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Who's Afraid of Law and the Emotions?

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Article

Who’s Afraid of Law and the Emotions?

Kathryn Abrams[†] and Hila Keren^{††}

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INTRODUCTION

Law and emotions scholarship has reached a critical moment in its trajectory.¹ It has become a varied and dynamic body of work, mobilizing diverse disciplinary understandings to analyze the range of emotions that implicate law and legal decisionmaking. Conferences, academic collaborations, and even a number of law school seminars reflect its gradual dissemination.² Yet mainstream legal academics have often greeted it with ambivalence. They have not predictably viewed it as a resource for addressing questions within their substantive fields. It is often treated as a novel academic pastime rather than an instrument for addressing practical problems. This reception contrasts sharply with that accorded two fields with significant overlap with law and emotions: behavioral law and economics, and the emerging field of law and neuroscience.³ In the sense

1. “Law and emotions” scholarship explores the reciprocal relations between emotions and the law. It reflects pluralism along several dimensions: (1) attributes of cognition: law and emotions scholarship values the affective dimensions of cognition as fully as the classically rational, rather than understanding them as “other” or as potentially problematic departures from rationality; (2) cognate literatures: law and emotions scholarship may draw on economics, biological science, and more objectivist social sciences, but it also draws on literature, history, philosophy and other humanist disciplines; (3) normative goals: law and emotions scholarship engages law not simply, or even primarily, to correct the cognitive responses of legal subjects in favor of greater rationality; it aims to modify law more fully to acknowledge the role of specific emotions, or to use law to produce particular emotional effects.

For a thoughtful article heralding the emergence of the field which defines it in somewhat different terms, see Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 *LAW & HUM. BEHAV.* 119 (2006) (arguing that law and emotions scholarship is organized around six approaches: emotion-centered, emotional phenomenon, emotion theory, legal doctrine, theory of law, and legal actor).

2. See, e.g., *Symposium on Law, Psychology, and the Emotions*, 74 *CHI-KENT L. REV.* 1423 (2000).

3. In their interdisciplinary exploration of dimensions of cognition that are not exclusively rational, these bodies of scholarship share common substantive ground with law and emotions work. They are not coterminous, however, in that some work within both behavioral law and economics and law and neuroscience analyzes forms of judgment, decisionmaking, cognition, or attributes of the mind which do not specifically involve emotion. Moreover, be-

that all three challenge the narrow definition of rationality that has informed traditional legal thought, they can be seen as branches of the same tree or as related fields of scholarship.⁴ Despite this apparent proximity, however, several factors have prompted a different response.

Law and emotions work is more epistemologically challenging to conventional legal thought than those variants that have received wider recognition: it does not privilege rationality or prioritize the objectivist epistemologies that have become cornerstones of mainstream legal thought. It draws on humanistic disciplines in addition to knowledge from the sciences and the social sciences. It has arrived only recently at an explicit embrace of normativity. And it is more plural in its normative aspirations: it does not aim simply to correct legal subjects' decisionmaking in favor of rationality—the primary normative impetus in behavioral law and economics scholarship⁵—but to modify legal doctrine to acknowledge and encompass affective

havioral law and economics has, in some cases, a distinct normative project of moving human beings whose decisionmaking is impaired by flawed heuristics back in the direction of greater rationality. In noting the differential reception of these related bodies of work, our point is not to critique them. We use behavioral law and economics scholarship in this paper, as well as in our individual work. Similarly, one of us is a faculty participant in the MacArthur Foundation's Law and Neuroscience Program and the other has used particular neuroscience works in her law and emotions writings. Our argument is, however, that these valuable bodies of work should not be taken to stand for the entire field of inquiry—into affective response or other departures from classically defined rationality—in mainstream legal scholarship. This pattern, as we contend below, is the product of a persistent dichotomizing of emotion and reason, and a prioritizing of rationality as a normative goal. *See infra* Part II.

4. See Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 2–3 (2007). According to Blumenthal:

At least two bodies of legal scholarship have recently challenged the primacy of the traditional rational-actor, law and economics approach to law and policy. The first, taking a cognitive-psychological or behavioral economics approach, focuses on mental heuristics and biases that lead to departures from optimal or rational decisionmaking. This literature is voluminous and increasing. A second line of legal scholarship focuses on the role of emotion in legal judgment and decisionmaking, whether by judges, juries, bureaucrats, legislators, or citizens. Although somewhat less developed than the first, this line of writing, and the empirical social science research it often seeks to incorporate, has likewise demonstrated departures from the traditional conception of a rational decisionmaker.

5. See On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2099 (2008) (book review) (“By understanding the ways in which individuals are susceptible to biases and flawed decisionmaking, law and policy can help improve individual and group behavior.”).

response, or use law to channel, moderate, or foster the emotions. From these features, mainstream scholars may have inferred that law and emotions analysis is more distant from recognizable modes of legal thought, less suited to recognizable forms of legal normativity,⁶ and therefore has less pragmatic value.⁷

In this Article we respond to these doubts: law and emotions is a vital field whose distinctive insights and plural methodologies are essential, not simply to the full understanding of the role of emotions in many domains of human activity, but to their intelligent and responsible engagement by law. Our main goal in this Article is therefore to explain the pragmatic value of this school of thought, and enable broader application of law and emotions analysis to pressing legal problems. Some legal analysts may never be persuaded that emotions should become a focal concern of the law. They may prefer to view law as an arena that answers to the standards of rationality, drawing on analyses such as behavioral law and economics to respond to rationality's limits. But for those who are prepared to understand emotion not simply as a departure from rationality, but as an affirmative mode of apprehension and response, the law and emotions perspective offers a way by which legal actors and institutions can both accommodate and influence crucial dimensions of human experience.

To this end, this Article seeks to analyze the ambivalent legal response to the law and emotions perspective. While the

6. For a thoughtful description of the centrality of particular forms of normativity to legal scholarship, see Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988). This attribute of mainstream legal scholarship has been the subject of trenchant and inventive critique. See, e.g., Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); Pierre Schlag, *Stances*, 139 U. PA. L. REV. 1059 (1991); Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963 (1991); Steven L. Winter, *Without Privilege*, 139 U. PA. L. REV. 1063 (1991). Although we concur in some dimensions of this critique, our point is that one need not embrace it in order to see value in emerging law and emotions work: this work reflects more conventional forms of legal normativity as well.

7. Some readers contend not that law and emotions work lacks normative or pragmatic value, but rather that it is associated with forms of normativity that we should find threatening. Although we see this objection as less prevalent than the belief that law and emotions work simply fails to provide the kind of normative direction legal scholars and actors require, we will address it below. See *infra* Part III.C.

recognition of emotional intelligence,⁸ or the award of the Nobel Prize to Daniel Kahneman,⁹ suggest a growing public appreciation of the limits on human rationality, legal analysts may be experiencing greater difficulty in relinquishing their rationalist premises. In fact, we may be witnessing a recuperation of the tendency to dichotomize and hierarchize reason and emotion: one which casts doubt not on the *presence* of the emotions in law, but on the *value* of analyzing and responding to that presence. Persistent legal skepticism about the emotions may also explain the warmer reception that has met the challenge to the assumptions of rationality offered by behavioral law and economics.¹⁰ Countering this skepticism about emotions, by high-

8. See, e.g., DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ 33–39 (1995) (explaining how “other characteristics,” such as the ability to empathize with others are gaining increasing recognition).

9. See Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1457 (2003) (“Utility cannot be divorced from emotion, and emotions are triggered by changes. A theory of choice that completely ignores feelings such as the pain of losses and the regret of mistakes is not only descriptively unrealistic, it also leads to prescriptions that do not maximize the utility of outcomes as they are actually experienced . . .”). Kahneman received the Nobel Prize in Economic Sciences in 2002. *Id.* at 1449 n.†.

10. Admittedly, emotions and cognitive processes are intertwined and what further blurs the lines is the lack of an agreed-upon definition of “emotion,” as opposed to emotionally driven behavior or decisions. Some theorists, for example, define emotion as the body’s response to an “exciting fact.” According to this understanding, fear is the lightning-quick retreat that follows the sight of a bear, and sadness is the tears that follow bad news. See generally KEITH OATLEY ET AL., UNDERSTANDING EMOTIONS 4–8 (2d ed. 2006) (discussing theories by Charles Darwin and William James). Such theories, which focus on a physiological response, somewhat decrease the gap between behavioral law and economics, in which the focus is on behavior, and law and emotions, in which the focus is on feelings. However, regardless of the breadth with which one defines emotion, behavioral law and economics tends to emphasize *decisions* rather than *emotions*, a fact that is reflected in the alternative names for this body of work: “behavioral *decision* theory” or “legal *decision* theory.” See, e.g., Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 740 (2000) (using the term “behavioral decision theory” (BDT) and explaining that BDT research has been used to identify “cognitive decision-making processes”). Among these processes, Rachlinski notes the use of mental heuristics, which “can be useful, but sometimes produce cognitive illusions that result in errors or biases in judgment.” *Id.*

An exception that may prove the rule is the engagement of behavioral law and economics with the emotion of regret, which stands at the core of the status quo bias. See Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, in BEHAVIORAL LAW AND ECONOMICS 116, 117 (Cass R. Sunstein ed., 2000) (arguing that the known status quo bias should be un-

lighting the patterns and contributions of law and emotions work, will be our primary goal in this Article. Law and emotions work has great pragmatic potential, ranging from its conceptualization of legal problems, through its investigation of the relevant aspects of emotions, to the proposal of specific normative legal solutions. Realizing this potential should be of interest to a range of legal scholars and actors.¹¹

In Part I, we offer a brief history of law and emotions scholarship, emphasizing its challenges to the assumptions of legal rationality, its broad interdisciplinarity, and its more recent turn toward a normative focus. In Part II, we examine the ambivalent response to this work among legal scholars, arguing that it reflects a renewed tendency to dichotomize and hierarchize reason and emotion, and a related preference for analyses grounded in objectivist premises. The best answer to this new wave of skepticism, we argue, is to demonstrate the pragmatic value of law and emotions work. Notwithstanding the breadth of its challenges to legal rationality, the affective perspective can contribute to the familiar normative work of the law—revising and strengthening existing doctrine and decisionmaking and informing new legal policies—as well as the less familiar task of using law to improve people’s affective lives. In Part III, we elaborate this pragmatic potential of law and emotions work. We contend its value lies along three dimensions: its capacity to *illuminate* the affective features of legal problems; its ability to *investigate* these features through interdisciplinary analysis; and its ability to *integrate* that understanding into practical, normative proposals. We conclude our examination of these dimensions by discussing some explicit concerns that have been raised about legal intervention in the emotions.

derstood in light of people’s efforts to avoid the emotion of regret, which they suspect may arise from attempting to change the status quo). Another exception is Cass Sunstein’s work on fear. See CASS R. SUNSTEIN, *LAWS OF FEAR* (2005). Jeremy Blumenthal, who contributes to both bodies of work and takes a special interest in the emotions, has recently underscored the gap between behavioral law and economics and the emotions. Interestingly, for purposes of our focus, Blumenthal shares the belief that legal interventions with the emotions present special difficulty. See Blumenthal, *supra* note 4, at 5–6.

11. It is interesting to compare our effort to demonstrate the usefulness of law and emotions against skepticism to a similar call coming from behavioral law and economics. See Rachlinski, *supra* note 10, at 742 (“If [behavioral decision theory] is to have a future in the law, law professors must find it to be a useful tool to address meat-and-potatoes legal issues . . .”).

I. A BRIEF HISTORY OF LAW AND EMOTIONS SCHOLARSHIP

Scholarship on law and emotions has undergone a rapid development, from a movement allied with feminists and other critical scholars in challenging legal rationality and objectivity, to an interdisciplinary effort aimed at exploring many dimensions of human affective response.¹² Most recently, law and emotions work has taken a normative turn, using the fruits of interdisciplinary exploration to argue for changes in legal conceptualization, policy, and doctrine.¹³

A. CHALLENGING LEGAL RATIONALITY

Law and emotions scholarship began by arguing that emotions have a vital role to play in legal thought and decisionmaking.¹⁴ This radical claim confronted a long intellectual tradition that dichotomized reason and emotion¹⁵ and construed legal thought as a professionally instilled cognitive process, which could be powerfully unsettled by affective response.¹⁶ The detachment of legal rationality reflected the historic view of law as a quasi-science: a process of deducing, from a framework of legal principles, the rule to be applied to a particular case.¹⁷ A detached, rationalist stance also served to insulate judges from pressure by the political branches¹⁸ or from undue sympathy

12. See *infra* notes 44, 46–53 and accompanying text.

13. See *infra* notes 46, 60–62 and accompanying text.

14. See, e.g., Angela P. Harris & Marjorie M. Shultz, “A(nother) Critique of Pure Reason”: *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1774 (1993) (“[W]hen emotions are acknowledged and rigorously examined, they can serve as a guide to deepening intellectual inquiry . . .”).

15. See, e.g., *id.* at 1775 (“Law schools operate at the junction of the academy and the legal profession. Both realms tend to polarize reason and emotion and to elevate reason.”).

16. In this Article, we use the term “affective” interchangeably with “emotional.” This draws on the definition of “affective” as “relating to, arising from, or influencing feelings or emotions.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 21 (11th ed. 2003). This is not, of course, the only way one could define “affect.” See, e.g., OATLEY ET AL., *supra* note 10, at 29 (defining “affective” as comprehending a larger domain including emotions, moods, and dispositions).

17. See Harris & Shultz, *supra* note 14, at 1776 (noting that Christopher Columbus Langdell, “the father of modern legal education,” treated law as a science and legal reasoning as a deductive process).

18. See Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1882–84 (1988) (arguing that judges have always valued impartiality and independence, even when sovereigns sought judicial favor).

with one or more of the parties.¹⁹ Emotion floods careful, stagewise reasoning in a tidal wave of affect; its association with particulars sweeps decisionmakers from their impersonal, Archimedean pedestal.²⁰ Law and emotions scholars challenged this entrenched understanding with two kinds of arguments.

The first was a descriptive claim: emotions already infuse decisionmaking whether or not they are recognized by legal actors.²¹ The second, and perhaps more central, argument was normative. Legal decisionmaking is enriched and refined by the operation of emotions because they direct attention to particular dimensions of a case, or shape decisionmakers' ability to understand the perspective of, or the stakes of a decision for, a particular party. Efforts to exile affective response—a damaging outgrowth of historic dichotomizing—can produce legal judgments that are shallow, routinized, devaluative, and even irresponsible.

One setting in which scholars applied this challenge was the law school classroom. Scholars such as Marjorie Shultz and Angela Harris described and confronted the exaggerated objectivism of the pedagogic environment.²² They highlighted the damage that can be produced when emotion is devalued or exiled from the classroom,²³ and the benefit that can be gained when emotion is acknowledged and used to illuminate unnoticed assumptions²⁴ or to direct attention to norms and commitments that speakers intuitively value.²⁵

19. See *id.* at 1885 (“If freed from having to engage personally with what occurs subsequent to their judgments, judges may be enabled to impose rulings that would otherwise be too painful to pronounce.”).

20. Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 799 (1990) (“Often, but not always, our passions seem directed toward, or attached to, particulars . . .”).

21. See Harris & Shultz, *supra* note 14, at 1774 (“[E]motions can never successfully be eliminated from any truly important intellectual undertaking, in the law or elsewhere.”).

22. See generally *id.* (advocating for an acknowledgement of emotion in the law school setting). Other critiques of the law school classroom made similar methodological or epistemological points, but organized them as a critique of the gendering of the law school classroom, rather than as a critique of its impoverished rationality. See, e.g., Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1300 (1988) (noting differences in the ways in which men and women experience law school).

23. Harris & Shultz, *supra* note 14, at 1799.

24. See, e.g., *id.* at 1792 (discussing an example of a male student's use of an expletive during a law seminar in an exchange about reproductive decisionmaking and abortion).

25. See *id.* at 1786 (“[E]motions embody some of our most deeply rooted

Although the law school classroom, and even the courtroom,²⁶ claimed the attention of some early law and emotions scholars, their primary focus was on the judge. This was particularly embattled territory as, in conventional legalism, the judge remained *the* legal actor, whose paradigmatic status required the separation of legal reason from emotion.²⁷ Unlike “jurors [or] children,” Richard Posner famously declared, judges discipline themselves to respond to the problems before them with careful, linear rationality.²⁸ Notwithstanding the depth and centrality of these mainstream commitments, early law and emotions scholars argued that judges not only did, but should, permit affective forms of knowledge to shape their decisionmaking.

In revealing and lauding the role of emotion in adjudication, these scholars drew on a varied foundation, which was emerging both inside and outside the law. The legal realists’ challenge to judicial objectivity²⁹ had been extended by a set of broader epistemological challenges raised by feminist psychologists,³⁰ philosophers,³¹ and legal scholars³² during the 1980s

views about what has importance.” (quoting MARTHA C. NUSSBAUM, *LOVE’S KNOWLEDGE* 42 (1990)).

26. Lynne Henderson, for example, discusses the empathic presentation of clients’ claims and lives in the lawyers’ briefs in cases such as *Brown v. Board of Education*, and *Shapiro v. Thompson*. See Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1596–607, 1612–17 (1987). Justice Brennan discusses the effect on his decisionmaking process of the appellees’ brief in *Goldberg v. Kelly*. See William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law”*, 10 CARDOZO L. REV. 3, 21 (1988).

27. See, e.g., Fiss, *supra* note 20, at 790 (“Given its deliberative character, the judicial decision may be seen as the paragon of all rational decisions, especially public ones.”).

28. Richard A. Posner, *Emotion Versus Emotionalism in Law*, in THE PASSIONS OF LAW 311 (Susan A. Bandes ed., 1999). Resisting the siren song of affect has been viewed as crucial because of emotion’s inevitable intertwinement with particulars: judges, as Owen Fiss has argued, must eschew responses that draw them toward specific individuals or motivations, and resolve cases in a detached and impartial spirit, “on the basis of reasons accepted by the profession and the public.” Fiss, *supra* note 20, at 801.

29. However, some heirs to legal realism have retreated toward objectivism, or formalism, in implementing the realist suggestion that law could be ameliorated through more systematic reliance on social policy analysis, or the social sciences. See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 504 (1988) (book review) (arguing that “liberal” heirs to legal realism have “recreate[d] significant elements of formalist reasoning”).

30. See generally MARY FIELD BELENKY ET AL., *WOMEN’S WAYS OF KNOWING* (1986) (demonstrating the incompleteness of the linear, hierarchical model of normative reasoning by highlighting contextual reasoning emphasizing social station in some subjects, particularly girls and women); CAROL GILLIGAN,

and early 1990s. Scholarship highlighting the role of emotion in adjudication also drew support from the published reflections of a handful of judges. Justice William Brennan argued in a controversial article, for example, that emotion had illuminated the human terrain that spurred his landmark decision in *Goldberg v. Kelly*.³³

These frank testaments to the presence and potential value of emotion in judging provided the final incitement for legal scholarly intervention. A group of legal theorists—many of whom had helped to inaugurate feminist legal theory—challenged the assumption that emotion was distinct from and

IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

31. See generally A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY (Louise M. Antony & Charlotte Witt eds., 1993); FEMINISM AND METHODOLOGY: SOCIAL SCIENCE ISSUES (Sandra Harding ed., 1987); SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE?: THINKING FROM WOMEN'S LIVES (1991). These philosophers and historians of science mounted a broader challenge to objectivist epistemology, which highlighted the partiality even of ostensibly objectivist approaches, and emphasized the value of reasoning positionally, through so-called standpoint epistemologies. See, e.g., HARDING, *supra*, at 136–37 (discussing feminist standpoint theory).

32. Scholarly analysis of experiential narratives, by feminist and other critical legal scholars, demonstrated that highly particularistic, experiential arguments could be valuable sources of knowledge, not simply through the illuminating quality of their affective charge, but through the unacknowledged assumptions their insights revealed, and the distinctive lines of vision their experience provided. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992).

These academic developments also coincided with broader currents, from the migration to American shores of the varied cultural challenges of post-modernism, see, e.g., JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984), to the surge of interest in those emotional aspects of “intelligence,” which were poorly measured by traditional indices such as IQ tests. See, e.g., GOLEMAN, *supra* note 8.

33. See Brennan, *supra* note 26, at 20 (“*Goldberg* can be seen as injecting passion into a system whose abstract rationality had led it astray.”). Other jurists, such as Wisconsin Supreme Court Justice Shirley Abrahamson, explained publicly that the particularity of their own experiences, with their attendant emotional resonances, had been a salutary factor in their decisionmaking. See Resnik, *supra* note 18, at 1928–29 (“All my life experiences—including being a woman—affect me and influence me” (quoting Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 492–94 (1984))).

alien to legal reasoning. Scholars such as Lynne Henderson,³⁴ Judith Resnik,³⁵ Martha Minow, and Elizabeth Spelman³⁶ contested the categorical valorization of qualities (such as detachment or impartiality) associated with “reason.” Thoroughgoing impartiality was virtually impossible for a situated human being to achieve;³⁷ moreover, aspiring to a stance of detachment could produce a failure to take responsibility for the consequences of judicial action.³⁸ In contrast, they argued, the self-conscious operation of affective response could humanize and strengthen the task of adjudication, helping judges to understand their daunting power and its implications for the lives of those before them.³⁹

34. See Henderson, *supra* note 26, at 1576 (arguing that empathy aids processes of legal justification and decisionmaking in ways that reason cannot).

35. See Resnik, *supra* note 18, at 1879 (“The tensions between stated expectations and practice lend an air of unreality to the articulated demands for impartiality.”).

36. See Martha Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 45 (1988) (noting that institutions and sympathies of judges cannot be confined to categorizations of emotion or reason, but rather combine elements of both).

