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# BOOTH V. MARYLAND, INSIGHTS INTO THE CONTEMPORARY CHALLENGES TO JUDGING

JOAN M. SHAUHNESSY\*

## INTRODUCTION

The question I address in this paper is what many have recently described as a major contemporary challenge to judging.<sup>1</sup> For many years, possibly for as long as our system of adjudication has existed in its present form, trial lawyers have known what scholars have discovered only recently. Trial lawyers have never thought, as legal scholars for many years seemingly believed, that the law is a rational science with rational means of proof, from which emotion should be divorced as far as humanly possible. To the contrary, trial lawyers have always understood that their job entails, in large part, presenting an emotional case for the application of seemingly emotion-free legal rules and judicial instructions.<sup>2</sup>

The role of emotion in legal decisionmaking, particularly in the area of criminal law, is multifaceted. First, the human tragedies relived in the criminal courtroom almost inevitably involve strong emotions on the part of the actors. Assessment of blame for the tragedy thus necessarily requires an understanding of those emotions by the trier of fact. But the role of emotion goes further than a requirement that the trier of fact acknowledge the emotions of those involved in the litigation. As moral philosophers have noted, human action is not the result solely of reason.<sup>3</sup> To move from

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1. See, e.g., JOHN F. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976); A. Morgan Cloud III et al., *Conference of Association of American Law Schools: Panel on Compassion and Judging*, 22 ARIZ. ST. L.J. 13 (1970); *Colloquy, Human Voice in Legal Discourse*, 66 TEX. L. REV. 577 (1988); Tristan Tayle Duncan, *Narrative Jurisprudence: The Remystification of the Law*, 7 J.L. & RELIGION 105 (1989); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); *Symposium, Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); *Symposium, Reason, Passion and Justice Brennan*, 10 CARDOZO L. REV. 1 (1988).

2. See, e.g., ROGER S. HAYDOCK & JOHN SONSTENG, *TRIAL: THEORIES, TACTICS AND TECHNIQUES* 638-39 (1991); Richard L. Tegtmeier, *Theory of the Defense*, 42 MERCER L. REV. 593, 600 (1991) (stating "Every case has a dominant emotion. In truth, jurors do not decide cases based upon facts. They decide them on the gut level instincts and feelings that they associate with or against your client."). I would put the matter differently than does Mr. Tegtmeier. I would argue that the facts of a criminal case are emotionally charged and that, to persuade the juror, emotions must be elicited and explained, not ignored. Robert B. Hirschhorn, *Opening Statements*, 42 MERCER L. REV., 605, 612 (1991) (stating "People are motivated and persuaded by feelings."); Drew Findling, *Closing Argument: Tapping the Human Experience*, 42 MERCER L. REV. 659 (1991).

3. See Edward de Grazia, *Humane Law and Humanistic Justice*, 10 CARDOZO L. REV. 25 (1988) for a discussion of the philosophical arguments.

reason through decision to action requires involvement of the actor's emotions. Second, the law asks the trier of fact in a serious criminal case to engage in actions which have serious consequences. A finding of guilt in such a case entails as a consequence punishment up to and including death. A finding of not guilty also entails serious consequences—emotional pain for those who feel they were harmed by the acquitted defendant and possible danger for others if the decision was erroneous. Third, some have argued with persuasive force that the substantive law of crimes itself is founded in large part on the general emotional reaction of society to offenses which it has chosen to punish.<sup>4</sup> The very underpinning of criminal law—the justification for its application—is not a rational, emotion-free calculus but, appropriately, a deeply felt community response to outrageous conduct.<sup>5</sup>

Thus, in approaching the trial of a criminal case, emotions are a large, often critical, consideration for the prosecution and for the defense. First, attorneys must show and help the trier of fact to understand the strong emotions of those involved in the crime. Without such information and understanding, the actions of the participants and the reasons for their conduct may be utterly inexplicable. Next, the trial lawyer must seek to invoke an emotional response from jurors that will lead them from understanding to action. Lastly, it is the task of the advocate, under this understanding of the criminal law and its process, to bring home to the jury the emotional basis underlying the substantive criminal law. In this way, the jury is moved to act in accordance with the community norms reflected in the substantive law.<sup>6</sup>

Traditionally, the law has not completely ignored the presence of emotion in criminal litigation; rather, the law has sought to disguise the role and importance of emotion. For example, trial lawyers' work in exposing the trier of fact to the emotions and the feelings of the litigants

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4. See, e.g., ROBERT C. SOLOMON, *A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT* (1990); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1991).

