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# ENGAGING CAPITAL EMOTIONS

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Louisiana seeks to execute Patrick Kennedy for raping his eight-year-old stepdaughter. As the Supreme Court weighs the death penalty for this child rapist, commentators are aghast. The *New York Times* and the *Los Angeles Times* editorial pages call child rape a heinous horror but dismiss this reality.[1] The death penalty, they claim, is inherently excessive for crimes short of homicide; visceral disgust at child rape, they assert, clouds reasoned reflection about proportional punishment. This position reflects long-standing criticisms of the death penalty as an expression of raw vengeance, a hot passion that clouds dispassionate justice. The march of justice seems to be in the other direction: away from emotion and towards reason, from Dr. McCoy to Mr. Spock, from the Furies to Athena in Aeschylus' *Eumenides*.

But the Furies will not die so easily, nor should we disdain them. Emotions and the passions they create are ever-present in our legal system. They bubble beneath any seemingly cool, detached analysis of crime and punishment. As astute observers highlight, debates over criminal law and practices turn not on neutral deterrence-speak, but rather on emotion-laden claims and concerns.[2] The undercurrents of emotion are especially salient in death-penalty debates. Those who deny or bemoan the benighted persistence of passion fail to appreciate its role.[3]

In this short Essay, we suggest that the conventional attitude toward emotion in punishment is misguided. Part I begins by describing the existing legal terrain, and then Part II evaluates it normatively. Descriptively,

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[1] Editorial, *Not Justice: Louisiana Wants to Execute a Child Rapist. The Crime Is Heinous, but the Death Penalty Is Too Harsh*, L.A. TIMES, Apr. 16, 2008, at A16 (link); Editorial, *The Limits of the Death Penalty*, N.Y. TIMES, Apr. 16, 2008, at A24 (link).

[2] *See, e.g.*, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 436–51 (1999) (noting that while death-penalty debates invoke deterrence statistics, what really influences supporters and opponents is not deterrence but expressive judgments rooted in values, emotions, and sympathies).

[3] The leading anthology on the role of emotions in the law is THE PASSIONS OF LAW (Susan A. Bandes ed., 1999). For a more recent exploration of the role of emotion in the death penalty generally, see Susan A. Bandes, *The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty*, 42 STUD. L., POL. & SOC'Y (forthcoming 2008).

emotion is unavoidable in criminal justice and particularly in capital punishment. Indeed, recognizing emotion's role helps to explain many features of capital-punishment jurisprudence, from the debate over execution methods in *Baze* to the exemption of juvenile and mentally retarded defendants in *Roper* and *Atkins*.[4] Normatively, emotion is crucial to a criminal justice system that seeks both to educate citizens with its symbolism and to channel their justified outrage. Emotions deserve respect, especially when they reflect the public's moral perspective that certain crimes have profound emotional resonance.

In this vein, Part III argues, the emotional case for the death penalty may be even stronger for child rape than for ordinary murders, for two reasons. The victim of a child rape ordinarily survives and has to deal with the emotions stirred up by victimization for the rest of her life. Moreover, the victim's parents and other members of the community may feel unique emotional harms from the rape of a child.

Finally, Part IV considers how death-penalty opponents could better accept and harness emotional language. Emotional arguments are more promising strategies for abolitionists than simply questioning death penalty's cost and deterrent effects. The more successful foes of the death penalty speak the language of the emotions. Defense attorneys and reformers counter the emotional demands for justice with equally emotional pleas for mercy and for appreciating human fallibility. Rather than bemoaning emotional reactions, reformers should acknowledge emotion as the legitimate battlefield of criminal justice.