37. See Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1201 (1992) [hereinafter Minow, *Bias and Impartiality*] (quoting Clarence Thomas during his Senate Judiciary Committee confirmation hearing, in claiming that he “stripped down like a runner” to prepare for the task of judging). The widespread skepticism about Clarence Thomas’s claim may be viewed as evidence of this conclusion. See, e.g., Martha Minow, *The Supreme Court, 1986 Term, Foreword—Justice Engendered*, 101 HARV. L. REV. 10, 36 & n.120 (1987) [hereinafter Minow, *Justice Engendered*] (highlighting the author’s view of objectivity and adjudication, without explicit reference to the emotions, but including an argument for an imaginative identification with “the other”). Minow’s argument is also similar to what Lynne Henderson describes as “empathy.” See Henderson, *supra* note 26, at 1576.

38. See Minow & Spelman, *supra* note 36, at 56–59 (noting the insulation from consequences afforded to judges by not having to carry out orders made pursuant to their judicial power); Resnik, *supra* note 18, at 1922 (describing her Senate testimony criticizing Supreme Court nominee Robert Bork for remaining purposefully distant from facts relating to the concrete circumstances of litigants). These authors argue that a detached, objectivist stance enables judges to insulate themselves from moral intuitions or anxieties that might inform their decisionmaking process. On this point, Henderson, Minow, and Spelman point to a telling insight of Robert Cover’s: for judges asked to enforce the fugitive slave law, a belief that legality required them to put aside individual moral qualms enabled many to enforce laws which they would have reviled, as a matter of private judgment. See Henderson, *supra* note 26, at 1590–91 (citing ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975)); Minow & Spelman, *supra* note 36, at 48 (same).

39. Two of the most influential of these works, *Passion for Justice*, by Mi-

These insights produced a modest, yet important, shift in the way that legal analysts viewed the role of emotion in adjudication. By the early nineties, fewer scholars viewed emotion as “trespassing on territory, such as the judge’s mind, that is owned by reason.”⁴⁰ Mainstream legal scholars increasingly began to acknowledge that emotions were not wholly alien to judicial decisionmaking, and emotions such as empathy could conceivably contribute to judicial reflection on cases.⁴¹

Yet, this change in perception remained, in many ways, shallow in its conceptual penetration. Scholars admitted some role for more affective forms of decisionmaking without acknowledging their centrality. Most remained committed to a core of detached, impersonal decisionmaking, though they acknowledged that it could be tinged at times with infusions of affect.⁴² The bounded character of this transformation is important: it explains why questions about the legitimacy of affectively informed decisionmaking have continued to surface even as law and emotions analysis has proceeded in the legal academy. But even this partial or provisional shift in understanding was sufficient to launch a body of new work, and to send legal scholars in search of other disciplines, where analysis of the emotions was already in progress.

B. STUDYING THE EMOTIONS

The next phase of inquiry turned from a focus on the legitimacy of the emotions in law to a focus on the emotions themselves. This movement had been occurring incrementally for a number of years, but it was highlighted and consolidated in 1999 with the publication of Susan Bandes’s landmark collec-

now & Spelman, and *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, by Resnik, took their bearings explicitly from these judicial revelations. See Minow & Spelman, *supra* note 36; Resnik, *supra* note 18.

40. Minow & Spelman, *supra* note 36, at 37.

41. Legal academics—along with members of the public—came to recognize that judges had lives and commitments which inevitably exerted a torque on their decisionmaking. See Minow, *Bias and Impartiality*, *supra* note 37, at 1203 (“[W]e want . . . judges to have, and to remember, experiences that enable their empathy and evaluative judgments.”).

42. Eric Posner’s treatment of the emotions as temporary departures from rationality that erupt in the lives of human subjects, for example, reflects this position. See Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1979 (2001) (“Emotions are usually stimulated by the world, either via the mediation of cognition or through a more primitive stimulus-response-like neurological mechanism.”).

tion, *The Passions of Law*.⁴³ Bandes's introduction stated conclusively the insight that many law and emotions scholars had begun to draw from the epistemological exchanges of the preceding years: emotion is everywhere in law.⁴⁴ Thus, the question becomes not whether emotion *can* have a role in law, but what kinds of emotions operate in particular contexts and what sort of a role do they play?⁴⁵ Legal scholars began to study the emotions, often drawing on the research or insights of other disciplines, to answer this question.⁴⁶

In this newer work, legal scholars investigated emotions with greater particularity. They focused not on the general category of affective response, but rather on a range of distinct and particularized emotions, from vengeance to indignation to mercy.⁴⁷ Much of this attention was trained on the negative emotions that inform the criminal law.⁴⁸ Emotions like anger or vengeance had been part of criminal jurisprudence even before the epistemological challenge; criminal law is one of the few areas of doctrine in which an examination or assessment of emotions (for example, did the defendant act in the "heat of passion" or did he demonstrate remorse?) has been a standard feature of the doctrinal and adjudicative landscape.⁴⁹ The exploration of emotion in criminal justice helped to expand law and emotions scholars' view of the contexts that constituted "law," adding foci such as the jury,⁵⁰ capital sentencing,⁵¹ state

43. See THE PASSIONS OF LAW 311 (Susan A. Bandes ed., 1999).

44. Susan A. Bandes, *Introduction* to THE PASSIONS OF LAW, *supra* note 43, at 1.

45. *Id.* at 7 ("The essays in this volume move beyond the debate about *whether* emotion belongs in the law, accepting that emotional content is inevitable. They focus on the important questions: how do we determine which emotions deserve the most weight in legal decision making and which emotions belong in which contexts?").

46. See *id.* ("The essays begin from the premise that law needs to incorporate the widely shared insights developed in other fields.").

47. See *id.* at 2 ("The law, as [the essays] illustrate, is imbued with emotion. Not just the obvious emotions like mercy and the desire for vengeance but disgust, romantic love, bitterness, uneasiness, fear, resentment, cowardice, vindictiveness, forgiveness, contempt, remorse, sympathy, hatred, spite, malice, shame, respect, moral fervor, and the passion for justice.").

48. See *id.* ("In the conventional story, emotion has a certain, narrowly defined place in law. It is assigned to the criminal courts.").

49. See *id.* (noting that emotions are most visible in criminal courts, especially when the death penalty is a possible outcome).

50. See, e.g., David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 LAW & HUM. BEHAV. 183 (2006) (studying the ways in which gruesome photographic and verbal evidence influences juror verdicts).

and federal legislation,⁵² and the pronouncements of public officials and advocates.⁵³

As legal analysts sought to learn more about the range of emotions they now perceived, they increasingly turned to fields outside the law, where inquiry into the emotions was better established.⁵⁴ One can glimpse this pattern in scholarly arguments about disgust, whose role in the criminal law fueled one of the most vivid and extended debates in this body of work. William Miller's *The Anatomy of Disgust*,⁵⁵ a path-breaking volume in this vein, was far-ranging and eclectic in its use of cross-disciplinary knowledge. Miller drew broadly on literature;⁵⁶ he also mined psychological, anthropological, and philosophical discussions to understand the emotion of disgust.⁵⁷ Similarly, Martha Nussbaum's challenge to the legal mobilization of disgust analyzed a range of sources, from the poetry of Walt Whitman to psychological studies of disgust provoked by food.⁵⁸ The distinguishing feature of this interdisciplinary investigation was the breadth of its aspiration, drawing on re-

51. See, e.g., Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) (studying the role of remorse in capital sentencing); Austin Sarat, *The Cultural Life of Capital Punishment: Responsibility and Representation in Dead Man Walking and Last Dance*, 11 YALE J.L. & HUMAN. 153, 161 (1999) (analyzing representations of the death penalty in film and the connections to legal subjectivity and the legitimacy of state killing).

52. Bandes, *supra* note 44, at 3 (noting the emotional nature of the initial legislative question of what to criminalize).

53. See, e.g., Dan M. Kahan, *The Progressive Appropriation of Disgust*, in THE PASSIONS OF LAW, *supra* note 43, at 63, 70–71 (citing a public official's statement expressing disgust for a particular offender and his crime, and describing public expressions of disgust as one of the functions of hate crime legislation).

54. See Bandes, *supra* note 44, at 7 (drawing on an interdisciplinary range of fields such as philosophy, classics, psychology, religion, ethics, and social thought, in addition to law).

55. See WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997).

56. For example, his discussion of the hierarchical character of disgust, and the related emotion of contempt, draws provocatively on George Orwell's *Down and Out in Paris and London*. See *id.* at 243–47.

57. See, e.g., *id.* at 17, 27, 29 (noting variations by culture of what constitutes disgust and citing authors such as Freud and Sartre).

58. See Martha C. Nussbaum, "The Secret Sewers of Vice": *Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW, *supra* note 43, at 19, 23, 33–34 (discussing research by Paul Rozin on food and disgust as well as Walt Whitman's *Song of Myself*). Nussbaum also juxtaposed the resulting conception of disgust to philosophical accounts of anger and indignation to determine how each functioned as an expression of collective moral judgment. See *id.* at 26–28, 55.

sources as distinct as Orwell or Mahler,⁵⁹ on the one hand, and empirical psychological studies, on the other, to create a synthetic account of particular emotions that resonated with human experience.

C. MAKING A NORMATIVE TURN

As legal scholars interested in the emotions ventured into other disciplines, some brought insights gleaned from this work to bear normatively on specific legal questions. In the first instance, these works examined the possible roles for particular emotions in law, or the appropriateness of specific emotions in particular legal contexts. Dan Kahan, reviewing Miller's work on disgust, asked how the law might harness disgust to serve a variety of goals, from expressing the moral norms of the community, to marking the special salience of hate crimes.⁶⁰ Over time, this focus expanded to include not simply works that considered whether and how particular emotions should play a role in law, but also works that asked whether and how law might affect emotions in a more purposive way.⁶¹ Both of these emphases shifted the focus from understanding emotions to working with the law. However, the latter project envisions the law as having a more instrumental role in shaping affective experience. Martha Minow, Laurel Fletcher, and others explored the

59. See *id.* at 28 (discussing the listener's "musical experience" of the "cry of disgust" in the third movement of Mahler's second symphony).

60. See Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1631 (1998) ("The desire to separate [others such as sexual deviants or sadistic criminals] from the rest of us . . . motivates individuals to lash out against them in violence, and communities to punish them in appropriately severe and expressive ways.").

61. This normative legal work was previewed by work in philosophy, and elsewhere, which suggested that emotions could be produced, modified, channeled, or scripted by law, among other institutional and cultural forces. Robert Solomon argued, for example, that law could serve the salutary social function of cooling, rationalizing, and satisfying the powerful emotion of vengeance. See Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in *THE PASSIONS OF LAW*, *supra* note 43, at 123, 131 ("If one purpose of law is to rationalize and satisfy the most powerful social passions, then vengeance must be considered first and foremost among them."). Cheshire Calhoun has argued that legal prohibitions on gay marriage, among other social and cultural influences, have served to script romantic love as an exclusively heterosexual affair. See Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, in *THE PASSIONS OF LAW*, *supra* note 43, at 217, 218 ("The deep difference between homosexuality and heterosexuality is in part socially constructed by imputing to gays and lesbians a psychology that makes them incapable of romantic love . . .").

ways that law might help contending factions move toward forgiveness or reconciliation after mass violence.⁶²

In a similar vein, we recently argued that the law—in contexts from litigation to programs such as Head Start—can help to cultivate hope in people whose political or material deprivation has led them toward despair.⁶³ This more recent work has significantly expanded the scope of law and emotions scholarship. It encompasses doctrinal areas beyond the criminal field, moving into areas such as family law,⁶⁴ education policy,⁶⁵ and corporate and securities law.⁶⁶ It comprehends both negative emotions such as fear and disgust, and positive emotions such as love,⁶⁷ forgiveness,⁶⁸ and hope.⁶⁹ Perhaps most importantly,

62. See generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998) (examining legal recourse taken by societies after periods of mass violence). See also Laurel Fletcher, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, 19 BERKELEY J. INT'L L. 428, 429 (2001) (reviewing MINOW, *supra*) (“The dominant view among transitional justice scholars is that trials and truth commissions are state-sanctioned models to heal the wounds of mass violence.”).

63. See Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CAL. L. REV. 319, 323 (2007) (“In some situations, particularly where despair has taken over, it may be impossible for people to conceive alternative futures for themselves, or see themselves as capable of creating such futures. . . . It may be necessary to cultivate hope through institutional interventions, including those secured by law.”).

64. See Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1246 (2008) (arguing that family law should anticipate and reflect the full range of human emotions); Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 441 (2008) (advocating for a conception of family law that “cultivate[s] forgiveness between divorcing parents”).

65. See Abrams & Keren, *supra* note 63, at 363–77 (analyzing the affective impact of Head Start).

66. See Peter H. Huang, *Emotional Impact Analysis in Financial Regulation: Going Beyond Cost-Benefit Analysis* 6 (Temple Univ. Legal Studies Research, Paper No. 2006-21, 2006) [hereinafter Huang, *Beyond Cost-Benefit Analysis*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870453 (discussing securities regulations and advocating for the use of Affective Cost-Benefit Analysis in regulation promulgation); Peter H. Huang, *Regulating Irrational Exuberance and Anxiety in Securities Markets*, in *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* 501, 503 (Francesco Parisi & Vernon L. Smith eds., 2005) [hereinafter Huang, *Regulating Irrational Exuberance*] (“Most U.S. federal securities laws focus on the cognitive form and content of certain information. In contrast, many investors respond emotionally to both the form and content of information . . .”).

67. See Calhoun, *supra* note 61, at 217, 218 (discussing romantic love in the context of same-sex marriage).

68. See Minow, *Justice Engendered*, *supra* note 37, at 14–24 (exploring the law’s interaction with the contrasting emotions of vengeance and forgive-

it envisions a more dynamic and purposive relation between law and the emotions, reflecting both the belief that law can be used strategically to nurture, shape, or channel particular emotions, and the awareness that law can create incidental effects on the emotions, which legal actors may endeavor to anticipate and control.

II. ECHOES OF THE LAW/EMOTION DICHOTOMY

This brief retrospective may seem to offer a triumphal narrative of scholarly innovation and integration: a body of work that combines doctrinal critique, interdisciplinary inquiry, and normative contribution. But the reception that has greeted this effort within the legal mainstream suggests a more equivocal response. While law and emotions scholarship has generated intermittent interest around moments such as Justice Brennan's challenge to legal rationality,⁷⁰ it has sometimes been treated as more of a novelty than a pragmatic innovation, more of an intellectual exercise than a valuable theoretical perspective or problem-solving methodology. This pattern can be glimpsed in several different kinds of responses which we explore below. The incomplete embrace of this promising work within the legal mainstream reflects a missed opportunity, but it also reflects the surprising persistence of certain rationalist and objectivist assumptions. Conventional legal resistance to the emotions may not have been overcome to the extent that many of its critics have believed. Instead, the law/emotion dichotomy appears to be re-emerging in a subtler and more obscure form, as a refusal not of the descriptive, but of the norma-

ness); *see also* Huntington, *supra* note 64, at 1300 (discussing forgiveness in family law); Maldonado, *supra* note 64, at 441 (suggesting that cultivated forgiveness can reduce acrimony in family law).

69. *See* Abrams & Keren, *supra* note 63, at 344–77 (using case studies including litigation vindicating the rights of migrant workers and the establishment of the Head Start program to demonstrate that law has the potential to cultivate hope).

70. *See* Brennan, *supra* note 26, at 3 (“[J]udging could not properly be characterized as simply the application of pure reason to legal problems . . .”). Another interest-generating moment was the debate between Martha Nussbaum and Dan Kahan over the role of disgust in criminal law. *Compare* Nussbaum, *supra* note 58, at 19, 45 (arguing that disgust does not provide a prima facie case for legal regulation), *with* Kahan, *supra* note 53, at 63 (arguing that in the law, disgust is “indispensable” in some situations). Yet this pattern may be attributable as much to the visibility of the principals as to the appeal of the innovation offered by the larger theory.

tive implications of this work. This shift can make such resistance more difficult to identify and critique.

Section A explores the equivocal response to law and emotions scholarship by highlighting substantive areas in which legal scholars have failed to recognize affective analysis as an important resource, notwithstanding what we view as its applicability and potential illumination. Section B examines the more engaged reception that has greeted two interdisciplinary bodies of work which also highlight nonrational dimensions of human cognition: behavioral law and economics, and law and neuroscience. We argue that these patterns suggest the persistence of rationalist premises in legal scholarship, as well as a continued commitment to certain objectivist epistemological assumptions and methodologies. Section C identifies rationalist premises at work in two more explicit responses to law and emotions scholarship: first, critiques that suggest the inappropriateness of law as a tool for engaging the emotions; second, analyses that suggest that affective analysis is particularly appropriate in the examination of one kind of issue—women’s reproductive choices. We urge legal scholars to embrace a less dichotomous, more epistemologically heterogeneous approach to work that investigates the nonrational dimensions of cognition—an approach which would encompass behavioral law and economics, law and neuroscience, and law and emotions analysis. We argue that the best way to encourage receptivity to such an approach in the legal mainstream is to demonstrate the pragmatic value of law and emotions analysis, a question to which we turn in Part III.

A. UNDERVALUING AFFECTIVE ANALYSIS AS A RESOURCE

Legal scholars have rarely treated law and emotions analysis as a resource in cases where it would seem to be well-suited to the problems at stake. Equal protection scholars, for example, have largely declined the Court’s invitation to attend to the effect of official treatment on “hearts and minds”⁷¹ of tar-

71. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”). This pattern reflects a rejection among scholars, not only of the larger anti-subordination theory within which this affective account is nested, but more specifically of an affective exploration of the phenomenon of group-based subordination. *But see* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (advocating for the

geted groups, as a means of assessing—or even understanding—potential violations. Similarly, analyses of the labor required by women or people of color to assimilate into environments designed around the biographies, life patterns, or cultural norms of dominant groups have emphasized logistical or cognitive adaptations while only rarely tapping the vast—and clearly implicated—realm of affective response.⁷² While such emphasis may in some cases reflect the promising contribution of other analytic or disciplinary lenses, it may also reflect the continuing hierarchization of reason and emotion: scholars are reluctant to communicate a controversial message by recourse to a stigmatized form of discourse.⁷³

adoption of anti-subordination as the dominant principal in equal protection disputes); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (arguing in favor of the group-disadvantaging principle rather than the more formalist antidiscrimination principle as the proper standard in equal protection cases).

72. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279–308 (2000) (offering a highly nuanced behavioral analysis of adaptations of people of color in mainstream work settings which does not explicitly address emotional labor); see also Tristin K. Green, *Race and Sex in Organizing Work: “Diversity,” Discrimination, and Integration*, 59 EMORY L.J. (forthcoming 2010) (manuscript at 18–19, on file with authors) (noting the additional time expenditures required of women and people of color in supporting institutional commitments to diversity by employers). This emphasis may be different, however, in fields outside the law. See, e.g., *Sociologists Explore “Emotional Labor” of Black Professionals in the Workplace*, WOMEN’S HEALTH WKLY., Aug. 21, 2008, at 504 (reporting the results of a sociological study which concluded that black professionals who attempt to conform to their white co-workers’ expectations in the workplace tend to feel “isolated, alienated, and frustrated”).

An interesting exception to this pattern, which dates back to the early years of law and emotions scholarship, may be found in certain examples of critical race feminism, which relate the experience of women of color in elite institutions, highlighting the often agonizing emotions that emerge in that context. See, e.g., Margaret Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185, 197–98 (1994) (describing the elaborate practice of “masking” that permits people of color to assimilate into elite educational institutions and referring to shame that infuses those moments when the mask “drops”). This work largely predates the interdisciplinary inquiry into particular emotions, and therefore, does not undertake that form of analytic labor; but it vividly describes the affective costs of assimilation.

73. See Kathryn Abrams, *Barriers and Boundaries: Exploring Emotion in the Law of the Family*, 16 VA. J. SOC. POL’Y & L. 301, 307 (2009) (quoting Melissa Murray as remarking, ironically, that scholars in a highly gendered field like family law who engage in affective discourse “might as well be sitting around braiding each other’s hair”). Recently, however, a younger generation of family law scholars appears to be moving beyond this reservation. See, e.g., Symposium, *Family Law and Emotion*, 16 VA. J. SOC. POL’Y & L. 301 (2009)

Yet another pattern may be found in scholarly gatherings or symposia examining legal issues—which are highly proximate to the emotions, but which have declined to elicit or draw on affective analysis that might have enriched the discussion. Law and emotions analyses might have contributed to discussions of “Fault in Contract Law”⁷⁴ or “The Mind of the Market,”⁷⁵ for example, by illuminating the emotions that might play a role in each of them. For example, decisionmakers debating the merits of fault-based versus no-fault regimes might want to take into account the ways in which competing legal rules bear on feelings of guilt or shame among breaching parties, or anger or indignation among those who claim to have been injured by breaches of contract. Discussions of “The Mind of the Market” might have benefited from work by legal scholars who have explored the role of trust, guilt, and happiness in market transactions and their legal regulation,⁷⁶ or by sociolo-

(including articles by legal scholars Clare Huntington and Solangel Maldonado).

74. See Univ. of Chicago Law School, Fault in Contract Law, <http://www.law.uchicago.edu/node/1277> (last visited Apr. 25, 2010) (announcing a conference sponsored by the University of Chicago Law School and the John M. Olin Center for Law and Economics at the University of Michigan, which brought together scholars working from a variety of disciplines and perspectives). According to its announcement, the conference included many “other views—some of which are strongly opposed to the economic approach,” but which did not appear to include the law and emotions perspective. *Id.*

75. See Harvard Law School, At HLS, a Conference on the Free Market Mindset, http://www.law.harvard.edu/news/2009/03/17_free-market.html (last visited Apr. 25, 2010) (announcing a conference sponsored by Harvard Law School’s Program on Law and Mind Science which included perspectives from behavioral economics and psychology, social psychology, and sociology, but which does not appear to have included any perspectives drawn from the study of emotions).