5. I do not mean to suggest, in any argument I make in this article, that legal decisionmakers are, can be or should be, indifferent to the law, including the demand (if it is made) to set aside emotion in favor of the hard demands of the rule of law. I believe that legal decisionmakers clearly are profoundly influenced by their understanding of the duties demanded by their role in the legal system. That influence can be beneficial in protecting against dangers ranging from thoughtlessness to deep prejudice. That influence can also be pernicious, by robbing legal decisionmakers of the approbation needed to bring their emotions to bear and by providing them with a shelter to deny responsibility for wrenching decisions. See generally ROBERT M. COVER, *JUSTICE ACCUSED* (1975); sources cited *supra* note 1 (addressing judicial resort to law and legalism); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305; William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1987-88); WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* (1987) (for effect in capital cases of jury belief in legal inevitability of their vote for death); see also Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359 (for uses of demands of Rule of Law in countering prejudice).

6. See *Spaziano v. Florida*, 468 U.S. 447, 468-69 (1984) (Stevens, J., dissenting).

has been constrained, but by no means prevented, through the doctrine of relevance. In theory, the doctrine of relevance forces the trial of emotional issues into a reasoned, rational framework. The rule of relevance customarily has taken the form of a syllogism—any fact put before the jury must make a legal finding more or less likely.<sup>7</sup> Moreover, relevant evidence has been excluded if found to be unfairly prejudicial; emotion has been the quintessential example of unfair prejudice.<sup>8</sup> Nevertheless, as a practical matter, the requirement of relevance has left wide room for trial lawyers to paint an emotional picture for jurors. For example, courts routinely permit the use of color photographs of the victim of a homicide, ostensibly offered to illustrate the dry and technical medical testimony concerning the cause of death.<sup>9</sup> Similarly, rules permitting evidence concerning the character of the victim and of the accused allow the criminal defense substantial leeway to provide an emotional context for its case.<sup>10</sup> Good trial lawyers can, and do, use the rational framework of the evidence rules to tell compelling human stories.<sup>11</sup>

Similarly, while the law has purported to restrict argument appealing to the emotions of the trier of fact, in practice attorneys have had wide latitude in making their arguments, particularly when made to a jury.<sup>12</sup> While courts have disapproved particularly distasteful appeals—for example, blatantly racist arguments and arguments designed to instill personal fear—counsel have been permitted wide latitude to invoke emotional involvement and an emotional stake in decisionmaking on the part of jurors.

Finally, the law has cloaked in secrecy the actual deliberations of jurors. This permits the relatively free reign of emotion in the jury room<sup>13</sup> and perpetrates the illusion that jurors proceed by reasoning syllogistically from a finding of a particular fact to an application of the judge's reasoned instructions to a final verdict. This illusion is frequently bolstered by the traditional instruction that tells jurors not to take account of sympathy or prejudice.<sup>14</sup>

The appellate judicial process seems to treat the role of emotion in a similar fashion.<sup>15</sup> Judicial opinions are presented in the voice of objective rationality, from which the explicit invocation and judgment of the emo-

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7. FED. R. EVID. 401.

8. FED. R. EVID. 403; FED. R. EVID. 403 advisory committee's note.

9. See Geimer & Amsterdam, *supra* note 5, at 47-51 (describing profound effect photos of homicide victims may have on jurors).

10. FED. R. EVID. 404(a)(1) & (2); *but see* FED. R. EVID. 412.

11. W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981).

12. See generally Welsh S. White, *Prosecutors' Closing Arguments at the Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 297 (1990-91); Weisberg, *supra* note 5, at 363-83.

13. See generally Victoria Slind-Flor, *Counties Begin to Help Jurors Cope Afterward in Grisly Trials*, NAT'L L.J., Jan. 20, 1992, at 3 (describing emotional effect on jurors of service in serious criminal cases).

14. See *infra* note 50 and accompanying text.

15. See sources cited *supra* note 1.

tional context of a dispute are largely absent. Instead, logical legal doctrine comes to the fore and the emotions of the parties and their judges are largely obscured. This is not to say that emotion plays no role in appellate judging, but rather that the role emotion plays is largely suppressed in decisions as they are presented and explained by judges.

