

2018

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### Recommended Citation

Susan A. Bandes, *All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty*, 116 MICH. L. REV. 905 (2018).

Available at: <https://repository.law.umich.edu/mlr/vol116/iss6/6>

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# ALL BATHWATER, NO BABY: EXPRESSIVE THEORIES OF PUNISHMENT AND THE DEATH PENALTY

Susan A. Bandes\*

COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT. BY Carol S. Steiker and Jordan M. Steiker. Cambridge: The Belknap Press of Harvard University Press. 2016. Pp. 322. \$29.95.

## INTRODUCTION

The death penalty in the United States is rooted in two anachronistic traditions. The first is the Puritan ethic, which provides a respectable pedigree for a practice that today bears little connection to the concerns of the Puritan era. The public hangings of that era, for example, deployed the execution as a ritual that would cleanse the soul of the condemned and encourage god-fearing behavior from the assembled crowds. But executions are no longer public affairs. They no longer communicate, if they ever did, a collective message of redemption and moral education. They occur in quiet, closed chambers, more an antiseptic procedure than a shared public ritual. Capital punishment as practiced today is best understood not in light of its religious roots, but in light of its other U.S. precursors: slavery and the use of lynching to enforce a racial caste system after slavery was abolished.

Carol Steiker and Jordan Steiker<sup>1</sup> call the Court's refusal to acknowledge the role of race in capital punishment the "original sin" of U.S. death penalty jurisprudence (p. 3). In *Courting Death: The Supreme Court and Capital Punishment*, they take the measure of this jurisprudence, considering whether the Supreme Court is capable of reining in the arbitrariness and unfairness that characterize the U.S. capital system. It will surprise no one that the Steikers,<sup>2</sup> the "most influential legal scholars in the death penalty

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\* Centennial Distinguished Professor of Law Emeritus, DePaul University College of Law. This Review began taking shape when I was a visiting scholar at NYU Law School in the spring of 2017, and I owe thanks to Rachel Barkow, Barry Friedman, and NYU's Center on the Administration of Criminal Law for being such gracious hosts. I am also grateful to Deborah Denno, Carol Sanger, and Scott Sundby for valuable comments on an earlier draft of this Review, and to David Garland for illuminating conversation.

1. Carol S. Steiker is the Henry J. Friendly Professor of Law at Harvard Law School. Jordan M. Steiker is the Judge Robert M. Parker Endowed Chair in Law at University of Texas School of Law.

2. Carol and Jordan Steiker are brother and sister and have frequently coauthored articles, as well as worked together on legislation and other death penalty initiatives. P. 5.

community,”<sup>3</sup> have produced a fair-minded, richly textured account of the fraught relationship between capital punishment and the United States Supreme Court. The book will repay reading by both educated general readers and legal scholars—including knowledgeable scholars in the field. The Steikers are abolitionists and advocates, and they are straightforward about their commitments, but readers who don’t share those commitments will not feel short-changed.

One irony of a fair-minded doctrinal analysis is this: it calls into question the limits of legal doctrinal tools for shedding light on the forces that shape and sustain capital punishment in the United States. As the authors explicitly recognize, capital punishment doctrine often serves as little more than window dressing, providing a false sense of coherence and legal legitimacy to prop up a regime that is both arbitrary and discriminatory.<sup>4</sup> And race is at the heart of this disconnect. It is the key to understanding the origins of U.S. death penalty and the formidable challenges to its fair implementation.<sup>5</sup> Yet the Court’s increasingly elaborate doctrinal framework never confronts race directly.<sup>6</sup>

The Steikers argue for the importance of recognizing the uniqueness of the “novel third course” our Supreme Court has charted “between the options of retention and abolition” (p. 40). The United States came tantalizingly close to abolishing the death penalty in *Furman v. Georgia* in 1972.<sup>7</sup> But instead of finding the death penalty itself unconstitutional, the Court in *Furman* focused on the procedural flaws that produced an “arbitrary and capricious” death penalty.<sup>8</sup> This approach left a crack in the door, and the states rushed through with newly crafted statutes<sup>9</sup> that the Court approved just four years later in *Gregg v. Georgia*.<sup>10</sup> As a result, in the odd hybrid state that came to characterize U.S. death penalty jurisprudence, abolition was off the agenda, but detailed regulation was put in place with the goals of ensuring fairness and consistency. The Steikers argue that this regulatory regime has created the worst of both worlds: the appearance of careful or even overzealous scrutiny, but little actual constitutional protection for the rights of defendants.<sup>11</sup>

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3. EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 311 (2013).

4. See, e.g., pp. 211–12.

5. DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* 190–91 (2010).

6. To the contrary, the Court famously declined to confront the issue *because* it so pervaded the criminal justice system. See *infra* notes 43–46 and accompanying text.

7. 408 U.S. 238 (1972) (per curiam).

8. *Furman*, a 5–4 decision, consisted of nine separate opinions. The dominant theme of the five opinions comprising the majority was the arbitrary and capricious imposition of the death penalty. See, e.g., *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

9. P. 61 (discussing post-*Furman* statutes that sought “to limit the discretion characteristic of death penalty schemes before *Furman*”).

10. 428 U.S. 153 (1976).

11. See pp. 155–56.

This book is clear-eyed and appropriately unsentimental about the politics of the death penalty. But the authors do hold out hope that a principled capital jurisprudence is possible. They seek to distinguish the factors that *ought* to animate the Court's jurisprudence from those that are illegitimate. For example, they argue that the current legal regime is distorted by electoral politics (and the effects of those politics on judges and prosecutors),<sup>12</sup> by intense emotions (such as collective outrage at shocking crimes, or selective empathy for some victims and their families),<sup>13</sup> and by racial prejudice.<sup>14</sup>

The Review proceeds in three Parts. Part I describes the book's main arguments. Part II explores the implicit question underlying the Steikers' critique: Is there a path toward a principled capital jurisprudence? Part III focuses on so-called "expressive" theories of punishment, which emphasize the symbolic, communicative importance of the death penalty.<sup>15</sup> It argues that expressive theories often cloud rather than clarify punishment discourse. It then returns to the topic of Part II, exploring the difficulty of distinguishing "off-limits" or "extralegal" political, emotional, and prejudicial influences from appropriate legal influences on the death penalty debate. This Review will question whether, once all these arguably illegitimate influences are stripped away, a coherent, principled doctrinal capital punishment doctrine is possible. In other words, is there any baby, or is it all bathwater?<sup>16</sup>

#### I. A DEVASTATING ACCOUNT

The flash point for *Courting Death* is the four years that began with the Supreme Court's "bold abolition" of the death penalty in 1972 and ended with its "chastened reauthorization" in 1976 (p. 3). In the 1972 case of *Furman v. Georgia*, the Court was faced with a penalty that was "so wantonly and freakishly imposed" that it was "cruel and unusual in the same way that being struck by lightning is cruel and unusual."<sup>17</sup> When *Gregg v. Georgia* reauthorized the death penalty four years later, the Court began its "effort to reform and rationalize the practice . . . through top-down, constitutional regulation" (p. 3). The goal of *Courting Death* is to analyze the success or failure of this "experiment"<sup>18</sup> and what it means for the future (p. 5). The

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12. See pp. 144–48.