## I. THE PREVALENCE OF EMOTIONS

The evolution of criminal law reflects the persistence of emotional threads. A sudden heat of passion mitigates a killing from murder to manslaughter.[5] The emotional fear of being battered, according to some feminist scholars and defense lawyers, justifies or excuses women who kill their abusers.[6] Hate crime laws target bigotry and disgust and combat hateful emotional messages.[7] Insanity defenses sometimes turn on emotional ap-

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[4] Baze v. Rees, 128 S. Ct. 1520, 1533–37 (2008) (plurality opinion) (holding that three-drug method of lethal injection was not inherently cruel and unusual punishment); Roper v. Simmons, 543 U.S. 551, 569–75 (2005) (forbidding execution for crime committed while under age eighteen); Atkins v. Virginia, 536 U.S. 304, 317–22 (2002) (forbidding execution of mentally retarded criminals).

[5] *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 692–96 (1975).

[6] *See, e.g.*, Bechtel v. State, 840 P.2d 1, 8, 11 (Okla. Crim. App. 1992) (quoting LENORE WALKER, THE BATTERED WOMAN SYNDROME (1979)) (excising reasonableness requirement from jury instructions, to allow self-defense to women who kill abusers during a lull); State v. Norman, 378 S.E.2d 8 (N.C. 1989); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 56 (1986) (advocating self-defense excuse for battered women who kill abusers).

[7] *See, e.g.*, Dan M. Kahan, *The Progressive Appropriation of Disgust*, *in* THE PASSIONS OF LAW 63, 69–71 (Susan A. Bandes ed., 1999) (suggesting that hate crimes are useful tools to express disgust at bigotry).

preciation of a crime's wrongfulness or irresistible emotional impulses to act.[8]

The emotional topography is especially visible in enduring debates over capital punishment. For starters, why do communities persist in spending millions of dollars pursuing, defending, and seeking to carry out death sentences? Surely politicians and voters realize that years of litigation are not the most efficient way to incapacitate criminals, but efficiency is not the point. Legislatures continue to champion our society's ultimate punishment because elected officials and voters value the death penalty's unique symbolism, solemnity, and gravity.[9] Capital punishment expresses and educates our emotions, underscoring the solemnity of the community's judgment and condemnation.

Emotions undergird the Supreme Court's intricate modern regulation of capital punishment. The Framers wrote a seemingly emotional test into the Constitution: The ban on "cruel and unusual" punishments invites emotional reflection on which punishments are cruel and inhumane.[10] Moreover, the Justices' extraordinary willingness to hear so many capital cases—and often to debate issues beyond the one at hand[11]—suggests that even the nation's top judges feel strongly about the death penalty.[12]

Consideration of criminals' emotional capacity helps to explain which kinds of defendants the Court has exempted from execution. When killers lack emotional capacity, society cannot justify blaming them fully. Killers who are mentally retarded are too irresponsible to earn our full emotional outrage.[13] For similar reasons, *Penry* invalidated jury instructions that lim-

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[8] *See* MODEL PENAL CODE § 4.01, explanatory note (2001) (noting that the term "appreciate" in Model Penal Code's insanity test is broad enough to encompass apprehending the deeper significance of one's acts).

[9] *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) (discussing the death penalty as, in part, "an expression of society's moral outrage at particularly offensive conduct").

[10] U.S. CONST. amend. VIII.

[11] In *Kansas v. Marsh*, 126 S. Ct. 2516, 2531–39, 2544–46 (2006), which evaluated capital jury instructions, Justices David Souter and Antonin Scalia wrote extended separate opinions to debate the frequency of wrongful capital convictions. In *Baze v. Rees*, 128 S. Ct. 1520, 1542–56 (2008), which evaluated Kentucky's lethal-injection protocol, Justices John Paul Stevens and Antonin Scalia wrote extended separate opinions to debate the basic constitutionality of the death penalty.

[12] *See generally* Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death"* (forthcoming 2008) (noting and criticizing the Supreme Court's tendency to devote a large part of its limited docket to death penalty cases).