Many legal scholars have argued persuasively that the law's distrust of emotion is both erroneous and harmful to good legal decisionmaking. For example, Justice Brennan in his Cardozo lecture argued that "[the] internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality."<sup>16</sup> Numerous commentators wholeheartedly accept Brennan's view.<sup>17</sup> Recognition of the centrality of emotion provides both a better explanation for the way in which law operates and a suggestion for better legal decisionmaking in the future. As others have noted, it is encouraging to hear a Supreme Court nominee declare that the qualities of a "good judge" include "compassion, warmth, sensitivity, and an unyielding insistence on justice."<sup>18</sup>

Nevertheless, in our enthusiasm for the constructive role emotion can play in legal decisionmaking, it is important to try to understand the limits and dangers of the use of emotion. An exploration of a recent United States Supreme Court decision, *Booth v. Maryland*,<sup>19</sup> authored by Justice Powell, will help to develop and refine the boundaries of emotion in litigation.

*Booth* was not a landmark opinion. It did not establish any great principles of constitutional analysis. It is not a model of legal analysis, never had wide applicability, and was rather quickly overruled.<sup>20</sup> Moreover, the *Booth* opinion reflects a distrust of emotion which is contrary to much recent jurisprudential writing. Nevertheless, the *Booth* case and other recent capital decisions provide a vehicle for examining the virtues and vices of the appeal to emotion in litigation.

Justice Powell's opinion for the Court in *Booth* begins with a brief description of the facts:

In 1983, Irvin Bronstein, 78, and his wife Rose, 75, were robbed and murdered in their West Baltimore home. The murderers, John

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16. William J. Brennan, Jr., *Reason, Passion and the Progress of the Law*, 10 CARDOZO L. REV. 3, 3 (1988).

17. See, e.g., sources cited *supra* note 1.

18. Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 60 S. CAL. L. REV., 187, 192 n.188 (1988). I am indebted to Professor Resnik for this quotation. Professor Resnik states that this quote from then Judge Kennedy, according to the *New York Times*, was in a written answer supplied to the Senate Judiciary Committee. Many of Professor Resnik's fine insights into the need for attention to emotion by judges can be found in the foregoing article; in Judith Resnik, *Changing Criteria for Judging Judges*, 84 NW. L. REV. 889 (1990); and in Judith Resnik, *Feminism and the Language of Judging*, 22 ARIZ. ST. L.J. 31 (1990).

19. 482 U.S. 496 (1987).

20. See *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

Booth and Willie Reid, entered the victims' home for the apparent purpose of stealing money to buy heroin. Booth, a neighbor of the Bronsteins, knew that the elderly couple could identify him. The victims were bound and gagged and then stabbed repeatedly in the chest with a kitchen knife. The bodies were discovered two days later by the Bronsteins' son.<sup>21</sup>

Booth was found guilty of two counts of first degree murder and of lesser offenses and a penalty trial was held to determine whether Booth would be sentenced to death.<sup>22</sup> At the penalty trial, a Victim Impact Statement, prepared by the State Division of Parole and Probation, was read to the jury.<sup>23</sup> The Victim Impact Statement is reproduced as an appendix to Justice Powell's opinion in *Booth*.<sup>24</sup> The statement is a vivid and wrenching depiction of a grief-stricken family and of the people they loved and horribly lost. The conclusion, for example, reads,

The family states that Mr. and Mrs. Bronstein were extremely good people who wouldn't hurt a fly. Because of their loss, a terrible void has been put into their lives and every day is still a strain just to get through. It became increasingly apparent to the writer as she talked to the family members that the murder of Mr. and Mrs. Bronstein is still such a shocking painful and devastating memory to them that it permeates every aspect of their daily lives. It is doubtful that they will ever be able to fully recover from this tragedy and not be haunted by the memory of the brutal manner in which their loved ones were murdered and taken from them.<sup>25</sup>

The Victim Impact Statement also reflected the family's anger and desire for retribution. For example, it contained the following comments:

The victims' son feels that his parents were not killed but were butchered like animals. He doesn't think anyone should be able to do something like that and get away with it.<sup>26</sup>

The victims' daughter states that animals wouldn't do this. . . . The murders show the viciousness of the killers' anger. She doesn't feel that the people who did this could ever be rehabilitated and she doesn't want them to be able to do this again or put another family through this.<sup>27</sup>

The family wants the whole thing to be over with and they would like to see swift and just punishment.<sup>28</sup>

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21. *Booth v. Maryland*, 482 U.S. 496, 497-98 (1987).