76. See, e.g., Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1736 (2001) (“[T]he experimental evidence on trust sheds light on how corporate law works, by suggesting that judicial opinions in corporate cases influence corporate officers’ and directors’ behavior not only by altering their external incentives but also by changing their internalized preferences.”); see also Huang, *Beyond Cost-Benefit Analysis*, *supra* note 66, at 4 (advocating for the SEC to go beyond cost-benefit analysis, “to consider emotional impacts of regulations”); Peter H. Huang, *How Do Securities Laws Influence Affect, Happiness and Trust*, 3 J. BUS. & TECH. L. 257, 261–73 (2008) (analyzing the potential impacts of securities regulation on three important emotions and advocating for an “accounting, inclusion, measurement, and quantification” of such impacts); Peter H. Huang, *Trust, Guilt, and Securities Regulation*, 151 U. PA. L. REV. 1059, 1075–88 (2003) (finding that securities regulations creating fiduciary relationships between broker-dealers and clients create an affective deterrent to breaching trust).

gists who have analyzed the role of emotions in contemporary capitalism or its institutions.⁷⁷

A different, yet highly telling, example is the scholarly response to the Court's opinion in *Gonzales v. Carhart*, which upheld a legislative ban on partial-birth abortions citing, among other things, concerns about the regret triggered in women by the abortion procedure.⁷⁸ The explicit recognition of particular emotions as a ground for constitutional decision might be viewed as a kind of slow pitch over home plate for prospective legal analysis of the emotions. Yet surprisingly few scholars have swung the affective bat. Scholars already engaged in work on the emotions have questioned the Court's ungrounded referencing of women's regret in *Carhart*: Terry Maroney critiqued the Court's recourse to uninterrogated "emotional common sense" in advertent to women's regret,⁷⁹ and Chris Guthrie argued that the Court neglected a rich psychological literature on regret that tended to refute the dangers the Court foretold.⁸⁰ Yet constitutional scholars, more broadly, have rarely considered the meaning of the Court's foray into affective terrain, or what the jurisprudence of regret imports for future cases.⁸¹ The failure to consider the potential contribution

77. See *infra* notes 118–19 and accompanying text (discussing the work of Eva Illouz and Arlie Hochschild).

78. See *Gonzales v. Carhart*, 550 U.S. 124, 128–29 (2007) ("Whether to have an abortion requires a difficult and painful moral decision, which some women come to regret.") (citation omitted).

79. See Terry Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 853–54 (2009) ("The *Carhart* Court explicitly prefaces its comments by noting that it has 'no reliable data to measure the phenomenon' of post-abortion regret; instead, it presents its observations about women's emotional experiences as 'unexceptionable' and 'self-evident.'" (citing *Carhart*, 550 U.S. at 159)).

80. See Chris Guthrie, *Carhart, Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877, 903 (2008) ("[T]he bulk of the empirical evidence on the operation of regret . . . strongly suggests that most women fare quite well following abortion. For these reasons, the Court was wrong to invoke the prospect of postabortion regret in *Carhart* . . .").

81. Feminist constitutional scholars have, however, analyzed *Carhart's* threat to women's dignity or autonomy. See, e.g., Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1701 (2008) ("[T]he gender-paternalist justification for restricting abortion [in *Carhart*] is in deep tension with the forms of decisional autonomy *Casey* protects."). Yet only those already engaged in work on the emotions have reflected on what appears to be a concerted effort—by advocates of woman-centered anti-abortion analysis, if not by the Court's majority—to script women's emotions in the area of abortion. See, e.g., Kathryn Abrams, *Tribute to Professor Melvyn R. Durchslag: Exploring the Affective Constitution*, 59 CASE W. RES. L. REV. 571 (2009); Clare Huntington, *Family*

of affective analysis in cases where emotions are so transparently in play suggests a difficulty both in seeing and in appreciating the potential of the tools that such analysis provides to legal critique and reconstruction.⁸²

B. AFFIRMING RATIONALIST AND OBJECTIVIST PREMISES

Those forms of affective analysis which have been most readily embraced by legal scholars further suggest a persistent inclination to dichotomize reason and emotion, or objectivity and subjectivity. The analyses of emotion—or of departures from legal rationality—which have generated the greatest mainstream legal interest are those which adhere most strongly to certain rationalist and objectivist assumptions that traditional legal thought embraces, and which early law and emotions scholarship sought to challenge. We can see this pattern in relation to two recent bodies of work which have been embraced by the legal mainstream: behavioral law and economics, and law and neuroscience.

1. Behavioral Law and Economics

The earliest mainstream responses to law and emotions scholarship—which described emotions as momentary departures from a paradigmatic human rationality⁸³—have been succeeded by the burgeoning body of work known as “behavioral law and economics.”⁸⁴ This work characterizes departures from

Law's Textures: Social Norms, Emotion, and the State, 59 EMORY L. REV. (forthcoming 2010).

82. A related pattern may be that of scholars doing law and emotions analysis yet not connecting their analysis with that body of work. See, e.g., Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 750 (2007) (providing an illuminating example of law and emotions scholarship, yet refraining from mentioning law and emotions as one of the bodies of work to which they see their article as contributing). In this work, the authors describe the various literatures to which they aim to contribute, including “tort law literature on hedonic damages,” “the wider literature on adaptive preferences,” and “behavioral realism,” apparently overlooking the fact that their discussions of pity, happiness, and pleasure place them squarely within the ambit of law and emotions analysis. *Id.*

83. See Posner, *supra* note 42, at 1978 (“[P]eople’s ‘calm’ preferences—that is, the preferences that they have when they are not emotionally aroused—differ from their ‘emotion state’ preferences, which are skewed toward the stimulus that provokes the emotion.”).

84. For a small slice of this capacious literature, see generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* (2008); Christine Jolls et al., *A Behavioral Approach*

rationality not as passing occurrences, but as the products of flawed decisional heuristics, which are pervasive but potentially corrigible. Although this work shares with law and emotions analyses a focus on patterns of cognition and response that depart from the rationality sometimes assumed by law, behavioral law and economics views these departures as predictable cognitive missteps rather than alternative modes of assessment or important signals of valuation.⁸⁵ It documents these flawed heuristics by recourse to social scientific (usually psychological) studies that are empirical in nature.⁸⁶ Furthermore, the normative interventions of behavioral law and economics, which may be found in a subset of this work, aim to correct flawed heuristics and move human beings, as choosers and decision-makers, in the direction of greater rationality.⁸⁷

Some solutions can be classified as attempts to correct or eliminate an unconscious human bias, while others can be classified as attempts to harness such a bias and use it to channel individuals toward the best decisions. However, other behavioral law and economics scholars have been much more critical about the prospect of normative engagement, worrying that such activity threatens to turn the government “into an irrationality monitor.”⁸⁸

to *Law and Economics*, 50 STAN. L. REV. 1471 (1998); Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. CHI. L. REV. 207 (2006). For a lucid and lively review of behavioral law and economics with an eye to its prescriptive applications, see Amir & Lobel, *supra* note 5.

85. See Nussbaum, *supra* note 58, at 22 (“[T]he specific cognitive content of disgust makes it always of dubious reliability in social life, but especially in the life of the law.”); cf. Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 749 (2008) (assessing varying conceptions of the relationship between reason and emotion and concluding that the empirical data could support either an “irrational weigher” or a “cultural evaluator” viewpoint).

86. See Neel P. Parekh, *Theorizing Behavioral Law and Economics: A Defense of Evolutionary Analysis and the Law*, 36 U. MICH. J.L. REFORM 209, 210 (2002) (“[Behavioral law and economics]’s *empirical data* show that in fact people often do not choose the path to the highest expected payoff.” (emphasis added)).

87. See THALER & SUNSTEIN, *supra* note 84, at 3 (suggesting that the law should engage in “choice architecture,” i.e., implementing legal measures that correct for human deviations from rationality).

88. See Gregory Mitchell, *Tendencies Versus Boundaries: Levels of Generality in Behavioral Law and Economics*, 56 VAND. L. REV. 1781, 1811 (2003). Such concerns emerge both from skepticism about the ability of legal measures to correct biases, given the limitations of the legal system, and from anxiety that normative efforts will put behavioral law and economics at risk of

It is important to note that much of behavioral law and economics analysis does not analyze responses that we would describe as emotions, but focuses rather on nonaffective cognitive assumptions that depart from rationality.⁸⁹ In that sense the domain of behavioral law and economics overlaps with, but is not coterminous with, that of law and emotions. The comparison of the response that has greeted these two bodies of work is nonetheless important because both law and emotions and behavioral law and economics analyze departures from the rationality that has been a methodological premise, and a premise about the character of human subjects, in mainstream legal scholarship.

Behavioral law and economics thus reflects several features which make it more accessible and less unsettling to legal scholars. First, it has an appealing conceptual proximity to the preexisting frame created by the rational actor assumptions of law and economics. Even as it loosens the descriptive assumptions of that body of work, by exposing a range of departures from rationality, it retains the centrality of that frame by cataloguing these forms of behavior as “biases” (or departures from rationality), a classification which reinforces rationality as the *norm*. The normative centrality of rationality is made explicit in those works that propose choice architecture, or other prescriptive legal interventions, to move human subjects closer to the behavior of *homo economicus*.⁹⁰ This ostensibly behavioral focus is especially compatible with the familiar vision of law as aiming to supervise or direct *behavior*, rather than to intervene in motives, thoughts, or feelings.⁹¹ Finally, in its empirical

“becom[ing] a political movement rather than a scientific endeavor—and its lifespan will probably be quite short.” *See id.*

89. *See, e.g.*, Russel Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228–29 (2003) (describing the endowment effect, wherein a subject assigns an economic value to an object she already possesses that is higher than what she would be willing to pay for it were she to seek to purchase it in the market).

90. *See* RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 382 (1990) (discussing the “Economic man,” a human subject who embodies the assumptions relied upon by classical economists); *cf.* THALER & SUNSTEIN, *supra* note 84, at 6–8 (providing a particularly evocative comparison between the behavior of the average person and the behavior of an ideal type they describe as “Econ”). Thaler and Sunstein’s goal is to use law to reduce the difference in behavior between the average person and Econ. *See id.* at 8.

91. The focus of normative behavioral law and economics work on behavior aims to vindicate the traditional vision of law as targeting assessable human activities; it therefore appears to be concerned with verifiable, objective indicia. However, a closer examination suggests that many of the proposed in-

orientation, behavioral law and economics utilizes a methodology that can claim to be nonsubjective and replicable, features which are congenial to a discipline that prizes impartiality and retains traces of its classical aspiration to function as a science.⁹²

2. Law and Neuroscience

Law and neuroscience (sometimes referred to as “neuro-law” or “legal neuroscience”) is a second body of work that explores the nonrational (as well as the rational) dimensions of cognition. This scholarship takes a burgeoning field of research into the neurological bases of a range of mental states, processes, and operations—often drawing on new technologies for making visible such activities in the brain—and asks what this research may imply for the law. When compared to its neighboring perspectives of law and emotions and law and behavioral economics, law and neuroscience scholarship has thus far been engaged with a more tightly focused array of legal issues, most of them relating to the criminal law (broadly defined to include substantive and procedural issues) and the law of evidence. The main discussions circle the themes of criminal responsibility of mentally ill, brain-damaged, or psychopathic adults and juveniles,⁹³ the challenge posed by neuroscience re-

terventions in this literature are in fact efforts to influence the *processes of decisionmaking* of human subjects. As such, they have the character of intervening in processes that could readily be described as subjective and internal—and therefore more comparable to motives, thoughts, or emotions.

92. The “Law as Science” perception is usually attributed to Christopher Columbus Langdell. See GRANT GILMORE, *THE DEATH OF CONTRACT* 109 n.22 (1974) (“It was indispensable to establish at least two things; first that law is a science; secondly, that all the available materials of that science are contained in printed books.” (quoting Christopher Columbus Langdell, Address at the Meeting of the Harvard Law School Association on the 250th Anniversary of the Founding of Harvard University (Nov. 5, 1886))). As one of the founding fathers of American jurisprudence, the admired Dean of Harvard Law School, and the author of the first modern case book, Langdell was highly influential in implementing the idea. For an analysis of the connection between this approach and the rejection of emotions in the context of contract law, see Hila Keren, *Considering Affective Consideration*, 40 *GOLDEN GATE U. L. REV.* (forthcoming 2010) (manuscript at 14–17, on file with authors).

93. See, e.g., Terry Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 *NOTRE DAME L. REV.* 89, 101 (2009) (discussing the criminal responsibility of minors); Peggy Sasso, *Criminal Responsibility in the Age of “Mind Reading,”* 46 *AM. CRIM. L. REV.* 1191, 1193 (2009) (discussing the criminal responsibility of adults).

search to the notion of free will,⁹⁴ and the role of lie detection and other neuroscience technologies in the courtroom.⁹⁵

Like behavioral law and economics (and unlike law and emotions), law and neuroscience work is not exclusively or even primarily focused on the emotions. Although Functional Magnetic Resonance Imaging (fMRIs) and related technology may allow neuroscientists to identify the location and/or intensity with which specific emotions appear as brain activity—and although important scientific effort has been dedicated to the emotions⁹⁶—few legal works have responded to this affect-

94. See, e.g., Stephen O'Hanlon, *Towards a More Reasonable Approach to Free Will in Criminal Law*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 395, 397 (2009) (discussing the free will dilemma).

95. See, e.g., Jane Campbell Moriarty, *Visions of Deception: Neuroimages and the Search for Truth*, 42 AKRON L. REV. 739, 758–61 (2009) (discussing the new technologies that arguably can detect deception and arguing against their immediate legal adaptation).

While the difference in the breadth of subjects can certainly be explained by the fact that this literature is still its formative stages, it may also be attributed to the fact that the most obvious legal use of the neurosciences stems from its technology, which appears to lend itself to legal procedures aimed at detecting the truth. However, there has been controversy, even within this emerging literature, about whether brain scans and other visual representations stemming from neuroscience technology represent any kind of “truth” readily accessible by the legal system. See, e.g., Henry T. Greely, *Law and the Revolution in Neuroscience: An Early Look at the Field*, 42 AKRON L. REV. 687, 707 (2009) (“People studying the ethical, legal, and social implications of neuroscience have to walk a tightrope We must always worry about how well this technology works now, under what circumstances, for what kinds of people, with what degrees of accuracy and confidence, and how we know those answers.”). There is also a related set of questions about whether triers of fact can accurately interpret and use brain scans and other neuroscientific images that may be entered into evidence. See *infra* notes 106–07 and accompanying text.

96. The work of Elisabeth Phelps is a prime example. See, e.g., Elisabeth A. Phelps et al., *From Fear to Safety and Back: Reversal of Fear in the Human Brain*, 28 J. NEUROSCIENCE 11,517, 11,517–25 (2008) (using brain scans to assess how the brain becomes conditioned to reacting with fear to certain stimuli); Elisabeth A. Phelps & Tali Sharot, *How (and Why) Emotion Enhances the Subjective Sense of Recollection*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 147, 147–52 (2008) (arguing that emotional experiences may distort our subjective sense of the accuracy of our recollections). Interestingly, Phelps's bias research has been identified as having a possible connection to law. See Greely, *supra* note 95, at 698 (“Could a lawyer introduce an fMRI analysis of the defendant in an employment discrimination case to show bias? Could criminal defense counsel compel an fMRI examination of the arresting police officer on the basis of the defendant's assertion of bias? Will we allow, or even require, neuro-voir dire?”).

focused work.⁹⁷ The normative dimension of law and neuroscience scholarship is still largely unformulated. The few normative debates already at play ask whether and how neuroimaging should be used as evidence that might decide a case in the courts. Interestingly, a substantial number of law and neuroscience scholars argue *against* such use, at least at the current stage of technological development.⁹⁸

Some law and neuroscience scholars have begun the arduous task of mapping the possible intersections of law and knowledge that arise from brain research.⁹⁹ Hank Greely, for example, recently illustrated some of the normative questions awaiting law and neuroscience scholars in the context of using fMRI technology, noting:

Society will first have to decide whether this works and then, if it does work, how we want it used. Do we want its use regulated? Do we want employers to be able to use it? What about schools or parents? Do we want the police, FBI, or intelligence community to be able to use it? Does it matter if it is voluntary or involuntary? Should we allow

97. *But see* Robert E. Emery, *Anger Is Not Anger Is Not Anger: Different Motivations Behind Anger and Why They Matter for Family Law*, 16 VA. J. SOC. POL'Y & L. 346, 347 (2009) (relying in part on neuroscience research to show that being emotionally hurt creates pain that is reflected by brain activity which is identical to that of physical pain and, like physical pain, may trigger anger); Keren, *supra* note 92 (manuscript at 50–51) (discussing neuroimages which shed light on altruistic behavior that results from feelings of *empathy*).

Although it may be too early to judge, the comparatively modest interest of legal scholars in brain research that focuses on emotions may itself support our argument that mainstream legal scholars are skeptical about work engaging the emotions. Neuroscientists, as opposed to legal scholars, are showing growing interest in researching the emotions.

98. *See, e.g.*, Joëlle Anne Moreno, *The Future of Neuroimaged Lie Detection and the Law*, 42 AKRON L. REV. 717, 725 (2009) (“[T]he science of cognitive neuroscience is far from clear.”); Moriarty, *supra* note 95, at 758–61 (arguing that researchers have not established the reliability of fMRI results to a threshold that would pass the evidentiary standards for admissibility in federal court). However, many legal works express high appreciation and even excitement about the *potential* of the neurosciences to change what we know about reality. *See* Greely, *supra* note 95, at 689 (discussing the rapid development of the neurosciences and arguing that “knowing more about brains—and as a result being able to know more about minds and mental states—may fundamentally change, in important ways, the legal system of the United States and every other country in the world”); Robert Robinson, *Daubert v. Merrell Dow Pharmaceuticals and the Local Construction of Reliability*, 19 ALB. L.J. SCI. & TECH. 39, 41 (2009) (“Over the next few decades, it is conceivable that scientists will be able to ‘see’ the genesis of a thought.”).

99. *See* David M. Eagleman, *Neuroscience and the Law*, 45 HOUS. LAW. 36, 38–40 (2008) (predicting eight points of intersection); Greely, *supra* note 95, at 689 (suggesting five points of intersection).

its involuntary use with a court order—a search warrant for the brain? Could it be used in court, and, if so, when and how? Does courtroom use of fMRI-based lie detection raise questions about the privilege against self-incrimination?¹⁰⁰

Although law and neuroscience is still at the early stages of being defined by its own participants,¹⁰¹ it has garnered both popular attention¹⁰² and widespread academic support and institutionalization.¹⁰³ Neuroscience research has also claimed the attention of courts.¹⁰⁴ The appeal of law and neuroscience to

100. Greely, *supra* note 95, at 699.

101. See Jane Campbell Moriarty, *Foreword to the Neuroscience, Law and Government Symposium*, 42 AKRON L. REV. 681, 681–82 (2009) (describing the September 2008 *Neuroscience, Law and Government Symposium* as a legal response to the rapidly growing body of research done by neuroscientists); see also Annabelle Belcher & Walter Sinnott-Armstrong, *Neurolaw*, 1 WILEY INTERDISCIPLINARY REVIEWS: COGNITIVE SCI. 18, 18 (2010), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/123216877/PDFSTART> (discussing the debate within law and neuroscience as to its meaning and uses). For additional examples of how law and neuroscience works, see generally Owen Jones et al., *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, 2009 STAN. TECH. L. REV. 5; Amanda C. Pustilnik, *Violence on the Brain: A Critique of Neuroscience in Criminal Law*, 44 WAKE FOREST L. REV. 183 (2009); Symposium, *Neuroscience, Law and Government*, 42 AKRON L. REV. 681 (2009); see also Maroney, *supra* note 93, at 100 n.47 (citing some leading works).

102. See, e.g., Jeffrey Rosen, *The Brain on the Stand*, N.Y. TIMES, Mar. 11, 2007, (Magazine), at 49–53, 70, 77, 82, 84 (reporting on numerous legal battles involving the introduction of neuroscience evidence, and speculating about the implications).

103. The John D. and Catherine T. MacArthur Foundation has established the Law and Neuroscience Project, committing \$10 million over the first three years, to bring together faculty participants in the fields of law, philosophy, psychology, and neuroscience from twenty-five universities across the country. See The Law and Neuroscience Project, <http://www.lawandneuroscienceproject.org> (last visited Apr. 25, 2010). In addition, a number of prominent law schools, including Harvard, Stanford, and Vanderbilt, have established centers to support research at this intersection. See The Project on Law and Mind Sciences at Harvard Law School, <http://isites.harvard.edu/icb/icb.do?keyword=k13943&pageid=icb.page63708> (last visited Apr. 25, 2010) (Harvard); The Center for Law and the Biosciences, <http://www.law.stanford.edu/program/centers/clb/#overview> (last visited Apr. 25, 2010) (Stanford); Law & Human Behavior Program, <http://law.vanderbilt.edu/academics/academic-programs/index.aspx> (last visited Apr. 25, 2010) (Vanderbilt).