[13] *See* Atkins v. Virginia, 536 U.S. 304, 318–19 (2002). *Atkins* itself emphasized that mental retardation impairs understanding, reasoning, communication, and impulse control. The Court may have used the clinical, scientific language of mental capacity in part because it felt that courts should not speak the language of emotion. But one could just as easily understand this scientific reasoning in lay emotional terms. Mentally retarded killers have difficulty appreciating how badly their crimes hurt others and educating and controlling their emotional impulses. To that extent at least, mentally retarded defendants have impaired emotional capacities, and partly for that reason society is less justified in levying *its* full emotional outrage upon them.

ited juries' ability to take full account of a killer's mental disabilities.[14] And *Ford* and *Panetti* forbid executing someone who is now insane.[15] Executing an insane or mentally retarded person could further incapacitation or general deterrence, but cannot communicate to the uncomprehending criminal the emotional outrage and wrongness of his deed. The same reasoning helps to explain why *Roper* forbids executing those who killed as juveniles.[16] Juvenile killers are not fully developed adults and so arguably are not proper targets of full emotional blame, even though their execution may incapacitate or deter.

Notice the structure that emerges from these Eighth Amendment decisions. Judges assess offender characteristics to make sure that general classes of capital defendants have a constitutionally sufficient minimal level of emotional capacity, culpability, and comprehension. Offenders who fail to meet this threshold are not proper targets of society's emotional wrath.

But if offenders meet the judicial threshold of emotional capacity, other legal actors evaluate offenders and offenses more finely and emotionally. For example, jury discretion at sentencing gives emotions a legitimate, recognized role in capital punishment. Judges exemplify dispassionate reason; juries, emotional judgment. The populist jury, as the conscience of the community, is better able than a lone judge to sit in emotional and moral judgment of a fellow human. Legal intricacies must not unduly fetter jurors' ability to tailor punishments in light of their emotional instincts. Thus, *Woodson* invalidated mandatory death-penalty statutes that leave jurors no room to calibrate punishments to crimes.[17] *Lockett* and *Eddings* struck down laws that restricted jurors' consideration of mitigating factors.[18] *Ring* required that jurors, not judges, find defendants eligible to die.[19] *Penry* guaranteed that jurors have all the information and instructions they need to make moral evaluations.[20] And *Payne* stressed that juries can

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[14] Penry v. Lynaugh, 492 U.S. 302, 322 (1989) (requiring that jury instructions inform the jury that it can consider and give effect to evidence of defendant's mental retardation and abuse, so that the jury may offer "'reasoned moral response'" to mitigating evidence), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002) (banning execution of mentally retarded defendants, but not affecting *Penry*'s guarantee of jury consideration of other mental disabilities).

[15] Ford v. Wainwright, 477 U.S. 399, 406–10 (1986); Panetti v. Quarterman, 127 S. Ct. 2842, 2859–63 (2007) (holding that a death-row inmate may not be executed if he lacks mental capacity to understand that he is about to be executed and that this execution will be punishment for his crime).

[16] Roper v. Simmons, 543 U.S. 551, 570–71 (2005).

[17] Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976) (plurality opinion) (forbidding mandatory death penalty for all first-degree murders).

[18] Eddings v. Oklahoma, 455 U.S. 104, 113–16 (1982) (requiring courts to consider offender's unhappy upbringing, emotional disturbance, turbulent family history, and beatings by his father as mitigating evidence in capital case); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (holding that death-penalty statute must permit jury to consider all mitigating evidence relating to the defendant's character, record, or offense).

[19] Ring v. Arizona, 536 U.S. 584, 609 (2002).

[20] Penry v. Lynaugh, 492 U.S. 302, 322 (1989) (requiring that a jury be permitted to consider and give mitigating effects to evidence of defendant's mental retardation and abuse), *abrogated on other*

hear directly from victims in order to consider the complete "emotional impact" of the defendant's crime.[21]

Research shows that juries attach great weight to offenders' emotional states. A significant predictor of a death sentence is whether a killer expresses remorse and seems sorry.[22] Is the killer someone with normal human emotions, who feels guilt and the pangs of regret at his awful misdeed? Or is he a stony-hearted monster who deserves outrage, not mercy? These classic jury questions drip with emotion. Tellingly, federal judges must now provide clear "statement[s] of reasons" for non-capital sentences,[23] but capital juries need not justify their sentences rationally.

