

REDISCOVERING THE LAW'S MORAL ROOTS

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In their recent essay,¹ Professors Berman and Bibas stake out terribly important ground, recognizing and then wonderfully articulating an essential duality between justice and emotion, and between law and morality, all in the context of the constitutionality of the death penalty for child rape as raised in *Kennedy v. Louisiana*.²

I do not express any opinion on whether their insight should have driven a different result in *Kennedy*—after all, there was the *constitutional* question of whether due process, or the Eighth Amendment, means that only death justifies death. True, labeling that inquiry as constitutional does not rescue us or the members of the Court from the “normative Furies,” to paraphrase Professors Berman and Bibas. Indeed, they are right to point out that those Furies are precisely what drove some state legislatures to make death the penalty for raping children, that such a journey is deeply personal and one about which reasonable and honorable legislators may disagree, and that this is therefore a fray into which the judicial branch should be especially leery to enter.

Still, the ultimate decision in *Kennedy* required the Court’s full range of constitutional tools, including, but certainly not limited to, its ability to recognize a state’s legitimate, emotional, and democratic expressions of deeply held stigma. Those of us who care about constitutional processes—not just outcomes—believe that some other tools, including text, history, and stare decisis should also play into the mix.³

In fact, when I read the increasingly voluminous literature on law and emotion,⁴ I sometimes worry that there is a risk of overplay, at least in the

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¹ Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/17/LRColl2008n17Berman&Bibas.pdf> (link).

² *Kennedy v. Louisiana*, No. 07-343, slip op. (U.S. June 25, 2008) (link).

³ Whether the Court actually used these other tools, and used them plausibly, I leave to other commentators.

⁴ See, e.g., *THE PASSIONS OF LAW* (Susan A. Bandes, ed., 1999); Susan A. Bandes, *Emotion, Values and the Construction of Risk*, 156 U. PA. L. REV. PENNUMBRA 421 (2008),

public's mind. When law professors start writing about "emotion," this may give the general public exactly the wrong idea—that law is arbitrary, that decisions are whatever a single judge or jury "feels" is right, and that the best lawyers win because a trial is not really about the search for truth but is instead some kind of legal version of American Idol. Indeed, it is a depressing fact, at least in my experience, that many prospective jurors already believe in this kind of relativist entertainment-based narrative; though the good news is that even those susceptible to this belief almost always take their oaths seriously, manage to transcend their beliefs, and return sensible verdicts based on the evidence. In any event, it may be, to paraphrase the old joke, that emotion, like sex and math, is something we are always thinking about but should seldom do in public.

Still, the payoff seems well worth the risk, especially since the post-modernists, on both the left and right, have spent so long trying to remove morals from every aspect of intellectual life. When I ask my law and biology students to give me a list of universal human do's and don'ts, they look at me like I was speaking Samoan.⁵ They have been taught for years that there is no right or wrong, that culture is everything, and that (on the left) law is just the tool of retaining power or (on the right) that it is just a way to make markets more efficient. As a result, most students are completely unprepared for anything even approaching a rich discussion of law and morality. Against this backdrop, risking a little overkill seems well worth it.

The law and emotion literature is just a small part of a broader rediscovery of the law's moral roots,⁶ a rediscovery that has significance far beyond the death penalty. It is driving a profound neo-retributivist rethinking of the purposes of punishment. Criminal law, and many if not most aspects of all law, are coming to be understood as cultural expressions of deeply held, and largely shared, moral intuitions. Those moral intuitions are, in turn, often instantiated by neural systems that have important emotional aspects. To simplify: it helps us all avoid becoming child rapists by being viscerally repulsed by child rape. Emotion is not the enemy of the

<http://www.penumbra.com/responses/03-2008/Bandes.pdf> (link); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006).

