

CHILD RAPE, MORAL OUTRAGE, AND THE DEATH PENALTY

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Is raping a child as heinous an act as taking a life? How should the comparative moral depravity of child rapists and murderers be measured? By what metric can the irrevocable harm murder inflicts on its victims be weighed against the long-term anguish inflicted on child rape victims? What is the judicial role in gauging the societal outrage and revulsion elicited by these two crimes, and in determining whether the death penalty is an appropriate response to those emotions?

In *Kennedy v. Louisiana*¹ the Supreme Court struggled with this daunting set of issues, which called for judgments that are inescapably moral and emotional. The Court also faced contentious questions about the nature and longevity of the psychological injuries to child rape victims and to their families,² about whether a capital prosecution would ameliorate or exacerbate those harms,³ and about whether the strong emotions jurors feel in child rape cases are likely to overwhelm their capacity to decide fairly.⁴ The *Kennedy* decision is a vivid illustration of the central point Douglas Berman and Stephanos Bibas make in *Engaging Capital Emotions*: that it is impossible to evaluate the legal issues raised by capital punishment without addressing the role of emotion.⁵

I've argued that once we acknowledge "the emotional wellsprings of the retributive calculus" we can have "a more clear-eyed debate about retribution's proper role in our capital punishment system."⁶ Berman and Bibas begin this debate.⁷ They argue that child rape should be a capital crime,

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¹ No. 07-343 (U.S. June 25, 2008) (link).

² *See id.*, slip op. at 24 (majority opinion); *see also id.*, slip op. at 21–23 (Alito, J., dissenting).

³ *See id.*, slip op. at 32 (majority opinion); *see also id.*, slip op. at 16 (Alito, J., dissenting).

⁴ *See id.*, slip op. at 29 (majority opinion); *see also id.*, slip op. at 18–19 (Alito, J., dissenting).

⁵ Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355 (2008) (link).

⁶ Susan A. Bandes, *The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty*, 42 STUD. IN L., POL. & SOC'Y 28 (2008) [hereinafter Bandes, *The Heart Has Its Reasons*].

⁷ Robert Blecker has also prominently argued in favor of the death penalty based on what he calls "emotive retributivism." *See, e.g.,* Robert Blecker, *But Did They Listen? The New Jersey Death Penalty Commission's Exercise in Abolitionism: A Reply* (July 24, 2007) (unpublished manuscript), available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=robertblecker> (link).

drawing support from the widely shared moral outrage the crime evokes, and from the crime's emotional toll on child rape victims and their families. Although I reach the opposite conclusion on the merits, their essay models precisely the sort of conversation we ought to be having.

Part I of this Reply considers the role of emotion in capital jurisprudence. Section A discusses the importance of confronting emotion's role in capital punishment. Section B explores the difficulties with using moral outrage as a metric. Section C argues that the penal system should not merely reflect moral outrage, but channel and educate it. Part II focuses on the role of emotion in deciding whether child rape should be a capital crime. Section A considers the relevance of victim harm to the question facing the *Kennedy* court. Section B argues that there are three particular problems with allowing juries to sentence child rapists to death: the deleterious impact of anger and empathy, the problem of generic prejudice, and the issue of race.

I. EMOTION AND CAPITAL PUNISHMENT

A. *Why Emotion Must be Part of the Conversation*

As Berman and Bibas argue, it is important to bring emotion into the legal conversation for several reasons. First, emotions help explain why people hold the views they do about the death penalty.⁸ When we engage in formulaic, affectless doctrinal discussions of deterrence, retribution, and incapacitation,⁹ we talk past each other and grow increasingly polarized. These doctrinal categories have little to do with why people in fact support or oppose the death penalty.¹⁰ The more we understand about why people take the positions they do, and why they adhere to them so vehemently, the more likely we are to persuade one another and move toward consensus.

Second, the capital system—like any legal institution—is premised on assumptions about human behavior. For example, it is built around assumptions about what motivates or deters criminal acts, about how judges and jurors decide, and about what victims need. As I mentioned above, the *Kennedy* opinions are rife with assumptions about human behavior, sometimes backed by empirical evidence, and sometimes not. When courts premise decisions on assumptions about human behavior, they ought to determine whether the available evidence supports those assumptions.