22. *Booth*, 482 U.S. at 498.

23. *Id.* at 501.

24. *Id.* at 509-15.

25. *Id.* at 514-15.

26. *Id.* at 512.

27. *Id.* at 513.

28. *Id.* at 514.

Booth offered no evidence to rebut the Victim Impact Statement.<sup>29</sup> The jury sentenced him to death for the murder of Mr. Bronstein and to life imprisonment for the murder of Mrs. Bronstein.<sup>30</sup>

The Maryland Supreme Court affirmed<sup>31</sup> and the United States Supreme Court granted certiorari. The Court, in an opinion by Justice Powell, joined by Justices Brennan, Marshall, Blackmun and Stevens, reversed.

The Court's holding was based upon the Eighth Amendment. It found that the information contained in the Victim Impact Statement was "irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."<sup>32</sup> The Court, drawing on its earlier capital cases, described the constitutionally required task of the sentencing jury as one of "determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime."<sup>33</sup> The reaction of the victim's family to the crime, in the Court's view, had no bearing on this task and had no relationship to the blameworthiness of the capital defendant.<sup>34</sup> The Court opined that to permit a decision on life or death to turn on a Victim Impact Statement would therefore be arbitrary. Moreover, the Court held that admission of the family's "*emotionally charged opinions* as to what conclusions the jury should draw from the evidence clearly is inconsistent with *the reasoned decisionmaking* we require in capital cases."<sup>35</sup>

The Court's opinion in *Booth* was an attempt to realize a long-held goal—that "any decision to impose the death sentence must be . . . based on reason rather than caprice or emotion."<sup>36</sup> In *Booth*, Justice Powell starkly presented what has been viewed as a dichotomy between reason and emotion and chose reason.

The Supreme Court has repeatedly faced the tension between reason and emotion in its capital decisions, with a surprising lack of consistency or willingness to confront the problem which continues to haunt its decisions. This is not the place to retell the saga of *Furman v. Georgia*<sup>37</sup> and its

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29. *Id.* at 518.

30. *Id.* at 501.

31. *Booth v. Maryland*, 507 A.2d 1098 (Md. 1986), *vacated in part*, 482 U.S. 496 (1987).

32. *Booth v. Maryland*, 482 U.S. 496, 502-03 (1987).

33. *Id.* at 507.

34. *Id.* at 508.

35. *Id.* (emphasis added).

36. *Id.* (citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

37. 408 U.S. 238 (1972). In *Furman*, the Supreme Court struck down several death sentences on Eighth Amendment grounds. Although there was no opinion for the Court in *Furman*, the result of the various concurring opinions was to invalidate most, if not all, then-existing capital punishment schemes. In the years that followed, state legislatures, responding to *Furman*, enacted new capital statutes. In 1976 the Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153 (1976), affirmed a sentence of death imposed under Georgia's post-*Furman* statute, putting to rest the question of whether *Furman* had invalidated all capital punishment.

progeny.<sup>38</sup> Nevertheless, the capital cases may be seen in part as the Court's struggle to deal with an issue for which modern law has left the Court utterly unequipped—the uses and dangers of emotion in judging.<sup>39</sup>

The classic understanding of law—however severely it has been criticized in recent years—has always been of a rational deliberative science. From time to time, the sources to be consulted in conducting the called-for rational inquiry have varied. In the fabled days of Langdell, law was regarded as self-generating and capable of being adduced from a study of judicial decisions. As time went by, the emphasis shifted to the use of data from the social sciences or from that vaguest of judicial sources—public policy. More recently still, some have urged that economics or history should form the core sources of data for the legal reasoner. Nevertheless, until recently, the emphasis was almost exclusively on reason, using whatever sources seemed most appropriate to the task at hand. Emotion was regarded as a regrettable and dangerous sensation in a legal decisionmaker, to be minimized and avoided wherever possible.