13. See pp. 146, 161.

14. See generally chapter 3.

15. See Susan A. Bandes, *The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty*, 42 *STUD. L. POL. & SOC'Y* 21, 32–33 (2008) (discussing expressive theories of capital punishment).

16. The phrase is taken from Tom Stoppard's play *The Hard Problem*. TOM STOPPARD, *THE HARD PROBLEM* 10 (2015).

17. P. 2 (quoting *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring)).

18. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

Steikers, in accord with most scholars, pronounce the experiment a failure at its intended goals of reining in arbitrariness and discrimination.<sup>19</sup>

As the Steikers show, the experiment has also had a number of *unintended* effects. These include a regime of hyperregulation that, in their view, has produced little substantive protection for capital defendants, and yet has convinced the populace that these defendants now receive too much protection (p. 155). Ironically, another unintended effect has been to build in yet another source of arbitrariness. On some death rows, stays of several decades have become commonplace.<sup>20</sup> On most others, “confined almost exclusively to the South and its borders,” execution is much swifter.<sup>21</sup> The *Furman* Court attempted to address arbitrary and capricious imposition of death sentences. Today it is not only the sentencing stage that looks like a lottery; it is also the execution stage.<sup>22</sup>

In their first chapter, the Steikers deftly disentangle the death penalty’s religious roots from its roots in Southern colonies, where lynching, and then capital punishment, were used to protect the slave economy (pp. 19–20). They illustrate the legacy of both influences.<sup>23</sup> It is fair to say that the legacy of slavery holds much more powerful sway today than the religious legacy. We no longer prosecute Puritan-influenced crimes against religious purity, but the use of the criminal law to police racial boundaries persists. The authors emphasize the strong link between execution use today and the history of lynch mob activity over a century ago (p. 17). As they underline, this history extended well beyond slavery: “[O]ne of the functions of the death penalty . . . was to *create race*: to segregate the myriad social positions of the New World into hard and fast categories of white and black, free and enslaved.”<sup>24</sup> They hold both legacies responsible, however, for two crucial aspects of our current day death penalty: the fact that it is largely a matter of local and state control, and the fact that the officials who control death penalty practices (prosecutors, governors, legislators) come from the political branches of government (p. 8).<sup>25</sup>

Time and again, the Court has endeavored to avoid confronting the death penalty’s racially discriminatory history and application.<sup>26</sup> The authors recount that the Warren Court, already embroiled in controversy over the school desegregation decisions, believed procedural justice would be a

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19. P. 4. *See generally* chapter 5.

20. *See* pp. 274–75.

21. *See* p. 118.

22. *See* p. 118.

23. *See, e.g.*, p. 12.

24. P. 20 (quoting 1 STEPHEN JOHN HARTNETT, *EXECUTING DEMOCRACY: CAPITAL PUNISHMENT AND THE MAKING OF AMERICA, 1683–1807*, at 20 (2010)).

25. Arguably, however, the problem unique to the United States is not so much the separation of powers, but the nature of the roles themselves—both the prosecutorial role and the judicial role. In the United States, prosecutors, as well as many state court judges, are elected, whereas in many other countries they are appointed.

26. *See generally* chapter 3.

more politically acceptable focus than racial justice.<sup>27</sup> But by focusing on procedural deficits, the Court created the false impression that the greatest failings of the death penalty system amounted to discrete, isolated problems like death-qualified juries,<sup>28</sup> inadequacy of counsel, or the absence of statutory standards.<sup>29</sup> In this account, the Court's choice to focus on process was pragmatic but also idealistic: a reflection of its reluctance to confront the fact that constitutional intervention could not erase institutionalized racism (p. 105). Subsequent courts continued the tradition of ignoring race (pp. 111–15). Consequently, “the unjust influence of race in the capital punishment process continues unchecked.”<sup>30</sup>

The next several chapters take a hard look at the death penalty as it operates today. Currently a few Southern states carry out the vast majority of executions (p. 118). The authors make the important point that what really separates the Southern states from the rest of the country is not so much the number of death sentences they impose, but the alacrity with which they carry them out.<sup>31</sup> Outside of these former slave states, executions are rare (pp. 118–20), and in some states—chiefly California<sup>32</sup>—capital punishment's function is mainly symbolic. These “symbolic states” impose death sentences but almost never execute anyone (p. 120).

As these stark geographical disparities illustrate, the federal constitutional limits on the death penalty, which theoretically bind every jurisdiction, are quite malleable. Some of the causes of this malleability are well chronicled. The Court has shown no appetite for reining in prosecutorial discretion (pp. 299–300). Vague jury standards like “heinous, atrocious, and

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27. See p. 99.

28. The Court has held that prospective jurors who oppose the death penalty can be excluded from capital juries for cause because of their unwillingness to consider all possible sentences at the penalty phase. See *Witherspoon v. Illinois*, 391 U.S. 510, 515 n.9 (1968). The Court in *Lockhart v. McCree* accepted this proposition for the sake of argument only, 476 U.S. 162, 173 (1986), over a strenuous dissent by Justice Marshall pointing out that the evidence for the effect was uncontradicted, see *id.* at 193 (Marshall, J., dissenting); see also CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 206 (2005) (“The Supreme Court’s opinion in *Lockhart* notwithstanding, we now know that the . . . effects [of death qualification] appear to facilitate the conviction of capital defendants and the imposition of death sentences.”).

29. See p. 109.

30. P. 110. This refusal to acknowledge the role of race in criminal justice is a much broader problem, extending well beyond the death penalty arena. See, e.g., Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2001); see also MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (describing racial discrimination as the impetus for many foundational criminal procedure cases, yet as an invisible presence in those cases).