The third reason is the most challenging. Once we acknowledge that, as a descriptive matter, emotion pervades the law, we can proceed to the necessary normative discussion about *which* emotions should play roles in various legal contexts. There are many ways to approach this question. For example, there are philosophical debates about whether certain emotions are

⁸ Bandes, *The Heart Has Its Reasons*, *supra* note 6, at 22–23.

⁹ *Id.*

¹⁰ *Id.*

normatively desirable, such as the debate between Martha Nussbaum and Dan Kahan about the role of disgust in criminal law.¹¹ There are psychological, sociological, and neuroscientific arguments that certain emotions contribute to better decisionmaking.¹² But it is often difficult to navigate around what the philosopher Hilary Kornblith called “the very hazy borderline between epistemology and empirical psychology.”¹³ That is, what relevance does the way we *do* reason have for the question of how we *ought* to reason? Does the fact that we feel certain emotions itself demonstrate that they deserve respect?¹⁴ Philosopher Anthony Appiah aptly describes the tension underlying many moral intuition analyses, observing that although we are right to “complain of normative systems that seem impossibly unmoored from human judgment,” we ought not to perpetuate objectionable or outmoded intuitive assumptions on the theory that “whatever is, is right.”¹⁵

Retributive theory tends to straddle this hazy borderline. Retributive arguments often draw support from the *fact* of the outrage engendered by crime, and the *fact* of the desire to act upon that outrage. When Berman and Bibas refer to retributive anger’s “deep roots in the law,”¹⁶ they are in part arguing that this retributive emotion deserves respect because it is such a basic and longstanding part of any punishment regime. Their argument is also, in part, empirical and pragmatic—an assertion that because the emotion is so entrenched, efforts to squelch it will fail, resulting in distortion, a loss of respect for the system, and even vigilante justice. And finally, their argument is explicitly normative. It is a contention that the legal system ought to reflect righteous anger and outrage, as a way of holding a moral agent accountable for his crime, expressing the community’s condemnation, and vindicating the victim.

The relevant question for the legal system is what government actions should follow from the fact that certain crimes evoke widespread and intense moral outrage. Is the depth of the moral outrage a normative argument for a certain degree of punishment or a certain type of punishment? My response, in brief, is that emotions, and the actions that follow from

¹¹ See Martha C. Nussbaum, “*Secret Sewers of Vice*”: *Disgust, Bodies and the Law*, in *THE PASSIONS OF LAW* 19–62 (Susan Bandes ed., NYU Press 2000); Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *THE PASSIONS OF LAW* 63–79 (Susan A. Bandes ed., NYU Press 2000).

¹² See generally ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (QUILL/ HARPER/COLLINS 1994).

¹³ Hilary Kornblith, *The Laws of Thought*, 52 *PHIL. & PHENOMENOLOGICAL RES.* 895, 896 (1992).

¹⁴ For a discussion of the relevance of emotion in decisionmaking processes, see Susan A. Bandes, *Emotions, Values and the Construction of Risk*, 156 *U. PA. L. REV. PENUMBRA* 421 (2008), <http://www.pennumbra.com/responses/03-2008/Bandes.pdf> [hereinafter Bandes, *Emotions, Values, and the Construction of Risk*] (commenting on Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 *U. PA. L. REV.* 741 (2008)) (link).

¹⁵ KWAME ANTHONY APPIAH, *EXPERIMENTS IN ETHICS* 76–77 (Harv. Univ. Press 2008).

¹⁶ Berman & Bibas, *supra* note 5, at 360.

them, must be evaluated in light of constitutional objectives. Moreover, as I will discuss below, the legal system should not simply reflect or evaluate emotional commitments. It must also channel, shape, and educate them.

Emotions are not inherently normative.¹⁷ Whether they are desirable depends on what function they are meant to serve and what goals they are meant to attain. The question is not whether retribution ought to be encouraged, or victims ought to be helped to heal, as an abstract matter, but what role retribution or healing ought to play in the American system of capital punishment. Under current Eighth Amendment law, capital punishment is permitted to the extent it comports with “the evolving standards of decency that mark the progress of a maturing society,”¹⁸ avoids wanton and unnecessary infliction of pain, is proportionate to the severity of the crime, and minimizes the risk of arbitrary and capricious action.¹⁹ Of course, there is deep disagreement about the meaning and interpretation of the Eighth Amendment generally, and about the proper scope and application of these constitutional standards.²⁰ Nevertheless, these standards provide the framework within which interpretation must take place.