104. See Greg Miller, *fMRI Evidence Used in Murder Sentencing*, SCIENCEINSIDER, Nov. 23, 2009, <http://news.sciencemag.org/scienceinsider/2009/11/fmri-evidence-u.html> (reporting that defense lawyers for an Illinois man convicted of raping and killing a ten-year-old girl used the scans to argue that their client should be spared the death penalty because he has a brain disorder). In connection with the Law and Neuroscience Project, Professor Susan Wolf is currently working on a database that compiles reported criminal law cases from 1994 to 2009, which reference neuroscience evidence, testimony, or argument. See Susan Wolf, Presentation at Law and Neuroscience Project Meeting (Jan. 8, 2010) (on file with the authors). Professor Hank Greely is col-

mainstream legal scholars has many of the same conceptual sources as the attractiveness of behavioral law and economics.

First, the exclusive focus on the brain—as the traditional locus (and image) of human cognition and response—accords with the preexisting frame of law as a rational system. Second, to an extent even greater than behavioral economics, neuroscience research is based on measurable indices and replicable methods that confer the epistemological benefits of “hard” science. The use of cutting-edge technologies, such as fMRIs, and presentable findings such as colorful brains scans, accords credibility in a legal system which retains aspirations to scientific objectivity,¹⁰⁵ and helps legal actors to view such research as probative on questions ranging from injury to mental states to lie-detection.¹⁰⁶ It seems likely that the epistemological privi-

lecting information and documents about every California criminal case from 2006 through 2009 where neuroimaging evidence about the defendant was introduced, or sought to be introduced. E-mail from Hank Greely, Director, Center for Law and the Biosciences at Stanford University, to Kathryn Abrams, Professor, University of California at Berkeley School of Law (Mar. 10, 2010) (on file with authors).

105. See *supra* notes 17–18, 92 and accompanying text (describing the genesis of the concept of “law as a science”).

106. Some research suggests, however, that legal actors may be inclined to accord findings based on such technology more probative value than they deserve, at least given the current state of technology. See, e.g., Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Using Functional Brain Imaging as Evidence of a Criminal Defendant’s Past Mental State* 56–72 (Feb. 12, 2009) (unpublished manuscript, on file with authors). In addition, some research suggests that people may defer to brain images over their own evaluation of facts and values in a courtroom setting. See Anne Beaulieu, *Images Are Not the (Only) Truth: Brain Mapping, Visual Knowledge, and Iconoclasm*, 27 SCI. TECH. & HUM. VALUE 53, 73 (2002) (distinguishing the scientific purpose of fMRI images and how the public will interpret them); Joseph Dumit, *Objective Brains Prejudicial Images*, 12 SCI. IN CONTEXT 173, 174 (1999) (“The persuasiveness of these images might be operating on levels supplementary to the logic of expert argumentation. And if this is the case, then a strong argument can be made for their visual exclusion from courtrooms.”); Adina L. Roskies, *Are Neuroimages Like Photographs of the Brain?*, 74 PHIL. SCI. 860, 861 (2007) (“It is imperative that the dangers inherent in naïve public consumption of brain images become widely recognized.”). Factfinders may also accord more credit to statements by designated “experts” in trial-like situations, when those statements are accompanied by brain scan images. But preliminary findings in a research project undertaken by Michael Saks in conjunction with the Law and Neuroscience Project suggest that brain scan images may not have the biasing effect on jurors that other work has ascribed to them. See Michael Saks, Professor of Law, Arizona State University, Presentation at the Law and Neuroscience Meeting (Jan. 8, 2010). A rich literature has, more generally, demonstrated the powerful effect of visual images on juror evaluation of evidence. See generally Bright & Goodman-Delahunty, *supra* note 50. For a thought-provoking discussion of the “visuality” of law, see generally Carol

leging of scientific work has legitimated even neuroscientific work that delves into the emotions.¹⁰⁷

One respect in which law and neuroscience appears to differ from behavioral law and economics concerns its potential for producing normative change in pivotal doctrinal assumptions. Although the normative aspirations of law and neuroscience have yet to be clarified, it is apparent that such analysis reflects a destabilizing potential. For example, legal scholars have already remarked, with apparent fascination, on the extent to which the materialist assumptions of neuroscience—the notion that “we *are* our brains”—threatens to upend the notions of free will and individual responsibility that have historically structured the criminal law.¹⁰⁸ Yet even given this destabilizing potential—an attribute law and neuroscience analysis would seem to share with law and emotions scholarship—the more potent association of law and neuroscience with rationalist and objectivist norms accords it higher acceptability among legal scholars.

Both behavioral law and economics and law and neuroscience may be viewed as importantly allied with law and emotions analysis in recognizing the incompleteness of the traditional focus on the rational dimension of cognition, and in attending (to a greater or lesser degree) to affective phenome-

Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008).

107. Cf. Susan A. Bandes, *Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489, 492 (2009) (“[I]t has become much easier to talk about emotion itself now that cognitive neuroscience has begun to study it. Brain imaging has given the fuzzy concept of emotion a comforting materiality.”). As we note above, however, the neuroscience work that examines the emotions has not been the focus of significant analysis among law and neuroscience scholars. See *supra* note 97 and accompanying text.

108. See Rosen, *supra* note 102, at 49 (“To suggest that criminals could be excused because their brains made them do it seems to imply that anyone whose brain isn’t functioning properly could be absolved of responsibility.”). For a less breathless account of this challenge by a pair of leading neuroscientists, see Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS OF THE ROYAL SOC’Y B: BIO. SCI. 1775, 1784 (2004) (“Free will as we ordinarily understand it is an illusion generated by our cognitive architecture.”). But see Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 397 (2006) (labeling exaggerated claims about the moral and legal ramifications of neuroscience Brain Overclaim Syndrome).

na.¹⁰⁹ Law and emotions analysis, one might add, offers the advantage of giving exclusive, sustained analysis to these affective responses, while the other two bodies of work analyze them only on occasion (behavioral law and economics) or as one among several foci (law and neuroscience). Yet the warmer reception that has greeted behavioral law and economics and law and neuroscience scholarship suggests a greater comfort with the rationalist assumptions and scientific methodologies reflected in this work.

C. REARTICULATING THE LAW/EMOTION DICHOTOMY

The rationalist basis of legal skepticism about law and emotions is also suggested by two more conspicuous patterns: the most explicit terms in which law and emotions scholarship has been challenged, and the specific contexts in which it has been embraced.

The most direct form of challenge—that is, the explicit concerns that have been raised about legal interventions based on affective analysis—suggest that legal scholars may still perceive an incompatibility between law and a focus on the emotions. Take, for example, the concern of Carol Sanger or Austin Sarat that judges and jurors instructed to attend to affective response may exert pressure on defendants to manifest remorse in the sentencing process, encouraging the strategic performance of counterfeit emotions.¹¹⁰ Or consider Melvin Eisenberg’s argument that legal enforcement of emotionally motivated gratuitous promises will damage the “world of gift” and change its nature forever.¹¹¹ This concern is revealing, both

109. In fact, increasing numbers of scholars may view themselves as participating in law and emotions analysis, as well as one of these neighboring fields. Legal scholars such as Jeremy Blumenthal, Peter Huang, Dan Kahan, and Terry Maroney might fit in this category.

110. See Carol Sanger, *The Role and Reality of Emotions in Law*, 8 WM. & MARY J. WOMEN & L. 107, 111 (2001) (“[A] convicted and guilty defendant can put on a great show of remorse and be rewarded for the display. All of the players now understand the ‘proper’ emotional response and each can act accordingly.”); Austin Sarat, *Remorse, Responsibility, and Criminal Punishment*, in *THE PASSIONS OF LAW*, *supra* note 43, at 168, 169 (noting skepticism about whether legal decisionmakers can distinguish feigned from genuine remorse).

111. See Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 847 (1997) (“[M]uch of the world of gift is driven by affective considerations like love, affection, friendship, gratitude and comradeship. That world would be impoverished if it were to be collapsed into the world of contract.”).

in its view of law as the heavy hand of state compulsion,¹¹² and of emotion as the last outpost of human individuality, which is either untouched and authentic, or distorted by the demand for performance for legal delectation. This remedial worry—that law may coerce or corrupt the vulnerable, inward dimensions of human personality reflected in emotion—is a familiar one in contemporary jurisprudence. It is reflected in many struggles over the boundary between the public and the private, including state concerns about entering the sacred precincts of the family home to address domestic violence,¹¹³ or about enforcing intimate exchanges.¹¹⁴

The concern that law may corrupt the separate domain of emotion is distinct from traditionalists' fears that ungovernable emotion would inflame the vaunted reason of the law.¹¹⁵ Yet both reflect a deeply dichotomous view of law and emotions. And each neglects the rich middle ground—which law and emotions scholars are only beginning to describe—in which emotion infuses law with responsibility and value, and law collaborates with culture, or structures institutions, so as to channel, shape, nurture, or transform emotions of individuals or groups.¹¹⁶

This latter view, that emotion is not simply an inward, bodily affair, but is inevitably conditioned and directed by a rich array of norms, practices, and structures, has been elaborated upon in a growing literature on the sociology of emotion.¹¹⁷ In

112. In contrast, it has been our observation that law and emotions scholars tend to take a broad or inclusive view of what counts as “law.” One can see this tendency reflected in our discussion of “integration,” where we discuss the variety of interventions that have been proposed or contemplated by legal scholars deploying this methodology. *See infra* Part III.C.

113. *See, e.g.*, Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2154–61 (1996) (analyzing Reconstruction-era cases in which courts declined to enforce criminal laws against abusive husbands on marital privacy grounds).

114. *See, e.g.*, Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 *HARV. L. REV.* 491, 493, 499–507 (2006) (arguing that scholars on both sides of the normative debate over the extent of state regulation of economic exchanges between intimates underestimate how the state shapes such exchanges). For a critique of Hasday’s analysis from a feminist perspective, see Hila Keren, *Can Separate Be Equal? Intimate Economic Exchange and the Cost of Being Special*, 119 *HARV. L. REV. F.* 19 (2005), http://www.harvardlawreview.org/issues/119/december05/forum_337.php.

115. *See, e.g.*, Fiss, *supra* note 20, at 800; Posner, *supra* note 28, at 324.

116. *See supra* Part I.

117. Sociology is not unique in its exploration of the ongoing social structuring of the emotions. *See, e.g.*, Calhoun, *supra* note 61, at 220 (describing the ways in which the emotion of (romantic) love is philosophically scripted by practices from marriage laws to popular culture).

her landmark 1983 work, *The Managed Heart*, Arlie Hochschild described the ways in which contemporary work environments structure the affective responses of employees.¹¹⁸ More recently, sociologist Eva Illouz has argued that the emergence of “emotional capitalism” has made emotions an integral part of the public domain, monitored by social forces and objectified.¹¹⁹ Law, too, as scholars such as Susan Bandes have observed, may function as one of the social and institutional influences that directs, structures, and gives meaning to particular emotions.¹²⁰ These insights complicate and problematize the implicit dichotomy between the heavy hand of the state and the intimate, authentic world of individual emotion.

A final echo of dichotomized thinking comes not from the spheres that have resisted affective concerns but from one arena that has been quick to embrace them: the area of reproductive rights.¹²¹ Here the law has been surprisingly frank in acknowledging the role of emotion, and moving directly to mitigate its most painful effects.¹²² Yet emotion here is not treated as a pervasive, inevitable human attribute: in a move reminiscent of earlier dichotomies, legal actors associate emotion exclusively and restrictively with women, and they address it in that most feminine (or feminized) of domains—the decision whether to bear a child.¹²³ This move was first introduced by pro-life advocates, who sought to alter public receptivity toward abortion by focusing on the physical and emotional well-being

118. ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 137 (1983).

119. See EVA ILOUZ, *COLD INTIMACIES: THE MAKING OF EMOTIONAL CAPITALISM* 4–5, 109 (2007); cf. *id.* at 16 (observing that the intimate sphere has been penetrated and transformed by a rationalist mentality traditionally associated with the public areas of life and noting that “never has the private self been so publicly performed and harnessed to the discourses and values of the economic and political spheres”).

120. See Susan A. Bandes, *Group Conflict Resolution: Sources of Resistance to Reconciliation: Victims, “Closure,” and the Sociology of Emotion*, 72 *LAW & CONTEMP. PROBS.* 1, 11–13 (2009) (arguing that expressions of grief structured by the formal public setting of the courtroom may be experienced differently by families of murder victims than expressions of grief offered in private or therapeutic settings).

121. See Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 *U. ILL. L. REV.* 991, 1011 (discussing the concern for the “psychological” health of women seeking abortions).

122. See *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007); see also *infra* text accompanying notes 129–30.

123. See Siegel, *supra* note 121, at 999.

of women going through the abortion process.¹²⁴ Groups such as Operation Outcry offered experiential narratives which highlighted the negative emotions such as regret, guilt, fear, and depression experienced by women who had chosen to end their pregnancies.¹²⁵

Although this focus on negative emotions was developed by actors who were not themselves lawyers, it was designed for and deployed in legal advocacy.¹²⁶ Operation Outcry testimonials, and the emphasis on harms to women more generally, were used to support changes in state laws, including more stringent informed consent requirements, and restrictions on some or all forms of abortion.¹²⁷ This approach to women's emotions received its most salient form of support in *Gonzales v. Carhart*.¹²⁸ In upholding a federal ban on partial-birth abortions, the majority observed: “[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life

124. *Id.* at 1009 (describing this development for legal audiences and theorizing the factors that render it constitutionally problematic).

125. Operation Outcry, <http://www.operationoutcry.org/pages.asp?pageid=27784> (last visited Apr. 25, 2010) (“Operation Outcry is the ministry of the Justice Foundation to end the pain of abortion by exposing the truth about its devastating impact on women, men and families.”) The Justice Foundation offers pro bono legal support for conservative political litigation. See The Justice Foundation, <http://www.thejusticefoundation.org/pages.asp?pageid=22827> (last visited Apr. 25, 2010). *Contra* A. Kero et al., *Wellbeing and Mental Growth—Longterm Effects of Legal Abortion*, 58 SOC. SCI. & MED. 2259, 2259–60 (2004) (citing a range of studies most of which found a prevalence of positive emotions, such as relief or a sense of responsibility, following abortion).

126. See Operation Outcry, *supra* note 125 (describing the use of evidence of the “tragic and harmful effects of abortion” in legal cases).

127. See, e.g., Siegel, *supra* note 121, at 1027 n.150 (describing an informed consent statute in South Dakota supported by David Reardon that was submitted to the legislature, which was “[a]n Act to define the applicable standard of care in regard to screening of risk factors for all abortions except in the case of a medical emergency, to provide civil remedies, and to exempt medical emergencies from the requirements of this Act”). The Reardon bill was later tabled in favor of the ban statute. See *id.* at 1024 n.137.

128. *Gonzales v. Carhart*, 550 U.S. 124 (2007); see also Brief of Sandra Cano et al. as Amici Curiae in Support of Petitioner, *Carhart*, 550 U.S. 124 (No. 05-380) [hereinafter Cano Brief] (using Operation Outcry narratives and similar woman-centered argumentation); Posting of Jack Balkin to Balkinization, *The Big News About Gonzales v. Carhart—It’s the Informed Consent, Stupid*, <http://balkin.blogspot.com/2007/04/big-news-about-gonzales-v-carhart.html> (Apr. 19, 2007 14:50 EST) (referring to the constitutional prioritizing of post-abortion regret as “the big news” about the case).

they once created and sustained. Severe depression and loss of esteem can follow.”¹²⁹

These arguments dovetail with earlier explorations of fear in the context of spousal notification¹³⁰ to create a significant legal emphasis on women’s affective experience in the exercise of reproductive rights. This perpetuates one of the most familiar of the dichotomized tropes of objectivism: the association of partiality, emotion, and their excesses, with women. Emotion—where it has been most forthrightly acknowledged in recent legal argumentation—is a force that besets and infantilizes women; it authorizes a highly paternalistic and restrictive state response.¹³¹ Affective responses to abortion which reflect women’s autonomy or independence—such as relief, happiness, or a sense of having exercised responsibility for one’s life¹³²—are consistently neglected in this doctrine in favor of those that reflect ambivalence, dependency, and a stereotypic maternalism.¹³³ This is hardly an auspicious beginning for judicial and broader legal recognition of the emotions.

These examples suggest that law and emotions scholars may have been too quick to infer that our challenges to the dichotomy between reason and emotions have transformed dominant conceptions of legal rationality.¹³⁴ The skepticism about whether even self-consciously normative forms of law and emotions scholarship have anything practical to offer; the gravita-

129. *Carhart*, 550 U.S. at 159 (citing *Cano Brief*, *supra* note 128, at 22–24).

130. *See* *Planned Parenthood v. Casey*, 505 U.S. 833, 971–76 (1992).

131. *See Carhart*, 550 U.S. at 181–83 (Ginsburg, J., dissenting) (observing that if legal actors were genuinely concerned about women’s regret, they would try to enhance the informational grounding of women’s choice, rather than depriving them of such choice).

132. *Cf.* Nancy E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 AM. PSYCHOL. 1194, 1198 (1992) (noting that while women respond to abortion with mixed emotions, “relief and happiness” are the most frequently reported emotions); Kero et al., *supra* note 125 (citing relief and a sense of responsibility as primary affective responses to abortion).

133. *See Carhart*, 550 U.S. at 159 (“Respect for human life finds an ultimate expression in the bond of love the mother has for her child.”). The maternalism implicit in this quote can be better appreciated by reflecting on the fact that it is being offered in the context of a discussion of abortion, a setting in which the woman exercising her reproductive choice does not wish to become a mother, and may not consider the fetus she has chosen to abort to be “her child.”

134. *See, e.g.,* Bandes, *supra* note 44, at 14 (“The essays in this volume make it impossible to think of law as a solely cognitive, emotionless zone *again*.” (emphasis added)). This suggests some optimism that the tendency to dichotomize law and emotions has eroded.

tion toward more scientific approaches to analyzing the emotions; and the co-optation of affective analysis by forms of legal advocacy which seek to associate it exclusively, and restrictively, with women, all suggest that we may be facing a recuperation of the traditional dichotomous, hierarchical view of reason and emotion. This iteration, while allowing for the possibility of emotions in the general orbit of the law, resists law and emotions analysis at just that point at which it seeks to gain practical purchase. It challenges not the *possibility* or *coherence* of affective analysis in the general context of the law, but its *utility as a valuable alternative response to practical legal problems: as a rubric, language, or organizing frame for legal intervention*. Analysis of emotions, in other words, may be helpful in explaining the lives of vacillating, suffering women, but not in directing the work of deliberative legal actors.

The growing awareness that human beings are capable only of bounded rationality has led to a wave of multidisciplinary inquiries into the nonrational dimensions of cognition, perception, and response.¹³⁵ This awareness and the transformative body of work it has produced demand a more venturesome and plural response by legal scholars. To fully comprehend the many challenges to human rationality and their potential impact on the law, legal scholars should draw on *all bodies of inquiry* that have the potential to illuminate law's engagement with the nonrational dimensions of human experience. Undoubtedly, we need the work of behavioral economics to analyze flawed heuristics, and create "choice architecture" that facilitates rational decisionmaking.¹³⁶

Similarly, we need neuroscience to help us understand the brain mechanisms that shape the human cognition and its limitations, and to glimpse the ways in which these patterns might be germane to legal decisionmaking.¹³⁷ But, despite the rationalist and objectivist premises that continue to ground legal instincts, we also need a broader and more diverse set of resources from disciplines such as anthropology, sociology, psychology, cultural studies, philosophy, and literature. Those bodies of knowledge will help us think about emotions not simply as temporary deviations from rationality (behavioral studies) or as forms of neural function (brain studies), but also, at times, as distinct and significant supplemental means of ap-

135. See *supra* notes 9–10, 57 and accompanying text.

136. See *supra* notes 86–90 and accompanying text.

137. See *supra* Part II.B.2.

prehending the world.¹³⁸ They will also help us develop a conception of law as a vehicle for attending, accommodating, and engaging in a variety of pragmatic ways these fundamental dimensions of human response. Achieving this final goal in the context of persisting rationalist tendencies will require, in turn, a different kind of response from law and emotions scholars. It will require that we demonstrate not the *pervasiveness of the emotions* within law, but rather the *utility of analyzing the emotions* in responding to concrete legal problems.¹³⁹ It is to this challenge that we now turn.

III. THREE DIMENSIONS OF USEFULNESS

The ambivalent reception of law and emotions scholarship stands at sharp odds with its pragmatic potential. Therefore, this Part aims to offer an analysis of law and emotions scholarship that explicates the tools it provides for responding to legal problems. We argue this scholarship has demonstrated three “dimensions” which can inform both the more modest end of improving legal doctrine, and the more ambitious aspiration of using law to produce desirable emotional effects. In this Part, we mark these three dimensions with the terms *Illumination*, *Investigation*, and *Integration*. The first dimension, “Illumina-

138. Cf. NUSSBAUM, *supra* note 25, at 3 (arguing that philosophic inquiry into ethical questions—how we should live our lives—stands to gain from the study of literature). Nussbaum maintains that literature offers a different way of illuminating and exploring conflicts of value: it emphasizes ethical insights gained from emotions, as well as the importance of particulars, uncontrolled happenings, and human relationships in aiding perception and shaping human affairs). *Id.* Nussbaum’s claims about literature as a distinct way of apprehending the world and the normative choices it presents have important overlap with the claims that humanistic law and emotions scholars make for emotion: that it is not a diminished or defective form of rationality, but, on the contrary, that it is capable of supplementing rational insights with different modes of perception and understanding. *Id.* at 53.

