study it. Brain imaging has given the fuzzy concept of emotion a comforting materiality. As Jerome Kagan observes, "[t]he ability to visualize an abstract idea has extraordinary power to persuade us of the reality of the idea."⁹ Cognitive neuroscience has taken a study that has long been deemed "scientifically unpursuable"¹⁰ and made it respectable. It has also provided a scientific language that allows fear to be approached with reference to the amygdala, empathy with respect to mirror neurons, and trust in relation to oxytocin.¹¹

But to talk about the emotions of fear, anger, disgust, sympathy, or compassion, and especially to discuss the use of emotion by legal professionals as opposed to lay actors—for example, judges instead of juries—is a type of discourse that sounds strange to our ears. There is a sense in which the very discussion of it is viewed as destabilizing. Indeed, the term "emotion" when used in legal discourse has traditionally

8. See, e.g., Susan Bandes, *What's Love Got To Do With It?*, 8 WM. & MARY J. WOMEN & L. 97, 104–05 (2001) (discussing the acceptability in philosophical discourse of the language of values like "autonomy" but not of values like "love"); Symposium, *The Hart–Fuller Debate at Fifty*, 83 N.Y.U. L. REV. (forthcoming 2009) (conference announcement available at <http://www.law.nyu.edu/conferences/hartfuller/index.htm>) (revisiting the famous debate on law and morality between H.L.A. Hart and Lon Fuller).

9. JEROME KAGAN, *WHAT IS EMOTION?: HISTORY, MEASURES AND MEANINGS* 26 (2007).

10. Jaak Panksepp, *At the Interface of the Affective, Behavioral, and Cognitive Neurosciences: Decoding the Emotional Feelings of the Brain*, 52 BRAIN & COGNITION 4, 5 (2003).

11. *Id.*

functioned as a category of exclusion. To label an influence “emotional” is to say it is inappropriate—the very opposite of the reasoned discourse on which the legal system is premised. The traditional approach is to define those influences regarded as improper as irrational and thus emotional, and to treat influences that undeniably pervade the legal system as really not about emotion at all—to talk instead about discretion, politics, advocacy, interpretive leeway, nullification, decisional frameworks, or even morality.

Recently a death penalty verdict was overturned because the jurors consulted the Bible during deliberations.¹² Specifically, the jury was consulting Leviticus and its call for “[an] eye for [an] eye; [a] tooth for [a] tooth.”¹³ The Colorado Supreme Court said that “[j]urors must deliberate . . . without the aid or distraction of extraneous texts.”¹⁴ Perhaps the court meant that jurors cannot bring their own materials into the jury room—such as Bibles, Black’s Law Dictionaries, Ouija boards,¹⁵ or, despite Henry Fonda’s famous scene in *Twelve Angry Men*, their own versions of the murder weapon. On the other hand, perhaps the court meant that biblical sources are distracting and extraneous, and that jurors should stick to applying the law.

The question of what counts as “extraneous” to a legal decision is complicated. When asked to determine what sort of punishment heinous murderers deserve, people consult their moral, ethical, and religious beliefs. They consult their emotional reactions—their empathy, disgust, and moral outrage. They consult their understanding of how the world works by relying on assumptions about why people behave as they do, about the relevance of background and upbringing, about who is redeemable and who deserves mercy, and about what ought to happen to those whose behavior transgresses moral boundaries.

These diverse influences on judgment lead to the questions at the heart of this article. Which influences on judgment should be considered distracting or extraneous? Is the emotion that imbues capital decision-making illegitimate? Can it be disentangled from moral, ethical, and

12. Kirk Johnson, *Colorado Court Bars Execution Because Jurors Consulted Bible*, N.Y. TIMES, Mar. 29, 2005, at A1, available at 2005 WLNR 4864980.

13. *Id.*

14. *Id.* There is a split in the circuits on this issue. See Warren Richey, *Supreme Court Lets Stand Death Sentence After Bible Reading*, CHRISTIAN SCI. MONITOR, Oct. 7, 2008, at 25, available at 2008 WLNR 19010373 (noting that the First, Fifth, and Eleventh Circuits have prohibited introducing a Bible into jury deliberations, whereas the Fourth and Ninth Circuits have permitted the reading of Bible verses during deliberations).

15. J.D. SUNWOLF, PRACTICAL JURY DYNAMICS 8 (2004) (discussing a case in which four jurors used a Ouija board to consult with the deceased victim during deliberations).

religious influences on judgment? In the conventional story, moral, ethical, and even some religious beliefs play a role in legal decision-making, however ill-defined. Emotion is regarded quite differently. This difference in treatment has much to do with how various influences are categorized. For example, despite the Colorado court's prohibition on bringing a Bible into the jury room, courts rarely object to prosecutors who exhort juries to abide by the "eye for an eye" injunction by returning a verdict of death.¹⁶ These references are rarely regarded as biblical, but are instead treated as proper arguments for retribution or for appropriate punishment. Conversely, defense appeals to exercise sympathy, mercy, or forgiveness toward the defendant tend to be classified as appeals to emotion. In other words, they are regarded as exhortations to the jury to turn away from fact and law and give in to influences that are irrational and illegitimate.

The problem with this asymmetry is not that the law abhors emotional responses. Nor is the problem that some emotional reactions take precedence over others—that is inevitable in an adversarial proceeding. The problem is the use of the category "emotional" to dismiss disfavored attitudes without analysis. The label "emotional" acts as a way of cutting off discussion and insulating or marginalizing certain attitudes and influences from scrutiny. For this reason, we need to pay close attention to what gets labeled emotional. We need to pay particular attention to assumptions about human behavior that go unchallenged or that "go without saying."¹⁷ We need a broader and more nuanced account of what "emotional" and "rational" mean. Only then can we debate which emotions advance the appropriate goals of the system, and investigate how to channel, educate, or discourage those that do not.

These rather lofty and abstract issues about the role of emotion are easier to think about in concrete legal contexts—appropriately so, since we are talking not about philosophy or psychology for their own sake, but about how to construct and conduct a legal system that has concrete and quite serious consequences. This article focuses on the capital context, which presents a conundrum. At first blush, the capital system seems a poor vehicle for a discussion of the law's failure to grapple with emotional influences. Emotion in capital trials is salient. It even receives some official

16. See Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715, 727 n.87 (2006) (discussing various cases from southern states that found the prosecutors' use of the phrase "eye for an eye" in closing statements did not constitute plain error).

17. For an excellent discussion of the assumptions about emotion that "go without saying," see Terry Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1282368.

recognition, as with appeals to mercy and the antisympathy instruction discussed below. Some of the emotion in the capital punishment context is obvious—but only some of it. Much of it is invisible—not categorized as emotional. On closer inspection, the capital system is a good illustration of what happens when we decide not to start down the path of inquiry into emotional influences—or when we assume such influences are easily cabined or addressed without any guidance from those disciplines that have studied emotional dynamics.

The capital system is built upon choices among competing emotional claims—some acknowledged and others not. Sometimes the system attempts to regulate or bar emotion explicitly. Sometimes it simply ignores emotion, regulating conduct as if no emotional variables were at play. And sometimes it actively tries to introduce emotion. This article illustrates each of these approaches. It argues that they reflect common and deeply entrenched misapprehensions about how law and emotion intersect and that these misapprehensions have serious consequences for the conduct of the capital system.

A. Putting Emotion Aside: The Antisympathy Instruction

First, consider one of the few situations in which the possibility of emotional influence is expressly acknowledged and made subject to regulation: the antisympathy instruction, which informs the jury that it “must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.”¹⁸

In capital cases, the jury at the penalty phase is faced with the task of rendering what is called a “reasoned moral decision” about whether the defendant should be executed.¹⁹ Jurors must determine the worth of the defendant’s life, weigh it against the gravity and harm of the crime, and determine whether the defendant deserves death. What does this mean in practice? How does one determine what is moral in this context and, moreover, whether one’s moral response is reasoned? Jurors are given little guidance on these daunting questions. Jurors receiving the antisympathy instruction are told, essentially, that a decision influenced by sympathy, passion, or sentiment is not a reasoned moral decision. Justice O’Connor, in her concurrence in *California v. Brown*, explained that the instruction properly recognized the jury’s decision as a moral inquiry into the culpability of the defendant and not an emotional response to the mitigating

18. *California v. Brown*, 479 U.S. 538, 539 (1986).