Emotion is also relevant to the kinds of crimes that legislators have made eligible for capital punishment. One prominent aggravating circumstance asks whether a murder was heinous, atrocious, or cruel.[24] These terms, laden with emotion, pose quintessential jury questions that are not readily reducible to judicial doctrines. Another emotional extreme also serves as a common statutory aggravating factor: did the killer murder for hire?[25] Legislators and jurors are aghast at the willingness of a contract killer to extinguish a human life coldly just to make a buck.

For similar reasons, legislators allow, and jurors eagerly hear, victim testimony in capital cases. Many victims desperately want their day in court, to vent their emotions and perhaps find closure and healing. And jurors want to know how it felt to suffer, to empathize with one side and with the other before rendering their moral verdict. This lay morality is not a bloodless Kantian categorical imperative, but an emotional, affective judgment.

Finally, emotions have always played a role in parole and clemency determinations. Like jurors, parole boards and governors typically want to know if offenders have admitted guilt and expressed remorse. They also often want to hear from victims about whether they have been able to move on emotionally years after the crime or instead still seek and need community vindication through punishment. Failure to express remorse weighs

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*grounds by* Atkins v. Virginia, 536 U.S. 304 (2002) (banning execution of mentally retarded defendants, but not affecting *Penry*'s guarantee of jury consideration of other mental disabilities).

[21] Payne v. Tennessee, 501 U.S. 808, 817 (1991) (overruling prior holdings that limited the presentation of "'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family").

[22] Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1600 (1998). Where jurors consider a murder to have been especially heinous, however, a perpetrator's remorse likely will not influence his sentence. *Id.*

[23] Rita v. United States, 127 S. Ct. 2456, 2468 (2007).

[24] MODEL PENAL CODE § 210.6(3)(h) (2001) (specifying capital aggravating circumstance for murders that were "especially heinous, atrocious or cruel, manifesting exceptional depravity").

[25] *See id.* § 210.6(3)(g) (specifying capital aggravating circumstance for murders committed "for pecuniary gain").

heavily against parole or pardon, and victims' forgiveness can spur governors to grant clemency.[26]

In short, capital sentencing law and practice is suffused with emotion. Descriptively, the death decision is an emotional decision through and through.

## II. JUSTIFYING EMOTIONAL JUSTICE

Emotions may in fact pervade the law, but does that make them right? Is our law just a jumble of backward, vengeful impulses, ones on which we as a civilized society should turn our backs? Are emotions—particularly punitive emotions—downright primitive and bestial?

On the contrary, punitive emotions deserve our respect, as a central part of what makes us human. When a wild animal threatens us, we do not judge or condemn it. We may incapacitate it or scare it off, but it is ludicrous to be angry at a shark or a tree for killing someone. Animals, plants, and objects are not moral agents. The same holds for very young children and truly insane adults.[27]

We are angry at moral agents because we acknowledge that they had the freedom to choose and chose wrongly. Anger recognizes and respects their freedom, holding them accountable for their choices. Our anger reflects our care for our victimized fellow man and our outrage at the criminal who should have known better. Anger underscores the moral community we share with victims and criminals.[28] Crimes have torn the social fabric and demand justice, payback to condemn the crime, vindicate the victim, and denounce the wrongdoer. Where there is no anger, there is no justice and no sense of community. Grave moral wrongs demand righteous indignation and action. Executing Adolf Eichmann was hardly necessary to incapacitate or deter him, but it was essential to condemn the Holocaust and vindicate its victims.

Given emotion's deep roots in the law, trying to uproot it may not only be futile, but dangerous. Punishment channels retributive anger, limiting it to proportional payback and tempering it with neutral adjudicators and punishers. If one squelches the impulse rather than channeling it, people may take the law into their own hands. That is the message, for example, of John Grisham's *A Time to Kill*: if the justice system does not offer a fair hope of justice, the victim's father may kill the perpetrators himself.[29]

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[26] *See* 2001 Guidance to United States Attorneys in Clemency Matters § 1–2.112(3), *reprinted in* 13 FED. SENT'G REP. 195 (2001) (suggesting, however, that absence of remorse should not entirely preclude clemency).