⁵ For a brief example of the continuing debate over moral relativism, see Peter Wood, *Pacifist Hoax*, Front Page Magazine, Sept. 20, 2003, <http://www.frontpagemag.com/Articles/Read.aspx?GUID=%7BC8A2BCF1-FADB-4D00-83BF-88DE1086ACEE%7D> (discussing the continued influence of Margaret Mead's controversial anthropological work in Samoa and New Guinea) (link). See also Stanford Encyclopedia of Philosophy, Moral Relativism, <http://plato.stanford.edu/entries/moral-relativism/> (last updated Mar. 10, 2004) (explaining the concept of moral relativism) (link).

⁶ See, e.g., Forum, *Consciousness and Culpability on Trial*, 26 LAW & HIST. REV. 99 (2008) (link); Symposium, *Law and Morality*, 31 HARV. J. L. & PUB. POL'Y 1 (2007) (link); Symposium, *Law and Morality in Constitutional Law*, 48 WM. & MARY L. REV. 1523 (2007); Jules L. Coleman, *Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence*, 27 OXFORD J. LEGAL STUD. 581 (2007); Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941 (2007); Eyal Zemir & Barak Medina, *Law, Morality and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL. L. REV. 323 (2008).

mind's rationality, it is its lubricant, a kind of evolutionary shortcut when circumstances don't warrant reflection (fight or flight) or when reflection could lead us astray or leave us paralyzed.

Notice that Berman and Bibas don't just say law is "linked" with emotion. Everyone says that, and then proceeds to criticize a verdict, opinion, statute, or proposed reform, arguing that somehow emotion, rather than rationality, drove the particular decision. This is all part of the larger Hobbesian fiction that law, and civilization for that matter, wages a constant battle against instinct, and instinct's cousin, emotion. But it is becoming increasingly clear that humans, precisely because we are such profoundly social creatures, have an evolved instinct to make and adhere to rules every bit as much as we have an instinct to break them. We have evolved a complex accommodation between self and others that includes a deeply held, universal, and largely culture-independent core of right and wrong.⁷

Berman and Bibas recognize this core, if not its evolutionary roots. And nowhere is that core more evident than in criminal law, and in the courtrooms where criminal law is applied. Anyone who has ever attended a sentencing hearing of any kind recognizes immediately that it is one act in a morality play. Emotions flood the courtroom, both catalyzing and inhibiting the results. Criminal law is applied human nature, and its application needs to be richly attuned both to the universality of that nature and to its dizzying variations.

I have a few small quibbles with the essay. I doubt, for example, that talking about "emotional capacity" will shed any light on the difficult issues of culpability, excuse, and justification.⁸ On the contrary, we can fairly assume every child rapist has several defects, "emotional incapacity" being only one. But surely that is not an excusing condition. In this regard, Berman and Bibas seem to commit the same baseline error as Justice Kennedy did in *Roper v. Simmons*:⁹ Of course juvenile brains are not generally as developed as adult brains. Of course child rapists have some empathy issues. Yet most people with underdeveloped brains or empathy issues still manage to get through their lives without committing murder or child rape. Even if there were some causative link between these alleged disabilities and the commission of crime, to quote my friend Stephen Morse, causation is not

⁷ See, e.g., Morris B. Hoffman, *The Neuroeconomic Path of the Law*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B: BIOLOGICAL SCI. 1667 (November 2004), available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1693450&blobtype=pdf> (link); Morris B. Hoffman & Timothy H. Goldsmith, *The Biological Roots of Punishment*, 1 OHIO ST. J. CRIM. L. 627 (2004) (link); Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007) (link).

⁸ See generally Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1082–97 (2007) (discussing mental disorder and criminal responsibility).

⁹ 543 U.S. 551 (2005) (holding that the Eighth Amendment prohibits states from executing murderers under 18 years old).

excuse.¹⁰ I would also have preferred an emphasis on broader targets than the death penalty, but of course I understand that the death penalty is the Golden Road to emotion, and therefore represents an exaggerated context in which to raise these important issues.

But these are nit-picking criticisms. The Berman and Bibas essay hits the nail on the head: law and emotion are two sides of the same coin because the coin is us, and our evolved neuroarchitectures. Pretending that the criminal law is not a reflection of our deepest moral instincts misses the essential nature of both. Their essay should be required reading for every law student, and every judge.

¹⁰ Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1592–94 (1994).