31. Pp. 119–20. In the last week of April 2017, for example, the state of Arkansas executed four men, striving mightily to get the job done before the state’s supply of lethal injection drugs ran out. Mark Berman, *Fourth Arkansas Execution in Eight Days Prompts Questions About Inmate’s Movements*, WASH. POST (Apr. 28, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/04/27/arkansas-readies-to-carry-out-last-planned-execution-before-drugs-expire/?utm\\_term=.06cc506ea679](https://www.washingtonpost.com/news/post-nation/wp/2017/04/27/arkansas-readies-to-carry-out-last-planned-execution-before-drugs-expire/?utm_term=.06cc506ea679) [https://perma.cc/88NM-YDKX].

32. The other major state in this category is Pennsylvania. P. 118.

cruel” do little to regularize sentencing (pp. 159, 177). Proportionality review has proved nearly toothless (pp. 163–64). These factors help explain arbitrariness and discrimination, but they do not explain regional differences. The Steikers add an important layer of description: they show that at the institutional level, there is enormous play in the joints: “It is only when these unrelated institutional actors achieve some degree of integration or political cohesion that one finds a steady stream of executions” (p. 149).

Today the promise of federal constitutional regulation devolves into separate constitutional regimes. The South<sup>33</sup> is able to continue its enthusiastic embrace of capital punishment, and its “resistance to norms dictated by the . . . Court,” relatively unimpeded.<sup>34</sup> California, which is ostensibly bound by the same constitutional strictures, now has the country’s largest death row, on which it is not uncommon for the condemned to spend decades.<sup>35</sup> On California’s death row, execution is only the third most common cause of death, after old age and suicide (p. 120).

In short, arbitrariness has not been eradicated. There is a robust consensus that “guided discretion”<sup>36</sup> of the sort the Court demanded in *Gregg* and subsequent cases is not achievable. It has proved impossible to individuate among defendants while at the same time avoiding arbitrariness or discrimination. Few believe we have achieved the goal of executing the “worst of the worst” (p. 164). The likelihood of receiving a death sentence is determined not so much by culpability as by geography, race (of both defendant and victim), and quality of representation.<sup>37</sup> In the Steikers’ words, “[T]he Court’s interventions strengthened the status of the death penalty . . . in the eyes of actors within the capital system and of the public at large . . . [creating] the appearance of intensive regulation” and providing “unjustified comfort” to those who administer the death penalty and to the public at large (p. 156).

Does this thoroughly miserable report card show that the Court chose the wrong path? The “what-if question”<sup>38</sup> looms large for the Steikers. They posit that the Court may have intervened too early; perhaps *Furman*, like *Roe v. Wade*, was decided prematurely (pp. 74–76, 223–27). Alternatively, it might have intervened too late (p. 48). There might have been a brief window in the early 1960s when judicial abolition would have been possible and the resulting backlash less effective in resurrecting capital punishment

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33. Including Texas and the Fifth Circuit. Pp. 132–37, 140–41.

34. See p. 149.

35. Pp. 274–75; see also *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting) (discussing the “excessively long periods” that the condemned spend on death row, and citing statistics).

36. *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (opinion of Stewart, Powell & Stevens, JJ.).

37. P. 268 (discussing *Glossip*, 135 S. Ct. at 2762–63 (Breyer, J., dissenting)).

38. MANDERY, *supra* note 3, at 432; see also Deborah W. Denno, *Courting Abolition*, 130 HARV. L. REV. 1827, 1856 (2017) (reviewing *Courting Death: The Supreme Court and Capital Punishment*) (noting the difficulty of addressing the “what if” question in light of “the empirical unknown—the ‘compared to what’ question.”).

(p. 75). The Steikers argue that the death penalty's ability to mobilize the public is contingent on its continued existence within a political community, and they speculate that an earlier decision abolishing the death penalty might have brought permanent abolition, bringing U.S. practice closer to Europe's.<sup>39</sup>

In addition to the question of timing, their account also raises the issue of whether a different substantive approach might have worked better. What if the Court had frankly acknowledged race? As the Steikers note, only Justices Douglas and Marshall were willing to even address this issue in *Furman* (p. 89). The eminent NAACP Legal Defense and Education Fund (LDF)<sup>40</sup> urged the *Gregg* Court to address race, arguing in its amicus brief that racial discrimination was "rooted in the very nature of capital punishment,"<sup>41</sup> but the *Gregg* opinions, which spanned 210 pages, made no mention of race at all (p. 94). Whether or not there was a brief period in the 1960s when the Court might have abolished capital punishment, it is virtually impossible to imagine that it would have done so on racial grounds.

Any glimmer of hope that after *Furman* and *Gregg* the Court might still confront the issue of race was extinguished by *McCleskey v. Kemp*.<sup>42</sup> There the Court accepted for the sake of argument the findings of the Baldus study.<sup>43</sup> The Baldus study was a major empirical investigation of the impact of race on the administration of the death penalty in Georgia.<sup>44</sup> It concluded that racial bias skewed the process, finding that the race of the victim, and to a lesser extent the race of the defendant, were unassailably powerful factors in both the decision to bring capital charges and the decision to impose a death sentence.<sup>45</sup>

The *McCleskey* Court, proceeding on the assumption that the Baldus study was correct, essentially accepted LDF's argument that "the evil of discrimination was not merely adventitious, but was rooted in the very nature of capital punishment."<sup>46</sup> But it declared itself powerless to do anything about this, stating that

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. . . .

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39. Pp. 73–75. However, this argument takes European support for abolition as a constant. Although European Union countries are currently constrained from reinstituting the death penalty, see GARLAND, *supra* note 5, at 112–13, there is reason to wonder, based on current trends, whether tensions about capital punishment in some European countries might rise in the face of increasing heterogeneity and backlash against immigration.

40. The LDF was at the forefront of the litigation that led to *Furman*, *Gregg*, and related cases. See p. 78.

41. P. 93 (quoting Brief for the NAACP Legal Def. & Educ. Fund, Inc. as Amicus Curiae at 1–2, *Gregg v. Georgia*, 428 U.S. 153 (1976) (No. 74-6257) [hereinafter LDF Brief]).

42. 481 U.S. 279 (1987).

43. *McCleskey*, 481 U.S. at 291 n.7. See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990), for a description of the study.

44. BALDUS ET AL., *supra* note 43, at 394–98.

45. *Id.* at 398–419.