139. Cf. Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1839 (2005) (drawing from Plato’s *Republic*, *Phaedrus*, and *Laws* for the two defenses of the poet’s role in the city). Yoshino uses this “Platonic paradigm” to assess the suitability and contribution of certain examples of “law and literature” work to the body of legal scholarship. *Id.* at 1859–60. The two possible defenses are “ineradicability,” that poetry inevitably reemerges in the city because it is indistinguishable from philosophy and other discourses appropriate to political life, and “virtue,” that poetry “has the capacity to serve, rather than merely to subvert, the proper ends of the state.” *Id.* at 1839. This analysis has much to offer the discussion of law and emotions, because, as Yoshino points out, much of the discussion of the defects of poetry in relation to the city concerns the defects of emotion in relation to reason. *See id.* at 1846–47, 1855–57.

tion,” stands for the task of highlighting the often unacknowledged way that emotions are implicated in a particular legal setting. The second, “Investigation,” reflects the interdisciplinary effort to better understand the nature and characteristics of the specific emotions at issue. The third, “Integration,” represents the challenge of incorporating the new affective insights gleaned through this effort into normative suggestions for legal change. Not every example of law and emotions scholarship encompasses each of these dimensions. Yet, particularly in the context of resurgent legal resistance to emotions, it is important to recognize that the most fully realized forms of this scholarship, and the aspirations of this body of scholarship as a whole, reflect all three.

A. ILLUMINATION

The “illumination” dimension has at its core the observation of specific legal issues through the new prism of the emotions. As law and economics works revisit legal problems from the perspective of costs and benefits, and feminist projects examine legal matters from the perspective of women’s experiences, or of gender bifurcation or subordination, law and emotions scholarship embodies a particular lens: an affective standpoint. Examining law from the perspective of the emotions is not, however, a simple task. In most cases the emotions do not appear on the surface of a judicial opinion, a legislated norm, or another articulation of a legal issue. Instead, the practice of dichotomizing law and emotions obscures the emotion or emotions that may be relevant to a particular legal context; we need therefore to dig beneath the surface, and ask ourselves how emotion might be implicated in such contexts. This process often permits us to see that emotions play a role that has not been acknowledged, or that they have been misapprehended in the context of existing legal doctrine.

Sometimes reconsidering a legal problem from the perspective of the emotions will reveal that emotions have been marginalized within conventional analysis. This is both a remainder and a reminder of the traditional dichotomy between law and emotions and its consequences. Typically in such cases, the accepted rationalist understanding of the subject either ignores the emotions altogether, or alludes to them briefly or shallowly as a matter that requires no inquiry or explanation. For example, writing about prisoners awaiting execution on death row, Professor Amy Smith illuminates the glaring neglect of the

negative emotions that occurs during the extended period of time between conviction and execution.¹⁴⁰ Describing an average wait time of twelve years, she writes:

[W]hile our Constitution claims to protect us against “cruel and unusual punishment,” a complex combination of circumstances and ignorance have somehow lulled us into believing that those we have condemned to death either deserve this pain in exchange for the harms they have caused or that they don’t suffer much as they await their executions.¹⁴¹

Professor Smith explains that legal actors have started to use the term “death row syndrome,” to describe the psychological effects of the experience of living in the harsh conditions of death row for a long period of time.¹⁴² However, she calls attention to the fact that despite legal “use of the word ‘syndrome,’ . . . the concept has never been systematically studied by psychologists, psychiatrists, or social scientists.”¹⁴³ Smith’s attention is directed at the lack of nonlegal research, and she does not link her analysis to the law and emotions project. And yet, this argument could be read as underscoring the law’s utter failure to consider the devastating affective outcomes of lives lived on death row. This is an important understanding which has potential bearings on legal regulation, as it exposes a crucial dimension of the “cruel and unusual” punishment that the Constitution proscribes.¹⁴⁴

Another observable pattern from an affective perspective is the legal failure to differentiate the particular emotions that may be relevant to a particular legal question. Although there are contexts in which it may be useful to speak generally about “the emotions,”¹⁴⁵ this monolithic characterization is often indicative of a persistent tendency to dichotomize emotion and reason. In many cases, the monolithic conception means that

140. See Amy Smith, *Not “Waiving” but Drowning: The Anatomy of Death Row Syndromes of Social Science Research on Emotion for Reading Casey*, 17 B.U. PUB. INT. L.J. 237, 237 (2008).

141. *Id.*

142. *Id.* at 238.

143. *Id.*

144. See *id.* at 240 (“While some scholars have argued that death row phenomenon, as used in international law, has few or no implications for capital punishment within the United States, others have suggested that its existence may raise constitutional issues. Indeed, there is quite a bit of legal scholarship speculating on the appropriateness and likely success of claims based on ‘death row phenomenon.’”).

145. See, e.g., Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1, 6 (2008) (discussing “fear appeals” in the abortion context).

“emotions” are being imagined as a bundle of overwhelming and uncontrollable “feelings” which, by definition, threaten the intellectual process of legal reasoning. This perception of the emotions may fuel an *intentional* effort to separate the emotions from law; as such, it goes beyond the simple legal neglect of the emotions.

For example, in *California v. Brown*, the Court affirmed an instruction stipulating that capital jurors assessing mitigation “must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.”¹⁴⁶ In explaining her support for the ruling, Justice O’Connor argued that “the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant’s background, character, and crime rather than *mere sympathy or emotion*.”¹⁴⁷ The undifferentiated treatment of emotion signals Justice O’Connor’s view of it as utterly distinct from, and destructive of, appropriate legal reasoning.

A similar pattern exists in the failure of contract law to enforce gratuitous promises.¹⁴⁸ Akin to instructing capital jurors to ignore their feelings in assessing mitigation, contract law historically made a deliberate choice to ignore those promises that are assumed to be motivated by emotions rather than by rational calculations, such as the profit motivation. In such cases, the failure to disaggregate “the emotions” not only reflects a deep suspicion of the role of affect in law, it also prevents analysts from glimpsing and analyzing the specific emotions such as empathy and gratitude that are actually implicated in gratuitous promises.

Occasionally, applying an affective frame reveals a legal decisionmaker gesturing toward particular emotions, without attempting fully to understand them. Chris Guthrie has made this argument, for example, about the Court’s opinion in *Gonzales v. Carhart*.¹⁴⁹ He argues that when the majority invoked the risk of women’s regret as a ground for upholding a law proscribing one form of late-term abortion, it named this emotion

146. 479 U.S. 538, 545 (1987) (O’Connor, J., concurring). The example is taken from Dustin Latka, *From Vengeance to Mercy: Examining the Other and Finding the Human 3* (2007) (unpublished manuscript for 2007 seminar entitled “Challenges of Legal Rationality,” on file with authors).

147. *Brown*, 479 U.S. at 545 (second emphasis added).

148. See Keren, *supra* note 92 (manuscript at 3).

149. Guthrie, *supra* note 80, at 877.

without knowing, or attempting to learn, about it.¹⁵⁰ Thus the Court failed to engage an important body of research, explaining how people anticipate, experience, and respond to regret, that would have shown this emotion to be a less serious problem than the Court predicted.¹⁵¹

Clare Huntington has made a similar point about family law, and its assumptions about the emotions that shape familial conflicts.¹⁵² Conventional family law, according to Huntington, assumes a simplistic binary affective model that dichotomizes love and hate.¹⁵³ For example, a couple is either married (love) or divorced (hate); birth parents either retain custody of their children (love) or relinquish their children completely to other adults (hate).¹⁵⁴ But, this reductive model is at odds with what psychologists and other social scientists have learned about the affective cycles that typify intimate relationships: these cycles often move from love to anger to guilt to efforts at repair.¹⁵⁵ By recognizing a limited affective model, which acknowledges only rupture but not a possible repair, the law freezes familial relationships at the moment of breakdown and “exacerbates emotional harm within families.”¹⁵⁶ By surfacing emotions that the law has tended to neglect, or demonstrating why legal doctrine requires a more thorough understanding of their operation,¹⁵⁷ affective analysis in its “illumination” mode permits a new understanding of family functioning.

Another group of cases which stand to benefit from affective analysis are those in which the law’s *significant impact on particular emotions* has not been acknowledged. This impact can work in two directions. On the one hand, doctrine may fail to acknowledge the law’s *negative* impact on certain emotions. Samuel Bagenstos and Margo Schlanger argue, for example, that the award of “hedonic damages” to those who become dis-

150. *See id.* at 881.

151. *See id.*

152. *See* Huntington, *supra* note 64, at 1254.

153. *See id.*

154. *See id.*

155. *See id.* at 1260.

156. *See id.* at 1249.

157. *See, e.g.,* Emery, *supra* note 97, at 347 (arguing that the insight that a single emotion, such as anger, can have different motivations and serve different goals in different contexts has important implications for family law).

abled in accidents risks precisely such negative impact.¹⁵⁸ Its flawed assumption that those disabled by an accident suffer substantial losses in “enjoyment” of life—when in fact their enjoyment returns to earlier levels after a short period of adjustment—induces nondisabled people to *pity* them without justification.¹⁵⁹ Such unwarranted pity is an affective cost obviously induced by the legal remedy of hedonic damages.¹⁶⁰

In another example, Carol Sanger uses the law and emotions lens to expose the affective cost of the “judicial bypass” process on pregnant teenagers seeking abortions.¹⁶¹ Sanger illuminates the *humiliation* that this process may cause to young, unmarried girls who do not enjoy parental support and are required to testify in court “about the circumstances of intercourse, their mishaps with contraception, misgivings about pregnancy, or the nature of their relationships with those closest to them.”¹⁶² This emotion of humiliation is different from and worse than a feeling of embarrassment; it is triggered by the fact that the confession of the pregnant girl is compelled, and delivered in a formal public setting, to authoritarian strangers.¹⁶³ Engendering humiliation, Sanger concludes, is a cost of the bypass process that has not been considered by lawmakers; it threatens severe harm to the girls involved as well as a basic denial of our society’s decency.¹⁶⁴

On the other hand, using the same lens, scholars can glimpse places where legal actors have neglected their potential to cultivate valuable and *positive* emotions. Solangel Maldonado makes this argument with respect to forgiveness in family law.¹⁶⁵ Although reforms such as no-fault divorce have not decreased the levels of “bitterness and vengefulness that characterize some divorces,”¹⁶⁶ Maldonado sees potential in a legal focus on

158. Bagenstos & Schlanger, *supra* note 82, at 778–84 (arguing that by awarding hedonic damages courts are encouraging pity and distracting attention from societal choices that create disability).

159. *Id.*

160. *Id.*

161. Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 414 (2009) (describing a regulatory scheme that requires pregnant teenagers who want to obtain an abortion without getting their parents’ consent to “convince a judge that they are sufficiently mature and informed to make the decision themselves”).

162. *Id.* at 447.

163. *Id.*

164. *Id.* at 497.

165. Maldonado, *supra* note 64, at 444.

166. *See id.* at 459.

forgiveness.¹⁶⁷ Drawing from forgiveness models developed by scholars in other disciplines, Maldonado argues that family law can cultivate forgiveness by offering “Healing Divorce Programs” to high-conflict divorcing couples.¹⁶⁸

The illumination dimension of law and emotions work is thus aimed at exposing law’s limited or mistaken assumptions, about the emotions in general or about particular emotions. The level of effort required by such analysis may depend on the particular starting point for a scholar’s inquiry, and the extent to which the connection of a legal issue to emotions has been concealed by the accretion of “rational” legal analysis. When the focal point is a legal problem that directly raises an affective concern, the connection may be evident and easy to illuminate. For example, scholars who have debated the value of admitting victim impact statements in capital sentencing proceedings face a context which is explicitly emotion-laden: from empathy and compassion toward the victim and her loved ones to vengeance and hatred toward the defendant.¹⁶⁹

In other cases, affective connection may not be obvious from the context, and the scholar may need to work in a different way. A scholar may grasp the connection between law and a particular emotion or multiple emotions only in retrospect, after she has developed some knowledge regarding these emotions. Accordingly, some works in the field begin from an analysis of a particular emotion or of emotions, and only then move on to connect their insights to legal contexts in which those emotions play a role. For example, writing about the role of emotions in risk regulation, Dan Kahan begins with three leading theories for conceptualizing this role,¹⁷⁰ and only then turns to what he calls “normative and prescriptive implications.”¹⁷¹ In exploring such questions as whether legislatures

167. *See id.* at 479.

168. *Id.* at 492–95 (describing Healing Divorce Programs and their connection to forgiveness).

169. *See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 392 (1996). As Bandes explains: “[c]apital punishment jurisprudence is also unavoidably emotional. Indeed, it is one of the rare areas of law in which an explicit dialogue about emotion takes place.” *Id.* at 390; *see also* Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 135, 143 (Peter Brooks & Paul Gerwitz eds., 1996); Yoshino, *supra* note 139, at 1883–84.

170. *See* Kahan, *supra* note 85, at 744 (exploring at length philosophical, psychological, behavioral, and cultural meanings of each of these theories).

171. *Id.* at 760.

should “limit access to guns in order to avoid the risk of shooting accidents or violent crime,”¹⁷² Kahan demonstrates the way his view of the emotions (as expressing and protecting cultural norms) can contribute to a better understanding of a particular legal dilemma.¹⁷³ Making both kinds of efforts—from doctrine deeper into the emotions and from emotions back to doctrine—is crucial to realizing the full potential of affective analysis.

In illuminating the place of emotions in a particular legal setting, it is important to note the wide variety of legal questions to which law and emotions tools can be applied. Not only have we seen examples from different areas of law (criminal law, constitutional law, family law, the law of contracts, criminal procedure, tort law, education law, and administrative law), but we have also seen that emotions may be implicated in judge-made doctrine, legislation, regulation, and legislative programs which reflect public policy. This variety suggests a wealth of possible targets for such scholarship, as well as the potential for broad contribution by its practitioners.

B. INVESTIGATION

As the foregoing discussion suggests, the law’s deep commitment to rationalism can render legal actors oblivious or ill-informed about the emotions that infuse it. Exploring and highlighting the research into emotion that is emerging from other disciplinary fields is thus a critical step toward improving legal understanding. This is especially true in legal settings that are affectively laden, such as reproductive choice, victim impact statements, or in contexts in which the law embraces specifically affective goals, such as enhancing deterrence by cultivating shame among criminal offenders.¹⁷⁴ Under these circumstances, the lack of awareness and understanding among legal decision-makers can be a critical shortcoming. What we define here as the “investigation” dimension of law and emotions scholarship refers to the efforts to fill this void.

Informing and enriching legal understanding of particular emotions or affective phenomena lies at the heart of law and emotions work. In this section, we explore the ways in which such efforts can be pursued. Our argument is twofold: first, we

172. *Id.* at 763.

173. *Id.*

174. See, e.g., Toni M. Massaro, *Show (Some) Emotions, in THE PASSIONS OF LAW*, *supra* note 43, at 80 (discussing the relationship between law, emotions, and the literature on social norms).

argue that an investigation effort is *essential* for the law and emotions project; second, however, we observe that simply engaging in such vital work is *not sufficient* to reveal the full potential of law and emotions scholarship.¹⁷⁵ In the work with greatest pragmatic potential, thorough interdisciplinary investigation of the emotions is the crucial predicate for normative thinking about the law: either about its amelioration or about its role in shaping the affective lives of its subjects.

The investigation effort is essential because what often justifies affective analysis, in the eyes of those outside of the law and emotions field, is the lack of knowledge among mainstream legal scholars about emotions which may be playing a crucial role in particular legal contexts. Although it may sound obvious that when knowledge regarding the emotions is lacking, an investigation should follow, not all law and emotions works have focused adequate attention on the investigation phase.

As we have seen, the first generation of law and emotions work was mainly devoted to the task of undermining the dichotomy between law and emotions and seemed to end after accomplishing this important goal.¹⁷⁶ To the extent that such works explored emotions independently, they did so for the limited purpose of targeting the myth that emotions threaten rationality and distort legal reasoning. For example, some legal scholars explored research from other fields which increasingly suggested that “emotions are partly cognitive in their very structure.”¹⁷⁷ This interdisciplinary insight helped to strengthen the conventional legal view that “emotions are not merely instinctive and uncontrollable.”¹⁷⁸

However, a focus that sidestepped systematic investigation of the emotions persisted in some law and emotions work, even as it moved beyond challenging the reason/emotion dichotomy, to addressing substantive areas of law. Recall, for example,

175. Cf. Posner, *supra* note 28 (reflecting on scholarship in which investigation was taken to be sufficient, with only passing attention given to the integration task that we see as crucial).

176. See, e.g., Harris & Shultz, *supra* note 14, at 1773 (writing about legal pedagogy and focusing on the damage that can be produced by the ways “[c]lassical legal education celebrates reason and devalues emotion” by failing to draw upon research pertaining to the emotions that may be relevant to their discussion).

177. *Id.* at 1786; see also Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 277–78 (1996) (making a similar general point about the cognitive component of the emotions).

178. Bandes, *supra* note 44, at 14.

Amy Smith's argument that the law has neglected the affective damage caused by years of waiting for execution on death row.¹⁷⁹ Professor Smith calls on psychologists and psychiatrists to study the phenomenon, but she declines to engage in a similar effort herself. While this choice may reflect the challenges of undertaking original, interdisciplinary, empirical work, there are many resources on which a legal scholar might have drawn to lay a foundation for such an effort.¹⁸⁰ Law and emotions scholars can enhance the potential contribution of their illumination efforts by investigating existing literatures that explore attributes of those emotions implicated in their particular contexts. This work may provide a useful foundation for legal scholars unfamiliar with these emotions, and for those who might be encouraged, as Smith proposes, to undertake research into their operation.¹⁸¹

Similarly, Bagenstos and Schlanger, in their work on hedonic damages, offered an instructive investigation of one emotion implicated by their question (joy),¹⁸² yet did not undertake a similar inquiry into another emotion that was central to their thesis (pity). Their argument that awarding hedonic damages inappropriately cultivates pity toward the injured person seems to call for an investigation of the nature and operation of pity. Moreover, this inquiry should be contextualized and shaped by the reasons that readers want to know more about pity.¹⁸³ As the authors argue that we induce pity by awarding a legal remedy, it seems important to explore *whether* and *how* this particular emotion can be externally cultivated or induced.

Works such as these that focus primarily on "illumination" provide a crucial function by alerting mainstream scholars and actors to the affective issues implicated by doctrine. But specifically because these audiences may have had so little exposure to analysis of the emotions, it can enhance the value of such works to take whatever steps are possible toward informing le-

179. See Smith, *supra* note 140, at 252–53.

180. In Professor Smith's case, for example, legal and philosophical work about hope, hopelessness, and despair, in the death penalty context and elsewhere, might have provided a useful foundation.

181. See Smith, *supra* note 140, at 252–53.

182. See Bagenstos & Schlanger, *supra* note 82, at 781–88.

183. See Bades, *supra* note 44, at 3 (explaining "the need to treat each emotion contextually"). For a fine example of such contextual analysis see Martha Minow's discussion of vengeance in Martha Minow, *Institutions and Emotions: Redressing Mass Violence*, in *THE PASSIONS OF LAW*, *supra* note 43, at 265–84.

gal audiences about the emotions in question, and highlighting the questions about those emotions that are particularly germane to the legal context.

While a thorough exploration of emotions is highly important for the formulation of a usable law and emotions scholarship, it may not, in and of itself, be sufficient to that task. A prime example can be found in William Miller's groundbreaking work, *The Anatomy of Disgust*.¹⁸⁴ This work set what many scholars viewed as the gold standard for nuanced interdisciplinary investigation of specific emotions; yet it placed little or no emphasis on linking this investigation to actual legal problems and their resolution. It was only as scholars such as Dan Kahan began to ask what instruction could be drawn from Miller's trove of insights for the direction of the criminal law that it became clearer how an investigation of disgust could serve the pragmatic goals of legal actors.¹⁸⁵

In the remainder of this section, we will identify the kinds of efforts that typify the investigation dimension. This exposition may encourage legal scholars to resist the traditional insularity of the law, and undertake the inquiry into particular emotions that is necessary to advance their arguments.

As legal actors are deeply invested in the "rational" image of the law, they are particularly averse to emotion when they view it as an "impulse[]" or "surge[]" of affect, which is "more or less devoid of thought or perception."¹⁸⁶ To overcome this resistance to affective analysis, it is important to prepare the ground by highlighting the connections between emotions and cognition. In *Descartes' Error*, for example, Antonio Damasio points to the imprecise and misleading character of the rea-

184. MILLER, *supra* note 55.

185. See Kahan, *supra* note 60, at 1631. Kahan explains:

My aim, however, is not to determine whether Miller gets it right about disgust. Rather, it is to see whether Miller's account supplies a *useful* remedy for the inattention to disgust in criminal law theory. And for that purpose, it is neither necessary nor sufficient that his account be *true* in some abstract philosophical sense. The law has its own distinctive purposes and needs. If it doesn't suit these, even an admittedly true account of disgust would be *irrelevant or possibly even pernicious*. By the same token, the law might be justified in accepting the guidance of an admittedly false account if it could nonetheless be shown to be *useful*.

(first, third, and fourth emphases added); see also Maldonado, *supra* note 64, at 479–85 (applying Murphy and Hampton's research on forgiveness to the legal context of divorce (citing JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988))).

186. Kahan & Nussbaum, *supra* note 177, at 277–78.

son/emotion dichotomy.¹⁸⁷ To him, emotions are forms of intelligent awareness: “just as cognitive as other precepts.”¹⁸⁸ Once the sharp distinction is removed, two arguments unfold. On the one hand, as works by scholars such as Martha Nussbaum demonstrate, many emotions have a cognitive structure: they embody judgments about the objects to which they respond that has a kind of logical structure.¹⁸⁹ Nussbaum argues, for example, that disgust is not only an “especially visceral emotion” but also an emotion that “has a complex cognitive content”: a desire to distance oneself from an object or practice that reveals one’s animality and inevitable mortality.¹⁹⁰

On the other hand, as psychologists such as Jonathan Haidt have argued,¹⁹¹ the process of cognitive decisionmaking embodies vital affective components. In one experiment, for example, people who received a gift while shopping in a mall became happier, and without being aware of it, evaluated their cars as performing better than those of control subjects who had received no gift.¹⁹² This appreciation of the emotional dimensions of cognition is particularly useful for a wide range of emotions that may be relevant to legal problems and it can help in preparing the ground for further investigation of the emotions: if various emotions have the structure of cognition, and cognition itself often functions in an intuitive, affective way, then bringing the two together by recognizing the place of emotions in law does not seem anomalous after all.