19. *See id.* at 545 (O’Connor, J., concurring).

evidence.²⁰ Consider the problems with this approach. Jurors are not given any guidance on what the term “sympathy” means. To complicate matters further, jurors are permitted to exercise mercy, but they are not given a definition of that term either. Moreover, they are given no instruction about the other strong emotions they are likely to experience in the wake of a capital trial and sentencing hearing. The implication seems to be either that jurors can give appropriate effect to their anger, outrage, empathy, and grief without any help, or that these reactions are not passions or sentiments, but simply reasoned moral responses.

Current research on moral decision-making muddies this picture even further. It is increasingly clear that emotion is an essential source of information about—and an essential influence on—social and moral judgment.²¹ Antonio Damasio and other researchers have observed that subjects with impaired access to their emotions may lose the ability to make decisions beneficial to their well-being or the welfare of others.²² Access to our emotions—our fear, compassion, remorse, and ability to empathize—enables us to perceive and attend to the emotions of others, evaluate the motives of others, and predict the consequences of our actions for others.²³ It also motivates us to care about these consequences. Some of Damasio’s patients had intact reasoning skills but could no longer feel emotion.²⁴ Like psychopaths, they understood the consequences of their actions but had lost the ability to care about the suffering of others.²⁵ The instruction to jurors to separate their moral instincts from their emotions when deciding whether the defendant should be sentenced to death is based on outmoded assumptions about moral reasoning.

How might these distinctions between reason, morality, and emotion play out in an actual jury room? In Scott Sundby’s fine book, *A Life and Death Decision*, in which he draws on interviews with the members of several capital juries after they render their verdicts, he tells the affecting story of Peggy, the sole holdout against a capital sentence on a twelve

20. *Id.*

21. See Jonathan Haidt, *The Moral Emotions*, in HANDBOOK OF AFFECTIVE SCIENCES 852, 852–70 (Richard J. Davidson et al. eds., 2003) (discussing the increasing number of studies regarding moral emotions and claiming that “emotions are in fact in charge of the temple of morality”).

22. ANTONIO DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 34–51 (1994) (discussing Elliot, a patient with damage to his prefrontal cortex). As Damasio points out, the particular pathology will depend on the nature of the neurological damage at issue. *Id.* at 38.

23. See, e.g., William D. Casebeer, *Moral Cognition and Its Neural Constituents*, 4 NATURE REV. NEUROSCIENCE 841, 843–44 (2003) (discussing theory of mind as an essential component of moral reasoning).

24. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 824 (2001) (discussing experiments by Damasio).

25. *Id.*

person jury.²⁶ Peggy listened to the evidence of the defendant's childhood and gained a glimmer of understanding about how he got caught up in a cycle of violence.²⁷ She thought she saw pain and confusion in his demeanor, and this led her to see him as capable of redemption.²⁸ She heard evidence of how his younger brother died during an incident in which the two were experimenting with alcohol and how he forever after felt responsible for his brother's death and its effect on his family.²⁹ This testimony moved her because she had both a sister and a daughter.³⁰ How should we describe her process here? Is it empathy, sympathy, a merciful attitude? Her outlook was, in some respects, affected by her religious beliefs as well.³¹ She tended to believe people are redeemable and to separate the sinner from the sin.³² How are we to separate the legal, moral, religious, and emotional aspects of her deliberative process? How are we to separate her deliberative process from her preexisting assumptions about how people behave and how the world works? If her approach was inappropriately emotional, then how is a juror meant to give effect to mitigation evidence and weigh it against the facts of the crime?

The antisympathy instruction is problematic for what it says, but also for what it does not say. The singling out of sympathy for mention in the instructions sends an implicit message that any other influences do not count as emotional. This implication is often made quite explicit. For example, in *Saffle v. Parks*, in which the jury had received an antisympathy instruction, the prosecutor said in closing argument:

[Y]ou're not yourself putting Robyn Parks to death. You just have become a part of the criminal justice system that says when anyone does this, that he *must* suffer death. So all you are doing is you're just following the law [I]t's not on your conscience. . . . God's law is the very same. . . . So don't let it bother your conscience, you know.³³

26. SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 59–103 (2005).

27. *Id.*

28. *Id.* at 62.

29. *Id.* at 71.

30. *Id.* at 85–86.

31. *Id.* at 70.

32. *Id.*

33. *Saffle v. Parks*, 494 U.S. 484, 512 n.13 (1990) (Brennan, J., dissenting) (first alteration and emphasis added in *Saffle*).

This misstatement of the law (which did not mandate a death sentence)³⁴ is, of course, an evocation of the *lex talionis*: the law of “an eye for an eye.” Yet it barely registers as a discussion about vengeance or retribution, or about religion or morality. It is treated like a garden-variety argument about the law.

And this selective coding is just what Sundby describes in his account of Peggy, the holdout juror—the other jurors regarded her as too weak-minded, emotional, and irrational to do the job with which she was entrusted.³⁵ They thought she was violating her oath to vote for death where warranted.³⁶ They told her to “get [her] feelings off the defendant and onto the victim—be sensible, be realistic.”³⁷

Another juror’s son was in a car crash during the deliberations; he survived but the juror then had a visceral sense of what it is like to lose someone without saying goodbye.³⁸ During deliberations, he often referred back to this sense and linked it to the inability of the victim’s family to say goodbye to the victim before he was murdered.³⁹ Yet this juror’s argument was not regarded as emotional—simply as making what was at stake more concrete. The emotions that lead to a death sentence are coded as tough-minded, evincing an ability to follow the law even when it is difficult.

B. Showing Some Emotion: Victim Impact Statements

In some instances, the legal system may explicitly permit the introduction of emotion, as it did in *Payne v. Tennessee*, which held that it is permissible for the families of murder victims to describe the emotional impact of the crime to the court and the jury at the penalty phase of a capital trial.⁴⁰ The *Payne* decision upheld the delivery of a heartbreaking

34. See OKLA. STAT. ANN. tit. 21, § 701.11 (West 2009) (effective July 24, 1976; amended 1987 in a manner not relevant here) (defining conditions under which a jury *may* impose the death penalty, but omitting any circumstances under which the death penalty is *required*); see also *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (striking down North Carolina’s death penalty statute because, *inter alia*, the mandatory sentencing procedure did not allow for “particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death”).

35. SUNDBY, *supra* note 26, at 67.

36. *Id.* at 90–92.

37. *Id.* at 88.

38. *Id.*

39. *Id.*

40. *Payne v. Tennessee*, 501 U.S. 808, 825 (1981). The reasoning in *Payne* does not explicitly acknowledge the emotional content of the statements. Rather, it depicts the statements as a vehicle for providing additional information to the jury—specifically, a fuller understanding of the harm caused by the crime. *Id.* For discussions of the emotions evoked by victim impact statements, see Susan Bandes,

statement by the mother of a murder victim:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.⁴¹

Although this testimony is nearly unbearably painful to read, and must have been devastating to hear in court, the *Payne* court saw such statements as conveying information, not emotion.⁴² It described them as “simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question.”⁴³ What sort of information are victim impact statements meant to convey? Victim impact testimony is not meant to convey the fact of the murder—that is established in the guilt phase. It conveys the emotional impact of losing the particular victim. The Court in *Payne* expressed confidence that courts would bar unduly inflammatory victim impact evidence whose prejudicial emotional effect outweighed its informational value.⁴⁴ But the distinction between prejudicial effect and informational value borders on the incoherent in this context, given that the value of the information is its ability to evoke pain and make grief salient.