46. P. 93 (quoting LDF Brief, *supra* note 41, at 1–2).



Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.<sup>47</sup>

As the Steikers observe, this reluctance is of a piece with the Court's larger tendency to "retreat from . . . constitutional norms when it regards remedial choices as unworkable or unattractive" (p. 236). It certainly reveals the Court's assessment (whether accurate or self-fulfilling) of the limits of its own power to address racial discrimination. But in addition, the Court's self-professed helplessness rests on a crucial, questionable move: an assumption that it cannot take on racial discrimination in the death penalty context unless it is also willing to try to fix the entire criminal justice system (p. 174).

The Steikers occasionally suggest ways to reform capital punishment—for example, exercising more robust proportionality review (pp. 163–64, 178), or narrowing the range of acceptable aggravating factors (pp. 161, 177), or raising the standards for effective representation (pp. 170–71, 178–79), or expanding the ability to assert "actual innocence" (pp. 173, 179), or attempting to insulate decisionmakers from electoral politics (p. 182). But as they are acutely aware, regulating the death penalty can be a treacherous trap: "[T]he impulse to abolish and reform the death penalty produced a body of law that substantially stabilized and perpetuated American capital punishment as a societal practice, at least in the short term" (p. 191). We are faced with a stark question. "Regulation can improve a practice . . . [o]r it can reveal the unsettling truth that [the] practice is beyond constitutional repair" (p. 212). It is hard to read this book as anything other than a compelling case for the latter conclusion.

That devastating bottom line is further explored in the next Part, which asks the following question: Even if it were possible to cordon off undesirable influences such as inappropriate emotions, low politics, and invidious discrimination, what would remain that we would be willing to claim as "a fair and principled death penalty scheme"? (p. 169).

## II. ALL BATHWATER, NO BABY?

In a discussion of recurring patterns in constitutional regulation, the Steikers seek to identify some commonalities between the Court's role in shaping death penalty discourse and its role in shaping same-sex marriage discourse. Yet the implicit differences between the judicial roles in these two doctrinal debates are more salient than the commonalities, and these differences bring the central question of the book into sharp relief.

In both contexts, the Steikers argue, the Court's rulings helped precipitate a shift in focus "from moral to utilitarian concerns" (pp. 250–53). They

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47. *McCleskey*, 481 U.S. at 314–15.

also argue that the Court's opinion in *Obergefell v. Hodges*<sup>48</sup> redirected energy from refuting the harms of same-sex marriage to celebrating the fundamental value of marriage itself (p. 253). They suggest that the Court could similarly influence the direction of the national death penalty debate (pp. 253–54). The Steikers go no further with their parallel. Playing out the comparison, however, reveals two crucial differences between the death penalty and same-sex marriage. In the same-sex marriage debate, opponents<sup>49</sup> were brought up short when they had to defend their moral arguments in court (pp. 251–53). Their moral outrage had taken them a long way politically (p. 250). But the landscape had changed by the time California's Proposition 8 (Prop. 8), which sought to ban same-sex marriage statewide, was challenged in federal court.<sup>50</sup> By that point, same-sex marriage opponents were faced with precedent that greatly weakened the force of their moral argument—specifically, the Supreme Court's decision in *Lawrence v. Texas*.<sup>51</sup> This precedent, as the Steikers describe, left opponents with no choice but to defend their position with empirical data (p. 253). This encounter with the federal court's demand for evidence provided “moments of absurdist theater that were a gift to the proponents of marriage equality, who easily demolished” the opponents' arguments (p. 251). Similar scenarios played out in the Seventh Circuit,<sup>52</sup> and ultimately in the Supreme Court in *Obergefell*.<sup>53</sup> As the Steikers describe it, the Court had “taken morality off the table,”<sup>54</sup> and the opponents had little else to offer. They could no longer argue their “real reasons,” and they had no reasons that could withstand judicial scrutiny (p. 253).

But in important respects, the trajectory of the capital punishment debate is quite different. Moral arguments hold more sway and have not been vanquished by demands for proof. Moreover, although opponents' moral argument for prohibiting same-sex intimate conduct remained constant—and ruled the day—for most of our history, moral arguments in the death penalty debate have taken multiple shapes over the years. Indeed the authors

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48. 135 S. Ct. 2584 (2015).

49. For the sake of clarity, I refer to opponents of same-sex marriage. In this context they were proponents of Prop. 8, which would have banned same-sex marriage.

50. Pp. 250–52; see *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013).

51. *Lawrence v. Texas*, 539 U.S. 558 (2003).

52. *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

53. *Obergefell*, 135 S. Ct. 2584.

54. P. 253. The Steikers assert that the import of *Lawrence* was that in order to prevail “going forward, opponents of marriage equality would have to identify harms—other than personal revulsion or moral outrage.” P. 251. Yet the effect of *Lawrence* on the Prop. 8 litigation was arguably less clear than that. *Lawrence*, unlike the Prop. 8 case, concerned a criminal statute, and could be read to place great weight on the threat of criminal consequences. See *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring in the judgment) (emphasizing the existence of a criminal statute).

point out the irony that after years of morally grounded abolitionist arguments, it is now the death penalty proponents who are making moral arguments (pp. 249–50). Opponents can point to the overwhelming expense of litigating death cases and keeping the condemned on death row.<sup>55</sup> Proponents seek to rebut these utilitarian arguments with a moral imperative: imposing the death penalty when called for is “an issue simply of justice” that ought to transcend practical concerns (p. 250).

In the same-sex marriage context, courts finally began rejecting the moral argument in the new millennium, when popular attitudes had shifted decisively. Once courts began insisting upon more concrete evidence, it was revealed that the opponents could not support their legal argument. This trajectory raises a revealing question: What would that triumphant moment in court—when it turned out the opponents of same-sex marriage could not back up their claims—look like in the death penalty context? What proof would the proponents of execution have to adduce to support their moral claims? This question is complicated for several reasons.

First, the Steikers emphasize that in the same-sex marriage debate, the opponents’ arguments about the harms caused by same-sex marriage “were lame because they weren’t the *real* reasons behind opposition . . . which were entirely moral in character” (p. 253). Yet, as they acknowledge, “real reasons” have not played a major role in U.S. capital jurisprudence.<sup>56</sup> The authors make a powerful case that racial prejudice is an unavoidable “real” explanation for the current state of the U.S. death penalty. They also acknowledge that the Court has gone to enormous lengths to avoid acknowledging this and that it will probably continue to do so. Indeed, the *McCleskey* decision is the dark underbelly of the same-sex marriage debate’s Prop. 8 moment. Opponents of the death penalty adduced proof; the Court turned away.