Another part of the preparation phase involves identifying the specific emotions that are implicated in a particular legal context. As Susan Bandes has reminded us, the emotions that

187. ANTONIO R. DAMASIO, *DESCARTES' ERROR* xv (1994).

188. *Id.*

189. See, e.g., NUSSBAUM, *supra* note 25, at 40; ANDREW ORTNOY, *THE COGNITIVE STRUCTURE OF EMOTIONS* 1 (1988); Richard Lazarus, *Universal Antecedents of the Emotions*, in *THE NATURE OF EMOTION* 163 (Paul Ekman & Richard J. Davidson eds., 1994) (arguing that emotions consist of “motivational, cognitive and coping activities that orient . . . creatures selectively to relevant features of their environments”).

190. See Nussbaum, *supra* note 58, at 22–25.

191. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 815 (2001) (explaining how cognition works on two tracks, one that functions instantaneously and intuitively, and another that proceeds through conscious, temporally sustained, logical operations).

192. See OATLEY ET AL., *supra* note 10, at 24 (describing research undertaken by Alice Isen and her colleagues).

pervade law are often “invisible”¹⁹³ and therefore an independent effort is often necessary to expose the emotions that are relevant to the discussion.

Huntington’s *Repairing Family Law* offers a fine example.¹⁹⁴ Drawing on a theory of intimacy first articulated by psychoanalytic theorist Melanie Klein, Huntington suggests that certain emotions and affective dynamics stand at the core of conflicts that emerge in the intimate sphere.¹⁹⁵ While family law has only noticed the binary existence of love and hate in those conflicts,¹⁹⁶ her interdisciplinary research shows “the cyclical nature of familial relationships.”¹⁹⁷ In this cycle, guilt feelings and a following emotive drive for reparation play a major role—a role which Huntington importantly exposes and identifies before delving into her investigation of the cycle of intimacy in Western culture and its acceptance in modern psychological thought and numerous other academic disciplines.¹⁹⁸

Similarly, in *Considering Affective Consideration*, the resistance of contracts scholars to the enforcement of promises to give gifts was animated by a particular view of either “the emotions” (as one thing) or a random list of emotions that were intuitively perceived to be connected to intimate relationships.¹⁹⁹ While tracing the inferior legal status of gifts to their affective associations belongs with the illumination dimension, the choice to focus on the exploration of the concrete emotions of empathy and gratitude (and their relation to each other) is part of the investigation dimension. This choice results from asking which emotions are linked with the altruistic act of gift promising—a question that can be answered only by drawing on interdisciplinary expertise.²⁰⁰

193. Bandes, *supra* note 44, at 2.

194. Huntington, *supra* note 64, at 1254–66.

195. *Id.* at 1245–46 (identifying the role of love, hate, and guilt in intimate relationships within the context of family law).

196. We classify this argument as belonging to the illumination dimension.

197. Huntington, *supra* note 64, at 1247.

198. *Id.* at 1260–74 (investigating the dynamic cycle of emotions in the intimate setting as it is described by different scholars in various disciplines).

199. Keren, *supra* note 92 (manuscript at 3–9); *see also* Eisenberg, *supra* note 111, at 849. According to Keren:

The world of gift is a world of our better selves in which affective values like love, friendship, affection, gratitude, and comradeship are the prime motivating forces. These values are too important to be enforced by law and would be undermined if the enforcement of simple, affective donative promises were to be mandated by the law.

200. Batson’s empathy-altruism hypothesis is a frequently cited explana-

The effort to identify the specific emotion(s) at play in a particular legal context is itself informed by research from outside the law. Mainstream legal scholars who understand emotions primarily in distinction to reason often think about emotions as undifferentiated. Those who study emotions in other fields, however, observe that emotions cannot be discussed monolithically. In the seminal book *The Emotional Brain*, for example, neuroscientist Joseph LeDoux compellingly makes this point:

[W]e saw that attempts to find a single unified brain system of emotion have not been very successful. It is possible that such a system exists and that scientists just haven't been clever enough to find it, but I don't think that's the case. False. . . . Different emotions are mediated by different brain networks, different modules

If I'm correct, the only way to understand how emotions come out of brains is to *study emotions one at a time*.²⁰¹

In working to identify the specific emotions that inform particular legal contexts, law and emotions scholars face the challenge of going beyond the limited list of emotions that have been conventionally associated with law. Such familiar emotions as anger, compassion, mercy, vengeance, and hatred²⁰² remain relevant; yet law and emotions scholars should be alert to the operation of other emotions. Indeed, examples from the existing law and emotions literature include happiness, guilt, forgiveness, romantic love, gratitude, loyalty, envy, regret, and our own engagement with hope.²⁰³ The list, we argue, is almost infinite and should remain open to accommodate new research and reflection from a variety of fields.²⁰⁴

tion for the direct causal connection between emotion and the readiness to help others. See C. DANIEL BATSON, *THE ALTRUISM QUESTION* (1991) (reviewing the altruism literature and suggesting the empathy-altruism hypothesis).

201. JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 105–06 (1996) (emphasis added).

202. Bades, *supra* note 44, at 2.

203. See, e.g., Huntington, *supra* note 64, at 1254–66 (exploring love, hate, and guilt); Calhoun, *supra* note 61, at 217–40 (exploring romantic love); Abrams & Keren, *supra* note 63, at 361–71 (exploring the role of law in cultivating hope).

204. This phase of analysis may also involve analyzing alleged affective phenomena which may not, on careful examination, turn out to be emotions, and may not function the way that advocates or analysts have suggested that they do. An interesting example in this regard is Susan Bades's work on "closure" in the context of the death penalty. See Bades, *supra* note 120. The goal of seeking "closure" for families of victims of murder or mass violence has become an important factor in shaping the penalty phase of capital trials for those defendants charged with the crimes. *Id.* at 1–4. Bades draws extensive-

As the investigation passes these preparatory steps and moves into a full exploration and synthesis of the existing literature, its distinguishing characteristic is its grave complexity.²⁰⁵ Knowledge about the emotions has been augmented in varied disciplines and within numerous bodies of research. A law and emotions scholar may find it complex to locate all the knowledge that is already available outside of the legal sphere with regard to the particular emotion she is interested in investigating.²⁰⁶ There may, moreover, be no crystallization of an agreed view with regard to the most basic questions, not even concerning the meaning of the term “emotion” itself. Furthermore, identifying the emotions that operate in a particular setting may be complicated by the fact that the relevant affective state is described in different words by different authors, or in different fields. The other-directed feeling which leads to altruistic motivation (and to the making of gratuitous promises), for example, has been described by various terms, including “sympathy,” “empathy,” “pity,” and “compassion.”²⁰⁷

Perhaps most critically, legal scholars who seek to unite law with research into the emotions must process and distill insights that have developed for decades in other fields such as psychology, neurobiology, anthropology, and philosophy. They must make judgments about which fields or literatures are most germane to a particular legal context, and develop synthetic accounts of the emotion(s) in question which both reflect the insights of the contributing fields and shed light on the legal question. Susan Bandes’s analysis of the pseudo-emotion of

ly on psychological and sociological literature to demonstrate that “closure” is not in fact an emotion, *id.* at 25–26, and the kinds of feelings toward which advocates of “closure” (i.e., victims’ rights organizations) aim are not predictably facilitated by expedients—such as victim impact statements or the witnessing by victims’ families of defendants’ executions—that have been endorsed as means of bringing them about. *Id.* at 16–26.

205. On the dilemma facing legal scholars who must address complex multidisciplinary research into the emotions, see Massaro, *supra* note 174, at 83–89.

206. JEROME KAGAN, *WHAT IS EMOTION?* xi (2007) (explaining about his book-writing process that “[b]ecause emotions are an active domain of inquiry, the completion of each chapter resembled the removal of fallen leaves from a vast lawn on a windy day in October”). As the emotions have become active domains of inquiry in many fields, legal scholars who do ongoing work in this area must stay abreast of a rapidly changing base of knowledge. *See* Bandes, *supra* note 44, at 7.

207. RICHARD S. LAZARUS, *EMOTION AND ADAPTATION* 287–88 (1991) (observing the overlap and the need to clarify the confusion among sympathy, empathy, pity, and compassion).

“closure,” for example, encompasses psychological work both on the elusive character of that alleged response, and on the proximate emotions of grief and loss.²⁰⁸ Moreover, her analysis of the effects of victim impact statements on survivors draws on sociological literature on the social and institutional shaping of emotion,²⁰⁹ to argue that the effects of expressing grief in the private familial, or even therapeutic, context—which often grounds the use of victim impact statements in the penalty phase of capital trials—are likely to differ starkly from the effects of expressing grief in the impersonal, highly structured and scripted setting of the courtroom.²¹⁰

While sorting out the information, the challenge is to avoid oversimplification, on the one hand, and still to create a useful synthesis of knowledge which will improve the understanding of law and its impact, on the other. A “useful synthesis” will sort and arrange the nonlegal knowledge in a manner which responds to the context and legal questions at hand. This means that some important theories or data will be purposefully omitted, while other facts and theories may be emphasized beyond their relative weight outside of law. For example, in responding to *Carhart’s* concern for women’s regret, Professor Guthrie argued that the court had misapprehended the ways that the emotion of regret operates.²¹¹ Yet his synthetic analysis of the “psychology of regret” was necessarily selective. Tailoring the nonlegal psychological insights to the Court’s assumptions led Guthrie not only to highlight insights such as the human tendency to avoid and to learn from regret,²¹² but also to eliminate parts of the psychological literature that have less connection to the abortion dilemma.²¹³

With the wide range of emotion theories, the many disciplines that study emotions, the abundant literature they produce, and the rapid pace of scientific progress, the complexity of

208. Bandes, *supra* note 120, at 18–25.

209. *Id.* at 4–8.

210. *Id.* at 16–25.

211. Guthrie, *supra* note 80, at 882–902.

212. *See id.* at 898–902 (documenting regret aversion and regret learning).

213. For example, some studies demonstrate that young children cannot experience regret, because they have difficulties retrieving the past and relating it to the present. Most likely because this otherwise important information regarding regret was remote from the context of adult decisions about abortion, Guthrie did not include it in his law and emotions analysis. *Compare id.*, with KAGAN, *supra* note 206, at 30 (documenting children’s difficulty in experiencing regret).

the investigation work may be daunting. Perhaps for this reason, scholarly collaborations between legal scholars and those who study emotions in other disciplines are gradually becoming more common.²¹⁴ Through whatever vehicle, however, coping with the challenge is not only extremely enriching, it is also crucial to creating a law and emotions scholarship with solid grounding in emotions research that enables it to be useful. Generally speaking, the key to breaking the traditional alienation between law and emotions is to be found in deepening the familiarity of legal actors with the emotions: with various affective dynamics, with the importance of the emotions to any “rational” decisionmaking, and with concrete emotions that are tightly connected to law and/or highly influenced by it.

C. INTEGRATION

The third dimension of law and emotions scholarship is “integration.” Scholars apply the analyses of particular emotions that they have gleaned from work in other disciplines to address particular problems in legal doctrine, policy, or argumentation.²¹⁵ For scholars whose work encompasses all three dimensions, this means returning to the problem that they initially identified as implicating the emotions, and developing normative proposals. For scholars who begin with an analysis of particular emotions, this third dimension means thinking about how their investigation may help to address specific legal issues. Attention to this dimension has emerged more recently in law and emotions scholarship; scholars outside the field may be less cognizant of this dimension than of the first two. Where it has been glimpsed, moreover, this dimension has proved more controversial than the first two. The development of normative legal proposals—particularly those which use law to foster, direct, or discourage specific emotions—may arouse both epistemological and practical concerns in some legal scholars and readers.

In the following discussion, we examine two attributes of “integration.” First, we consider the *normative goals* of this

214. See, e.g., THALER & SUNSTEIN, *supra* note 84; Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003); Kahan & Nussbaum, *supra* note 177; Jolls et al., *supra* note 84.

215. See David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 BYU L. REV. 1275, 1365.

scholarship: that is, what law and emotions scholars aim to achieve by using affective analysis to inform legal intervention. Then we explore the *normative means* of this scholarship: what legal instrumentalities it uses in these interventions. Our analysis will address some of the normative concerns that have been provoked by more ambitious forms of this scholarship. But we aim primarily to demonstrate that the normative dimension of this body of work—as well as its “illumination” and “investigation”—has practical promise.

1. Normative Goals

When law and emotions scholars use affective analysis to structure legal proposals, they have one (or more) of several possible goals. Many are simply trying to improve legal doctrine or policy, by making it more responsive to emotions that inflect its operation. If women’s reproductive decisionmaking, as Jeremy Blumenthal argues, can be distorted both by misleading facts and by extremes of emotion, then the standard for state abortion regulations should encompass both.²¹⁶ But law and emotions scholars do not simply see affective analysis as a vehicle for improving legal decisionmaking. Many also view legal doctrine, policy, and various forms of legal rhetoric, as vehicles for influencing the emotions. These goals may, moreover, be pursued in tandem: Hila Keren’s recent work, for example, aims not only to improve the law of contract through (an affective argument for) enforcing gratuitous promises; it also seeks to foster the empathy and gratitude reflected in such promises, by making them legally enforceable.²¹⁷

This section examines the less familiar, and potentially more controversial, of these goals: the idea that we can and should use law to produce particular effects on the emotions. It begins with an analytic question: in what ways can law engage the emotions?

a. A Framework for Analyzing Law’s Relations to the Emotions

As we have studied the work that has been done in investigating particular emotions or highlighting their role within specific legal contexts or questions, we have identified a num-

216. See Blumenthal, *supra* note 4, at 36–38 (discussing the crucial role of the emotions in the context of spousal notification laws).

217. Keren, *supra* note 92 (manuscript at 80–81).

ber of possible relations between law and various emotions.²¹⁸ These relations run the gamut from the purposive—action undertaken specifically because of its emotional effects—to the largely inadvertent. In some cases, legal actors understand or anticipate the emotional effects of their choices, though these effects are not the primary object of their action. Comprehending the range of such relations is an important first step to understanding the goals to which they might be turned: revising law to respond to new understandings of the emotions, or using law to produce specific emotional effects. We describe these relations below, in an order that reflects an increasing degree of intervention by law in the emotions in question.

Law may, first, serve as a vehicle for *expressing* society's collective response. In this role, law serves to mirror, project, or in some cases, support or amplify,²¹⁹ an emotion that is already present. This relation has become familiar in the context of criminal law: when the law criminalizes and punishes specific acts, for example, it becomes one vehicle through which citizens can express their anger, indignation, or disgust at these crimes.²²⁰

218. In a fascinating forthcoming article, Clare Huntington undertakes an inquiry that has some intersection with the one we pursue here. Huntington, *supra* note 81. Huntington is interested in the relation between emotions, social norms, and the law, and in particular she is interested in the way that the state, when it undertakes “norm entrepreneurship”—the process of fostering or redirecting social norms—acts through the emotions. Several of the relations between law and emotions that we describe below occur in the context of norm generation, or have the effect of fostering or shifting social norms: particularly the relations of expression and scripting. Also, we suspect that some of the inadvertent legal effects on emotions may occur in contexts where the primary goal is some form of norm generation. However, while we find Huntington's project to be highly valuable and illuminating, our focus is different—one could say both narrower and broader—in that we are interested in the variety of ways in which law engages the emotions: this means that we will examine contexts in which norm generation is not at issue or is more incidental (say, in the management or destruction of emotion, and in some contexts of redirection or cultivation), and that in contexts in which norm generation may also be occurring, our focus will be trained more specifically on emotional effects.

219. This appears to be the point in Dan Kahan's argument that criminal law should express societal disgust at certain acts or actors. *See* Kahan, *supra* note 53, at 63, 69–73. The law's expression of disgust toward perpetrators of hate crimes is designed not only to articulate what Kahan views as a morally sound response, but to encourage a response of disgust for the perpetrators of hate crimes (and correspondingly a diminution of such crimes) in the population subject to this type of articulated prohibition. *Id.*

220. Some legal expression of emotion may be inadvertent, or may proceed differently than anticipated. *See* Bandes, *supra* note 169, at 395–98 (arguing

Law may also seek to *modify* an emotion that is already present among some group of legal subjects. Legal actors may, for example, seek to *contain* emotions. A legal rule might aim to secure decisionmaking processes from the influence of what actors believe to be highly visceral or potentially distortive emotions. Jeremy Blumenthal's effort to encompass affectively based distortions in reproductive decisionmaking under *Casey* is an example of this kind of containment.²²¹ He is concerned that certain "informed consent" warnings about the attributes of the fetus may generate such strong emotions of anxiety, fear, or guilt as to make coherent decisionmaking impossible.²²² For this reason he wants to consider the possibility that such warnings may come within *Casey*'s ban on "misleading" information.²²³ Similarly, Susan Bandes has argued against the use of victim impact statements: they induce intense empathy, which can prevent juries from reaching just conclusions in capital cases.²²⁴

The goal of using law to contain emotions is shared by a small body of behavioral law and economics works that do go beyond the descriptive enterprise and seek to offer normative proposals.²²⁵ Such works critique the assumptions of rationality through which law and economics scholars have constructed *homo economicus*, arguing that "real people" are limited by their own biases and heuristics, and are characterized generally by bounded rationality, bounded willpower, and bounded self-interest.²²⁶ They propose legal interventions to contain the

that victim impact statements, aimed at allowing victims to express grief or loss following from the violent death of a loved one, actually enable victims to express vengeance or disgust toward the perpetrators). But, in the main, the legal expression of emotion has an intentional character: the law is purposefully deployed as a vehicle for articulating a particular affective response.

221. Blumenthal, *supra* note 145, at 27–38.

222. *Id.* at 20–26.

223. *Id.* at 36–38.

224. Bandes, *supra* note 169, at 392–93.

225. While behavioral law and economics scholars always offer descriptive work, they disagree with regard to the engagement in normative analysis. For an account of the debate see *infra* notes 304–06 and accompanying text.

226. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS, *supra* note 10, at 14 (arguing that describing the differences between *homo economicus* and "real people" is the main task of behavioral law and economics, and adding that the differences can be described "by stressing three important 'bounds' on human behavior, bounds that draw into question the central ideas of utility maximization, stable preferences, rational expectations, and optimal processing of information").

influence of the biases or heuristics, from a belief that, similarly to emotions, they may impede sound decisionmaking.²²⁷ Cass Sunstein's view that risk assessment may be distorted by probability neglect or availability bias, for example, leads him to argue that such irrationality can be controlled by delegating such decisions to experts, whose training makes them less vulnerable to flawed heuristics.²²⁸

However, because of the distinct focus and assumptions of each body of work, such areas of normative overlap between law and emotions and behavioral law and economics are relatively rare. Because behavioral law and economics privileges rationality and understands emotions and biases, in general, as disruptive, interventions in the emotions that aim at goals other than containment or control are largely beyond its ambit.

Law and emotions work may also use law to *manage* emotions. The goal of this management, which is most often applied to specific emotions, rather than to affective response as a general category, is to adjust specific emotions upward or downward in response to challenges in the specific context. We have recently begun a project that explores the role of hope in the legal representation of clients on death row. Our initial research suggests that attorneys representing those on death row play a pivotal, ongoing role in managing the hopes of their clients: they help clients with potentially weak cases to adjust their hopes downward when facing a promising plea agreement, or help clients to adjust their hopes upward when they are sentenced to death row or even life without parole, and need to glimpse the possibility of living a life with some value in prison.²²⁹ These interventions aim at specific legal outcomes: they seek to prevent "volunteering," which ends lives and creates ethical conflicts for death row lawyers,²³⁰ or to keep cases from going to trial, in contexts where a plea is more likely to avert a

227. *Id.* at 32–46.

228. SUNSTEIN, *supra* note 10, at 64–88. Interestingly, Sunstein analyzes fear by reference to such heuristics, focusing not, as humanistic legal scholars such as William Miller have done, on the judgment of danger implicit in fear, or on the physical sensation it produces, or on leading examples of fear in historical or literary works, but rather on the heuristically flawed estimation of risks which can underlie fearful response. For an overview of Miller's work, see William Ian Miller, *Fear, Weak Legs, and Running Away: A Soldier's Story*, in THE PASSIONS OF LAW, *supra* note 43, at 241, 241–64.

229. Audio tape: Interviews from Monterey Death Penalty Conference (Feb. 2007) (on file with authors).

230. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 850–54 (2000).

death sentence.²³¹ But they also seek to stabilize and ameliorate the emotional well-being of those who have been sentenced to death.²³²

The law can also work to *channel* or *moderate* emotions that are already being experienced by a particular person or group. Here we refer not simply to controlling the intensity of particular emotions, but to *reshaping* or *redirecting* them. The criminal law is sometimes conceptualized, in general terms, as a vehicle for channeling the anger, grief, or retributive urges of victims. The late Robert Solomon argued, somewhat more subtly, that embodying the desire for retribution in the criminal law actually serves to moderate this emotion: it makes the desire for vengeance cooler and less volatile, and less socially disruptive because the criminal law connects this urge to specific legal processes for determining guilt or punishment.²³³ Martha Minow has made a similar point about international tribunals convened in response to episodes of genocide: they may turn consuming grief and rage toward the more concrete and socially attainable goal of securing justice in relation to specific perpetrators.²³⁴ Such channeling or moderation usually has some purposive dimension, although it need not be the exclusive or primary goal of legal action: punishment or hearings before international tribunals may moderate the desire for vengeance, even as they serve the goal of justice, by bringing the culpable to account.