The Supreme Court recently declined an opportunity to clarify this distinction, denying certiorari in two cases involving victim impact testimony in the form of two emotionally powerful films about the lives of the victims.⁴⁵ One of these included music by Enya, a voiceover by the victim's mother, and a concluding shot of wild horses running free (depicting “the kind of heaven” in which the victim's mother said her daughter belonged).⁴⁶ The California Supreme Court held the videos admissible, finding that they “expressed no outrage,” and contained no

Empathy, Narrative, and Victim Impact Statements, 63 U. CHI. L. REV. 361 (1996) [hereinafter *Bandes, Empathy*]; Susan Bandes, *Victims, “Closure,” and the Sociology of Emotion*, in *LAW & CONTEMP. PROBS.* (forthcoming 2009) (manuscript at 11–15, on file with the *Vermont Law Review*) [hereinafter *Bandes, Victims*].

41. *Payne*, 501 U.S. at 814–15 (quoting Mary Zvokanek, mother and grandmother of the victims).

42. *Id.* at 825.

43. *Id.*

44. *Id.* at 831 (O'Connor, J., concurring). Justice O'Connor opined that where the admission of the evidence rendered the sentencing process fundamentally unfair, it might run afoul of the Due Process Clause. *Id.*

45. *People v. Kelly*, 171 P.3d 548 (Cal. 2007), *cert. denied*, *Kelly v. California*, 129 S. Ct. 564, 564 (2008) (Stevens and Breyer, JJ., dissenting).

46. *Kelly*, 171 P.3d at 570.

“clarion call for vengeance,”⁴⁷ but “just implied sadness.”⁴⁸ Similarly, it held that the video montage in the companion case was “not unduly emotional.”⁴⁹ The California court betrayed a misunderstanding of the nature of emotion—it searched for a salient emotional message, found none, and thus overlooked the devastating emotional impact of the testimony. In his dissent from the denial of certiorari, Justice Stevens quoted a federal district court judge who said of his own exposure to victim impact testimony:

I cannot help but wonder if *Payne* . . . would have been decided in the same way if the Supreme Court Justices in the majority had ever sat as trial judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony . . . and the juror’s sobbing during the victim impact testimony still rings in my ears.⁵⁰

Victim impact testimony is imbued with emotion, as this judge’s description attests. It also conveys information. As Justice Breyer observed about the video montage in the California case, it did “remind the jur[ors] that the person whose life was taken was a unique human being,” which gave them “a quick glimpse of the life’ the defendant ‘chose to extinguish.”⁵¹ It did this by evoking emotion in a way a cold evidentiary record could not have accomplished. The questions are whether the information conveyed was relevant, and whether its emotional impact interfered with the jury’s ability to deliberate on all the relevant evidence. As Justice Stevens pointed out, “[n]o member of the [California] court suggested that the evidence shed any light on the character of the offense, the character of the offender, or the defendant’s moral culpability.”⁵² The sharp distinction between evidence that evokes

47. *Id.* at 571.

48. *Id.*

49. *Id.* at 570. In *Zamudio v. California*, the video montage contained 118 photographs of the victims at various stages of their lives, including their childhood and early years of marriage, and concluding with photographs of the victims’ graves. *Kelly v. California*, 129 S. Ct. 564, 567 n.3 (2008) (Stevens, J., dissenting) (citing *People v. Zamudio*, 181 P.3d 105 (Cal. 2008)), *denying cert. to Kelly*, 171 P.3d at 548.

50. *Kelly v. California*, 129 S. Ct. 564, 567 n.3 (2008) (Stevens, J., dissenting) (quoting *United States v. Johnson*, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005)), *denying cert. to Kelly*, 171 P.3d at 548 (first alteration in *Kelly*, 129 S. Ct. at 567 n.3).

51. *Kelly v. California*, 129 S. Ct. 567, 568 (2008) (Breyer, J., dissenting) (quoting *Payne v. Tennessee*, 501 U.S. 808, 830, 831 (1991) (O’Connor, J., concurring)), *denying cert. to People v. Zamudio sub nom Kelly v. California*, 181 P.3d 105 (Cal. 2008).

52. *Kelly v. California*, 129 S. Ct. 564, 565 (2008) (Stevens, J., dissenting), *denying cert. to*

emotion and evidence that conveys information (i.e., that triggers cognition) muddies the courts' analysis and leaves them with no framework for determining whether this particular information, and these particular emotions, belong in the courtroom.

In allowing victim impact testimony, the Court in *Payne* made an assumption that seems, at first blush, both logical and fair. It assumed that victim impact statements are required to make the suffering of victims and their loved ones salient in the same way that the defendant's humanity is salient. This argument has tremendous emotional power. Its emotional resonance arises, in part, from the fact that grief about the victim's death, empathy for those who loved the victim, and anger at the defendant, feel natural and right. These feelings come easily, without any assistance from the legal system. One error the Court made was in treating the victim impact testimony in isolation rather than considering the emotional landscape of the trial as a whole. There is evidence that capital jurors enter the penalty phase with feelings of intense anger toward the defendant and intense empathy toward the victim and the victim's family. It is all too common for jurors to decide that the defendant should be executed before the penalty phase even begins.⁵³ Their difficulty at this juncture is not in imagining the humanity and suffering of the victim and survivors, but in meeting their constitutionally mandated duty to remain open to the defendant's mitigation evidence before determining whether a death sentence is appropriate.⁵⁴ Jurors *do* need help keeping their anger and grief from overwhelming their ability to hear the defendant's arguments. The victim impact statement intensifies their anger and grief instead.

The admissibility of victim impact testimony is also premised on certain assumptions about what murder survivors need in order to heal.⁵⁵ In the years since *Payne* was decided, it has become an article of faith that victim impact statements promote closure for murder survivors. But there is no good evidence that this is true. Those who have lost loved ones to murder tend to reject the notion of closure. Sharon Tewksbury, whose husband was murdered, said the following after the man responsible for the murder was executed: "My goal is to get all of the media to understand that 'closure' is a bad word, a word survivors don't

Kelly, 171 P.3d at 548.

53. William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1477 (1988). See also CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* 174–75 (2005).

54. Bowers et al., *supra* note 53, at 1485–86.

55. Bandes, *Victims*, *supra* note 40 (manuscript at 11–15).

understand.”⁵⁶ Moreover, even if closure is possible, it does not follow that it can or should take place during a capital trial.⁵⁷ Emotions take shape in the social world; they do not remain stable and fixed regardless of institutional context.

C. Ignoring Emotion:

Fear, Jury Confusion, and the Meaning of Life Without Parole

Third, consider a situation in which emotions are not acknowledged, and in which there is empirical evidence that the legal system is operating on problematic assumptions about how emotions operate. Several studies establish that there is a common perception—among jurors in actual capital trials as well as among the citizenry at large—that life without parole means about fifteen years in prison⁵⁸ (or seven years in prison in Georgia).⁵⁹ Studies have also shown that when jurors have the option of sentencing the defendant to life without parole, and understand that it really means life without parole, they will often choose that option instead of a death sentence.⁶⁰ In spite of this evidence, when jurors ask judges to explain the meaning of life without parole, the common judicial protocol is to refuse to answer, often instructing the jury that the terms should be given their “plain and ordinary meanings.”⁶¹ The Supreme Court has held that the defendant has no right to demand more accurate information unless his future dangerousness is specifically at issue.⁶² It has found future dangerousness to be at issue when the prosecution specifically cites it as a reason to impose a death sentence.⁶³ Yet the evidence suggests that, in capital trials, future

56. *Rethinking “Closure,”* ARTICLE 3 (Murder Victims’ Families for Human Rights, Cambridge, Mass.), Fall 2008/Winter 2009, at 2.

57. In prior articles, I have addressed victim impact statements in far greater depth. See Bandes, *Empathy*, *supra* note 40, at 364–65 (arguing that victim impact statements should be inadmissible because of the emotions they evoke during sentencing); Bandes, *Victims*, *supra* note 40 (manuscript at 14) (examining the claim that victim impact statements promote closure).