The disconnect in capital jurisprudence between “real” reasons and “legal” reasons is by no means confined to the race issue. For example, there was a marked shift in discourse post-*Furman* from a reliance on the deterrence rationale to a reliance on the retributive rationale.<sup>57</sup> It was becoming increasingly apparent that there was no good evidence that the death penalty deters crime, and this may have caused many to abandon the deterrence rationale. But strikingly, the level of public support for the death penalty remained constant even as the rationale for that support changed.<sup>58</sup> People changed rationales, but not their minds.<sup>59</sup> Social scientists have repeatedly

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55. Pp. 249–50 (discussing the enormous expense of both capital litigation and housing inmates on death row for extended periods).

56. See p. 253; *infra* text accompanying notes 75–81.

57. Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans’ Views on the Death Penalty*, J. Soc. ISSUES, Summer 1994, at 19, 26–29, 33.

58. *Id.* at 26–29.

59. *Id.* at 34. This outcome contradicted Justice Marshall’s hypothesis that more information about the workings of the death penalty would lead to more abolitionist sentiment. *Furman v. Georgia*, 408 U.S. 238, 361–62 (1972) (Marshall, J., concurring).

concluded that “most people’s attitudes toward capital punishment are basically emotional. The ‘reasons’ are determined by the attitude, not the reverse.”<sup>60</sup>

Moreover, the retribution rationale itself began to shift in the early 1980s, with a powerful assist from the Court. In *Payne v. Tennessee*,<sup>61</sup> the Court upheld the use of victim impact statements in capital trials. The Court’s rationale was that these statements are informational: they help inform capital juries of the victim’s individual qualities and the impact of the crime on the victim’s family.<sup>62</sup> This new focus on the characteristics of the individual victim had a strong influence on retributive discourse (and the operation of death penalty trials more generally).<sup>63</sup> One indirect result of the Court’s ruling was the introduction of the language of healing and therapy into the criminal courtroom. The retributive rationale, which had suffered from its association with revenge, was now softened and recast as a way to help victims’ family members heal.<sup>64</sup>

The path of capital jurisprudence is paved with reasons, but these reasons are often deployed ad hoc, inconsistently, or after the fact. The shifts and dodges described above<sup>65</sup> point to an even deeper problem. In capital jurisprudence, the distinction between off-limits arguments and appropriate legal arguments is extraordinarily hard to draw. The always-difficult delineation of categories like “morality,” “politics,” and “emotion”—and the effort to distinguish those categories from the category of “law”—seem especially intractable in the death penalty context. In capital punishment discourse, moral and emotional concerns are prominent both at the justification level<sup>66</sup> and at the individual decisionmaking level. Can we say that political considerations “distort” prosecutorial decisionmaking? Or that jurors’ empathy for the victim, or anger toward the defendant, “distort” their decisionmaking? Or that a defendant’s perceived remorse or arrogance “distorts” the jurors’ ability to evaluate his moral culpability? Are these influences bugs in the system or its essential features? Traditional capital punishment discourse assumes that “rigorous, non-emotional reasons for or against the death penalty exist, but that the conversation keeps getting hijacked by unruly passion.”<sup>67</sup> Instead, the entire debate is imbued with moral and emotional

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60. Ellsworth & Gross, *supra* note 57, at 26.

61. 501 U.S. 808 (1991).

62. *Payne*, 501 U.S. at 819; *see also id.* at 832 (O’Connor, J., concurring) (arguing that victim impact evidence helps convey the full extent of the harm caused by the defendant).

63. *See infra* Part III.

64. *See* Susan A. Bandes, *Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 Vt. L. Rev. 489, 501 (2009); Susan A. Bandes, *Victims, “Closure,” and the Sociology of Emotion*, LAW & CONTEMP. PROBS., Spring 2009, at 1, 11–12 [hereinafter Bandes, *Victims*].

65. *See infra* text accompanying notes 85–92.

66. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (holding that “[i]n part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct”).

67. Bandes, *supra* note 15, at 23.

content.<sup>68</sup> The next Part argues that the debate would gain some clarity through a closer examination of the role of “expressive” punishment theories, which emphasize the symbolic, communicative role of capital punishment.

### III. EXPRESSIVE THEORY AND THE DEATH PENALTY

“Expressive punishment” has become a grab bag of poorly differentiated concepts that too often obfuscate rather than illuminate the death penalty debate. The category can encompass a wide range of symbolic, communicative messages the death penalty might send, such as condemnation of the act or the defendant, communication of the community’s grief and anger, or recognition of the moral worth of the victim and the gravity of the loss.<sup>69</sup> The phrase is often claimed to promote descriptive accuracy,<sup>70</sup> but it is so elastic that it can have quite the opposite effect. Expressive arguments also often blur the lines between descriptive and normative claims, relying on the claimed expressive power of punishment as a justification. Ultimately, the question is whether the notion of expressive punishment, as malleable and imprecise as it is, diverts attention from the question of whether the death penalty today serves any legitimate penological purpose.

Expressive theories can serve an important descriptive role. They supplement and illuminate traditional legal explanations for many legal dynamics, including the basic question of how law communicates, shapes, and seeks compliance with its basic norms.<sup>71</sup> As Rick Pildes and Elizabeth Anderson observe in a seminal article, much of law is pervasively expressive.<sup>72</sup> This is a descriptive observation, not a normative one. As they caution, “Expressivism is not an independent, substantive moral or political philosophy . . . . The contents of expressive legal constraints must come from the values that inform the constitutional order . . . . Expressivism explains how our practices *realize* those substantive values in *expressing* them.”<sup>73</sup> All punishment has expressive elements. Deterrence theory is premised on the notion that punishment communicates a message to the public: this is what will happen if you do this. In the capital context, the question arises whether the message is communicated by the imposition of sentence at a public trial or by the actual execution (a question that has obvious ramifications for regimes where executions are rare or where capital punishment is only symbolic). But in all events, deterrence depends on public expression of the consequences of lawbreaking.

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68. *Id.*

69. *Id.* at 32–33.

70. See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2027 (1996).

71. See generally RICHARD H. McADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015).

72. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

73. *Id.* at 1570.

