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Repellent Crimes and the Limits of Justice: Emotion and the Death Penalty

By Susan Bandes

Introduction

Is there something about repellent crimes that places a particular strain on the legal system? In particular, is rational deliberation possible in the face of accusations of horrific murder? Although every murder is shocking, murders that lead to capital charges tend to be particularly horrific. Yet these emotionally charged cases call upon the legal system to decide, based on fair and rational criteria, whether to take a life. Is the system up to the challenge?

Scott Peterson is accused of killing his lovely young pregnant wife while he was having an affair; Susan Smith of drowning her two toddlers in her car after strapping them into their car seats; Lee Malvo of shooting randomly picked strangers in a series of murders that terrorized the Washington D.C area. These cases evoked intense community-wide emotion: fear, anger, grief; 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 cases tend to be horrifying enough to rivet the attention of the local community. In a small town in rural Illinois, an eight year old girl and her best friend are found dead in the forest near their homes, stabbed multiple times. In a wealthy suburb north of Chicago, a young woman and her fiancé are found in their home, tied to their chairs and shot to death. The community shares in the horror of the crime, the fear while the

perpetrator is at large, the agony on behalf of the victims' family and friends, the outrage at the accused, the desire to see justice done —and swiftly. Yet somehow the legal system, charged with identifying, trying and sentencing the perpetrators, is meant to float free of this emotional intensity, an island of pure deliberative reason. The assumption—or more accurately the hope—is that the legal system will provide a structure that allows passions to cool, that screens out or channels influences which distort reasoned judgment. The reality is that every legal institution charged with creating and implementing the death penalty struggles with the passions unleashed by such crimes, and that the law's attitudes toward these passions, and toward its responsibility to address them, is vexed and ambivalent.

The law on the books—rules and standards, legislative history, pattern instructions, statutes, precedents—barely acknowledges the possibility of emotional variables in these decisions. It is based on a narrow, even quaint, understanding of the process of rational deliberation, which in turn depends on an anachronistic view of emotion as untamable, impervious to reason, and in short, the very opposite of rational. The law occasionally makes explicit and rather clumsy attempts to regulate emotion. It may attempt to bar particular emotions, as when capital jurors are instructed not to give in to sympathy, passion and prejudice. More rarely, it may attempt to introduce emotion, as it did in *Payne v. Tennessee*, which permits the families of murder victims to describe during sentencing the emotional impact of the crime.¹

More often, emotional variables and influences are left unacknowledged. This lack of acknowledgment seems, at first blush, most problematic in relation to the capital jury. In the American system of capital punishment, the jury must decide whether the defendant should be

¹ The reasoning of *Payne v. Tennessee* 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 the harm caused by the crime. 501 U.S. 808 (1991). See also Susan Bandes, Empathy, Narrative, and Victim Impact Statements, 63 U. Chi. L. Rev. 361 (1996) (discussing *Payne*).

sentenced to death. In order to do so, capital jurors must hear graphic evidence of crimes most of us would prefer not to contemplate, and of the pain these crimes have caused. Sometimes, if there is competent defense counsel, jurors must also hear about the childhoods and life experiences of those accused of committing such crimes, and these are often unbearable to contemplate as well. And then, struggling to sort out anger, fear, pity, empathy, compassion, prejudice, even hatred, the jurors are sent to make a profoundly disturbing moral decision, with the instruction that they should put passion aside, as the legal terminology has it (though it does not explain where they should be put) and arrive at a reasoned moral judgment.

There is an obvious disconnect here, a disregard for the way human beings actually operate and how little it resembles the legal ideal. Too often courts are so insistent on hewing to the ideal rather than the real that they refuse to take simple but important steps to advance the accuracy of the process. For example, jurors' fear of the defendant's perceived future dangerousness plays an enormous role in their decision whether to impose a death sentence. Jurors who believe they have the option to choose a sentence of life without parole will frequently choose that option, but jurors often request reassurance that life without parole, contrary to common folk wisdom, really means life in prison. Judges generally refuse to clarify, preferring to deal with the idealized jury who understands the instructions as written rather than the actual jury before them.²

However, there is no simple fix for the problem at the heart of the disconnect. The capital jury must decide whether to impose the death penalty on the perpetrator of a brutal crime, who himself was, more often than not, the victim of brutal abuse and neglect throughout his childhood. How should any jury evaluate and weigh these factors? This is at its core a subjective

² See e.g. William J. Bowers and Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 *Tex. L. Rev.* 605 (1999).