58. See, e.g., Benjamin D. Steiner, William J. Bowers & Austin Sarat, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC’Y REV. 461, 472 (1999) (showing that citizens in New York, Nebraska, Kansas, and Massachusetts believe that offenders convicted of first degree murder usually serve less than fifteen years in prison before being paroled or released).

59. William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 608, 650–51 (1999).

60. *Id.* at 609 n.10.

61. *Kelly v. South Carolina*, 534 U.S. 246, 257 (2002).

62. See John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always “At Issue,”* 86 CORNELL L. REV. 397, 398 (2001).

63. *Kelly*, 534 U.S. at 254. See also *Shafer v. South Carolina*, 532 U.S. 36, 51, 54–55 (2001). In *Shafer*, the prosecutor introduced evidence of the defendant’s past aggressive conduct but did not explicitly argue future dangerousness. *Id.* The Court remanded for a decision on whether future

dangerousness usually is at issue,⁶⁴ and that it appears to exert a powerful influence on jurors.⁶⁵

II. ONCE MORE WITH FEELING: WHAT IS EMOTION?

There is a growing body of empirical evidence about the operation of the death penalty, and particularly about the dynamics of the capital jury. These studies demonstrate a marked disjunction between the role emotion plays and the role the law acknowledges. The law's conception of this role is grounded on several widely held misconceptions about what emotion is and how it functions, which I will briefly describe.

A. The Fundamental Misconceptions

Misconception one: emotions are material objects. They have an identity independent of the person they are in. As sociologist Arlie Hochschild observes, we talk about "expressing," "storing," or "getting in touch with" emotions.⁶⁶ Anger "overtakes or overwhelms us."⁶⁷ Fear creeps up on us.⁶⁸ Love deserts us.⁶⁹ These metaphors are more than just rhetorical flourishes. They reflect and inform our understanding of how the world works.⁷⁰ We assume that objects have certain properties. If we think of emotions as objects, we assume—often unconsciously—that they are cohesive. We imagine them as having clear boundaries, as assuming the same shape no matter where they are located, as capable of being moved from place to place, or of retaining their essence over time.

This way of thinking plays a prominent role in legal regulation of emotion. Most noticeably, the law approaches emotions as entities that it can add or remove, and that retain their shape regardless of location. It assumes it can inculcate shame through shaming penalties, and that shame will have the same civilizing effect on each defendant.⁷¹ It assumes it can

dangerousness was at issue. *Id.* at 51, 55.

64. See generally Blume et al., *supra* note 62, at 398, 401 (presenting research indicating jurors consider future dangerousness of offenders in most capital trials).

65. See Bowers & Steiner, *supra* note 59, at 664–71 (presenting evidence that jurors' misunderstanding of the meaning of life without parole leads to more death sentences).

66. ARLIE HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 203 (1983).

67. *Id.*

68. *Id.*

69. *Id.*

70. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 3–6 (1980); GEORGE LAKOFF, *THE POLITICAL MIND* 14–15 (2008).

71. See, e.g., Toni Massaro, *Show (Some) Emotion, in THE PASSIONS OF LAW* 80, 81 (Susan

prohibit sympathy by instructing jurors to put it aside, but it does not tell them how to extricate it or where they ought to put it.

Emotions are regarded as objects in another way—they are treated as unchanging regardless of the social or cultural context in which they unfold. Significant changes in the capital system have been based on assumptions about what the families of murder victims need in order to heal or attain closure. The notion of “healing” or “closure” on which these changes are predicated tends to be static, taking no account of differences between the needs of different murder survivors or changes in their emotions over time.⁷² But the oddest aspect of this notion of closure is its acontextual nature. The language of healing and therapy has been imported to the legal arena with little thought about whether the capital system is capable of serving therapeutic goals—or about what other values might be compromised in the process.

Misconception two: emotions are private and internal.⁷³ We conceive of emotions as taking shape *within* us, as “inner bodily experiences.”⁷⁴ We might express those emotions to the social world, and the social world might react to that expression, but these social dynamics are viewed as separate from the feeling of the emotion itself. This conception obscures the link between emotion and social and institutional dynamics. As Hochschild says, “each feeling takes its shape, and in a sense becomes itself only in social context.”⁷⁵ Moral reasoning, in particular, appears to be a social, interpersonal process rather than an individual, private one.⁷⁶

When group tasks such as jury deliberation are at issue, treating each juror like an emotional island is particularly misguided. It fails to take into account the fundamental ways in which the emotional climate of the jury room shapes the jury’s deliberative role: the jury’s ability to communicate, the facts it finds, the ways it interprets demeanor or judges credibility, and the normative judgments it reaches. Sociologist Candace Clark explains: “We judge the validity and appropriateness of one another’s perceptions, interpretations, and emotional reactions. . . . [J]udging is a social process

Bandes ed., 1999).

72. Bandes, *Victims*, *supra* note 40 (manuscript at 15–16).

73. *Id.* (manuscript at 5); See also HOCHSCHILD, *supra* note 66, at 203 (noting that people commonly speak of emotion as residing inside the body); Catherine Lutz & Geoffrey M. White, *The Anthropology of Emotions*, 15 ANN. REV. ANTHROPOLOGY 405, 409 (1986) (noting that emotions are generally defined as “private feelings”). I say that emotions are generally treated as internal because at times there is a requirement, explicit or implicit, that emotions be performed publicly. See generally Bandes, *Victims*, *supra* note 40 (manuscript at 11–15) (discussing the increased use of victim impact statements as a public expression of grief).

74. Lutz & White, *supra* note 73, at 429.

75. HOCHSCHILD, *supra* note 66, at 212.

76. Haidt, *supra* note 24, at 820.

notwithstanding the fact that it takes place internally.”⁷⁷ We try to bring our own feelings about others in line with what we think is culturally appropriate.⁷⁸ Jurors evaluate the demeanor of the defendant, the witnesses, the attorneys, and others by consulting their own reactions and the reactions of those around them. They evaluate the judgment of their fellow jurors in the same way. The jury room develops an emotional climate of its own. Regarding emotions as private and internal obscures these complex interactions.

Misconception three: emotions are bursts of uncontrollable passion that short-circuit rational deliberation. This misconception is twofold. First, it equates emotion with acute or salient emotion. We tend to categorize as *emotional* those states that are memorable for their intensity—times of anger, grief, or joy that depart from our general background states.⁷⁹ Thus, the capital system permits jury instructions about racial prejudice or fear when it deems those emotions to be salient, but in doing so it vastly underestimates their pervasiveness.⁸⁰ Just as we are always speaking prose, we are always feeling emotions. We are constantly deciding who we fear and who we trust, what attracts us and what repels us, when to sympathize and when to condemn.

Once emotion is equated with intensity, it seems to follow that emotions are not to be trusted—that they are irrational, unpredictable interferences with a steady state of rationality. This misconception is the most central and tenacious of all—the one at the heart of the law’s self-conception. Although the precise relationship between emotion and cognition is a matter of ongoing study and controversy, this conception of a sharp separation between emotion and cognition has rapidly fallen out of favor in every discipline that has studied the matter.⁸¹

77. CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE 196, 203, 205 (1997).

78. See *id.* at 203 (“Strong social norms call for us to perceive and judge other people’s behavior and to align our other-oriented feelings with the culturally appropriate judgments we make.”).

79. KAGAN, *supra* note 9, at 5.

80. See *infra* notes 138–140, 159–162 and accompanying text.

81. See ANTONIO R. DAMASIO, THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS 40, 133–67 (1999) (contending that emotions are critical to the regulation of homeostasis and, in turn, to the biology of consciousness); FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION 1–17 (Joseph P. Forgas ed., 2000) (providing a brief summary of theories explaining the role of affect in social thinking and cognition); Richard D. Lane et al., *The Study of Emotion from the Perspective of Cognitive Neuroscience*, in COGNITIVE NEUROSCIENCE OF EMOTION 3, 3–11 (Richard D. Lane & Lynn Nadel eds., 2000) (exploring the interplay between emotion and cognition); Panksepp, *supra* note 10, at 8 (suggesting that primitive affective processes are the foundation for cognitive process).