Retribution is also expressive in nature. Retributivism is a public means of pronouncing what is fair and just from the community's point of view. Sentences are pronounced in public and perform a signaling function about the state's recognition of the seriousness of the crime, the harm the crime has caused, and the state's duty to respond to it.<sup>74</sup> What more is conveyed by adding the "expressive punishment" category to these existing explanations? As one scholar summarizes,

[Expressive theories] acknowledge the moral need to rectify past wrongs while simultaneously seeking to generate positive benefits in the future. More importantly, [they] have more explanatory power than mere justifications do, because expressive theories describe a social process and clarify the relationships among the culprit, the victim, society at large, and those who impose the punishments.<sup>75</sup>

But arguably retribution already acknowledges the need to rectify past wrongs while deterrence signals the desire to achieve positive benefits in the future. And viewing the expressive dimension as a separate category does not help clarify the relationships among the actors. In fact, it does quite the opposite: it allows us to avoid hard questions about those relationships. For example, to say punishment is expressive clarifies nothing about whether the state's pronouncement of punishment on behalf of the community is a sufficient expression of condemnation, or whether individual victims or their family members should also be permitted to express their pain and loss. The term "expressive" is too vague to explain the roles of various actors in the process and can provide unintended cover for a failure to examine rigorously what those roles ought to be.

Even if "expressive" is a term that helps explain what punishment does, that is quite different from an argument for what it ought to do. There is ample support for the view that public attitudes toward punishment are largely driven by symbolic rather than instrumental concerns.<sup>76</sup> But that is not a normative argument. Assuming we accept some version of Durkheim's view that punishment serves as "an occasion for the collective expression of shared moral passions,"<sup>77</sup> it is a separate question when and how that passion ought to be facilitated by the government. To take the most obvious example, lynchings in the South, as David Garland has described, were "open, public, communicative events," covered by the media, and implicitly

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74. Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1445–46 (2004).

75. John Steele, *A Seal Pressed in the Hot Wax of Vengeance: A Girardian Understanding of Expressive Punishment*, 16 J.L. & RELIGION 35, 36 (2001) (footnote omitted).

76. See, e.g., Ellsworth & Gross, *supra* note 57, at 31; *infra* text accompanying notes 86–90.

77. DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 33 (1990) (discussing Emile Durkheim's theories of punishment).

or even explicitly condoned by government officials.<sup>78</sup> The crowds participated in a kind of “collective effervescence;” an “unabashed pleasure in punishment and its associated festivities.”<sup>79</sup> In short, the category “expressive” covers quite a bit of territory, some of which is clearly out of bounds.

Just as the concept of “expressive punishment” is sometimes used to smuggle positive normative evaluations into descriptive arguments, it may also be used to signal opprobrium, often in concert with terms like “political” and “emotional” that also convey a negative assessment. For example, in their astute analysis of why certain states have large death rows but no executions, the Steikers observe that in some states “the political benefits of capital punishment are concentrated at the local level,” where “[e]specially heinous murders tend to generate intense local outrage” (p. 146). This political calculus “puts pressure on local law enforcement actors to make arrests and to bring capital charges” (p. 146). They then observe that the “charge, subsequent conviction, and sentence generate most of the expressive value of capital punishment, and thus most of the political points” to be scored (p. 146), rendering the execution itself unnecessary. It is not evident what work the term “expressive value” does in this analysis, beyond providing a jurisprudential label for the political use of the criminal justice system to reflect raw, unmediated emotion.

At the very least, all these terms appear to connote undesirable extralegal influences on capital decisionmaking.<sup>80</sup> The three subsections that follow examine the categories of “politics,” “emotion,” and “prejudice” and consider the question: To the extent these are extralegal influences, would it be possible to strip them away and arrive at the principled core of death penalty jurisprudence? Or are they an inextricable part of the doctrinal framework?

#### A. *Politics*

As the Steikers well describe, the death penalty in the United States is intensely politicized, both institutionally (many of the most important actors in the administration of capital punishment are elected) and symbolically (p. 185). They describe the symbolic role this way: “[The death penalty] looms much larger than it plausibly should in public discourse because it is a focal point for fears of violent crime and powerful political shorthand for law-and-order policies generally” (p. 185). The institutional and symbolic aspects of politicization, they argue, ensure that the death penalty process is subject to “intense pressures, which . . . contribute to its arbitrary, discriminatory, and inaccurate administration” (p. 185).

The authors quite reasonably assert that political influences should not override analysis of the merits of particular cases. For example, there is no

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78. GARLAND, *supra* note 5, at 30.

79. *Id.*

80. See Denno, *supra* note 38, at 1850–51 (emphasizing the importance of examining extralegal influences).

defensible argument for the fact that elected judges are, according to a number of studies, more likely to uphold death sentences around election time.<sup>81</sup> But in a broader sense, capital punishment cannot escape politics.

Charging, trying, and sentencing in capital cases are always politically charged acts (p. 146). The standard argument for local control of criminal justice is that different localities have different priorities, conditions, and resources and that these deserve deference, within constitutional limits. But these local priorities can at times be hard to distinguish from localized fears and moral outrage.<sup>82</sup> At some point, the deference to local priorities must give way to the prohibition on arbitrariness and discrimination. It may be that once the notion of “the expressive value of capital punishment” (p. 146) is stripped away, the particular political influences that animate the U.S. death penalty will show themselves to be untamable and impossible to reconcile with the rule of law.

As the Steikers point out, when government officials gain distance from local politics or are otherwise insulated, they may be able to ameliorate local passions and pressures.<sup>83</sup> In fact, political leaders can take the ability to exercise certain political passions off the table entirely, as occurred in Europe,<sup>84</sup> where “anti-death penalty provisions have increasingly been embodied in human rights conventions, transnational treaties and international law.”<sup>85</sup> Although these changing international norms have intensified political pressure on other nations,<sup>86</sup> the United States has thus far resisted the human rights framework.<sup>87</sup> But as David Garland shows, “[T]oday’s death penalty is

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81. P. 186. A Brennan Center study found that appointed judges in capital cases were most likely to reverse death sentences, judges facing retention elections were less likely, and judges facing competitive elections were least likely. KATE BERRY, BRENNAN CTR. FOR JUSTICE, *HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 2* (2015), [https://www.brennancenter.org/sites/default/files/publications/How\\_Judicial\\_Elections\\_Impact\\_Criminal\\_Cases.pdf](https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf) [https://perma.cc/XDW6-38X7]. The study also found that “trial judges in Alabama override jury verdicts sentencing criminal defendants to life and instead impose death sentences more often in election years.” *Id.* The study relies on, inter alia, Melinda Gann Hall, *Justices as Representatives: Election and Judicial Politics in the American States*, 23 AM. POL. Q. 485 (1995), and Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360 (2008).

