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“ANOTHER THING NEEDFUL”: EXPLORING EMOTIONS IN LAW

THE PASSIONS OF LAW. Edited by Susan A. Bandes.¹
New York University Press. 1999. Pp. 367. \$35.00.

*Neal Feigenson*²

Law encounters emotion at every turn. Law deals with crimes of passion, property disputes, and divorces that involve fury, despair, and a dozen other feelings. Law is made and implemented by legislators, judges, and jurors who, being human, react to the matters before them with sympathy, anger, or disgust, all of which may affect their judgments. And both legal decisions and the processes by which they are reached can provoke strong emotional responses on the part of litigants and the community—recall the widespread outrage sparked by the verdict in the first Rodney King trial.

The mere ubiquity of emotion in law need not persuade legal scholars and practitioners that the emotions are worth serious study. One might believe, in accord with most legal doctrine and dominant traditions in philosophy and jurisprudence, that emotional influence invariably produces inferior decisionmaking and is simply to be avoided, or its effects contained, where possible. This pejorative view of emotion in judgment is illustrated by Judge Richard Posner's remarks in his contribution to the present volume:

The idea of emotion as a kind of cognitive shortcut explains why jurors, like children, are more likely to make emotional judgments than judges. The less experienced a person is at

1. Professor of Law, DePaul University.

2. Professor of Law, Quinnipiac University School of Law, and Research Affiliate, Yale University Department of Psychology. The essay's title is taken from the title of Chapter One in Book the Third of Charles Dickens's *Hard Times* (1845) and, as explained by Martha Nussbaum, one of the contributors to the present volume and perhaps the leading proponent of studying the significance of emotion in legal judgment, refers to the "intelligence and ineliminability" of emotion in human judgment. Martha Nussbaum, *Emotions as Judgments of Value*, 5 *Yale J. Criticism* 201, 201 (1992).

reasoning through a particular kind of problem, the more likely that person is to “react emotionally,” that is, to fall back on a more primitive mode of reaching a conclusion, the emotional. . . . Emotions, like sex, are something that we have in common with animals, who, having smaller cortexes than humans, rely more heavily than humans do on emotions to guide their actions.³

Those who would police the effects of emotions in law ought at least to be curious about their actual workings, but that curiosity may be dampened by a general disdain for emotion-driven thinking. One might also believe that even if knowing more about how emotions affect behavior and judgment could help legislators and judges to craft better rules and decisions, no such reliable and practical knowledge exists beyond what lawmakers’ “common sense” already tells them. Furthermore, one might take the position that the emotional repercussions of legal processes and decisions on participants and the community are not the law’s concern.

To capture the attention and imagination of mainstream legal scholars and officials, then, a book about emotion in law ought to explain why at least some emotions should be regarded as desirable features of at least some kinds of legal judgments, and how we should go about distinguishing desirable from undesirable emotional influences in various contexts. The book should ground these discussions in the best empirical research and theory on the emotions available in other fields. Like any other interdisciplinary scholarship, it should also be attentive to the controversies and the limits of the findings in those fields.⁴ Ideally, the book would persuade readers that interdisciplinary scholarship can guide practical thinking about the role that specific emotions play, and should play, in framing and deciding important legal problems.

3. Richard A. Posner, *Emotion versus Emotionalism in Law*, in Susan A. Bandes, ed., *The Passions of Law* 311 (New York U. Press, 1999). As the title of his essay indicates, Posner is attempting to distinguish this sort of undesirable “emotionalism” from what he later argues is the desirable use of certain emotions (indignation and empathy) in judging. *Id.* at 322-24. Perhaps most interesting here is that by equating jurors with children, and thence (via sex) with animals, in their emotionality, Posner deploys “emotion” in an all-too-familiar *rhetorical* fashion to support a hierarchy of who is best or least fit to render legal judgments. The premises underlying his contentions do not stand up to scrutiny: For instance, there is no basis for supposing that persons faced with an unfamiliar decisionmaking problem will fall back on emotional as opposed to non-emotional cognitive shortcuts.

4. As pointed out in another review of the present volume. Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 *Cornell L. Rev.* 974, 980 (2001).

The Passions of Law, edited by Susan Bandes, presents thirteen essays by outstanding contributors who investigate the extent to which particular emotions ought to affect law.⁵ The contexts addressed range from the proper place (if any) of anger and vengeance—by victim, judge, or community—in punishment, to whether popular disgust should be relevant to criminalizing a behavior or choosing a penalty for it, to the idea of romantic love underlying the Defense of Marriage Act, to the importance of a judge's emotional traits to his or her decision-making. Collectively the authors deploy their considerable learning from "philosophy, classics, psychology, religion, ethics, law, and social thought" (to cite Bandes's own list on p. 7) to understand some of the myriad descriptive and normative issues posed by the pervasiveness of emotion in law.