Law may also produce more palpable transformations in the affective states of its subjects. One of the subtler and more pervasive examples of this relation is law's capacity to *script* emotions: in other words, to prescribe the emotions that should be felt in particular contexts, or the particular persons or groups who are entitled to feel them. Scripting may be understood as a more intensive form of legal intervention than management or channeling, because it may encourage subjects to experience emotions in contexts where they might not otherwise have felt them (or discourage them in contexts where they might otherwise have arisen). Scripting, as Cheshire Calhoun

231. See Charles N.W. Keckler, *Life v. Death: Who Should Capital Punishment Marginally Deter?*, 2 J.L. ECON. & POL'Y 51, 95 (2006).

232. Cf. Jeffrey L. Kirchmeier, *The Undiscovered Country: Execution Competency and Contemplating Death*, 98 KY. L.J. 263, 263 (2009–2010) (noting that a large number of death row inmates have mental difficulties that may be aggravated by the contemplation of an impending death).

233. See Solomon, *supra* note 61, at 131–37.

234. See MINOW, *supra* note 62, at 52–90.

observes, may affect subjects not only as individuals, or in the aggregate, but as members of identified groups.²³⁵ She argues, for example, that romantic love is scripted in ways that place heterosexuals, but not homosexuals, in the “leading roles.”²³⁶ Heterosexual rituals and patterns of coupling—from “making love” to “starting a family”—shape the content of this emotion, as it is reproduced in language and cultural products such as fiction and film: only heterosexual couples are assumed—and encouraged—to feel romantic love.²³⁷ By implication, legal scripting also creates “outlaw” emotions: emotions that are outside the prevailing script and, as a result, are not considered natural, normal, or legitimate when they emerge in distinct groups or contexts. Laws which proscribe gay or lesbian partnership or marriage thus transform same-sex couples who experience romantic love into “emotional outlaws.”²³⁸

Similarly, informed consent laws that tell women that regret, guilt, or suicidal ideation may follow from an abortion—or a doctrine that tells women that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child”²³⁹—may suggest to women that these are the proper emotions to feel in relation to abortion (versus reproduction). They may transform into “emotional outlaws” those women who feel ambivalence or even relief about the decision to abort, whose primary response to the news of a pregnancy is not a “bond of love,” or who may not experience the embryo or fetus as “[their] child.”²⁴⁰

235. See Calhoun, *supra* note 61, at 217–20.

236. *Id.* at 220–22.

237. Such scripting is not exclusively a legal endeavor: romantic love is scripted both by cultural vehicles—such as films, books, and advertisements—and by laws that limit marriage to heterosexual couples. See *id.* at 217–22.

238. *Id.* at 223–25. An interesting question in this respect may be whether *legalizing* gay marriages may enable gays and lesbians to satisfy the originally heterosexual script. If so, it may offer an affective basis for efforts to bring about legal reform. See *id.* at 236 (arguing that allowing same-sex marriage may impose a threat on “the institution” of marriage). However, this change would still produce a category of emotional outlaws: those gays and lesbians (and perhaps those heterosexuals) who do not follow culturally prescribed patterns for romantic love—i.e., serial monogamists, the polyamorous, and others who do not want to live in long-term, committed, monogamous couplings. See Tucker Culbertson & Jack Jackson, *Proper Objects, Different Subjects and Juridical Horizons in Radical Legal Critique*, in FEMINIST AND QUEER THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 135–40 (Martha Albertson Fineman et al. eds., 2009).

239. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

240. *Id.* Legal scripting can run the gamut from completely intended to

Legal intervention can also engender emotion in specific contexts through *manipulation* or *misdirection*. Here law encourages people to feel a particular emotion, usually positive; yet it does so without adequate basis, so that such feelings are not situationally supported or justified. Where legal actors or institutions understand from the outset that the positive emotions their operations engender are not contextually justified, we might call the legal action “manipulation”; where the realization dawns only over time—making the disappointment of the law’s subjects inadvertent—we might call the relation “misdirection.” Peter Drahos illustrates purposive misdirection in the international approval of a regime of intellectual property protections aimed at benefitting large pharmaceutical companies. Wealthier countries manipulated the hopes of poor countries in securing their acquiescence, by arguing the only prospect of curing now-fatal diseases lay in the spur to scientific discovery provided by such protections.²⁴¹

largely incidental. The example of scripting Calhoun offers is implicitly acknowledged or understood by those legal actors taking part in it, even where it may not be the primary or explicit goal of legal action. See Calhoun, *supra* note 61, at 234–36. Most people would acknowledge that pro-life advocates who focus on women’s guilt or regret aim to induce a particular affective response in a woman contemplating abortion, though opinion might be more divided among members of the *Carhart* Court. See Guthrie, *supra* note 80, at 877–82.

However, scripting can also be nonpurposive or incidental. One recent controversy about nonpurposive scripting concerns the legal doctrine of sexual harassment. There has been a longstanding debate about whether dominance feminism, and the sexual harassment doctrine it has helped to create, generate scripts for women that cast them as diffident, emotionally vulnerable—and thereby marginal—denizens of the workplace. Compare KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS* 85–113 (1993) (suggesting that political correctness on campus has resulted in the label “sexual harassment” becoming overinclusive), with Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 *YALE L.J.* 1533, 1534 (1994) (reviewing ROIPHE, *supra*) (suggesting that Roiphe’s subtext is “that sexualized oppression is mainly a problem inside women’s heads”). It seems unlikely that this was a goal of those who formulated the doctrine. More recently, some feminists and queer theorists have argued that sexual harassment doctrine has scripted not only the subordination of sexuality, but all forms of sexual desire out of the workplace, casting those who exercise sexual desire at work in any way—be it subordinating or mutually enjoyable—as emotional outlaws. See Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061, 2063–72 (2003); see also Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE* 80, 80–104 (Wendy Brown & Janet Halley eds., 2002). Halley’s argument draws on poststructural social theories which bracket the question of the intentionality of decisionmakers; thus, she might not endorse the continuum of purposiveness or intentionality we advance here. *Id.*

241. Peter Drahos, *Trading in Public Hope*, 592 *ANNALS AM. ACAD. POL. &*

An example of the inadvertent misdirection of hopes might be the No Child Left Behind Act of 2001.²⁴² This Act engaged the hopes of a generation of schoolchildren and their parents, particularly children of color and English language learners, by promising to improve academic performance and reduce the performance gaps between groups.²⁴³ But if the Act is inadequately funded, or its test-based strategy fails to deliver, or it offers children the hope of progress without the means within their control to achieve it, the Act may be said to misdirect those hopes—or raise them without justification, albeit inadvertently.

An especially forceful legal intervention in the realm of affective experience is the relationship of *cultivation*. Here law's role is truly ambitious in that it purposefully attempts to bring new emotions into being. Scholars such as Martha Minow²⁴⁴ and Laurel Fletcher²⁴⁵ have investigated the ways that truth commissions and tribunals—often operating in conjunction with other social processes or initiatives—can foster feelings of reconciliation or empathy between former enemies. Our work on hope²⁴⁶ examines the role that law can play in fostering this crucial, but often neglected, emotion. Focusing on the examples of Project Head Start and group litigation involving immigrant sweatshop workers, we discuss the steps that lawyers or legally created institutions can play in cultivating hope by supporting the self-conception, imagination, and agency of groups whose circumstances have made it difficult to develop these qualities, and by giving them the solidaristic support and resources to move deliberately toward larger goals.²⁴⁷ Similarly, Solangel Maldonado proposes to cultivate forgiveness by adding special procedures to the legal process of divorce.²⁴⁸

SOC. SCI. 18, 24–30 (2004).

242. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20, 25, and 42 U.S.C.).

243. Cf. Anita F. Hill, *A History of Hollow Promises: How Choice Jurisprudence Fails to Achieve Educational Equality*, 12 MICH. J. RACE & L. 107, 137–40 (2006) (describing the expectations associated with the Act).

244. See MINOW, *supra* note 62, at 52–90.

245. See Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 597–601 (2002).

246. Abrams & Keren, *supra* note 63.

247. *Id.* at 345–71.

248. Maldonado, *supra* note 64, at 492–94.

Law can also be used to cultivate negative emotions, such as the emotions of fear or shame. Law has been used to cultivate fear or shame quite intentionally—one might point to laws passed restricting the activity, movement, and dress of Jews during the early part of the Nazi regime.²⁴⁹ The intensive restriction and surveillance of activity promoted an atmosphere of fear in Jewish neighborhoods and the requirement to display a yellow Star of David conspicuously on clothing produced a feeling of stigma and shame in the Jewish population.²⁵⁰ These laws had a simultaneous but distinct effect on non-Jews living and working in proximate areas: they encouraged non-Jews to feel disgust or contempt for those so rigorously marked and regulated.²⁵¹

249. For a timeline of restrictive legislation affecting Jews in the first years of Hitler's dictatorship, see United States Holocaust Museum, Examples of Antisemitic Legislation, 1933–1939, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007459> (last visited Apr. 25, 2010). See also Nuremberg Laws on Citizenship and Race, September 15, 1935, <http://frank.mtsu.edu/~baustin/nurmlaw2.html> (last visited Apr. 25, 2010).

250. *Id.* A poignant example of the painfully mixed emotions these regulations inspired in German Jews may be found in a letter from the Organisation of Independent Orthodox Communities to Hitler in 1933 asking for a clarification of the meaning of the regulations. The letter describes “the position of the German Jewry [as] intolerable”; yet it also avows that “[t]he Orthodox Jewry is unwilling to abandon the conviction that it is not the aim of the German Government to destroy the German Jews.” It states that if the Government was “willing to maintain moral Jewry,” the community would “not demand of the Government overnight the cancellation of all the regulations affecting Jews,” as the community did “not wish to create difficulties for the national government.” Memorandum from the Organisation of Independent Orthodox Communities to the German Chancellor (Hitler), October 1933, in DOCUMENTS ON THE HOLOCAUST: SELECTED SOURCES ON THE DESTRUCTION OF THE JEWS OF GERMANY AND AUSTRIA, POLAND, AND THE SOVIET UNION 59–63 (Yitzhak Arad et al. eds., 1981) [hereinafter Orthodox Community Memorandum]. Although this posture of extreme deference may be a product of the authoritarian structure of German society at the time, it may also reflect the abjection and sense of powerlessness produced in the Jewish community by the regulations. We thank Deb Wood for this reference, and this insight.

251. For contemporaneous discussions of the purpose and effect of such regulations, see Robert Weltsch, *Wear It With Pride, The Yellow Badge*, JUEDISCHE RUNDSCHAU, Apr. 4, 1933 (noting that posting of Magen David symbols on all Jewish businesses was “intended as a brand, a sign of contempt” and exhorting Jews to resist it by displaying the symbols with pride). See also Orthodox Community Memorandum, *supra* note 250, at 59–63 (“[T]he position of the German Jewry must be perceived as altogether desperate by the most objective of observers the world over.”). Recent legal efforts to enact shame-based sanctions, such as proposals to mark the clothing or residences of convicted sexual predators, aspire to cultivate similar emotions, both in their immediate targets and in the broader population. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 632–33 (1996).

But the law may also operate to engender fear without such explicit or unitary intention. Jonathan Simon's recent book, *Governing Through Crime*, makes this kind of point: through a range of laws and regulations that seek to combat ostensibly pervasive criminality, legal actors have engendered a fairly widespread culture of fear.²⁵² Here, enhancing collective security by responding to extant or potential criminality may be the primary, or most explicit, goal of governmental action.²⁵³ But the related affective production—the engendering of fear in a broader population that includes those who are neither current nor prospective criminals—may contribute to this goal, or may be a not-entirely-unanticipated effect of so comprehensive an approach to criminality.²⁵⁴

Just as decisionmakers may use the law to cultivate or foster particular emotions, they may also use it to *discourage* or *prevent* them from emerging in particular settings. Sam Bagenstos and Margo Schlanger's argument against the award of hedonic damages is aimed at discouraging pity toward the disabled, which they view as both erroneous and demeaning.²⁵⁵ Along similar lines, courts—such as the majority in *Carhart*—that express concern about post-abortion regret may see themselves as trying to prevent the emergence of that emotion in women facing difficult reproductive choices.²⁵⁶

Perhaps the most conclusive impact that law can have on the emotions is the effect of *destruction*. This operation of law

252. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 4–7 (2007).

253. *See id.* at 75.

254. *See id.* at 260–61.

255. *See Bagenstos & Schlanger, supra* note 82, at 748–52.

256. Chris Guthrie's recent article on regret in the context of abortion seems to ascribe this goal to the Court in *Carhart*. *See Guthrie, supra* note 80, at 877 (citing Judge Kennedy's reasoning: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."). It is possible that some decisionmakers crediting this argument are attempting to prevent regret, while others, such as the advocacy organizations involved in soliciting women's narratives, are more interested in preventing abortions, or in scripting regret in a way that associates it with the choice to obtain an abortion. Robin Toner, *Abortion Foes See Validation for New Tactic*, N.Y. TIMES, May 22, 2007, at A1 (describing a conservative foundation's attempt to document over 2000 women's accounts of post-abortion regret). We see it is as possible that a specific legal strategy could have more than one relation to, or effect on, particular emotions.

on the emotions is often nonpurposive: legally induced affective destruction is most frequently a byproduct of failed legal interventions. Our work with capital lawyers suggests, for example, that clients' hopes can be almost irrevocably destroyed by years of incompetent or uncaring representation.²⁵⁷ Amy Smith's work similarly highlights the destruction of hope by legal norms, which deny post-conviction capital prisoners any control over the timing of execution, dooming them to extended periods of helplessness and uncertainty.²⁵⁸ It is also possible that the law can perpetrate emotional destruction through flawed institutional design. One might think about the kind of affective destruction that can be produced by layer upon layer of mind-deadening bureaucracy. Lucie White underscores these effects in *Notes on the Hearing of Mrs. G.*,²⁵⁹ when she presents a client's unexpected emotional resilience in the face of such bureaucracy as a puzzle or a miracle; we might ask how many more people have been emotionally depleted by a life lived within such legal structures. One can only hope that this kind of destruction is not the result of purposive design by legal actors.

Thus, the law may embody a range of potential relations to the emotions, from relations such as expression, which produce little or no change in the emotion itself, through more active forms of engagement, such as channeling, containment, or management, to relations capable of bringing emotions into being or the reverse, such as scripting, cultivation, or destruction.

b. Uses of the Framework

This framework serves, first, to highlight the fact that law is already actively engaged in shaping the emotions—whether or not legal scholars or actors recognize it. The framework demonstrates many ways in which law may produce “affective externalities”: effects on the emotions that stem from legal actions undertaken for other reasons. These may be wholly unintended (such as the misdirected hopes of No Child Left Behind)²⁶⁰ or partially anticipated but not the primary goal of

257. Interview with Lis Semel & Ty Alper, Univ. of Cal. Berkeley School of Law Death Penalty Clinic, in Berkeley, Cal. (Nov. 16, 2006) (on file with authors).

258. Smith, *supra* note 140, at 238.

259. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 32 (1990).

260. See *supra* notes 242–43.

regulation (such as the scripting of romance as taboo in the workplace under sexual harassment law).²⁶¹ The framework also demonstrates that there are cases in which legal actors quite purposively have undertaken to shape the emotions of those in a particular context—transitional justice regimes following mass violence is one example—though conventional commitment to legal rationality may make it difficult for us to perceive legal action in this way.

For scholars whose goal is to ameliorate the functioning of the law, this framework may highlight the affective consequences of particular doctrinal choices—both intended and unintended—and permit scholars to contemplate doctrinal revision. Doctrinal questions will rarely be formulated in explicitly affective terms, even when emotions are directly implicated. For example, *Carhart* is, strictly speaking, about the constitutionality, under due process, of a federal statute prohibiting one form of late-term abortion.²⁶² The above framework helps to demonstrate that the case may also be described as being about the effects of particular legal rules on the emotions of guilt or regret.

Even more importantly, the framework helps legal analysts contemplating *normative* recommendations to reflect on what kind of legal response is appropriate to produce specific effects on particular emotions. For example, the framework helps us see that the Court, or the state, claims to be preventing the emergence of guilt or regret among women contemplating abortion;²⁶³ but it may also (or instead) be scripting guilt or regret, so that women associate it with the choice to obtain an abortion. Once we understand these potential relations we can ask more explicitly normative questions about what the law *should be* doing in the future. If we credit the government's goal of preventing guilt or regret, we can ask what kinds of solutions—from providing specific information before the procedure, to restricting access to any or all abortion procedures that might cause it—reflect the most plausible alternatives for achieving this goal. If we believe this doctrine also, or primarily, affects the scripting of regret, we can ask whether the risk of negative emotions can be reframed in less portentous terms, or whether the affective costs of providing such information outweigh its ostensible benefits.

261. See Schultz, *supra* note 240, at 2079–84.

262. See *Gonzales v. Carhart*, 550 U.S. 124, 132–33 (2007).

263. See *supra* notes 128–31 and accompanying text.

The same framework can also be used for thinking through legal challenges that implicate legal representation or policy, or have not yet crystallized into a case. For example, if a capital attorney is troubled by the problem of excessive volunteering or suicide on death row, then she might explore forms of legal representation that *cultivate* or at least *manage* hope. Similarly, if legal actors are concerned with the impoverishment of children that may follow a particularly hostile divorce, they may be interested in reforms, such as those examined by Solangel Maldonado, that help to *cultivate* forgiveness or *channel* rage.

For scholars who begin not with the analysis of a legal problem, but with the analysis of an emotion, or for scholars whose goal is to use law to affect emotions in particular ways, this framework may offer illustrative normative possibilities. The relations elaborated above highlight *possible ways* that law can affect emotions; the examples of scholarship associated with each help to illustrate the *kinds of legal strategies* through which such influence has been, or can be, accomplished. Robert Solomon explains how vengeance is cooled, rationalized, or satisfied through certain features of the criminal law.²⁶⁴ Dan Kahan demonstrates how shame might be fostered by alternative criminal sanctions.²⁶⁵ Similarly, we show how programs such as Head Start have successfully cultivated hope in the parents of students.²⁶⁶ So when legal scholars begin to focus on an emotion that they believe might play a salutary role in a particular context, they can draw on a body of work that reflects the range of things that law can do and offers some more instrumental guidance.

2. Normative Means

If law and emotions scholars approach the normative dimension of their work with the goals of enhancing the operation of law, and ameliorating the affective lives of those who live under it, what are the means that they use to advance these goals? In the remainder of this Part, we explore four instrumentalities that law and emotions scholars have used to forward their normative aims: doctrinal revision, institutional design, rhetorical and deliberative strategies, and programmat-

264. See Solomon, *supra* note 61, at 127–31.

265. See Kahan, *supra* note 251, at 605–30.

266. See Abrams & Keren, *supra* note 63, at 363.

ic/policy initiatives.²⁶⁷ Each of these approaches demonstrates that affective analysis can fuel productive legal action.

a. *Doctrinal Revision*

The first, and most familiar, normative means deployed by law and emotions scholars is doctrinal revision. Scholars have advocated changes in doctrine in a wide range of substantive fields, from contract law,²⁶⁸ to constitutional law,²⁶⁹ to statutorily based securities,²⁷⁰ or tort law.²⁷¹ Scholars argue that doctrine is flawed either because it is based on a flawed understanding of the emotions, or it fails completely to apprehend the operation of emotion in the specific legal context: in either case, the answer is revision of the doctrine to encompass the relevant affective knowledge.

Hila Keren argues, for example, that contract law misunderstands the emotions that animate gratuitous promises. Far from reflecting a realm of self-sacrifice that is distant from market relations, the emotions that animate altruism afford benefits to the giver that are importantly comparable to the benefits of market transactions.²⁷² This understanding demands a change in doctrine: some gratuitous promises should be enforced for many of the same reasons applicable to contracts formed in the market.²⁷³ And in the abortion context, Jeremy Blumenthal argues that the *Casey* Court's concern about *factually* misleading

267. This ordering moves from the narrowest and most concrete kinds of legal proposals to the most global or ambitious.

268. *E.g.*, Keren, *supra* note 114, at 25–27.

269. *E.g.*, Blumenthal, *supra* note 145, at 1; Guthrie, *supra* note 80, at 882.

270. See Huang, *Beyond Cost-Benefit Analysis*, *supra* note 66, at 6; Huang, *Regulating Irrational Exuberance*, *supra* note 66, at 518.

271. *E.g.*, Bagenstos & Schlanger, *supra* note 82, at 774.

