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The Heart Has Its Value: The Death Penalty's Justifiable Persistence

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The Heart Has Its Value: The Justifiable Persistence of the American Death Penalty

By Douglas A. Berman* & Stephanoas Bibas†

Susan Bandes is right that emotional currents drive death-penalty debates and deserve more respect. But putting emotions “at the center of the debate about its fate” will not lead the death penalty to “die a well-deserved death.” On the contrary, reengaging with emotion will reinvigorate capital punishment.

Historically, societies that emphasize emotions are more likely to embrace capital punishment. Well into the 20th century, Americans could hardly be accused of “moral and emotional distance and even disengagement” from the death penalty. At the last public execution in 1936, more than 20,000 people flooded into Owensboro, Kentucky to see Rainey Bethea hanged for raping and murdering a 70-year-old woman. Thwarting public desires for extreme punishment of the worst offenders may simply deflect punitive emotions elsewhere, leading them to warp other areas of criminal justice. Perhaps hiding punishment behind prison walls has frustrated these emotions and created upward hydraulic pressure on prison sentences, such as life without parole even for some non-violent and juvenile offenders.

 Turning from history to human nature, emotions keep the death penalty on the books in almost three-quarters of American states. Legislatures still champion this ultimate sanction because the public values its unique symbolism. Juries, in deciding whether to execute particular killers, serve as a legitimate outlet for emotions. Judges exemplify dispassionate reason; juries, communal emotional judgment.

Bandes suggests that vengefulness and punitive emotions are inflamed in the abstract and that focusing more on individual cases will lead her preferred emotion, empathy, to predominate. Indeed, she brings forth promising candidates for empathy, such as repentant Karla Faye Tucker and innocent Rolando Cruz. But these examples, who are well known because they are emotional outliers, hardly undercut capital punishment as an institution. On the contrary, they confirm that even death-penalty supporters distinguish murderers based on desert and empathy, rather than angrily calling for every killer’s head. Other renowned capital defendants elicit very different, contextualized emotional responses. Think of Oklahoma City bomber Timothy McVeigh or serial killer Ted Bundy. Such pure examples of hatred and evil justifiably evoke little empathy and enormous righteous indignation. These men deserve emotional condemnation and a punishment different in kind from the ones we give to common thieves and drug dealers.

Likewise, Bandes rightly suggests that jury instructions should not preclude empathy. But in fairness, both sides should be equally able to bring emotional arguments to bear and seek catharsis and healing. If defendants can emphasize their humanity and plead for leniency, then prosecutors and victims’ families should be equally free to make the emotional case for retribution. From an emotional point of view, the return of victim-impact evidence is cause for celebration, not Bandes’ dismay. How else can juries make emotionally well-rounded judgments?

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Finally, we must respect punitive emotions as a central part of us. We are angry at moral agents because they were free to choose but chose wrongly. We are angry because we care about the victim as a fellow man and are outraged at the criminal who abused his freedom. Crimes tear the social fabric and demand payback to vindicate victims, condemn crimes, and denounce wrongdoers. Without anger, there is no justice nor sense of community. We must express our indignation and respond to grave moral wrongs. Though there was no need to deter or incapacitate Adolf Eichmann, executing him appropriately condemned the Holocaust and vindicated its victims.

Bandes prefers the warm-and-fuzzy emotion of empathy, but offers little justification for squelching the visceral capital emotions. Certainly we can take them too far and can critique and restrain their excesses. But properly limited, these emotions rightfully demand a place at the table. Perhaps Vulcan criminal justice would not need to vent outrage at the worst killers, but human criminal justice must and inevitably will. At least for these epitomes of evil, the only emotionally effective punishment may be the ultimate one, death.

In sum, the heart has its reasons, but also its value. The heart not only explains the death penalty’s persistence, but also justifies it. A complete human, and a humane criminal justice system, need both head and heart. Such a system may well praise the death penalty, rather than burying it. We should certainly educate and critique emotions and their excesses, such as lynchings. Momentary eruptions of anger may cloud reflective emotional judgments. The job of the justice system is to not to stifle or skew emotions, however, but to promote reflective emotional deliberation. We can neither ignore punitive emotions nor assume that enlightened emotional progress will make the death penalty fade into the obscure mists of the past.