B. A Very Brief History of Emotion Theory

Understanding emotion is necessarily an interdisciplinary endeavor.⁸² A range of fields, including philosophy, psychology, sociology, political science, anthropology, and cognitive neuroscience, hold pieces of the puzzle about what emotion is and what roles it plays. These disciplines have approached emotion from very different angles. Even within disciplines, many issues—including definitional issues—are hotly contested. It is questionable whether any useful overarching definition of emotion can be formulated. As the philosopher Amélie Rorty succinctly says, “Emotions do not form a natural class.”⁸³ Another scholar states that “[t]he term *emotion* refers to numerous heterogeneous processes.”⁸⁴ There is a danger in regarding the term as a description of a material, discrete, or unitary phenomenon rather than a set of functions.⁸⁵ Its definition changes depending on the disciplinary focus and the source of evidence—for example, physical actions, biological or neurological reactions, or verbal descriptions.⁸⁶ Its description and interpretation vary across time⁸⁷ and culture.⁸⁸ Moreover, there is a concern that the very use of a “conceptual framework that separates emotion and cognition into different areas of research” perpetuates the false notion of antagonism between the two.⁸⁹ Jerome Kagan suggests setting aside disagreements over the correct definition of *emotion*⁹⁰ and instead observing and understanding the complex phenomena we seek to study.⁹¹ The term will need to be provisionally defined for analytic purposes, “but it should not be reified.”⁹²

82. Arvid Kappas, *The Science of Emotion as a Multidisciplinary Research Paradigm*, 60 BEHAV. PROCESSES 85, 87–88 (2002). However, Robert Solomon pointed out that this division of the study of emotions into disparate disciplines is relatively recent. He observed that in the nineteenth century, scholars like Darwin and William James would not have understood the separation of psychology and philosophy into separate fields. ROBERT C. SOLOMON, WHAT IS AN EMOTION? CLASSIC AND CONTEMPORARY READINGS 55 (2d ed. 2003).

83. Amélie Oksenberg Rorty, *Introduction* to EXPLAINING EMOTIONS 1, 1 (Amélie Oksenberg Rorty ed., 1980).

84. Arvid Kappas, *What is an Emotion? Many-splendored Things!*, THE EMOTION RESEARCHER (Int’l Soc’y for Research on Emotion, Poughkeepsie, N.Y.), Fall/Winter 2006–Spring 2007, at 7.

85. Agneta Fischer, *President’s Column*, THE EMOTION RESEARCHER (Int’l Soc’y for Research on Emotion, Poughkeepsie, N.Y.), Fall/Winter 2006–Spring 2007, at 4.

86. KAGAN, *supra* note 9, at xi.

87. See, e.g., INVENTING THE PSYCHOLOGICAL: TOWARD A CULTURAL HISTORY OF EMOTIONAL LIFE IN AMERICA 8 (Joel Pfister & Nancy Schnog eds., 1997) (exploring emotions in light of their “historically contingent, socially specific, and politically situated” nature).

88. Lutz & White, *supra* note 73, at 410; Peggy A. Thoits, *The Sociology of Emotions*, 15 ANN. REV. SOC. 317, 320 (1989).

89. Lane et al., *supra* note 81, at 5.

90. KAGAN, *supra* note 9, at 41.

91. See *id.* at 3.

92. Anna Wierzbicka, *What is an Emotion?*, THE EMOTION RESEARCHER (Int’l Soc’y for

With these caveats in mind, this article focuses on the way the term *emotion* is used and how the concept of emotion is deployed in the legal system. The term is often used in the legal context to communicate opprobrium and to describe and denigrate influences that are thought to interfere with decision-making.⁹³ It is a category defined chiefly in terms of the irrational, the impetuous, and the unreasonable—that is, the antithesis of the ideal of law. Therefore it is important to explore the term's use and the consequences that follow. This will require a little recent history, vastly oversimplified.

Questions about the relationship between thinking and feeling, or reason and passion, have fascinated philosophers since ancient times.⁹⁴ Plato and Aristotle debated the issue, and it was a central occupation of the Stoics, of Descartes and Spinoza, and of Kant and Hume.⁹⁵ The assumption that emotion and reason are separate faculties goes back at least as far as the ancient Greeks, as does the debate about whether these two faculties work in unison or at cross purposes.⁹⁶ The latter assumption, that the processes of thinking and feeling are not only distinct but antithetical, continues to exert a powerful influence on our understanding of reason and emotion. It has often gone hand in hand with the conviction that, because emotions are vague, ephemeral, and irrational, they are unscientific and not a proper object of study.⁹⁷

The nineteenth century ushered in two separate strands of emotion theory: a scientific or organismic model (associated with Darwin, William James, and early Freud) focusing on emotions and the brain; and a social or interactional model (associated with Erwin Goffman and John Dewey) focusing on emotions and society.⁹⁸ Shades of that split (body vs. mind and private vs. social) exist today. The organismic model viewed emotions as biologically based, as instinctual rather than reflective, and as stable entities that remain fixed across social groups, cultures, and times.⁹⁹ Proponents of this model addressed the origins of and the triggers for emotion, but since

Research on Emotion, Poughkeepsie, N.Y.), Fall/Winter 2006–Spring 2007, at 9.

93. See, e.g., Owen M. Fiss, *Reason In All Its Splendor*, 56 BROOK. L. REV. 789, 801 (1990) (“Allowing passion to play a role in the decisional process of the Supreme Court . . . is inconsistent with the very norms that govern and legitimate the judicial power . . .”).

94. For a fascinating history of the earliest understandings of passion and temperament, see generally NOGA ARIKHA, *PASSIONS AND TEMPER: A HISTORY OF THE HUMOURS* (2007).

95. *Id.* at 4–5, 39, 191–95; PAUL BLOOM, *DESCARTES' BABY* 125 (2004); R.J. DELAHUNTY, *SPINOZA: THE ARGUMENTS OF THE PHILOSOPHERS* 213–54 (1985).

96. See, e.g., *Introduction to SOLOMON*, *supra* note 82, at 1.

97. Lutz & White, *supra* note 73, at 409.

98. This brief description of emotion research in the nineteenth century draws heavily on Arlie Hochschild's *Appendix A* in *The Managed Heart*. HOCHSCHILD, *supra* note 66, app. a, at 201–22.

99. *Id.* at 205.

they viewed emotion as fixed and acultural, they were not particularly interested in its social role.¹⁰⁰ The biological model's assumption that emotion was instinctual left little room for its role in cognition.

The interactional model, conversely, focused on how social factors mold emotion.¹⁰¹ In this account, cultural context shapes emotion through both explicit and implicit rules and expectations about what we ought to feel and how we ought to express it.¹⁰² In sociologist Arlie Hochschild's example: if a man becomes violently angry when insulted, it will matter what, in his cultural milieu, constitutes an insult.¹⁰³ Features of his cultural milieu may aid or inhibit his expression of anger and help determine whether he reacts to his own anger with shame or pride.¹⁰⁴ In other words, context will help determine both how he experiences and understands the emotion and how he acts upon it. Because it assumed that societal norms help shape emotions, the interactional model thus left more room for discussion of emotion's role in cognitive judgment. However, it had little to say about the science of emotions—where they come from and how they work.

In the twentieth century, science virtually abandoned the study of emotion, leaving scientific knowledge stalled at the conclusion that emotions are hard-wired, instinctual, and impervious to reason. Social and psychological theory generally accepted this duality between emotion and reason. By the late 1960s, Lawrence Kohlberg's theory of the development of moral reasoning was ascendant.¹⁰⁵ This theory privileged the abstract, the categorical, and the logical.¹⁰⁶ Kohlberg's influential work defined the terms for research on moral reasoning, which tended to view emotion and intuition as low-order precursors to moral judgment.¹⁰⁷ In recent years this model has been challenged in a broad array of relevant fields. Models emphasizing the salutary role of emotion in cognition generally, and in

100. *Id.* at 208–11.