It was in the capital cases that the Court was finally forced to confront directly the limits of reason in legal decisionmaking. As the Court recognized in *Furman v. Georgia*,<sup>40</sup> the penalty of death, at least in the 1960s and early 1970s, was inflicted on only a few of the persons who committed crimes punishable by death.<sup>41</sup> Several justices concurring in the *Furman* judgment found the death penalty arbitrary and capricious for that reason.<sup>42</sup> Accordingly, after *Furman* the stage was set for the Court to hold the death penalty constitutionally valid if it could be administered in accordance with neutral, objective rules.

Inevitably, the post-*Furman* cases forced the Court to confront the consequences of such a position. The series of decisions which came during the 1975 term of the Court, and which set the framework for modern death penalty jurisprudence, included *Woodson v. North Carolina*.<sup>43</sup> In the plu-

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38. One of the finest discussions of post-*Furman* jurisprudence can be found in Weisburg, *supra* note 5.

39. For a splendid and far more developed discussion of the role of emotion in judging, see Pillsbury, *supra* note 4.

40. 408 U.S. 238 (1972).

41. It remains the case today, of course, that only a minute percentage of all homicides result in execution of the perpetrator. Compare U.S. Bureau of the Census, Statistical Abstract of the United States: 1991 (111th ed.), Washington, D.C., 1991 at 176, Table 292 (approximately 21,500 murders committed in United States in 1989) with *id.* at 197, Table 342 (16 prisoners executed in United States, all for murder, in 1989). The 1989 executions were beyond doubt for crimes committed in earlier years, but the statistics nevertheless reveal the order of magnitude involved.

42. *Furman v. George*, 408 U.S. 238, 248-49 n.11 (1972) (Douglas, J., concurring); *id.* at 294-95 (Brennan, J., concurring); *id.* at 309-16 (Stewart, J., concurring); *id.* at 313 (White, J., concurring). Of these opinions, those of Justices Stewart and White turned on the rarity of death sentences, as reflected in Justice Stewart's well-known phrase, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309.

43. 428 U.S. 280 (1976).

rality opinion of Justice Stewart, joined by Justices Powell and Stevens, the Court rejected North Carolina's mandatory death scheme, *inter alia*, on the ground that "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of *compassionate* or mitigating factors stemming from the diverse frailties of humankind."<sup>44</sup>

In *Lockett v. Ohio*,<sup>45</sup> the Court held<sup>46</sup> that capital defendants must constitutionally be permitted to offer evidence on *any* aspect of their character, their record or the circumstances of their offense.<sup>47</sup> The Court based its decision on "[t]he need for treating each defendant in a capital case with that degree of respect due to the uniqueness of the individual."<sup>48</sup> Thus, in *Woodson* and *Lockett* the Court seems to have constitutionalized the view that certain emotions cannot be excluded from consideration in deciding between death and life.<sup>49</sup>

Following *Woodson* and *Lockett*, the door was open for defendants in capital sentencing proceedings to offer a full range of evidence, including emotional evidence, concerning the defendant's character, background, and actions. Capital defendants can proffer and have proffered all of this evidence to support arguments to the jury that some penalty less than death was appropriate in a particular case.<sup>50</sup>

44. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1978) (emphasis added).

45. 438 U.S. 586 (1978). See Scott Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991), and Louis O'Bilionis, *Moral Appropriateness, Capital Punishment and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283 (1991), for a complete discussion of *Lockett* and its role in modern death penalty jurisprudence.

46. Justice Burger's opinion on this point was not technically an opinion for the Court. It was written for himself and three other justices. *Lockett v. Ohio*, 438 U.S. 586, 589 (1978). However, it was effectively an opinion for the Court because, although Justice Marshall concurred only in the judgment, he concurred on grounds that could properly be described as broader and he clearly agreed with the plurality's position on the admissibility of individualized factors. *Id.* at 620-21.

47. *Id.* at 604-05.

48. *Id.* at 605.

49. See generally Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1989) (discussing role of mercy in modern capital punishment scheme).