B. *Taking the Measure of Moral Outrage*

Does our understanding of the deep roots of the retributive emotions shed light on the questions of proportionality and evolving standards of decency the Court faced in *Kennedy*? Do the retributive emotions help us find a metric for determining what sorts of crimes, or what sorts of offenders, deserve the death penalty?

Retributivists “seek[] to punish an offender because she deserves to be punished in a manner commensurate with her legal wrongdoing and responsibility Not more, not less.”²¹ Although this principle has strong intuitive appeal,²² it is in danger of being circular and indeterminate—an assertion that “we punish because it is the right thing to do, and we mete out the punishment that is right.”²³ Paul Robinson and his coauthors have explored the notion of “empirical desert,” arguing that people share robust in-

¹⁷ See Susan A. Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U CHI. L. REV. 361, 405 (1996).

¹⁸ *Kennedy v. Louisiana*, No. 07-343, slip op. at 8 (U.S. June 25, 2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (link).

¹⁹ See generally *Gregg v. Georgia*, 428 U.S. 153 (1976) (link).

²⁰ Compare Justice Stevens’s concurrence in *Baze v. Rees*, 128 S. Ct. 1520, 1551–52 (2008) (Stevens, J., concurring in the judgment) (link), which draws on his own experience implementing the death penalty to buttress his conclusion that capital punishment is unconstitutional, to Justice Scalia’s concurrence, 128 S. Ct. at 1552–53 (Scalia, J., concurring in the judgment), in which he argues that Justice Stevens’s conclusion is insupportable as a matter of constitutional interpretation and that the legitimacy of capital punishment is a legislative question.

²¹ Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1441 (2004).

²² See Mary Sigler, *Mercy, Clemency, and the Case of Karla Faye Tucker*, 4 OHIO ST. J. CRIM. L. 455, 464 (2007) (link).

²³ Bandes, *The Heart Has Its Reasons*, *supra* note 6, at 27.

tutions about how serious punishment ought to be for a range of crimes. But Robinson notes that “modern notions of desert are ordinal rather than cardinal.”²⁴ They tell us where on the continuum punishments should fall, but not what types of punishment should bracket the continuum. In short, people share strong intuitions about which crimes deserve the most serious punishments, but, at least thus far, the research has no implications for the question of what the most serious punishments ought to be.²⁵ As I will suggest shortly, it is plausible that the available punishments frame attitudes about appropriate punishment.

Another difficulty with gauging moral outrage as a measure of proper punishment is that people rarely feel one emotion in isolation. To get at the issue of what people want from punishment, it is necessary to examine a complex set of emotions. For example, it is important to disentangle moral outrage from fear. Studies show that when fear of returning the defendant to the community is taken out of the equation, and life without parole is offered as an option, support for the death penalty falls significantly.²⁶

One final difficulty with measuring the retributive urge is that it is not static and does not always arise from the bottom up. The public’s moral outrage not only influences penal policy, but is influenced by it, as I will discuss in the next section. The public’s level of outrage is also influenced by media, political discourse, and all the other factors that routinely inform (or misinform) public opinion.

C. Channeling and Educating Moral Outrage

Berman and Bibas argue that “[g]rave moral wrongs demand righteous indignation and action,” and that the death penalty is a way of “[d]enouncing and punishing [child rape] in the strongest possible terms.”²⁷ They suggest that since child rape is as terrible a crime as capital murder, we ought to express our condemnation by punishing it the same way. This argument assumes that capital punishment is the proper expression of the strongest moral outrage.

My difficulty is with the authors’ claim that the emotion of moral outrage provides support for the death penalty. It is one thing to say that the *emotion* deserves respect; it is quite another to say that the particular punishment does. I will first consider whether an understanding of the retributive emotions leads to a normative argument for capital punishment. In the next section, I will consider what guidance these emotions offer for the question of whether some child rapists should be executed.

²⁴ Paul Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1835 (2007), available at http://local.law.umn.edu/uploads/images/6298/Robinson_Kurzban_Final.pdf (link).

²⁵ See *id.*

²⁶ See *Baze v. Rees*, 128 S.Ct. 1520, 1546 (2008) (Stevens, J., concurring in the judgment) (link).

²⁷ Berman & Bibas, *supra* note 5, at 360, 362.