101. *Id.* at 207.

102. *Id.*

103. *Id.* at 211–12.

104. *Id.*

105. Lawrence Kohlberg, *The Psychology of Moral Development: The Nature and Validity of Moral Stages*, in 2 *ESSAYS ON MORAL DEVELOPMENT* 1, 3 (1971).

106. *Id.*

107. See Larry Nucci, *Education for Moral Development*, in *HANDBOOK OF MORAL DEVELOPMENT* 657, 657 (Melanie Killen & Judith G. Smetana eds., 2006) (“[M]oral development moves from earlier stages, in which morality is intertwined with self-interest and social norms, to later, more mature stages, in which morality as justice is differentiated from and displaces social convention as the basis for moral judgments.”); Haidt, *supra* note 24, at 816 (discussing highly influential nature of Kohlberg’s “rationalist” and “somewhat Platonic” model of reasoning).

moral judgment specifically, have gained increasing acceptance.¹⁰⁸ This shift has enabled a more nuanced debate about the role of specific emotions in specific contexts.

C. A Provisional Definition

In recent years, one of the most influential and exciting challenges to the reason–emotion duality and the mind–body duality¹⁰⁹ has come from the field of cognitive neuroscience, which “seeks to integrate into the study of human thought, our rapidly emerging knowledge about the structure and functions of the brain, and about the formal properties of . . . decision-making processes.”¹¹⁰ The neuroscientific research, using powerful brain-imaging tools like electroencephalography (EEG) and functional Magnetic Resonance Imaging (fMRI) scans, has helped show the importance of both the biological and social strands.¹¹¹ The current understanding of emotions views them as biologically rooted processes, depending on innately set brain devices, shaped by a long evolutionary history.¹¹²

However, as Jack Balkin usefully points out, “it is highly misleading to think of individuals as consisting of identical hardware into which identical copies of software are installed.”¹¹³ In fact, as he adds, when we speak of the computer, we generally think of it as consisting of hardware and

108. William D. Casebeer & Patricia S. Churchland, *The Neural Mechanisms of Moral Cognition: A Multiple-Aspect Approach to Moral Judgment and Decision-Making*, 18 *BIOLOGY & PHIL.* 169, 188 (2003); DAMASIO, *supra* note 22, at 38, 43; Haidt, *supra* note 24, at 817.

109. Neuroscientist Jaak Panksepp notes that “[b]y appreciating how the brain is organized, we may gradually outgrow the illusory sense that we are creatures of two distinct realms, of mind and matter.” JAAK PANKSEPP, *AFFECTIVE NEUROSCIENCE: THE FOUNDATIONS OF HUMAN AND ANIMAL EMOTIONS* 302 (1998). He also notes, however, that “the issue of mind-brain dualism has not disappeared completely from neuroscience thinking.” *Id.* at 337.

110. Oliver R. Goodenough & Kristin Prehn, *A Neuroscientific Approach to Normative Judgment in Law and Justice*, 359 *PHIL. TRANSACTIONS ROYAL SOC’Y LONDON SERIES B* 1709, 1713 (2004) (citation omitted).

111. Casebeer, *supra* note 23, at 843. Cognitive neuroscience, in addition to making a considerable contribution to the store of knowledge about emotion, serves another purpose as well. The language and accoutrements of science—the ability to talk about “the amygdala” or “mirror neurons” rather than fuzzy-sounding concepts like “fear” or “empathy,” and the ability to show charts of brain activity—arguably have made the study of emotion more respectable and palatable to a wider array of scholars. See KAGAN, *supra* note 9, at 26 (discussing the effect of color photographs of brain states on willingness to believe in the power of the abstract notion of “emotion”); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 *OHIO ST. J. CRIM. L.* 397, 397 (2006) (arguing, with specific reference to the question of criminal responsibility, that those “inflamed by the fascinating new discoveries in the neurosciences” are often prone to making empirically unsustainable claims about the legal implications of neuroscience).

112. Goodenough & Prehn, *supra* note 110, at 1714–15.

113. J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 5 (1989).

software—a meld that also describes the brain.¹¹⁴ Current understandings suggest that when the brain faces a complex cognitive task it recruits a variety of brain functions as well as a diverse selection of information sources. These sources, which include genetic information, cultural knowledge, and personal experience, contribute to the construction of templates or scripts about how the world is supposed to work and how people are supposed to behave.¹¹⁵ The brain sorts and categorizes information according to these templates.¹¹⁶ To use another computer metaphor, it is not efficient to open a new file folder for each new piece of information; the brain tries to file the information in the folder that offers the closest fit. It filters for similarity and difference, the familiar and the deviant, relying on shorthand indicators (some of them helpful and accurate, some unhelpful or even pernicious).

Emotion plays a role in all these functions. As Candace Clark says, “[j]udging is an almost constant feature of social life.”¹¹⁷ More basically, choosing is an essential feature of survival. Emotion helps to choose among sources, emphasize, highlight, flag perceived deviance, indicate importance and urgency, assess risk or advantage, and assist in evaluating the intentions of others. It helps guide and prioritize decision-making processes; moving us to action. Emotion thus plays a key role in cognition, highlighting the importance of studying not merely the salient emotions, but also the influence of emotional variables on the very structure of decision-making. As Oliver Goodenough suggests:

Perhaps it is not so much that emotion is a key to normative judgment as it is a key to important and effective normative judgment, normative judgment that gets our attention and gets translated into action, either with respect to our own conduct or to the reward or punishment of others.¹¹⁸

114. *Id.* at 4.

115. Goodenough & Prehn, *supra* note 110, at 1714–15.

116. See Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 520–21 (2004) (explaining that mental models—representations of the factors that are included in a decision—are influenced by one’s physical world, social world, and conceptual world); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1131 (2004) (explaining that categories and schemas are critical building blocks of the cognitive process); see also Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 150 (2006) (explaining that cultural world-views shape normative judgments about law and public policy).

117. CLARK, *supra* note 77, at 196.

118. Goodenough & Prehn, *supra* note 110, at 1717.

Legal judgment is not exempt from these dynamics. It is a complex system of explicit and implicit rules and principles that must be applied by individuals according to their varying templates. Moreover, legal judgment occurs in a social and institutional context, within which the role of emotion in forming legal judgment needs to be understood. Emotion is in a complex feedback loop with institutions like the justice system. It has a role in shaping our institutions, and the institutions in turn shape emotions—their expression, their display, and even, arguably, their inchoate nature. Institutional settings are rife with unspoken rules about how emotion ought to be displayed outwardly and even about what ought to be felt internally.

III. EMOTION IN CONTEXT:

THE EMOTIONAL LANDSCAPE OF THE CAPITAL SYSTEM

The capital trial is a circumscribed, tightly controlled, and highly ritualized setting. Judging by its formal rules, it is a proceeding that allows little room for emotion, despite the morally and emotionally charged question it is meant to resolve. But once the misconceptions discussed above are identified, it becomes clear that the proceeding is rife with emotion. It occurs against a backdrop of widely shared empathy for the victim and his family.¹¹⁹ It poses the challenge to the decision-maker of overcoming anger and disgust toward the defendant and exercising empathy, at least temporarily, in order to consider the defendant's mitigation evidence. It raises questions about the role of empathy toward the defendant's family. The struggle over empathy is endemic to the proceeding. Excising empathy completely is not possible or even desirable. The better goal is to determine which emotions, and in particular which empathetic responses, the system ought to be encouraging or discouraging in order to improve the likelihood of a fair and just process.