In its impressive variety of topics and approaches, *The Passions of Law* indeed "take[s] the conversation about emotion [in law] far beyond easy platitudes about the desirability of compassion, mercy, and love or the dangers of vengeance and resentment." (pp. 14-15) The authors' insightful and intellectually rigorous normative analyses should persuade even casual readers that the place of emotion in law deserves much closer study. The use of empirical research on the emotions in psychology and elsewhere to inform specific issues the editor and authors themselves raise, however, is less consistent, somewhat hampering the collection from achieving the editor's laudable Legal Realist aim of grounding law in (what we think we know about) reality.⁶

The Passions of Law does not offer an overarching theory of the emotions or their effects on legal decisionmaking. This is as it should be, because no generally agreed-upon theory exists. Bandes recognizes that emotion theory and research is immensely complex and that the role of emotions in behavior, including social judgments, is highly variable and context-dependent. (pp. 8, 13) The particularity of the essays is thus well suited to the present state of psychological (and other) knowledge about emotion. The better pieces manage to avoid what Bandes identifies as the twin dangers of reductionism (ignoring the complexities and uncertainties in what other disciplines have learned about emotions) and paralysis (treating

5. *The Passions of Law* arose in part from a conference on the subject of law and emotion held at the University of Chicago Law School in May, 1998.

6. Susan Bandes, *Introduction*, in *Passions* at 8 (cited in note 3) ("[a]t some point, we need to take what we know [about emotions] . . . and incorporate it into our decisionmaking processes").

those complexities and uncertainties as grounds for rejecting emotion theory and research as an aid to legal decision and policymaking). (p. 8) I will mention just a few examples of the authors' nuanced knowledge of other fields and their application of that knowledge to specific legal issues.

Martha Nussbaum argues that disgust should be irrelevant to law—contrary to current practice in a variety of contexts, constitutional and other.⁷ For instance, the disgust of an average member of the community is considered central to defining expression as obscene and thus unprotected by the First Amendment.⁸ Statutes allowing capital juries to impose the death penalty for crimes they believe to be “outrageously or wantonly vile, horrible and inhuman” (or similar language), some of which have been held to violate the Eighth Amendment, invite jurors to factor their disgust into their sentencing decisions.⁹ And the disgust of a killer for his victim's homosexuality is sometimes recognized as a mitigating factor in homicide.¹⁰

Nussbaum first summarizes the psychology of disgust, pointing out that “[i]n all societies . . . disgust expresses a refusal to ingest and thus be contaminated by a potent reminder of one's own mortality and animality,” (p. 25) and that disgust often works by means of “psychological contamination.” We may be disgusted by something not because it is offensive in itself but because it has either been in contact with or is perceived to resemble a disgusting substance. (p. 28) Nussbaum argues that due to these essential features,¹¹ disgust as a type of emotion is inherently unsuited to law. Law should reflect collective judgments based on the “public exchange of reasons,” but feeling

7. Martha C. Nussbaum, *'Secret Sewers of Vice': Disgust, Bodies, and the Law*, in *Passions* at 19-62 (cited in note 3).

8. *Id.* at 39; see *Miller v. California*, 413 U.S. 15 (1973) (stating obscenity test).

9. Nussbaum, *'Secret Sewers of Vice'* at 49-50 (cited in note 7); see, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980) (holding that statute permitting death sentence if offense “outrageously or wantonly vile, horrible and inhuman” violated Eighth and Fourteenth Amendments).

10. Nussbaum, *'Secret Sewers of Vice'* at 35-38 (cited in note 7).

11. Cognitive emotion theorists (of whom Nussbaum is one) posit that each type of emotion has a distinct “cognitive structure” which reflects the kind of appraisal of and reaction to the world that that emotion (implicitly) represents. See, e.g., Andrew Ortony, Gerald L. Clore, and Allan Collins, *The Cognitive Structure of Emotions* (Cambridge U. Press, 1988). Similarly, psychologist Richard Lazarus calls each emotion's defining structure its “core relational theme.” Richard Lazarus, *Universal Antecedents of the Emotions*, in Paul Ekman and Richard J. Davidson, eds., *The Nature of Emotion* 163, 164 (Oxford U. Press, 1994) (defining the core relational theme of disgust, e.g., as “[t]aking in or being too close to an indigestible [sic] object or idea (metaphorically speaking)”).