moral decision about the value of a life; a decision in which empathy, fear and other emotions are deeply involved. One of the most salient characteristics of the capital trial is its denial of this subjectivity. 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 emotional-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 is just the mechanistic application of rules, that any emotional twinges are unwelcome intrusions and should be suppressed. In numerous ways the message is conveyed: *You are not making a profoundly disturbing ethical choice about the taking of a life. You are not directly responsible for the taking of a life; you are just one link in a complex chain. You are simply answering some questions yes or no. In any case, the execution is far off and probably won't occur.*

The denial of the emotional influences on legal actors—judges, prosecutors, defense attorneys—is even more pronounced. In the conventional wisdom, it may be understandable that a jury of laypeople will sometimes fail to banish all improper emotion from its deliberations, but this understanding does not extend to the legal actors who are an essential part of the capital decision-making process.³ Yet it is not only the jury that must struggle to properly channel the influence of sympathy, compassion, anger, fear and prejudice. Consider a few of the many junctures for decision-making in a capital case:

Lawmaking: Even in states that have adopted the death penalty, legislators are often faced with questions of its scope and implementation. For example, legislators may be asked to expand the list of death eligible crimes to include additional aggravating factors. Such efforts often come in

³ Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?* 79 *Oregon L. Rev.* 61, 100 (2000) (reporting on findings that courts are more likely to recognize the possibility of bias by juries than by judges).

the wake of highly publicized murders which have engendered community outrage and revulsion, and involve emotional testimony by survivors and community activists. For example, in the wake of the brutal murder of a firefighter or schoolteacher, the legislature may need to determine whether to amend the code to make such murders capital crimes.

Prosecutorial discretion: The prosecutor is the gatekeeper of the capital process. He decides whether to charge a death eligible defendant with capital murder. There are few legal constraints on the decision. He is charged with choosing the most heinous and vile among a large group of accused murderers. He is never required to charge a defendant capitally, and his charging decision will be virtually unreviewable. Nevertheless, he decides in an environment rife with constraint and pressure. The crime is likely high profile; the community in an uproar; the family of the victim wracked with grief.

State Judicial Oversight: State trial court judges (who are chosen by election or, in a minority of states, appointment for a limited term) oversee the capital trial process. They regulate and influence the process in all the usual ways—for example through voir dire, instructions, rulings on motions, and oversight of plea negotiations. State appellate court judges—also elected in many states—must determine whether to uphold convictions and death sentences. In a recent Illinois case, for example, elected judges presided over a high profile capital case in which the defendant was charged with the cold-blooded killing of two police officers. The evidence against the defendant included a confession that he credibly claimed was obtained by torture, and suppression of this confession would likely lead to a new trial.⁴ Judges, like prosecutors, face intense pressures that are a complex mix of the political, ideological and emotional. Yet, perhaps

⁴ *People v. Wilson*, 626 N.E. 2d 1282 (1st Dist. 1993) (upholding conviction and rejecting claims that confession should have been suppressed. See also *Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993) (federal civil rights suit against municipality for policy of permitting torture by police during interrogations). For a full discussion of the police torture scandal see Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *Buff. L. Rev.* 1275 (1999).

even more than prosecutors, judges are perceived to be wholly above the fray; able to put emotion and other “extra-legal” considerations aside.

Supreme Court Oversight: The Supreme Court is the court of last resort for defendants sentenced to death. In this role it decides whether individual death sentences will be carried out and oversees the development of death penalty law in light of constitutional guarantees, most prominently the Eighth Amendment’s bar against cruel and unusual punishment, which requires the Court to evaluate the death penalty in light of “evolving standards of decency.”⁵ This is language that is difficult to apply mechanistically. What sources do—or should-- the members of the Court enlist in arriving at a judgment? To what extent do emotional reactions underlie or inform the Court’s death penalty jurisprudence?

Some justices have struggled publicly to sort out—or reconcile—the legal, moral, and emotional aspects of their approach to the death penalty. Justice Blackmun’s struggle with these issues is well known. In *Furman v. Georgia*, the 1972 case that permitted states to go forward with capital punishment, Justice Blackmun said:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and indeed, abhorrence for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds.⁶

This statement was a prelude to his dissenting argument that such sentiments had to be put aside in favor of adherence to the Constitution’s mandate. Twenty-two years later Justice Blackmun’s agonizing journey had brought him to conclude that the death penalty could not be constitutionally administered, and that he was morally and intellectually obligated to refuse to

⁵ See e.g. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). See also *Trop v. Dulles*, 356 U.S. 86 (1958) (the original source of the “evolving standards of decency” language).