272. See Keren, *supra* note 92 (manuscript at 12–13).

273. Chris Guthrie argues, similarly, that the Court's decision in *Carhart* is based on a misunderstanding of the focal emotion of regret. Guthrie, *supra* note 80, at 877. Regret is, in fact, better avoided, rationalized, and learned from than the Court appears to believe, rendering it a minimal danger to women contemplating reproductive choices. *Id.* at 881–82. Thus, as Guthrie argues, the flawed reasoning of *Carhart* should not be extended, either to other abortion contexts, or to other constitutional contexts implicating choice in the exercise of protected rights. *Id.* at 882. Additionally, Sam Bagenstos and Margo Schlanger argue that the award of hedonic damages in tort cases involving disability misapprehends the affective experience of the recently disabled: most experience a substantial return of their subjective well-being as they adjust to their disabilities. Bagenstos & Schlanger, *supra* note 82, at 774–75. This revised affective understanding supports the elimination of hedonic damages in the context of tort cases involving the disabled. *Id.*

information in informed consent exchanges fails completely to recognize that information can be factually correct but *affectively* misleading, or distortive of women's decisionmaking processes, as well. The answer, again, is to change the doctrine and to interpret *Casey* in a way that responds to both kinds of threats to women's reproductive decisionmaking.²⁷⁴ Terry Maroney argues that emotional as well as cognitive capacities affect criminal defendants' ability to make the decisions necessary to participate in their own defenses.²⁷⁵ After examining these affective dimensions of competence and explaining how they bear on defense-related decisionmaking,²⁷⁶ she proposes modifying the *Dusky* standard for assessing competence to stand trial,²⁷⁷ to encompass emotional as well as cognitive measures of the "rational understanding" necessary to establish decisional competence.²⁷⁸

b. Institutional Competency or Design

Other scholars engaged in affective analysis have focused not on doctrine but on questions of institutional competency or design. What they have learned about the role of emotions in the decisionmaking process leads them to a conclusion about the optimal decisionmaker in a particular legal context. As we saw above, Cass Sunstein's concern with flawed heuristics in risk assessment leads him to delegate certain forms of such assessment to experts who have been schooled to avoid such reliance.²⁷⁹ Dan Kahan, on the other hand, relies on a different

274. See Blumenthal, *supra* note 145, at 11–12.

275. Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1376 (2006).

276. *Id.* at 1400–25.

277. *Id.* at 1425–33. In *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam), the Supreme Court articulated the applicable standard for adjudicative competency. It held that a defendant is competent to stand trial when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Id.*

278. Maroney, *supra* note 275, at 1399–425. She also argues, more specifically, that psychological and neurological testing might be added to the screening tools, such as the MacCAT-CA (MacArthur Competence Assessment Tool—Criminal Assessment), which are already used to assess cognitive competence. These tools can identify competence-affecting emotional disorders stemming from two kinds of problems: depression and related mood-altering psychological conditions and "Gage matrix" disorder stemming from organic brain damage in the area of the frontal cortex. *Id.* at 1425–31.

279. SUNSTEIN, *supra* note 10, at 64–88. An emphasis on institutional competency or institutional design is another normative feature that some behavioral law and economics scholars share with law and emotions work. Sun-

view of emotions to argue against Sunstein's proposal.²⁸⁰ Emotions, he argues, are not forces that fuel departures from rational decisionmaking; rather they are "judgments of value"²⁸¹ that help us perceive a larger worldview that orients us toward risk. Because all of us, whatever our training, read risk assessment data according to our worldviews, rather than adjusting our worldviews to risk assessment data, efforts to avoid the influence of emotion through reliance on experts are likely to be unavailing.²⁸² The goal of legal policy should instead be to educate laypersons about the evaluative power of their emotions, and to frame policy alternatives in ways that demonstrate their responsiveness to a range of worldviews.²⁸³

A comparable view of emotion and expertise animates Doni Gewirtzman's understanding of constitutional decisionmaking.²⁸⁴ In what we have called the illumination dimension of his work, Gewirtzman observes that emotion has historically been treated as anathema to sound constitutional decisionmaking—as a matter of both constitutional theory and institutional arrangements.²⁸⁵ However, in his investigative work he uses recent psychological research to demonstrate that emotion is integral to two attributes we consider essential to functioning

stein and his sometime-collaborator Richard Thaler, for example, have placed great emphasis on certain institutional design issues they refer to as the "architecture of choice." THALER & SUNSTEIN, *supra* note 84, at 81. This architecture involves, for example, selecting defaults that maximize those choices that the government sees as rational or as maximizing citizens' well-being. *Id.*

280. Kahan, *supra* note 85, at 749–53.

281. *Id.* at 750 (citing MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 19 (2001)).

282. *Id.* at 748–52.

283. *Id.* at 764–65. According to Kahan:

Historically, the view that emotions are "judgments of value" has also been affiliated with the position that emotions can be educated. The type of instruction this approach contemplates, however, consists not in a stoic program of disciplining the mind and strengthening the will to resist the supposedly corrupting influence of emotion on judgment. Instead, it has involved a species of moral instruction that reforms a person's emotional apprehension of the social meanings that unjust or destructive states of affairs and courses of action express.

(citing NUSSBAUM, *supra* note 281, at 218–20, 233, 425–33). *But see* Peter Huang, *Diverse Conceptions of Emotions in Risk Regulation*, 156 U. PA. L. REV. PENNUMBRA 435, 437 (2008), <http://www.pennumbra.com/responses/response.php?rid=40>.

284. Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 625–26 (2009).

285. *Id.* at 635–44.

constitutionalism: commitment and imagination.²⁸⁶ This gives members of the lay citizenry, in whom such emotions flourish, valuable resources to contribute to ongoing constitutional reflection, deliberation, and revision.²⁸⁷ Eventually, at the integration level, Gewirtzman uses this understanding to buttress a burgeoning theoretical interest in popular constitutionalism, and to question the historical primacy of the judiciary in constitutional decisionmaking.²⁸⁸

c. Rhetorical and Deliberative Strategies

Understanding the affective dimensions of a problem can also fuel new rhetorical strategies, or approaches to structuring public debate. In some contexts, scholars have asked whether debates should be framed in affective (as opposed to rational) terms, or whether particular emotions should play a prominent role in legal argument. Douglas Berman and Stephanos Bibas have argued, for example, that grasping the ways that emotions infuse the death penalty should persuade abolitionists to frame their opposition in affective—as opposed to dispassionate—terms.²⁸⁹ Martha Nussbaum and Dan Kahan have debated whether the emotion of disgust should animate the rhetoric, structure the sanctions, or more generally, direct the enforcement of criminal law.²⁹⁰

In other cases, affective understanding points to a new frame or structure for public debate. Dan Kahan and Donald Braman have argued that understanding positions on gun control as a function of “cultural worldview”²⁹¹ rather than rational

286. *Id.* at 632–35.

287. *Id.* at 670.

288. *Id.* at 679–81.

289. See Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 N.W. U. L. REV. COLLOQUY 355, 360–61 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/17/LRColl2008n17Berman&Bibas.pdf>.

290. See, e.g., Kahan, *supra* note 53, at 70; Nussbaum, *supra* note 58, at 19.

291. Kahan’s “cultural theory of risk perception” is not exclusively an emotional theory. He argues that people assess risks not as rational actors, but as individuals with a particular cultural orientation, which embodies a specific set of moral values and societal aspirations. See Kahan & Braman, *supra* note 214, at 1294–95. This cultural view of risk is not modified by empirical evidence; rather, one’s cultural orientation determines what risks, and what empirical evidence regarding risks, one takes as salient. *Id.* at 1295–99. However, emotions are directly implicated in the theory because they provide the perceptual cues to what one values; that is, they aid in one’s perception of the elements of her cultural orientation. See Kahan, *supra* note 85, at 744–48. We consider Kahan’s theory to be closer to a law and emotions theory than behavioral law and economics because its goal is not to correct decisionmaking be-

risk assessment should change our strategy for approaching disputes about gun control regulation. Policymakers have often assumed that we need more empirical information about the relative risks related to different levels of regulating gun possession. Yet, Kahan and Braman contend, if one's cultural orientation²⁹² determines one's response to empirical evidence, rather than vice-versa, we need not more evidence, but rather a form of democratic exchange that permits us to articulate, and openly discuss, means of reconciling competing worldviews, including the emotions they comprise.²⁹³ Attending to affectively infused cultural positions, rather than relying on neutral liberal dialogue about evidence, may prevent the kinds of deliberative breakdown, and harsh affective fallout, that currently infects the debate.²⁹⁴

d. Policy and Programmatic Design

Analysis of the emotions can also inform normative proposals in a final area: policy assessment or programmatic design. Some scholars have used the effect on emotion as a criterion for retrospective assessment of the efficacy of specific legal or governmental programs. This kind of assessment has been prominent in studies of transitional justice, where scholars such as Laurel Fletcher and Harvey Weinstein have asked about the extent to which legal regimes facilitate the gradual restoration of trust or a sense of common purpose among neighbors who have become enemies.²⁹⁵ We have asked, in the

havior so that it more closely resembles that of the rational actor. Rather, it is to transform our understanding of motivation and decisionmaking in a way that makes central those dimensions of self-understanding and choice that reflect a role for affect, and are not readily comprehended by assumptions of rationality.

292. Kahan and Braman rely, for example, on paradigmatic cultural orientations, such as authoritarian, egalitarian, or individualist. See Kahan & Braman, *supra* note 214, at 1297.

293. *Id.* at 1324 ("No amount of econometrics or cost-benefit analysis can tell us how to respond to these risk appraisals; only a frank and open discussion of the competing worldviews that sponsor them can.").

294. *Id.* at 1318. Kahan and Braman's argument does not revolve around a simple opposition between emotion and rationality: the current, flawed version of the gun-control debate features both unhelpful empirical rationality, and pointless affective mudslinging. Their argument is, rather, about the ways that acknowledging the affectively infused, value driven dimensions of risk assessment can integrate emotion and cultural norms in a more productive form of discussion that takes its bearings from worldviews rather than from empirical evidence. *Id.*

295. Fletcher & Weinstein, *supra* note 245, at 617–35.

context of educational policy, what features can make legislated programs suitable for cultivating the hopes of children and their parents, where hope is understood as the ability to conceive and work toward the realization of challenging, long-term goals.²⁹⁶ We then suggested a framework for a cultivation of hope which includes guidelines for engaging in such an effort.²⁹⁷

Scholars whose work has highlighted the value (or the danger) of particular emotions may devise specific policies that are aimed at fostering (or ameliorating) them. This has been a vital recent focus in the area of family law. Solangel Maldonado, working on the emotion of forgiveness, has advocated the use of “forgiveness education” programs which assist family members in ventilating and processing anger, and moving to a posture of greater acceptance and mutual engagement.²⁹⁸ Courts can expand recourse to such programs by ordering participation in the context of legal proceedings such as divorces.²⁹⁹ Clare Huntington’s recent work also includes several examples of affectively driven policy proposals. In her work on “repair” she suggested substantive changes such as creating the status of “coparent” to recognize relationships that continue after rupture,³⁰⁰ and process-based changes such as the use of collaborative law, family group conferencing, mediation, and parenting coordinators.³⁰¹ All these changes better reflect the complex cycles of love, anger, guilt, and repair that, according to her analysis, infuse intact family life as well as divorce.³⁰²

3. Normative Concerns

Doctrinal or programmatic initiatives which reflect an affirmative role for law, or for the state, in cultivating, scripting, or more generally shaping, the emotions have tended to provoke the wariest response from readers and commentators. This kind of normative work draws the fears about intrusive

296. Abrams & Keren, *supra* note 63, at 320–22.

297. *Id.* at 344–60.

298. Maldonado, *supra* note 64, at 483.

299. *Id.*

300. Huntington, *supra* note 64, at 1303–04.

301. *Id.* at 1305.

302. *Id.* at 1304–05. In an even more ambitious work, Huntington argues that a notion of “family flourishing,” drawn from the emerging field of positive psychology, should become the metric for assessing a range of contending family law policies. See Clare Huntington, *Happy Families? Translating Positive Psychology into Family Law*, 16 VA. J. SOC. POL’Y & L. 385, 401 (2009).

state intervention, or the manufacturing of sham emotions that we surveyed earlier.³⁰³ Though a full treatment of such reservations is beyond the scope of this Article, we will conclude with some thoughts that aim to place these concerns in perspective.

First, it is important to acknowledge the normative motivations of many who engage in law and emotions scholarship. Here, again, the comparison to behavioral law and economics, with its focus on description and its ambivalence about making normative recommendations for legal interventions, comes to mind. It is not surprising that traditional law and economics scholars who strongly believe in *homo economicus*, such as Richard Posner, have attacked the behavioral law and economics project as being “useless.”³⁰⁴ It is more remarkable that contributors to the project have expressed internal resistance to normative moves. Gregory Mitchell, for example, has warned that normative engagement will “convert the government into an irrationality monitor” and sound the death-knell of behavioral law and economics by making it “a political movement rather than a scientific endeavor.”³⁰⁵ Within the behavioral project, even scholars who are less opposed to prescriptive work often find themselves equivocal about the normative import of their

303. Another reservation, which Clare Huntington explores, is that such normative initiatives are drawn from interdisciplinary work that is largely descriptive in its focus. See Huntington, *supra* note 64, at 1258. This appears to be more of an internal critique, raised by those working within the law and emotions field to clarify their enterprise, rather than an external critique, offered to problematize the normative dimension of the project. Huntington tries to answer this critique, suggesting that certain means of deploying such work—for example using the notion of flourishing derived from positive psychology as a metric for assessing broad visions and specific policies within the field of family law—mitigates this problem, at least to some degree. See Huntington, *supra* note 302, at 387. This appears to be so because this kind of approach uses a (positive) descriptive theory as a standard, rather than translating it into specific normative programs when it is, in and of itself, normatively indeterminate.

304. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1560–61 (1998).

305. Mitchell, *supra* note 88, at 1811. Mitchell’s arguments presented a challenge to the movement and induced a debate. For a reply to Mitchell, see Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1670 (2003) (arguing that the behavioral law and economics movement “retains great potential to add valuable insights to legal scholarship, despite Mitchell’s withering attack” on the movement). Interestingly, Mitchell himself has recently published a co-authored article in which the behavioral law and economics analysis is self-defined as containing both descriptive and normative arguments. See Adam J. Hirsch & Gregory Mitchell, *Law and Proximity*, 2008 U. ILL. L. REV. 557, 559.

analysis.³⁰⁶ Thus, as a general matter, behavioral law and economics has prompted far fewer objections on the ground of excessive intervention.

Law and emotions scholarship may be greeted with suspicion by some scholars—such as those described above—simply because it increasingly reflects normative motivations.³⁰⁷ But this pattern explains only part of the resistance. Legal scholarship is, by and large, a normative enterprise.³⁰⁸ This suggests that the mainstream scholars may be responding, in part, to the *characteristics* of, or the *kinds* of, normativity that are emerging as part of law and emotions analysis. The forms of normativity that are being proposed are, as the discussion above suggests, far-ranging and various. They are not easily categorized, but they are unlikely to be confined to such goals as correcting human behavior in the direction of rationality, or providing decisionmaking “architecture” to encourage rational choice.³⁰⁹

This variety itself may seem unmanageable to some mainstream scholars, or may prompt fears of excessive legal intervention. Moreover, the motivations for normativity in this work go beyond (although they may also include) a desire to improve the functioning of the law. Normative proposals may be animated by a desire to cultivate, script, or otherwise shape emotions. Both the emotions, as a target of legal effort, and the desire to influence them, as a goal, may appear less objective and more “political” (in the sense of particularistic or partial) than other normative interventions that aim to improve the law. Finally, while normative proposals emerging from law and emotions analysis may sometimes counsel law or legal actors to do less—one may think, for example, of Bagenstos’s and Schlangner’s critique of hedonic damages, or Bandes’s critique of victim impact statements—they also frequently envision a larger role

306. Prentice later wrote about the unenforceability of gratuitous promises in contract law. See Robert A. Prentice, “Law &” *Gratuitous Promises*, 2007 U. ILL. L. REV. 881. He concluded by saying about behavioral law and economics (BLE): “Although BLE analysis makes a very forceful case that the traditional arguments, even as enhanced by economic understanding, cannot justify treating gratuitous promises differently from bargained-for promises, BLE ultimately does not justify overturning the common law’s time-honored conclusion that gift promises should not be enforced.” *Id.* at 937.

307. See *supra* notes 295–306 and accompanying text.

308. See *supra* note 6 and accompanying text.

309. See *supra* notes 87–89 and accompanying text.

for law, and they assume the interpenetration of law with other institutional, social, and cultural forces.

None of these qualities, however, make legal interventions that aim to produce emotional effects pernicious (or, for that matter, salutary) *as a category*. Critiques that view them in such broad terms may reflect the resurfacing of a dichotomized approach to emotion and reason (affectively based grounds for legal intervention are suspect), or a resurgent objectivism (scholarship which is “scientific” is preferable to scholarship which is “political”), more than a response to a specific type of normative intervention. Similar to the “anti-anti-paternalism” message of the more normatively oriented behavioral law and economics—which challenged the sweeping resistance of law and economics to legal interventions in private decisions³¹⁰—the law and emotions movement has convincingly demonstrated the fallacy of comprehensive objection to affectively motivated interventions.

Law and emotions scholarship has also, within its own terms, responded to many of the specific objections that critics have raised. To see emotion as the *sanctum sanctorum* of human personality; to see it as a separate realm, untouchable by the impersonal hand of the law; or to see it as either pure and authentic or as a sham response to state demands, neglects many of the insights that burgeoning research into the emotions has produced. It neglects the deep intertwining of emotion with other forms of cognition. And it neglects the social situatedness of emotion: the ways in which our affective responses—as potent signals of what we value³¹¹—are continually being shaped and informed by the responses of others, and by social and cultural norms.³¹² Finally, these anxieties ignore the point, underscored by law and emotions work itself, that a range of current legal interventions do, in fact, produce emotional effects, whether such effects are wholly incidental, vaguely anticipated, or purposefully contemplated.

All this being said, *particular* interventions in the emotions may be good or bad, promising or ominous—or many combina-

310. See Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1178 (1997) (arguing against libertarian antipaternalism); see also Blumenthal, *supra* note 4, at 56.

311. See Kahan, *supra* note 85, at 774; Nussbaum, *supra* note 58, at 26.

312. See *supra* notes 117–20 and accompanying text. See generally Bandes, *supra* note 120, at 17–22 (describing the effect that the failure to embrace the role of emotion in the law has had on the capital system).

tions of these. They demand assessment, but as specific normative proposals, rather than as a comprehensive category of legal action. There are questions we might propose to promote more useful forms of discussion about particular normative interventions in the emotions.

When evaluating a potential intervention, we may want to think first about the character of the emotion in question.³¹³ We may find it worth sustaining risks of inappropriate interference if we find the emotion in question worthy of cultivation, or particularly promising in a specific context. Similarly, legal action may seem warranted where the emotion is potentially damaging enough—particularly in a specific setting—to warrant management, channeling, or other amelioration. Anger, resentment, or distrust among neighbors in a suburban housing development, or between neighborhoods battling over a locally undesirable land use, may not strike us as demanding legal intervention aimed at the emotions; but anger, distrust, or resentment among neighbors in Bosnia may prompt a different response. Some emotions may also strike us as less public, or more intimate—and they may, therefore, induce greater caution when they are proposed as targets for legal intervention. We may feel less concerned about having our retributive urges cooled through law, for example, than having our love scripted by the state.

However, a large part of what determines whether we find a legal intervention promising or ominous—from the standpoint of either mind control or generation of sham emotions—is the manner or process through which it occurs. One question we may want to ask of such interventions is the extent to which they entail transparency about their affective goals or impacts: we may feel most subject to manipulation when the law, broadly defined, acts on our emotions without making clear what it is doing, or without our being aware of its affective impact. It is not always possible to make such effects accessible to all those who may be influenced. But, frank discussion of why hope should be cultivated or why the possibility of regret is serious enough to justify the intervention of the state may foster valuable discussion and serve to calm anxieties of this sort.

A second question which may be important is whether legal approaches condition specific legal consequences on the

313. Clare Huntington makes the point with respect to state-based norm entrepreneurship that proceeds via the emotions. *See* Huntington, *supra* note 81 (manuscript at 40).

manifestation of particular emotions. Many of the most troublesome examples raised by critics—from Carol Sanger’s concern with the regret of teenagers seeking abortions,³¹⁴ to Austin Sarat’s worry about the remorse of those entering sentencing proceedings³¹⁵—concern this kind of legal demand to perform emotion, on pain of punishment or of losing some significant benefit. Interventions that simply seek to engender emotions, without conditioning legal consequences on their manifestation, may be less intrusive, and may raise fewer concerns about generating inauthentic affective responses.

In the realm of process considerations, it may also be useful to think about the specific legal actor, or the level of government responsible for implementing the intervention.³¹⁶ Head Start may have been a better vehicle than No Child Left Behind for cultivating hope, partially because it was administered through local centers, which had programmatic discretion and could respond to the affective and other needs of particular constituencies. One-size-fits-all efforts to induce affective response, or interventions undertaken at a governmental level which is distant from subjects’ (affective) lives seem to raise more serious concerns.

When these are the questions that are framed and answered, it becomes clear that interventions aimed at shaping affective response are not so distinctive or anomalous. Some interventions may seem problematic; others more innocuous, or even beneficial. They prompt questions about substance, process, and level of government charged with implementation—much like many other kinds of legal intervention. And the body of scholarly thought that informs them and debates their merits is a pragmatic, normatively oriented legal endeavor, like many which have received wider recognition in legal scholarship.

CONCLUSION

This inquiry brings us full circle to the original insight of law and emotions scholarship, which was not simply a challenge to legal rationality, but an appreciation of the vital role of the emotions in human life and in the life of the law. The emer-

314. Sanger, *supra* note 110, at 111.

315. Sarat, *supra* note 51, at 159–63.

316. See Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1331–51 (1988). We are grateful to Rachel Moran for bringing this issue to our attention.

gence of neighboring fields of analysis that permit us to comprehend the limits on rationality is a valuable and illuminating contribution; but it is not enough. Legal thought requires an understanding of emotions not simply as defects of rationality, but also as a distinctive mode of apprehending and navigating the world around us. Developing this understanding requires a body of work which draws on a breadth of humanistic and (social) scientific knowledge, which brings that knowledge to specific legal problems by integrating it into practical solutions, whose utility follows many distinct paths and can be communicated to and adopted by a range of legal actors. So who's afraid of law and the emotions? No one should be.