This section will consider the capital jury in particular. As discussed above, the legal system's approach to the capital jury has been to focus, from time to time, on particular salient emotions it seeks to encourage or discourage. The implicit assumption appears to be that in the absence of direction about what emotions are acceptable or off-limits, jurors will simply behave rationally—without passion, favor, or prejudice. However, jurors are not blank slates. They cannot be separated from the templates they bring with them. What they see will be mediated through their notions

119. *But see* Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 375–76 (2003) (finding that jurors feel more empathetic toward some victims than others, and that their degree of empathy can have a significant influence on their sentencing decisions).

of what they expect to see, and will affect who they trust, who they understand, who they fear, and with whom they empathize.¹²⁰ Moreover, jury decision-making must be understood in light of the additional templates provided by the institutional context. The trial courtroom, and more particularly the unique institution of the capital jury, creates its own set of cultural expectations and rules, and these include rules, usually unspoken, about how emotion is expressed and interpreted. As Arlie Hochschild explains in the context of corporate culture, the institution may even help shape the emotions felt by those over whom it exerts power.¹²¹ These rules may seem invisible, but they exact emotional costs when they are broken.¹²²

Craig Haney and his co-authors observe about the capital jury:

The courtroom becomes the jurors' separate reality, and they spend weeks or months in this legal world, amateurs in an arena of experts. Like all people in unfamiliar and threatening situations, they become acutely sensitive to—and highly dependent upon—the social cues and implicit messages they receive from the legal experts around them.¹²³

In his book *Death by Design*, Haney persuasively argues that one of the most salient characteristics of the capital trial is the insistent message that the issue of life and death facing the jury is not an emotional issue.¹²⁴ The very appearance of dispassionate process is an important part of the system's emotional landscape: a powerful implicit message to the jury as well as the other legal actors. By failing to acknowledge the emotion-laden nature of the decision in jury instructions or otherwise, with the exception of explicit instructions to put aside passion or prejudice, the court sends several messages. It sends a message that this decision-making process requires merely the mechanistic application of rules; that any emotional twinges are unwelcome intrusions and should be suppressed.¹²⁵ The message begins early on with the death-qualifying process, in which jurors are asked whether they are capable of following the law by voting for

120. Mike Allen, Edward Marby & Drue-Marie McKelton, *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 LAW & HUM. BEHAV. 715, 724 (1998).

121. HOCHSCHILD, *supra* note 66, at 218.

122. *Id.* at 218–19.

123. Craig Haney, Lorelie Sontag & Sally Constanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. SOC. ISSUES 149, 151 (1994).

124. HANEY, *supra* note 53, at 141–43.

125. Haney et al., *supra* note 123, at 172.

death.¹²⁶ Those who say no are excluded. This process signals that death is the default, or “expected,” sentence and that those who are “good” and law-abiding will fall in line.¹²⁷

The message is reinforced by the jury instructions, which in various ways provide emotional distance from the life-and-death consequences of the verdict. Instructions may ask the jurors to find the existence of aggravating and mitigating factors, and then fail to explain how these should be weighed.¹²⁸ They may ask for answers to several “factual” questions, such as whether the defendant would pose a continuing danger.¹²⁹ Many jurors believe these instructions require them to approach the penalty-phase deliberations as a simple accounting—a checklist of questions and answers—in which certain answers lead automatically to a decision in favor of a death sentence.¹³⁰ Jurors may also believe that the judge—rather than the jurors themselves—will carry the heavy burden of ensuring that justice is done.¹³¹

The significance of these distancing mechanisms is underscored by recent research in the field of cognitive neuroscience on the dynamics of moral decision-making, which suggests that people approach ethical decisions quite differently depending on whether they experience the ethical issue as personal or impersonal.¹³² Moral dilemmas that are experienced as personal activate different parts of the brain, evoke a different set of emotions, and lead to different conclusions about what is right and wrong.¹³³ This research helps explain in physiological terms what psychologists like Robert Jay Lifton, Herbert Kelman, and Stanley Milgram have long observed: it is easier to decide to hurt or kill someone when direct responsibility is masked and that person’s fate seems far removed from your own.¹³⁴

126. HANEY, *supra* note 53, at 116.

127. *See id.*

128. *Id.*

129. Haney et al., *supra* note 123, at 164.

130. *See* HANEY, *supra* note 53, at 180 (describing how jury instructions led jurors to “just [weigh] the factors” in determining the outcome). *See also* Robert Weisberg, *Deregulating Death*, 8 SUP. CT. REV. 305, 391 (1984) (describing how jurors use “legal formalities” to “distance themselves from choices” they must make in death penalty cases).

131. *See* HANEY, *supra* note 53, at 155–56 (explaining how jurors use jury instructions to absolve themselves from the responsibility of determining the defendant’s fate). *See also* Joseph L. Hoffman, *Where’s the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L. REV. 1137, 1147 (1995) (“[C]apital jurors are generally instructed that their verdict is only a ‘recommendation’ which the judge is free to accept or reject.”).

132. Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105, 2106 (2001).

133. *Id.* at 2107.

134. *See* ROBERT J. LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF*

The result of this implicit message of passionless routine is not to banish emotion from the courtroom. Regardless of what they may say with all sincerity in *voir dire*, jurors experience a gamut of emotions toward capital defendants, including disgust, anger, and pity.¹³⁵ Studies show that they are particularly swayed by sympathy,¹³⁶ fear,¹³⁷ and conscious or unconscious racial bias;¹³⁸ and indeed, that racial bias may determine whether a particular defendant is the object of sympathy or fear.¹³⁹

Jurors enter the courtroom with preexisting notions about crime shaped by media and other cultural sources. These sources tend to stoke fear—and all too often racialized fear. They disseminate the widespread and inaccurate impression that most crime is random, pervasive, violent, and perpetrated by black men on white victims.¹⁴⁰ Yet the prevailing rules tend to treat jurors as blank slates unsullied by cultural stereotypes, and to decline to address issues of race and dangerousness unless they become salient. This focus on salience is misdirected.

The perception that crime is pervasive, violent, and perpetrated by black men on white victims contributes to racial bias in specific and general ways. It specifically exacerbates the fear that black capital defendants, if not sentenced to death, will pose a threat to the community. As discussed above, this fear in turn is exacerbated by another piece of inaccurate folk wisdom: that even a sentence of life without parole will not keep a convicted murderer off the street for very long.¹⁴¹ Despite evidence that juries misunderstand the meaning of “life without parole,” the common

GENOCIDE 418–500 (1986); Herbert Kelman, *Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers*, 29 J. SOC. ISSUES 25, 38, 49–52 (1973); STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW*, at xi (1974).

135. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 30 (2000).

136. *Id.* at 30–31.

137. *Id.*

138. See William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 180 (2001); HANEY, *supra* note 53, at 189.

139. See Bowers et al., *supra* note 138, at 244–57 (exploring how white racial bias affected the leanings of a jury). See also Jennifer L. Eberhardt, Paul G. Davies, Valier J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006) (reporting that stereotypes, such as the belief that black people are more criminally inclined, can affect jurors' evaluation of credibility and blameworthiness); Thomas W. Brewer, *Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants' and Victims' Race in Combination*, 28 LAW & HUM. BEHAV. 529, 542 (2004) (finding that black jurors are more receptive to mitigation evidence in capital cases involving a black defendant and a white victim).

140. Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 595 (2004).

141. Steiner et al., *supra* note 58, at 472.

judicial protocol is to refuse to address a jury's misconceptions. The Supreme Court's holding in *Simmons v. South Carolina* that the defendant has no right to demand more accurate information unless his future dangerousness is specifically at issue¹⁴² is premised on the confusion about salience discussed earlier.¹⁴³

More generally, the media portrayal of violent black men exacerbates preexisting racial prejudice, confirming attitudes that blacks are of lesser character. Left unaddressed, racial stereotyping will influence how jurors respond to and deliberate with one another, how they judge witness credibility, how they evaluate mitigation evidence, and how they assess future dangerousness.