⁶ *Furman v Georgia*, 408 U.S. 238 (1972).

uphold it any longer.⁷ Justice Scalia, in contrast, has expressed little difficulty distinguishing the legality of capital punishment from “extra-legal” considerations like religion, morality and emotion. Justice Scalia recently explained why he finds the death penalty consistent with his Roman Catholic faith, noted that he would resign if he believed otherwise, but asserted that his faith has nothing to do with *how* he votes in death penalty cases.⁸

As to all the institutions with a direct role in implementing the death penalty-- law enforcement agents, legislators, lawyers, judges, pardon boards, governors who must decide on clemency, wardens and other prison personnel--the textbook description of their role will either ignore emotional variables or, to the extent it acknowledges non-legal factors at all, subsume the influence of emotion under other more acceptable rubrics: discretion, politics, advocacy, interpretive leeway, nullification, ethics, perhaps even morality: a category generally assumed distinct from both law and emotion.

Although questions about emotion’s role in the cognitive processes are hotly contested, as, indeed, is the very category of “emotion,” there is a broad consensus that this view of emotionless decision-making is wrong. Turning specifically to decision-making in the capital context, the more we learn about the operation of the death penalty, and particularly about the dynamics of the capital jury, the more obvious is the vast disjunction between the role emotion plays and the role the law acknowledges. There is still much to learn, most notably in areas in which the law most emphatically denies that emotion plays a role, such as prosecutorial and judicial decision-making. But enough is known to make one thing clear: the law’s difficulties

⁷ *Callins v. Collins*, 114 S. Ct. 1130 (1994) (Justice Blackmun, dissenting from denial of *certiorari*). See also Linda Greenhouse, *Becoming Justice Blackmun* at 114, 160-181 (2005) (discussing the evolution of Justice Blackmun’s capital punishment jurisprudence).

⁸ Antonin Scalia, *God’s Justice and Ours: The Morality of Judicial Participation in the Death Penalty* at 239, in *Religion and the Death Penalty: A Call for Reckoning* (Erik C. Owens, John D. Carlson and Eric P. Elshstain, eds. 2004).

with the role of emotion in decision-making have serious consequences for the system's ability to sort out who should live from who should die.

The reasons for the legal system's recalcitrance on the subject of emotion are complex and longstanding, as I will discuss in Chapter 2. They are grounded on some basic misconceptions about what emotion is and how it functions, and these misconceptions are not benign. At bottom, the idea that emotion plays a role in legal decision-making challenges law's most cherished self image. In the conception pioneered by Christopher Langdell, the father of modern legal education, law is an autonomous discipline—even a science-- which generates its own internally consistent principles. Emotion, or more accurately the conception of emotion that held sway until quite recently, posed a threat to law's autonomy on several fronts. It augured variability in the application of doctrine, it threatened to import "external" disciplines into the field of law, and worst of all, it stood for everything unscientific and unruly. This latter view was not peculiar to the law; the dominant assumption in the hard and social sciences, until recently, was that emotions are impervious to reason. Emotion, in this view, is the enemy of rational deliberation. This attitude toward emotion has begun losing its ascendancy only in the last few decades, and most rapidly in the last few years, as neuroscience has offered verifiable evidence of its flaws. The law has clung to it most stubbornly. As recently as 1990, the prominent legal scholar Owen Fiss expressed the conventional wisdom on the matter, declaring that: "allowing passion to play a role in the decisional process...is inconsistent with the very norms that govern and legitimate the judicial power."⁹

As legal jurisprudence has become more open to the lessons of other disciplines, and as those disciplines have come to roundly reject the notion of a sharp separation between emotion and reason, legal discourse on the topic has been a good deal more sophisticated. The institutions

⁹ Owen M. Fiss, Reason In All Its Splendor, 56 Brooklyn L. Rev. 789, 801 (1999).

that implement the law, however, are slow to follow. Emotion has always been acknowledged in certain legal contexts. Homicide is less culpable if committed in the heat of passion; hate crimes carry enhanced sentences; judges impose shaming penalties. But these limited contexts themselves illustrate the standard misconceptions about emotion in the law.