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

Courts and other legal institutions play a role in guiding public reactions to crime and public expectations about punishment. The legal system is not a mere conduit for outrage. Rather, it channels outrage, ensuring that punishment is proportional and the product of deliberation. It separates the vengeful impulse from the legitimate retributive urge. Ideally, it ensures that serious decisions are not made in the initial stages of grief and fury that follow a heinous, high profile crime²⁸ and that all relevant voices are heard—even those in danger of being overwhelmed by public outrage.

Moral outrage does not merely well up from the populace; it takes shape in a political and social context. When respected institutions send the insistent message that only the death penalty can truly express appropriate condemnation for the most heinous crimes, and that only the death penalty can honor the worth of the victims of these crimes, that message has consequences. It guides the public to feel moral outrage when it is *deprived* of the death penalty. It creates a set of emotional expectations. Once the death penalty is advertised as a sign of the highest respect for the victim, a prosecutor's failure to bring capital charges, a jury's failure to sentence the defendant to death, or the system's failure to execute the defendant are branded as signs of disrespect for the victim and inadequate moral condemnation.²⁹ If child rape is declared a capital crime because of the emotional devastation it causes, victims of other serious crimes might reasonably experience the decision as denigrating the nature and intensity of their suffering. They might come to feel that only a capital sentence can properly express society's condemnation.

There may be widely shared intuitions about which crimes are the most heinous, but the Court and other institutions play an important role in the debate about what punishments those heinous crimes deserve. Studies of “anchoring effects” suggest that those who define the initial outer boundaries for decisionmaking exert significant influence.³⁰ If life without parole were the ultimate punishment, it might be viewed as an appropriate reflection of moral outrage at the crime and respect for the victim. The expressive function may be served by imposition of the most serious punishment

²⁸ See Susan A. Bandes, *The Lessons of Capturing the Friedmans: Moral Panic, Institutional Denial, and Due Process*, 3 LAW CULTURE & HUMAN. 293 (2007) [hereinafter Bandes, *The Lessons of Capturing the Friedmans*] (discussing high profile child sexual abuse prosecutions in which legal institutions exacerbate rather than channel public outrage).

²⁹ See Susan A. Bandes, *Victims, “Closure,” and the Sociology of Emotion*, LAW & CONTEMP. PROBS. (forthcoming 2009) [hereinafter Bandes, *The Sociology of Emotion*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1112140 (discussing the deleterious consequences of this message) (link).

³⁰ See J.J. Prescott and Sonja Starr, *Improving Criminal Jury Decision Making After the Blakely Revolution*, 2006 U. ILL. L. REV. 301, 325–26 (discussing the importance of providing the jury with a well-chosen “base anchor” to guide sentencing discretion, given the strong influence that the anchor will exert on deliberation) (link); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2516–18 (2004) (discussing the strong “anchoring” influence of a prosecutor's initial charge on subsequent plea negotiations).

available, rather than by imposition of the death penalty *per se*. This question deserves further study.

II. EMOTION, CHILD RAPE, AND THE DEATH PENALTY

In the next two sections, I will address the role of emotion in determining whether child rape should be a capital crime. This short Reply is meant primarily to address the Berman and Bibas essay, which was written prior to the Supreme Court's *Kennedy* decision. Therefore, I will address the authors' arguments in favor of making child rape a capital crime, with reference to the *Kennedy* opinion where relevant.

A. *The Relevance of Harm to Victims*

In the *Kennedy* case, Justice Kennedy acknowledges the anguish child rape victims suffer,³¹ but despairs of "quantifying" this harm in the way one can "quantify" the harm caused by murder.³² He rests his distinction between murder and child rape on the fact that only the former is irrevocable.³³ Justice Alito's dissent cites empirical evidence of the grievous and often long-term harm caused by child rape in support of his argument that Louisiana's legislative judgment was not unreasonable.³⁴ Berman and Bibas, too, cite the emotional devastation suffered by victims and their families as a compelling reason to treat the most heinous child rapes capitally. The focus on harm to victims poses some difficult issues for the criminal justice system. Most centrally, there is profound uncertainty about what role the emotional needs of victims ought to play in Eighth Amendment jurisprudence.