50. The Court has so far refused to take the final step in legitimating the role of emotion in capital decisionmaking. In *California v. Brown*, 479 U.S. 538 (1987), the Court considered an instruction to a capital sentencing jury which stated that [the jury] "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Brown*, 479 U.S. at 540. The Court rejected the argument that this instruction "denie[d] [the] capital defendant the right to have the jury consider any 'sympathy factor' raised by the evidence when determining the appropriate penalty." *Id.* (quoting California Supreme Court's decision below, *People v. Brown*, 709 P.2d 440, 453 (1985)). The Supreme Court held that the instruction was "a directive to ignore *only* the sort of sympathy that would be totally divorced from the evidence." *Id.* at 542 (emphasis added). The Court thus left open the possibility that a sentencing jury should be instructed to consider sympathy when it was evoked

*Woodson* and *Lockett* were correctly decided. For all of the reasons described earlier,<sup>51</sup> it is completely appropriate and necessary that courts give defendants an opportunity to present any evidence which might persuade a trier of fact to avoid the death sentence. Juries are entitled to see and understand the person they are being asked to condemn. The decision to impose the death penalty cannot be made without emotion and should not be made under the pretense that legal decisionmaking is emotion free. The question then arises as to whether the decision in *Booth v. Maryland* can be justified. Do not all of the reasons and arguments which might be brought forward in favor of *Woodson* and *Lockett* apply equally to the offer of evidence which gives a "glimpse of the life" which a defendant "chose to extinguish?"<sup>52</sup>

I believe that *Booth* can be supported, but in order to do so it is necessary to move beyond Justice Powell's rejection in *Booth* of emotion in favor of reason.<sup>53</sup> Instead, it is necessary to look again at the arguments supporting the use of emotion in legal decisionmaking and to recognize their limits and their dangers. None of the arguments in favor of the use of emotion in litigation can support the use of a Victim Impact Statement, or similar sweeping evidence regarding the emotions of the survivors of a murder, in a capital sentencing proceeding. First, as noted previously, judgment of human action requires judgment of the emotions of the participants in that action. Accordingly, in the guilt phase of a capital trial, the parties will present much evidence which pertains to the emotions both of the capital defendant and, where their emotions shed light on the circumstances of the crime, of the victim and other actors. This type of evidence might also be admissible at the sentencing phase of a capital trial to shed light on the "character and record of the defendant and the circumstances of the crime." But the evidence admitted in *Booth* went far beyond the evidence needed for an assessment of the circumstances of the offense. Its purpose and effect seemed to be geared far more directly to the latter two uses I have suggested for emotion in litigation.

The Victim Impact Statement helped the state accomplish two purposes in the sentencing phase of the capital trial. First, it provided a direct means to involve the jury emotionally, in a way favorable to the state, in the sentencing proceeding. It thus served as a sort of catalyst to move the jury

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by the evidence, or, at least, should not be instructed to exclude sympathy in its deliberations. In *Saffle v. Parks*, the Court refused to consider a similar argument in a habeas proceeding on the ground that it urged a "new rule" and thus could not be applied on collateral review. 110 S. Ct. 1257, 1263 (1990). *But see* Sundby, *supra* note 45, at 1191 n.145, 1196-97 n.170 (arguing that *Saffle* decided issue and upheld anti-sympathy instruction).

51. *See supra* notes 1-6 and accompanying text.

52. *Payne v. Tennessee*, 111 S. Ct. 2597, 2607 (1991) (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

53. *But see* Mark G. Yudof, "Tea at the Palaz of Hoon": *The Human Voice in Legal Rules*, 66 TEX. L. REV. 589, 603-06 (1988) (discussing *Booth* and taking more critical view of use of emotion in legal decisionmaking).

from knowledge to action. In *Booth*, the action sought from the jury was a verdict of death as opposed to life. Second, the Victim Impact Statement also fulfilled a role in bolstering and particularizing the emotional underpinnings of the criminal law, particularly of the death penalty. It permitted the state to offer graphic, emotional evidence of particular survivors' desire for retribution against the defendant.

Neither of these uses are valid reasons for permitting parties to offer such evidence in a sentencing proceeding. The superficial equality between emotional evidence concerning the defendant, offered in the hope of moving the jury to vote for life, and emotional evidence concerning the victim, offered in the hope of moving the jury to vote for death,<sup>54</sup> will not sustain analysis. The simple and tragic truth is that the victim and the defendant are not equally situated before the capital sentencing jury. The capital sentencing jury has only one life in its hands—that of the defendant. At best, the victim's family will obtain a sense of catharsis and a belief that they have been heard by being allowed to put before a jury their memories of the victim and their grief at the victim's death. However, the law offers the jury only one way to compensate the victim's survivors for the pain that is so graphically demonstrated before the jury. That way, in the context of a capital sentencing proceeding, is to choose the death of the defendant over the life of the defendant. It is not the least bit clear that, if given a full range of remedial power, the jury would be moved to respond in that way to survivors' emotions. But given the restraint, the jury can answer its felt need to respond only with a verdict of death. Evidence of survivors' emotions, therefore, poses a serious risk of distorting the jury's judgment on the only question before it—whether the defendant is one of those few offenders modern American society deems deserving of execution.