First, the legal system tends to see emotion as an optional commodity: one that can be introduced at appropriate times, or barred completely. For example, the Court has upheld the common instruction that warns jurors not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."¹⁰ This instruction exudes a naïve faith in the ability to regulate juror expression of passion and prejudice. It suggests a clear and easily communicated line between off-limits emotions like sympathy and allowable emotions like mercy.¹¹ Moreover, the singling out of this selection of emotions implies a baseline of passionless decision-making—free from the influence of vengeance, unconscious racism and fear—which, it seems, can be achieved with no instruction at all.

Second, emotions are treated as fixed and immutable: across time, culture, and individual or institutional context. They are portrayed, that is, as having an unchanging presence or identity regardless of the person they are in, the circumstances in which they arise, or the cultural or historical moment. The currently fashionable concept of “closure” provides a useful illustration. As I will discuss in Chapter 5, much recent innovation in the administration of the death penalty is based on the notion that a murder victim’s loved ones will achieve a sense of closure once the perpetrator is executed. For example, the ability of survivors to give victim impact statements is in part justified as a way to provide closure; so are efforts to truncate the appeals process and speed up executions. Closure is depicted as a fixed psychological state. The assumption is that

¹⁰ *California v. Brown*, 479 U.S. 538, 542 (1987).

¹¹ *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (holding that the jury must always be given the option of extending mercy).

every survivor needs closure in equal measure, and that this closure ought to be provided by the legal system. It is depicted as a well-established psychological state, not the uncertain and recently minted concept it is. The law at times traffics in such psychological concepts, but it rarely displays the humility or nuance appropriate to the task.

Third, the links between emotions and institutions are rarely explored and little understood. Emotion exists in a complex feedback loop with the institutions that comprise the justice system. It has a role in shaping our institutions—including the institution of capital punishment itself. Institutions in turn shape emotions—their appraisal, their expression, their display, their inchoate nature. Like any institution, the legal system is rife with unspoken rules bearing on the performance and even the experiencing of emotion—rules that may be known only indirectly, by the consequences when they are broken. To take two examples: a capital defendant who fails to display remorse in a way the jury understands and deems authentic, may pay a terrible price; a survivor who does not tell a stock story about loss leading to the desire for vengeance may find her voice silenced. Such display rules are complicated by the problems of communicating and understanding emotion across cultural, ethnic or racial divides, as I will discuss in Chapter Four.

Emotion is deeply involved in social, ethical and legal judgment, in ways that are not optional, fixed, or severable. There has rarely been a more opportune time to study the relationship between emotion and law. As I will discuss in Chapter Two, cognitive neuroscience has turned to the study of emotions in recent years, with salutary results both for the store of knowledge about emotion and cognition and for the stature of emotion theory itself. Emotion theory, not so much a discipline as an overlapping set of disciplines drawing on neuroscience, psychology, philosophy, sociology, anthropology and other fields, illuminates the dynamics of

individual decision making on every level. It teaches that emotion plays an important role in how we find facts, categorize, discern patterns, identify norms and their transgressions, and choose among available options. It demonstrates that emotion plays a key role in cognition, highlighting the importance of studying not merely the salient emotions, but the influence of emotional variables on the very structure of decision-making. As one article on neuroscience and legal judgment helpfully summarized:

Perhaps it is not so much that emotion is the 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.¹²

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, and the role of emotion in forming legal judgment needs to be understood in this context as well. Thus emotion theory is not merely a window into individual decision-making. It also helps explain the nature of legal institutions: both how institutions channel, encourage and even help shape our emotions, and how the institutions in turn reflect the social and ethical value judgments those emotions help to shape.

Some might argue that the disjunction between the complex dynamics of legal decision-making and the law's formal conception of decision-making is not necessarily problematic: the law operates according to all sorts of fictions, and the fiction of a dispassionately implemented death penalty may be quite functional. In other words, even if emotions roil below the surface, what is accomplished by taking them into account? There is a concern that the very acknowledgment of emotional variables, or at least the effort to address them, will introduce

¹² Oliver R. Goodenough and Kristin Prehn, A Neuroscientific Approach to Normative Judgment in Law and Justice, *Phil. Trans. Soc. Lond.* 1709, 1717 (2004)

unwelcome uncertainty, disparity and arbitrariness into the system. Perhaps it is better to simply assume, or at least aspire to, a system of just and equitable rules, dispassionately enforced.