Berman and Bibas argue that the grievous harm suffered by child rape victims and their families makes child rape a crime worthy of capital punishment. In large part their argument is premised on the need for fitting retribution for this horrific crime. In taking the measure of a crime's heinousness and a criminal's depraved heart, it seems reasonable to ask whether it is the sort of crime that is likely to cause long-term harm. Nevertheless, the reliance on predictions of future harm poses some problems for the retributivist rationale.

Retributive rationales for punishment are generally backward-looking. They focus on the crime, or perhaps on the character of the defendant as inferred from the crime. As Mary Sigler said in explaining why "pickaxe murderer" Karla Faye Tucker did not deserve clemency despite her exemplary and remorseful conduct during her years on death row: "[from] the retributive perspective that provides the primary rationale for the death

³¹ See *Kennedy v. Louisiana*, No. 07-343, slip op. at 24 (U.S. June 25, 2008) (link).

³² See *id.*, slip op. at 29.

³³ See *id.*, slip op. at 27.

³⁴ See *id.*, slip op. at 22 (Alito, J., dissenting).

penalty,³⁵ . . . predictions about an offender's future conduct are irrelevant to determinations of desert."³⁶

Berman and Bibas defend retributive punishments for child rapists because of what the future might hold—for both defendants and victims. They refer to the possibility of additional abusive acts by the defendant against the victim.³⁷ But an argument for capital punishment that relies on the future behavior of the defendant for support needs to encompass the possibility that the defendant's behavior will change in ways that could be helpful rather than harmful to the victim and her family. For example, as Justice Kennedy observed, the defendant might come to accept responsibility and express remorse for the harm he has caused.³⁸ Moreover, their prediction of future harm to victims requires speculation on what victims and their families will come to feel with the passage of time. It is difficult and dangerous enough to generalize about what victims need in the present.³⁹ Predicting how they will feel in the future is an even riskier endeavor.⁴⁰

The discussion of victim harm contains some troubling ambiguities for the question facing the *Kennedy* court. Evidence of future harm might be offered as a general measure of the heinousness of child rape—an argument that this type of crime is worthy of the harshest form of retribution. But that argument flows almost imperceptibly into another: that the death penalty is needed to help individual victims heal. For example, Berman and Bibas argue that “[t]he death penalty unequivocally proclaims society’s empathy and outrage, that these victims bear no blame and need never fear that their abusers will repeat or keep exploiting their trauma.”⁴¹ The question of whether society has a right to express its moral outrage by executing child rapists, however, is not the same as the question of what will help victims heal.

Justice Kennedy recognizes this distinction between the needs of society and the needs of the victim, suggesting that “[s]ociety’s desire to inflict the death penalty for child rape by enlisting the child victim” in a lengthy

³⁵ Sigler, *supra* note 22, at 477.

³⁶ *Id.* at 473.

³⁷ The authors raise the possibility that the victims “may have their horrifying treatment captured on film and then peddled around the world” and will “spend their lives not only grappling with the anguish of rape, but fearing that any computer could replay their childhood horror.” This scenario seems to encompass additional abuse by both the defendant and unknown third parties. Berman & Bibas, *supra* note 5, at 362.

³⁸ See *Kennedy*, No. 07-343, slip op. at 36 (majority opinion) (“In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.”); see also Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85 (2004) (arguing for the importance of remorse in the criminal justice system).

³⁹ Bades *Empathy, Narrative and Victim Impact Statements*, *supra* note 17, at 405.

⁴⁰ Lynne Henderson, *The Wrongs of Victims’ Rights*, 37 *STAN. L. REV.* 937, 964 (1985).

⁴¹ Berman & Bibas, *supra* note 5, at 362.

and wrenching capital case might have the effect of inflicting additional harm on the child victim.⁴² Justice Alito dismisses this argument as a policy concern irrelevant to the constitutional calculus, asserting that “the Eighth Amendment protects the right of an accused. It does not authorize this Court to strike down . . . laws on the ground that they are not in the best interests of crime victims or the broader society.”⁴³ Yet if the future wellbeing of victims is at issue,⁴⁴ surely it is reasonable to seek evidence about whether the death penalty will contribute to that wellbeing or detract from it.