The danger of distortion is heightened by the very strong possibility that, if given evidence that asks the jury to choose between emotional response in favor of the capital defendant and emotional response in favor of the victim, the jury will almost certainly turn away from the defendant and toward the victim and the victim's survivors. The victim and the victim's survivors are far more likely to be persons whose lives are similar to those of the persons on the jury, whose character and actions the jury can readily understand, and with whose grief the jury may feel able to identify. By contrast, many of the factors which are so likely to lead to the defendant finding himself faced with a capital sentencing proceeding are elements far less likely to be within the purview of an ordinary jury. For example, there is substantial evidence that a large proportion of those sentenced to death in capital proceedings suffer from substantial mental impairment or disturbance.<sup>55</sup> Moreover, many capital defendants suffered severe deprivation,

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54. *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991).

55. See, e.g., Richard H. Burr III, *Representing the Client on Death Row: The Politics of Advocacy*, 59 UMKC L. REV. 1, 3 n.3 (1990) (citing psychiatric evidence); Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time*

abuse, or both as children, the effects of which are outside the experience of most jurors. Finally, of course, the jury sitting on the sentencing decision has already found the defendant guilty of murder—frequently a crime difficult or impossible for the jurors to understand, much less empathize with.<sup>56</sup> In addition, by their earlier verdict, the jury has to some extent publicly committed itself to the prosecution and its position.<sup>57</sup> The danger that the jury will not respond with equal consideration to evidence from each party is particularly acute in light of the substantial evidence that “death-qualified” jurors<sup>58</sup> are particularly receptive to prosecution evidence and arguments.<sup>59</sup> For these reasons, the arguments in favor of recognizing and using victim emotion in the particular moral judgment that results from a capital sentencing procedure are fundamentally flawed.

Nor is it appropriate, given the current structure of capital punishment in America, to permit the state to offer Victim Impact Statements as a way of particularizing the general retribution argument in favor of capital punishment. The argument that retribution is the appropriate emotional basis for punishment assumes that retribution reflects the emotional reaction of the community as a whole to the offense.<sup>60</sup> To permit evidence of the type offered in *Booth*, in which family members in the Victim Impact Statement plead for death as a retributive punishment, is to substitute the view of individuals for the views of the community at large. This introduces an element of unequal treatment recognized by some of the opinions in *Booth* and in *Payne*.<sup>61</sup> Moreover, it forces those in the most emotionally

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*Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE, 451, 481-87 (1990-91) (gathering evidence of mental illness and retardation among death row inmates).

56. See *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980); see also Robert L. Hayman, Jr., *Beyond Penry: The Remedial Use of the Mentally Retarded Label in Death Penalty Sentencing*, 59 UMKC L. REV. 17, 45-53 (1990) (explicating this danger as it applies to mentally retarded defendants); see generally Toni M. Massaro, *Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?*, 1987 MICH. L. REV. 2099 (1989) (discussing limits of empathy).

57. WHITE, *supra* note 5, at 95-98 (discussing problem of commitment to prior decision in context of prosecutor's penalty phase closing argument).

58. The term “death-qualified” jurors refers to those jurors chosen after a *voir dire* process designed to identify and excuse for cause venire persons whose beliefs would not allow them to vote for death. The Supreme Court limited the scope, but did not prohibit the use, of such exclusions in *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

59. See *id.* at 162-94 (discussing studies showing that “death-qualified” jurors are sympathetic to prosecution arguments). In *Lockart v. McCree*, 476 U.S. 162 (1986), the Supreme Court refused to find that a “death qualified” jury violated a capital defendant's right to an impartial jury in the guilt phase.

60. Scott Burris, Note, *Death and Rational Justice: A Conversation on the Capital Jurisprudence of Justice John Paul Stevens*, 96 YALE L.J. 521, 537-39 (1987).