[27] Here we are discussing moral agency in the context of free will, blame, and responsibility for one's actions. Broader considerations of human dignity protect children, the mentally ill, and others from being victimized, even though they are not fully responsible for their actions.

[28] Walter Berns, *For Capital Punishment: The Morality of Anger*, HARPER'S, Apr. 1979, at 15.

[29] *Cf.* JOHN GRISHAM, A TIME TO KILL (2004). Note that in the book, the father killed his daughter's assailants because he feared they would not be punished. Of course, outside of fiction child rapists

Moreover, efforts to distance the death penalty from its emotional roots can produce a distorting cognitive dissonance. Modern litigation over lethal injection protocols reflects deep ambivalence about the emotions behind the death penalty.[30] The quest for painless execution methods is quixotic: States seek to inflict the ultimate violence while avoiding needless suffering. The offender deserves to suffer, yet we simultaneously want to see justice done and avert our eyes from it.

In recent decades, many psychologists have embraced the concept of emotional intelligence to help explain why traditional definitions of intelligence are lacking.[31] Legal scholars need to make a similar move when examining capital punishment. Only by raising our emotional IQ can we better understand the remarkable persistence of the death penalty in America.

## III. EXECUTING CHILD RAPISTS?

Even if the death penalty is emotionally appropriate for the worst murders, that does not resolve Patrick Kennedy's case. Aren't murders qualitatively far worse than rapes? Shouldn't the worst penalty be reserved for the worst, most outrageous crime of all? But a strict ranking of murder as eclipsing all rapes, even child rapes, is emotionally tone deaf. In our view, child rape may present an even stronger emotional case for capital punishment than the ordinary murder, for at least two reasons.

First, the direct victim of a murder is dead. The victim of a rape almost always survives and must deal for the rest of her lifetime with the emotional scars this crime leaves behind.[32] Child rape in particular targets a defenseless victim, who often has been violated by a relative or trusted authority figure, as with Patrick Kennedy's stepdaughter. Observers understandably empathize with her wounded innocence and rage at his brutal breach of paternal trust.

Moreover, in the horrific universe of child rape, many survivors will bear grievous scars. A recent article highlighted the emotional scars of children who are raped and exploited by child pornographers:

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normally receive some punishment, though perhaps not as much as the populace would like. Thus, the fear of vigilantism is not as great in modern America as it is in fiction.

[30] *See* Baze v. Rees, 128 S. Ct. 1520 (2008) (note the fractured Supreme Court opinions, reflecting the Court's own ambivalence about pain in executions).

[31] *See, e.g.*, DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ (2006).

[32] The Supreme Court emphasized this point in the course of banning capital punishment for the rape of an adult in *Coker v. Georgia*, 433 U.S. 584, 598 (1977): "Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." To our modern ears, this sentence seems quite emotionally insensitive; it fails to recognize how badly rape can scar its victims. It is especially dated in light of modern research on the social and personal impact of sexual violations. *See, e.g.*, NAT'L CTR. FOR VICTIMS OF CRIME & CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 7–8 (1992).

> They are real children sometimes snatched from real streets in real neighborhoods both in the U.S. and abroad. . . . Sometimes, these children are being victimized by those they once held dear, Knoxville FBI Supervisory Agent Rob Root noted.
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> "A lot of times it's familial relationships," Root said. "Sometimes it's neighbors. It's someone who has an ability to have contact with these children in private."
>
> U.S. Attorney Russ Dedrick added, "A lot of these kids are just ruined for the rest of their lives."[33]

These child rape victims may have their horrifying treatment captured on film and then peddled around the world. They will spend their lives not only grappling with the anguish of rape, but fearing that any computer could replay their childhood horror. No punishment can erase that pain, but capital punishment is at least a fitting response because it is so solemn, severe, and final. The 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.