In social settings, there are rules about the display of emotion: when emotions should be held in check and when an outward display is appropriate or even expected.¹⁴⁴ The trial is a highly choreographed social setting, in which the participants are quite literally judged by their performance. Studies of jury decision-making consistently show that a defendant's showing of remorse is correlated with a jury's willingness to grant mercy; a defendant's lack of remorse is often cited as justification for condemning him to death.¹⁴⁵ Haney, in his study of California capital jurors, reports that one of the major factors in their decision was "whether or not the defendant expressed *remorse* (based only on in-court observations of the defendant). In the opinion of most of the jurors, capital defendants simply did not express appropriate emotion during the penalty-phase proceedings"¹⁴⁶ Scott Peterson's case is a recent example of this dynamic.¹⁴⁷ The *New York Times* reported that "[t]he prosecution had portrayed his unflinching behavior [in court] as the cool calculation of a killer."¹⁴⁸ Similarly, author Beverly Lowry gives this description of Karla Faye Tucker's attempt to follow her lawyer's instructions:

[Her lawyer] had told her to try to look dignified and calm and so she was trying to look unmoved by the proceedings and when she did they said she was cold and when she looked out into the courtroom and smiled at [her father] Larry Tucker, the press

142. *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994).

143. *See supra* Part I.A–B.

144. *See, e.g.*, JONATHAN H. TURNER & JAN E. STETS, *THE SOCIOLOGY OF EMOTIONS* 37, 48, 232 (2005) (discussing theories about the rules governing display of emotion).

145. Haney et al., *supra* note 123, at 163.

146. *Id.*

147. Dean E. Murphy, *At Peterson Sentencing, A Family's Anger*, N.Y. TIMES, Mar. 17, 2005, at A20, available at 2005 WLNR 4116395.

148. *Id.*

reported that she had smiled at somebody else, and so she never looked out in the courtroom again.¹⁴⁹

Alex Kotlowitz describes how a jury of men and women who strongly favored the death penalty came to spare the life of Jeremy Gross, a capital defendant whom they had convicted of a brutal murder.¹⁵⁰ He recounts how the jury, learning about Gross's own brutal childhood, gradually came to understand him and even to empathize with various aspects of his life.¹⁵¹ At first, jurors could not look him in the eye, and they adjudged him to be cold and indifferent.¹⁵² As they got to know more about him, they "began to view what they initially thought was indifference as shame."¹⁵³ This rereading of his demeanor was crucial to their eventual decision to spare him.¹⁵⁴

The problem is that people are far less adept at evaluating demeanor than they believe and than the legal system assumes them to be.¹⁵⁵ This problem is greatly exacerbated when demeanor must be evaluated across cultural,¹⁵⁶ ethnic,¹⁵⁷ or racial lines.¹⁵⁸ Bill Bowers, Marla Sandys, and Ben Steiner found, for example, that after observing the same defendant and interpreting the same mitigating evidence, black jurors saw a disadvantaged upbringing, remorse, and sincerity, while white jurors saw incorrigibility, a lack of emotion, and deceptive behavior.¹⁵⁹ They discovered that:

149. BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* 171 (1992).

150. Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, § 6 (Magazine), at 32, available at 2003 WLNR 5191787.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* Both the jurors and defendant were white. E-mail from Alex Kotlowitz to author (Mar. 3, 2005) (on file with author).

155. Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1158–59 (1993); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1104–05 (1991).

156. See Martha Grace Duncan, "So Young and So Untender": *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1499 (2002).

157. See Ronald S. Everett & Barbara C. Nienstedt, *Race, Remorse, and Sentence Reduction: Is Saying You're Sorry Enough?*, 16 JUST. Q. 99, 99 (1999) (finding that both race and ethnicity affected evaluations of expressions of remorse).

158. See generally Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 264–65 (1996) (focusing on how racial perceptions influence credibility assessments). See also Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 4 (2000) (presenting evidence that jurors are unable to accurately judge the demeanor of witnesses of a different race). Jurors are also ill-equipped to judge the credibility of defendants with mental disabilities. See Georgina Stobbs & Mark Rhys Kebbell, *Jurors' Perception of Witnesses with Intellectual Disabilities and the Influence of Expert Evidence*, 16 J. APPLIED RES. INTELL. DISABILITIES 107, 112 (2003) ("[J]urors are likely to perceive witnesses with intellectual disabilities to be fundamentally honest but are also likely to have negative attitudes towards their witnessing capabilities.").

159. Bowers et al., *supra* note 138, at 257–58.

Where a white juror sees black witnesses as faking or “putting on,” a black juror sees them as sincere. Where a white female juror interprets the black defendant’s demeanor as hard and cold, a black male juror sees him as sorry. Where a white female juror sympathizes with the anguish of the black defendant’s mother, she blames the defendant for it and rationalizes that his execution will be in his mother’s best interest.¹⁶⁰

The empathic divide between the white juror and the black defendant is deep, pervasive, and tenacious. The Bowers study shows that a related set of dynamics plays out in the jury room.¹⁶¹ Not only do black and white jurors evaluate the evidence differently, they also evaluate one another through the sharply differing lenses of their own prior cultural perceptions.¹⁶²

These preexisting biases are left unaddressed except in a few narrow circumstances in which the Supreme Court has found race to be a salient issue. In the 1986 case of *Turner v. Murray*, the Court recognized that in black defendant–white victim cases, there was a serious risk that racial bias could lead to improper sentencing.¹⁶³ It therefore held that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned about whether they harbor racial bias.¹⁶⁴ Thus the Court acknowledges the possibility of racial bias in a very narrow context, ignoring the vast universe of cases and situations in which race is not *salient* for jurors. Several fascinating studies suggest the possibility that racial bias is more likely to infect juror decision-making in precisely those cases in which race is not salient.¹⁶⁵ In those cases, prejudice will operate unconsciously and jurors will be less likely to adjust their attitudes to conform to prevailing norms.¹⁶⁶

160. *Id.*

161. *See id.* at 244.

162. *Id.*

163. *Turner v. Murray*, 476 U.S. 28, 36 (1986).

164. *Id.* at 36–37.

165. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1014 (2003) (finding that “White juror bias may be most likely when a trial is not racially charged and jurors’ concerns about racism are not made salient”); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 606 (2006) (showing that “the presence of Black group members translated into fewer guilty votes before deliberations,” even when such jurors are not active participants); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. (forthcoming 2009) (measuring race and gender bias and finding that once they are brought into consciousness, they can be ameliorated).

166. Sommers & Ellsworth, *supra* note 165, at 1014.

A year after the *Turner* decision, the Court, in *McCleskey v. Kemp*, made clear its intention to avoid the deeper, omnipresent question: What are the implications for the death penalty if the racial divide cannot be adequately bridged?¹⁶⁷ This is not a question confined to the workings of the jury.¹⁶⁸ Although much attention has been paid to the dynamics of jury decision-making, we know less about the way other legal actors, such as prosecutors and judges, arrive at their decisions. In the conventional wisdom, it may be understandable that a jury of laypeople will sometimes fail to banish improper emotion from their deliberations, but this understanding does not extend to the legal actors who are an essential part of the capital decision-making process.¹⁶⁹ There is substantial research to be done on the emotional dynamics of judging, prosecuting, and defending capital crime.

CONCLUSION

Even if emotions roil below the surface, what is accomplished by taking them into account? Why not preserve the aspirational fiction of a passionless cognitive process, with the understanding that no system is perfect? I have argued that in any real sense, rational deliberation without emotion is simply not a viable option, and that the cherished legal fiction that such emotionless cognition is both possible and desirable has destructive consequences. The legal system tries to shape, harness, or encourage emotion from time to time, and it generally does so clumsily, without much understanding of how emotions work and how they might be effectively regulated. Emotion is partially cognitive; it is not immutable. It can be channeled and it can be educated. To the extent it skews judgment we can try to discourage it or correct for it. Treating emotion as invisible is a choice not to address dynamics that will, nevertheless, continue to operate and will have serious consequences for the justice system.

167. *McCleskey v. Kemp*, 481 U.S. 279, 315–17 (1987).

168. The racial disparities in sentencing contemplated by the *McCleskey* Court and documented in a study by David Baldus were traced not only to jury verdicts but also to prosecutorial charging decisions. DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 160–62 (1990).

169. See Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 99–100 (2000) (reporting on findings that courts are more likely to recognize the possibility of bias by juries than by judges).