82. See, e.g., Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 593–94 (2004); see also Jed S. Rakoff, *Will the Death Penalty Ever Die?*, N.Y. REV. BOOKS, June 8, 2017, at 46, 46 (reviewing *Courting Death: The Supreme Court and Capital Punishment*) (suggesting that *Courting Death* should have paid more “attention to the moral outrage that provides much of the emotional support for the death penalty”).

83. See pp. 146–47 (discussing the ability of officials who are removed from immediate local pressures to “remain more impervious” to politics).

84. FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 23 (2003) (discussing the role of elites in abolishing capital punishment in Europe).

85. GARLAND, *supra* note 5, at 112–13.

86. *Id.* at 113.

87. See generally JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).



deeply embedded in American political culture.”<sup>88</sup> Its political and cultural meanings are always evolving, but it is inescapably political.

### B. *Emotion*

A major emotive shift in death penalty discourse has occurred in the past several decades. By the end of the twentieth century, the deterrence rationale for the death penalty was falling out of favor.<sup>89</sup> The retributive rationale had long had a public relations problem—it sounded too blood-thirsty; too much like the revenge that state-sanctioned punishment was meant to replace. At the same time, the victims’ rights movement, which sought better treatment for crime victims and their family members, was becoming increasingly successful.<sup>90</sup> Its most prominent early victory was the Supreme Court decision upholding the admissibility of victim impact statements against constitutional challenge. *Payne v. Tennessee*<sup>91</sup> upheld the statements on the ground that testimony about the characteristics of individual victims and the impact of their death provided important information to the sentencing jury.

The Supreme Court has not weighed in on victim impact statements (VIS) since this 1991 decision. In the ensuing quarter century, the expressive message conveyed by VIS has evolved in ways the Court did not (at least explicitly) anticipate. Victims’ groups, prosecutors, lower courts, legislators, and others have come to treat the ability to deliver VIS as a therapeutic tool to help murder victims’ family members heal.<sup>92</sup> This development has changed the meaning of the jury’s verdict in capital cases. Juries are told that they can help grieving family members by returning a death sentence. A decision that once might have seemed too close to vengeance was reframed as an act of compassion. The retributive rationale was softened and made more palatable.<sup>93</sup>

This reframing of the expressive message has had other effects as well. Just as it tells jurors that they can help victims’ family members heal by returning a death sentence, it implicitly (and at times explicitly) promises the family members themselves that a death sentence will bring closure.<sup>94</sup> But whereas the message to jurors tends to dovetail neatly with the prosecution’s agenda, the message to victims’ family members creates expectations of healing and autonomy that might be at odds with the prosecution’s

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88. GARLAND, *supra* note 5, at 253.

89. Ellsworth & Gross, *supra* note 57, at 26–27.

90. See Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 285–87 (2003).

91. 501 U.S. 808 (1991).

92. As well as the victim of crimes other than murder in noncapital cases. See, e.g., MOTHERS AGAINST DRUNK DRIVING, VICTIM IMPACT STATEMENT BOOKLET (2013) <http://domesticviolencehomicidehelp.com/wp-content/uploads/2016/02/victim-impact-statement.pdf> [<https://perma.cc/9VDG-EQTN>].

93. P. 248; see also Bandes, *Victims*, *supra* note 64, at 19–20.

94. Bandes, *Victims*, *supra* note 64, at 11–12.

agenda.<sup>95</sup> Indeed it has long been a question whether the prosecution would continue to support this new, more victim-centered rationale for capital punishment when it threatened to limit prosecutors' nearly untrammelled discretion in capital cases.<sup>96</sup>

The conflict over the content of the expressive message was a powerful subtext of the Boston Marathon bombing trial. The Richard family was a focal point of the prosecution's capital case against Dzhokhar Tsarnaev.<sup>97</sup> The prosecution urged the jury to express its moral outrage at Tsarnaev and to help bring justice on behalf of the Richard family and the other victims by returning a death sentence.<sup>98</sup> The Richards did not support the prosecution's request for a death sentence, and they chose not to offer victim impact testimony. Instead they wrote a letter to the U.S. Attorney's Office conveying their opposition to the government's decision to seek death. They had come to their own conclusion about what the death penalty expressed, and about what would help them heal:

For us, the story of Marathon Monday 2013 should not be defined by the actions or beliefs of the defendant, but by the resiliency of the human spirit and the rallying cries of this great city . . . . As long as the defendant is in the spotlight, we have no choice but to live a story told on his terms, not ours. The minute the defendant fades from our newspapers and TV screens is the minute we begin the process of rebuilding our lives and our family.<sup>99</sup>

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95. And that the criminal justice system may be ill-equipped to meet. See Margaret Vandiver, *The Death Penalty and the Families of Victims: An Overview of Research Issues*, in *WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* 235, 238–40 (James R. Acker & David R. Karp eds., 2006).

96. See, e.g., Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 *STAN. L. & POL'Y REV.* 447 (2004).

97. Katharine Q. Seelye, *Parents of Youngest Boston Marathon Victim Oppose Death Penalty for Tsarnaev*, N.Y. TIMES (Apr. 17, 2015), <https://www.nytimes.com/2015/04/18/us/martin-richard-boston-marathon-bombing.html> (on file with the *Michigan Law Review*). Denise and Bill Richard lost their eight-year-old son Martin in the bombing. *Id.* Bill and Denise Richard and their daughter Jane all suffered grievous permanent injuries. *Id.*

98. See Hilary Sargent, *Tsarnaev's Fate Goes to Jury*, BOSTON.COM (Mar. 4, 2015), <https://www.boston.com/news/local-news/2015/03/04/tsarnaevs-fate-goes-to-jury> [<https://perma.cc/9GA9-VJPS?type=image>].

99. Bill Richards & Denise Richards, *To End the Anguish, Drop the Death Penalty*, BOS. GLOBE, <https://www.bostonglobe.com/metro/2015/04/16/end-anguish-drop-death-penalty/ocQLejp8H2vesDavItHIEN/story.html> (on file with the *Michigan Law Review*).

The jury saw the letter only after it had sentenced Tsarnaev to death.<sup>100</sup> One juror said, “If I had known that, I probably—I probably would change my vote.”<sup>101</sup>

In short, expressive messages are contested and sometimes contradictory, they are deployed strategically, and they evolve. The question of whose emotions count is also contested—especially now that the introduction of victims’ voices has disrupted the traditional adversary model. Emotions exist in a complex feedback loop with institutions like the justice system. The Supreme Court and other institutional actors do not merely reflect back the emotions of those affected; they influence the emotional content of our responses to capital punishment. The question is: In service of what legitimate ends?