The move toward justifying capital punishment based on the emotional harm to individual victims creates an additional problem. It puts courts and juries in the position of passing judgment on that harm. Despite the Supreme Court’s overconfident prediction to the contrary,⁴⁵ courts have consistently shown themselves unwilling and ill-equipped to regulate the admission of victim impact testimony by murder survivors in capital cases.⁴⁶ It is likely that courts would find evaluating child rape victims’ testimony about emotional harm at least as unpalatable. But if capital charges and capital sentences are to be determined, in part, by the level of emotional devastation to victims, then prosecutors, judges, and juries will indeed need to evaluate claims of emotional harm, and defense attorneys will need to refute them.⁴⁷ This is a prospect that ought to give us pause.⁴⁸

B. Juror Emotion and Child Rape

Thus far I have addressed the argument that moral outrage and other emotions lend support to making child rape a capital crime. I now turn my attention to the effect of these emotions on the trial process itself. Accusa-

⁴² *Kennedy*, No. 07-343, slip op. at 32.

⁴³ *Id.*, slip op. at 16 (Alito, J., dissenting).

⁴⁴ Later in his dissent, Justice Alito argues at length that the harm to child rape victims is severe and long-lasting, and that the “problems that afflict child-rape victims often become society’s problems as well.” *Id.*, slip op. at 20–23.

⁴⁵ See *Payne v. Tennessee*, 501 U.S. 808, 836 (1991) (Souter, J., concurring) (expressing confidence in the “traditional guard against the inflammatory risk, in the trial judge’s authority and responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal”) (link).

⁴⁶ See John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 270–73 (2003) (link); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 145 (1999).

⁴⁷ See Bandes, *Empathy, Narrative and Victim Impact Statements*, *supra* note 17, at 407 & n.235; Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 50–51 (1992) (discussing the specter of “mini-trials” on the victim’s character).

⁴⁸ One dramatic example of this dynamic came in the oral argument in the *Kennedy* case, in which counsel for the State began her oral argument with an agonizing description of the injuries to the victim, and Justice Stevens inquired whether the injuries were permanent. Counsel responded that, after surgery, the physical injuries had healed. Transcript of Oral argument at 28–29, *Kennedy*, No. 07-343.

tions of child rape evoke emotions in jurors, prosecutors, judges, and the public at large that may interfere with the ability to implement the death penalty in a constitutionally acceptable manner. There are three overlapping concerns: the problematic role of anger and empathy in this context; the problem of generic prejudice; and the issue of race.

The authors assert that “legislators, prosecutors, and juries are well equipped to decide which child rapes are so heinous as to call for the ultimate punishment.”⁴⁹ There is substantial evidence casting doubt on this claim. As Berman and Bibas observe, accusations of child rape evoke understandable empathy for the victim and rage against the perpetrator. The law needs to make a difficult distinction between taking account of what people understandably feel and taking steps to ensure that those feelings don’t adversely affect the fairness of the legal process.

Empathy and anger are both emotions that can have deleterious effects on the operation of the criminal justice system when not properly channeled. Both of these strong emotions evoke the desire to act. There is evidence that anger interferes with sound judgment by causing misattributions of blame,⁵⁰ and some evidence that it translates into harsher sentences.⁵¹ In child sexual abuse prosecutions, this anger is coupled with intense empathy for the victim, and this empathy may drive jurors to want to alleviate the victim’s suffering.⁵² This combination of emotions renders child sexual abuse prosecutions particularly vulnerable to distortion and miscarriages of justice.

The concept of “generic prejudice” is useful in understanding one source of the concern. As Neil Vidmar explains, although any case may trigger prejudices that interfere with fairness, in some types of cases, the nature of the crime charged evokes prejudice against *any* person accused of committing that crime.⁵³ Generic prejudice implicates the jury’s ability to decide whether a crime occurred or, if it occurred, whether the defendant was the perpetrator. As Vidmar found, generic prejudice is a significant problem in child sexual assault cases.⁵⁴

The issue was not mere disapprobation or abhorrence of sex abuse but rather attitudes and beliefs that bear on the presumption of innocence when a defendant is accused of sexual abuse. Simply upon hearing the nature of the charges

⁴⁹ Berman & Bibas, *supra* note 5, at 362.

⁵⁰ Bandes, *The Sociology of Emotion*, *supra* note 29, at 21.

⁵¹ See Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L.REV. 419, 445–46 (2003) (link).

⁵² See, e.g., DANIEL GOLEMAN, *SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS* 96 (2006) (discussing the neural dynamics of empathy and compassion).