Second, the innocent parents of the rape victim, and other parents, may feel unique emotional harm from the sexual violation of children. Precisely because children are innocent and defenseless, adults feel special affection and solicitude and responsibility toward them. We are to protect them, so any exploitation—especially sexual violation—outrages that trust. Denouncing and punishing that violation in the strongest possible terms repudiates the breach of trust and tries to repair it. It is all we can do to vindicate the wounded, suffering victim. Hence the father's natural impulse to kill the rapists of his ten-year-old daughter, and the jury's willingness to acquit him by reason of insanity, in *A Time to Kill*.

Disappointingly, much of the modern debate over capital child rape does not even acknowledge, let alone confront, the extraordinary emotional freight of every child rape. Of course, only the most heinous child rapes will deserve the death penalty, just as very few murders are thought to justify the ultimate punishment. But legislators, prosecutors, and juries are well equipped to decide which child rapes are so heinous as to call for the ultimate punishment. While judges should of course review these decisions, they should at the same time respect other actors' efforts to express society's outrage.

## IV. EMOTIONALLY OPPOSING DEATH

Our argument is not that the modern administration of the death penalty is completely fine or that emotion always justifies society's ultimate

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[33] Jamie Satterfield, *Hunting Predators*, KNOXVILLE NEWS (Tenn.), May 18, 2008, at A14, *available at* http://www.knoxnews.com/news/2008/may/18/hunting-predators/ (link).

sanction. Capital punishment in America has many shortcomings, ranging from the evidentiary flaws exposed by innocence commissions to obvious race, sex, and wealth imbalances in its application. But those who oppose the death penalty need to stop simply reciting bloodless arguments about cost and deterrence in order to engage in rich emotional dialogue.

Indeed, the best capital defense attorneys already do this. When arguing to juries, they use mitigation experts to humanize defendants and get jurors to empathize with them and their often limited capacities. They work to evoke and highlight their clients' remorse and apologies. They counter the emotional language of justice with the equally emotional language of mercy.[34]

The most persuasive opponents of the death penalty neither deny the power of outrage nor demonize supporters as bloodthirsty animals. Rather, they persuade jurors who are open to the death penalty that the most authentic emotional response to this defendant is to feel at least a little pity, just enough to spare his life. This tactic works often enough with juries. Perhaps it is time to conduct more of the public-policy debates on this terrain as well.

Indeed, the modern political debate over the death penalty has been transformed not by new data about racial disparities or deterrence, but by concerns about convicting the innocent. Wrongful conviction is not unique to the death penalty, and evidentiary reforms attack the problem more directly than can punishment rules. Moreover, the actual percentage of wrongful executions is likely quite small. Nevertheless, because just the possibility of a wrongful execution has so much emotional resonance, that fear has fueled significant capital-punishment reforms.[35] Though costs and racial skews may animate criminal-justice reformers, emotional politicians and voters will be drawn to stories of individual capital cases gone wrong.

Reflecting again on the *Kennedy* case, the strongest policy argument against capital child-rape laws may be the particularly great worry about wrongful convictions. Rapes are often challenging to prosecute, and that is doubly true of cases depending on young child witnesses, who may have shaky memories and verbal skills. Hysteria over monsters in our midst can distract prosecutors and jurors from carefully judging guilt. Rather than resisting the emotional case for executing child rapists, opponents should develop their own emotional case for minimizing wrongful executions.

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[34] *See* Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 331–33 (1996) (noting, however, that this strategy does not always succeed).

[35] *See generally* Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004).

## CONCLUSION

Emotions can evolve and be informed. Some opponents contend that capital-child-rape laws will harm child-rape victims and their families. If so, this harm will undercut the sympathy and empathy that drive these laws, leading legislators to pull back. As our discussion highlights, democratic processes engage capital emotions effectively in deciding which crimes are eligible for the death penalty. Thus, unelected judges should be wary of stifling a healthy, democratic national dialogue that can air and develop capital emotions.

Cool, somber courtrooms can seem hostile to emotional expression. But, especially in criminal justice, we must neither forget nor disdain seething passion. Especially where those passions are most intense, in capital cases, lawyers and scholars ought to combine doctrinal analysis with sensitivity to emotion.