### C. Prejudice

Punishment conveys a message of social cohesion. As Joseph Kennedy observes, one way to promote cohesion is to reaffirm, through the criminal justice system, our shared repugnance toward “[m]onstrous crimes and monstrous criminals.”<sup>102</sup> He also notes that “punishment that is truly morally expressive must make individualized and contextual judgments about the moral worth of each offender—his degree of culpability for the crime he committed and his potential for reintegration into the community.”<sup>103</sup> When offenders are regarded as monstrous, the solution is to cast them from the human community. This reaffirms that the threats they pose are “external to the group.”<sup>104</sup>

The crimes that generate outrage, garner media attention, and therefore exert the most pressure on elected officials generally involve white victims.<sup>105</sup> As the Steikers explain, “The racial disparities in capital charging decisions favoring cases with white victims mirror the disparities in political influence in the vast majority of communities” (p. 186). If the death penalty is an opportunity to send a message about the value prosecutors and jurors place on the lives of victims, the Baldus study provides evidence that these decisionmakers “value” white victims over black victims.<sup>106</sup> The increasing focus

100. Kevin Truong, *Boston Bombing Trial: Should Juror Have Known About Victim’s Family’s Wishes?*, CHRISTIAN SCI. MONITOR (Aug. 25, 2015), <https://www.csmonitor.com/USA/USA-Update/2015/0825/Boston-bombing-trial-Should-juror-have-known-about-victim-s-family-s-wishes> [https://perma.cc/49QF-5SUD] (“[T]he defense attempted to submit the Richard family’s view as part of the case, but the evidence was excluded by the judge . . . .”)

101. Patrick Radden Keefe, *The Worst of the Worst*, NEW YORKER (Sept. 12, 2015), <https://www.newyorker.com/magazine/2015/09/14/the-worst-of-the-worst> [https://perma.cc/4V35-54DM].

102. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 830 (2000).

103. *Id.* at 833.

104. *Id.*

105. See p. 186; Bandes, *supra* note 82, at 585, 587.

106. BALDUS ET AL., *supra* note 43, at 315 tbl.50; see also David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the*

on individual victim characteristics promoted by the Court in *Payne* has the potential to exacerbate this racial divide.<sup>107</sup>

The goal of guided discretion statutes was to individuate among defendants while cabining improper influences like race. But there is pervasive evidence that this has not occurred.<sup>108</sup> Craig Haney has written about the “empathic divide” that separates white jurors in capital cases from black capital defendants.<sup>109</sup> Jurors, relying on vague, emotion-laden standards like “heinous, atrocious, and cruel” (p. 177), make judgments about whether a defendant has been shaped by his horrific background or is just evil.<sup>110</sup> They judge whether a defendant is remorseful or arrogant;<sup>111</sup> chastened or a continuing danger to society.<sup>112</sup> All these judgments are affected by race.

There is no good reason to think that the Supreme Court will properly address the race discrimination that infects the death penalty. It has instead consigned itself to perpetuating a regime that, based on all the available evidence, cannot comport with the Eighth or Fourteenth Amendments. Contrary to the *McCleskey* Court’s assumption, the fact that many of the problems plaguing the capital punishment regime also affect the criminal justice system more generally should not let the death penalty off the hook.<sup>113</sup> As the Steikers convincingly show, one deeply unfortunate effect of the expressive power of the death penalty is that it has sucked so much air out of other prison-reform efforts (pp. 290–91). Many of the problems infecting the capital punishment regime also plague the criminal justice system as a whole. But it does not follow that we cannot address the death penalty until we are ready to fix the entire system. Every society needs “some level of imprisonment to deter crime and incapacitate dangerous offenders”

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*Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1423–26, 1424 tbl.3 (2004); *Race of Death Row Inmates Executed Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenalty-info.org/race-death-row-inmates-executed-1976> [<https://perma.cc/P2TR-5ZEC>].

107. See, e.g., Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof, and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1037–44 (2014); see also Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?*, 31 CARDOZO L. REV. 979, 987–88 (2012).

108. See generally Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

109. HANEY, *supra* note 28, at 203.

110. See Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1580–81 (2004) (explaining that jurors, in deciding whether to attribute a crime to internal choices or external circumstances, tend to assess those different from them more harshly and assume their choices are willed).

111. William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497, 1502 (2004) (discussing findings that white jurors are less likely than black jurors to see black defendants as remorseful).

112. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

113. See p. 315 (discussing a slippery slope problem).

(p. 316). But “[t]he constitutional attack against the death penalty is premised on the assertion that the death penalty is unnecessary and our society would be best served by abolishing it altogether” (p. 316). Furthermore, as Scott Sundby observes, “A slippery slope argument only works if the threat that the system is going into an uncontrollable free fall is real and the consequences at the end of the slope clearly are to be avoided.”<sup>114</sup> If the consequence of acknowledging discrimination in the death penalty context is the need to address invidious discrimination in the criminal justice system more broadly, this is a goal that ought to be embraced.

#### CONCLUSION

The “powerful drama and symbolism” of the death penalty have ensured that it occupies an “outsized role in public discourse about criminal justice” (p. 317). Yet what does the drama signify? In the Steikers’ estimation, it is “political shorthand” with the “capacity to appeal to . . . many different audiences in a visceral, emotional way” (p. 318). One might say the death penalty is expressive all the way down. Moreover, its expressive message is not always the message the jurisprudence reflects. As Justice Marshall said in another context, the underlying message is “less likely to be inarticulable than unspeakable.”<sup>115</sup> In short, there is no path to a principled capital jurisprudence on the horizon. As the Steikers rightly conclude, “The inevitability of discretion means that the capital decision cannot be tamed through legal language” (p. 177).

The death penalty regime is a world away from the triumphant scene that played out in the California courtroom in which the Prop. 8 proponents were forced to adduce evidence to support their moral and emotional claims against same-sex marriage. The Court’s interventions have long buoyed the vain hope that there is a principled core, a set of “real reasons” that float free from the “extralegal” emotion, politics, and prejudice that infect the death penalty. The Prop. 8 moment illustrated the power and value of principled jurisprudence—a demand for reasons that transcend politics, prejudice, and raw emotion. It’s long past time to apply the same principled approach to capital punishment.

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114. Scott E. Sundby, *The Loss of Constitutional Faith: McCleskey v. Kemp and the Dark Side of Procedure*, 10 OHIO ST. J. CRIM. L. 5, 29–30 (2012).

115. *Florida v. Bostick*, 501 U.S. 429, 442 n.1 (1991) (Marshall, J., dissenting) (emphasis omitted).