This book sets out to make the case that practically, we do not have the luxury of conducting our system of capital punishment according to outmoded assumptions about legal decision-making, and normatively, we should not wish to do so. As I will illustrate, as long as our legal institutions turn away from knowledge about emotion and its effects on decision-making, the death penalty will be captive to racial prejudice, both unconscious and conscious, to fear, disgust, and selective empathy. It will not be freed from emotional content; but instead rendered helpless to channel, screen, or educate it. Emotional forces, ignored and denied, will continue to exert a powerful influence on sentencing, and that influence will undermine principles of equality and due process. The continued existence of the death penalty is a declaration that, as a constitutional matter, our legal institutions are capable of identifying capital crimes with an acceptable degree of precision. If they are not capable of doing this according to constitutional criteria, the gap between practice and aspiration negates the moral authority of the entire enterprise.

The book's focus, in large part, is on the emotional dynamics that contribute to the subversion of justice in capital cases. However, its ambitions are broader. The legal system's treatment of capital crimes provides a window into a larger discussion about the intersection between emotion and legal process. Capital punishment is both the best and worst jumping off point for such a discussion. It provides fertile terrain for discussing emotion in part because its emotional content is so salient, and so obviously difficult to banish 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 trap of treating the death penalty as unique. Capital punishment is depicted as an extraordinary challenge to the system; implicitly positing a criminal justice system that is capable of acting rationally, that can rise above passion in contract disputes, personal injury cases, and all the other usual fare, but that is sorely tested, and sometimes overwhelmed, by the passions evoked in death penalty cases. Yet to focus solely on the intense passions elicited in death penalty cases is to mistake the pervasive and often invisible influence of emotion on rational deliberation itself, and on every aspect of the decision-making process. Emotion pervades the law. It poses special challenges in capital cases, both because it is so salient, and because so much is at stake. But as we will see, emotions may be powerful even when they are not salient. Indeed, the invisible emotions can be the most dangerous of all.

The first step, as any self-help regime will attest, is to acknowledge the problem. A better understanding of the emotional variables that help shape decision-making will make the system stronger. In the capital context, weighty decisions are made based on a host of assumptions about human behavior—the behavior of the defendant, the victims' families, and all the legal actors charged with ensuring a just verdict. Some of these assumptions are unexamined, others are demonstrably wrong. To arrive at a better understanding of how these life and death decisions are made, it is necessary not only to examine emotional dynamics, but to study how these dynamics operate in institutional contexts.

Much of the work on the topic of law and emotion has proceeded one emotion at a time—discussions of shame, compassion, vengeance, disgust... This book takes a different approach; viewing a range of emotions as they operate within a system. It will study emotion's role in capital jurisprudence; grappling with the gamut of emotions, salient or invisible, benign or

pernicious, permitted or off-limits. It will approach the death penalty as an institution, albeit one that intersects with or is part of several other institutions—the legal system, the criminal justice system, the jury system, the prison system. The American system of capital punishment is an institution comprised of multiple actors, each with a distinctive role. These roles bring expectations about how emotion should be expressed and even experienced, and lead to consequences when those expectations are thwarted. This book will explore these role dynamics and their implications for the system. Finally, the book will explore the emotional dynamics contributing to the continued existence of capital punishment itself. The death penalty is an evolving creature of societal expectations; imbued with emotional content. Indeed, the very tenacity of this penalty in our society, in the face of its significant human, political and financial costs and its lack of deterrent value, is only partially explained by historical and social factors. Ultimately our continued societal allegiance to the death penalty is inexplicable without an understanding of the emotional forces that sustain it.

The first step will be to grapple with the daunting concepts I have thus far been employing without much definition. I owe readers at least a working definition of emotion; which I will offer in Chapter One, though it will need to be accompanied by caveats and placed in historical context. More important, for my purposes, is to place the term in its legal context. The law, as embodied in legal practice, education and scholarship, has long sought to ignore, deprecate, or at least cabin emotion. This chapter will explore law's (very slowly) evolving understanding of emotion and its role; concentrating on the barriers to understanding, and ending, in light of the current explosion in cross-disciplinary knowledge on the topic, on a hopeful note.

Chapter Two will explore emotion's role in an institutional setting, and specifically, in the arena of capital punishment. I will argue that the American system of capital punishment reflects and is in part shaped by our emotional commitments. Conversely, the institution itself helps not only channel but shape the emotions of its institutional actors. And with help from other institutions-- most prominently the media—the institution has a hand in shaping the emotions of the lay public as well.

Chapters Three through Seven will focus on institutional roles, specifically the capital jury, the judiciary, the prosecutor and defense attorney, and the victims' families. Each role comes freighted with expectations. Some of these expectations are invisible to the untrained eye, others explicit, and perhaps explicitly regulated.