⁵³ Neil Vidmar, *Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials*, 21 LAW & HUM. BEHAV. 5, 6 (1997).

⁵⁴ *Id.* The well known “moral panics” that led to child sexual abuse allegations against hundreds of daycare workers in the 1980s are a painful illustration of the results of this dynamic. See generally Bandes, *The Lessons of Capturing the Friedmans*, *supra* note 28.

against the defendant, substantial numbers of jurors swore under oath that they could not be impartial in deciding guilt or innocence and were found partial by the triers.⁵⁵

Capital sentencing hearings, which focus on the more subjective question of whether a defendant deserves to die, raise particular problems in this regard. Jurors may want to ensure that the ultimate punishment available is meted out, and that desire may override their ability to determine whether the particular defendant deserves to die. The life and death decision is inherently moral and emotional, but it must also be particularized. There is no mandatory death penalty for any type of crime, no matter how repugnant. The decision must focus on the question of *which* child rapists deserve to die, and there is reason to seriously question the ability of juries to make this decision based on constitutionally acceptable criteria.⁵⁶

Finally, there is substantial evidence that race can play a distorting role in capital murder cases. As sociologist Craig Haney explains, jurors must cross an “empathic divide” in capital cases, and “in the case of African American capital defendants, the empathic divide” is especially wide.⁵⁷ In the context of capital murder, a defendant accused of killing a white victim is significantly more likely to be capitally charged and sentenced to death than one who is accused of killing a black victim.⁵⁸ As to what would occur if capital rape were reinstated, the evidence about the role of race in capital rape cases prior to 1977 (when the Court held in *Coker v. Georgia* that the death penalty is a disproportionate sentence for the rape of an adult woman⁵⁹) is not encouraging. Whatever one might think about the *Coker* decision—and I tend to agree with Berman and Bibas that it is emotionally tone deaf on the devastation caused by rape—the Court was facing a particular problem concerning race, rape, and the empathic divide. Consider these statistics from the defendant’s brief in *Kennedy v. Louisiana*:

⁵⁵ Vidmar, *supra* note 53, at 18.

⁵⁶ Justice Kennedy’s majority opinion expresses this very concern. See *Kennedy v. Louisiana*, No. 07-343, slip op. at 29 (U.S. June 25, 2008) (stating that when dealing with “a crime [such as child rape] that in many cases will overwhelm a decent person’s judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be ‘freakish’”) (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972)) (link). There is also reason to question the ability of prosecutors and judges to withstand the substantial pressures that arise in cases involving child rape and capital punishment. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995) (discussing political pressure on judges in capital cases); JAMES S. LIEBMAN, ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 169–170 (2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf> (discussing factors interfering with fair verdicts, including effects of political pressure on prosecutors and judges) (link).

⁵⁷ CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 203 (2005).

⁵⁸ See DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 316 (1990).

⁵⁹ *Coker v. Georgia*, 433 U.S. 584, 598–99 (1977) (link).

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

The practice [of executing rapists] originated in the antebellum South, where blacks were hanged (and often lynched) for raping white women; “[n]o white rapists are known to have been hanged.” Even during the mid-twentieth century period ending with the last execution in this country for rape in 1964, over 89% of those executed for rape were black, while blacks and whites were executed for murder in almost identical numbers. All fourteen rapists Louisiana executed during the 1940’s and 1950’s were black.⁶⁰

CONCLUSION

There is ample reason to believe that the legal system should not simply place its imprimatur on the emotions evoked by child rape. The better path is the one Berman and Bibas recommend (though I would follow it to a different destination). We need to take those emotions very seriously. We also need far more empirical evidence on how a wide range of emotions operate and can be effectively channeled. Most important, we need to continue to evaluate the retributive emotions and debate their place in the legal system. Justice Stevens recently protested that our current death penalty jurisprudence is the “product of habit and inattention rather than an acceptable deliberative process.”⁶¹ A broadly acceptable process will be one that both respects and evaluates the moral and emotional concerns animating the debate about capital punishment.

⁶⁰ Brief for Petitioner at 43 n.16, *Kennedy v. Louisiana*, No. 07-343 (U.S. June 25, 2008) (citations omitted) (link).

⁶¹ *Baze v. Rees*, 128 S.Ct. 1520, 1546 (2008) (Stevens, J., concurring in judgment) (link).