61. *Payne v. Tennessee*, 111 S. Ct. 2597, 2620-21 n.1 (1991) (Marshall, J., dissenting); *id.* at 2631 (Stevens, J., dissenting); *Booth v. Maryland*, 482 U.S. 496, 505-06 (1989). In addition, the defense in a case in which victim impact evidence is offered is put in the position of choosing between two equally destructive alternatives. It may seek to meet the prosecution's favorable evidence about the victim with attacks on the victim's character and relationships,

vulnerable position—the survivors of a murder victim—to choose whether to officially seek retribution through the death penalty. The victim's survivors cannot be expected to express the judgment of the community as a whole, and it may be cruel to force them to a choice they may later regret.<sup>62</sup>

This paper is part of a symposium in honor of Justice Lewis Powell. Perhaps it might fairly be said that I honor Justice Powell with faint praise. Certainly, it is not my intention to defend Justice Powell's position on the death penalty or his capital decisions. Moreover, as I hope this paper has made clear, I do not share the view of judging implicit in Justice Powell's *Booth* opinion. Nevertheless, I think Justice Powell's opinion in *Booth* demonstrates, as much as he himself might deny it, how central and important the role of human emotion is in judging, whether judgment is rendered by a Supreme Court Justice or by one of twelve jurors in the first stage of a criminal proceeding.

On the occasion of his retirement, Justice Powell gave an interview to the *New York Times*. In it, he is quoted as saying,

I never think of myself as having a judicial philosophy, I have in mind that each one of these cases is enormously important to the parties, particularly the defendant in a criminal case. I try to be careful, to do justice to the particular case, rather than to try to write principle that will be new, original, or whatever.<sup>63</sup>

It would be a foolish misdescription of Justice Powell to suggest that he was anything other than firmly committed in his work, in his life and in his decisions to the proposition that the rule of law in all its senses governs the work of lawyers, of judges, and of courts. But I find a hint of something more in Justice Powell's self-description: in the description of a man who did not come to the Court with a judicial philosophy; in the description of a man who kept in mind the importance of individual cases to the parties, particularly to a criminal defendant.

There was in Justice Powell, who came to the Supreme Court from a lifetime in the practice of law, an implicit understanding that law is more than a cold, rule-bound calculus, from whatever source. There was in Justice Powell some instinct for the operation of the rule of law on real people, with all of their powerful emotions and all of their human failings. There was also in Justice Powell a recognition of the need to channel and control those reactions in a court of law. It is that knowledge and that recognition

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thus causing fresh pain to survivors and appearing cruel and relentless to the jury, or it may let the evidence go unanswered, at the possible cost of the defendant's life. Such a choice is more than a "tactical" decision, see *Booth v. Maryland*, 482 U.S. 496, 518 n.3 (1987) (White, J., dissenting); it is a "Catch-22" to which no person on trial for his or her life should be subjected.

62. SHIRLEY DICKS, *DEATH ROW* 38-41 (1990) (statement of Marie Deans); Lynne V. Henderson, *The Wrongs of Victims Rights*, 37 *STAN. L. REV.* 937, 996-99 (1985).

63. Stuart Taylor, Jr., *Powell on His Approach: Doing Justice Case by Case*, *N.Y. TIMES*, July 12, 1987, § 1, at 1.

which led to *Booth*, and which are reflected in the many tributes to him upon his retirement, whose common chord seems to be a recognition of Justice Powell's virtues both of detachment and of concern for the particularities of each case before him.<sup>64</sup>

To take the jurisprudence of emotion seriously is to call for legal scholars and judges to come to an explicit understanding, and development, of the countervailing pressures of detachment and legality on the one hand and emotion and factual particularity on the other hand. Justice Powell, a man of his time, did not explicitly confront this difficulty. If we, as legal scholars today, are to do more than simply react against the excesses of legality, we must seek to find explicitly what Justice Powell found implicitly in his work on the Court. We must seek a framework which will permit genuine, discerning judgment of the cases brought before our courts. Such a framework must include a full recognition of the inevitable emotional dimensions of legal decisionmaking, and a means by which emotions can be guided, addressed and, ultimately, accepted or rejected

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64. See, e.g., *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 395-96 (1987) (statement of Justice Sandra Day O'Connor); *id.* at 403 (statement of Richard H. Fallon, Jr.); *id.* at 418-19 (statement of Judge J. Harvie Wilkinson III); Linda Greenhouse, *Powell: Moderation Amid Divisions*, N.Y. TIMES, June 27, 1987, § 1, at 32.