Chapter Three addresses the jury, the most obvious locus of emotion theory because the emotional aspects of the jury's role are comparatively salient. The capital jury is a rich source of information about how emotion plays out in institutional contexts. The capital trial is a circumscribed, tightly controlled, and highly ritualized setting, governed by special rules of voir dire, by pattern jury instructions, by patterned responses to juror questions, and other protocols. Judging by its formal rules, it is a proceeding that allows little room for emotion, despite the fact that the jury must decide whether to take a life. The dynamics of actual jury decision-making tell a very different story, reflected in a fascinating body of empirical research which illustrates the power of certain emotions evoked by the defendant, particularly fear, anger, and unconscious race bias, in the decisional process. This chapter will explore what is known, and what is yet to be discovered, about the effects of emotion on the workings of the capital jury. As it will explain, 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—not just in the courtroom, but in the jury room as well.

Chapters Four and Five discuss capital prosecutors and defense attorneys, and these are markedly different discussions. Prosecutors are the “black box” of the capital system. Their loosely constrained and largely unreviewable power to decide whether to bring capital charge is an invitation to decision-making influenced by unrecognized emotions like unconscious bias and selective empathy, or by more salient emotions like disgust and racial animus. The problem is exacerbated by a prosecutorial culture that defines itself as rational, tough, and unemotional. Chapter Four examines this dangerous mix and its consequences for the capital system. Chapter Five, which focuses on capital defense attorneys, confronts a different landscape. Capital defense attorneys are a garrulous and self reflective lot, and in this chapter I draw from their own accounts (both published accounts, and original interviews) to explore the emotional impact of their work on their personal and professional lives, their clients, and the system.

Judges occupy the most rarified position in the legal realm; they are meant to rise above emotion entirely, and rule from a perspectiveless, omniscient place. The fiction of the omniscient judge has been critiqued since at least the time of the legal realists, but it persists. Capital cases represent an extraordinary challenge for judges; but not a unique one. The impossibility of passionless judging in this context holds lessons for judging in all contexts. Chapter Six explores the emotional dynamics of judging capital cases at the trial level, in the full glare of public passion. It also discusses the very different set of challenges confronting Supreme Court justices, a topic that draws from the accounts of justices as diverse as Harry Blackmun (whose anguished journey toward an abolitionist position is well documented) to Antonin Scalia (who stoutly

denies that emotion, religion, or other “external” factors play any role in his capital jurisprudence.)

In Chapter Seven, I turn to a group that is not officially part of the capital system, though that is changing—the families and other survivors of the victim. The increasingly effective victims’ rights movement has helped grant crime victims and survivors status in the criminal justice system, and nowhere is its influence more evident than in the capital system. This is an arena in which psychological concepts are frequently employed. The survivors’ assumed emotional needs have contributed to the adoption of victim impact statements, which grant bereaved family members an official voice in the sentencing hearing. The survivors are often invoked by those advocating execution, or at least a more streamlined appellate path toward a final decision about execution. This chapter examines these assumptions, and considers both whether they reflect the actual needs of survivors, and how they contribute to the workings of the capital system more generally. It also takes a look at a more obscure group of families, the families of those accused and convicted of capital murder.

The concluding chapter, Chapter Eight, comes back to the question: why should the system of capital punishment take emotional dynamics into account? In order to address this question fully, it faces head-on a persistent theme of the preceding chapters, the theme of racial inequality in the capital system. In capital cases, the Constitution demands that the punishment be tailored both to the nature of the crime and to the defendant’s personal responsibility and moral guilt. The legitimacy of capital punishment rests on our legal system’s ability to meet this constitutional demand; to claim that the judgment to take a life was consistent with eighth amendment principles. There is mounting evidence that the punishment is too often tailored not to the crime or the defendant’s moral guilt, but to extraneous factors such as unconscious racism

(exacerbated by poor representation). Recent neuroscientific research, for example, suggests just how deeply imbedded race-based decision-making may be. Psychological differences in reaction to skin color are magnified by cultural representations of crime, race and danger. The problem cannot be addressed if it is ignored, and it cannot be fully grasped without attention to the emotional dynamics of the decision-making process.

In this concluding chapter, I draw together many of the strands of previous chapters to highlight the recurring problem of systemic racism. It may be that racial discrimination in capital cases cannot be eradicated at all. If so, we have a moral choice to make, and an emotional one too; a choice that will test the depth of our passion for justice.