disgust does not “provide[] the disgusted person with a set of reasons that can be used for purposes of public persuasion.” (p. 27) One cannot formulate “publicly articulable reasons” to persuade another to be disgusted by something that person is not already disgusted by. (p. 27) In this respect disgust is unlike, say, anger and indignation, which are based (in part) on the perception that one (or one’s community) has been wronged.¹² “The reasons underlying a person’s indignation can be false or groundless,” but often those reasons can at least be identified and articulated; and “if they stand up to scrutiny, we can expect our friends and fellow citizens to share them.” (p. 26)

Might the experience of disgust nevertheless be valuable to legal decisionmakers by providing a visceral signal that something is to be disvalued and hence avoided?¹³ No, argues Nussbaum, because our occasional disgust reactions toward *other people* are too likely to have been socially engineered by dominant groups to disparage and exclude disfavored groups: women, Jews, homosexuals, persons of color.¹⁴ For the law to recognize a jury’s disgust at an allegedly obscene object or a criminal’s disgust at his homosexual victim (Nussbaum analyzes specific cases of each in detail) is to validate misogynistic or homophobic fears of bodily contamination—not justifications that belong in a democratic society committed to equality. (pp. 35-42) Moreover, for the law to permit a jury to take its disgust (as opposed to its anger or even outrage) at a homicide into account when determining how severely to punish the offender is to encourage the perception of criminal defendants as “heinous monsters more or less outside the boundaries of our moral universe,” (p. 50) an attitude that fosters ever more extreme reactions to crime and protects us from having to consider whether we ourselves might not do awful things were our luck and circumstances different. (pp. 51-52)

12. Nussbaum, ‘*Secret Sewers of Vice*’ at 26 (cited in note 7); see also Lazarus, *Universal Antecedents* at 164 (cited in note 11) (defining core relational theme of anger as “[a] demeaning offense against me and mine”).

13. See, e.g., Antonio R. Damasio, *Descartes’ Error: Emotion, Reason, and the Human Brain* 165-201 (G. P. Putnam’s Sons, 1994) (defining emotions as “somatic markers” that help us to choose among alternative courses of action).

14. Nussbaum, ‘*Secret Sewers of Vice*’ at 29 (cited in note 7); cf. Daniel Farber and Suzanna Sherry, *The Pariah Principle*, 13 Const. Comm. 257, 265-67 (1996) (describing people’s experiences of being treated as untouchables or pariahs, and arguing that the equal protection clause stands for the principle that government cannot pass legislation that creates or encourages that sort of treatment).

Nussbaum's argument that decisionmakers' disgust at crimes or offenders should be irrelevant to their decisions is disputed by Dan Kahan.¹⁵ Readers will draw their own conclusions, but it seems to me that Nussbaum has the better of this debate. For example, both discuss a case in which the state refused to turn over to the representatives of a man convicted of the sexual torture and murder of a woman the items he had used in the crime and various pornographic literature the state had seized from him. The court ruled that returning the property would not be consistent with the public interest (the statutory standard for dealing with the return of seized property): It would "offen[d] basic concepts of decency" because of the connection between that property and the gruesome crime itself. Kahan argues that only disgust can explain why the court's decision is correct. He contends that the decision cannot be justified on the grounds of rehabilitation of the convict (he was serving a life term without parole) or general deterrence (it is unlikely that the forfeiture of such property adds any marginal deterrence to such a severe sentence, and it is unclear how deterrence required the convict to forfeit these particular items, as opposed to money or other things of equal value). The only sufficient explanation, Kahan asserts, is the court's disgust at giving back to the criminal things that "bore the unmistakable aura of his crime," lest "the state itself [become] complicit in his depravity." (pp. 66-68)

Nussbaum counters that public outrage and incredulity, the other two emotions (in addition to disgust) which the state specifically claimed would be a likely result of granting the criminal's request, themselves adequately explain the correctness of the decision; disgust need not be relied upon. The public would justifiably be both angered and astonished to learn that the criminal was being rewarded, by the return of his property, "in just that area where he should be most severely punished," and would view the act as profoundly disrespectful to the victim. (pp. 53-54) I would simply add that the sense of outrage Nussbaum posits encompasses core notions of equity and reciprocity that have long been recognized as fundamental to justice (*e.g.*, an eye for an eye),¹⁶ so (*contra* Kahan) we do not need disgust to explain why the criminal's punishment must include depriving him of the very instrumentalities of his crime. Moreover, while

15. Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *Passions* at 63-79 (cited in note 3).

16. See Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in *Passions* at 123, 124, 137-40 (cited in note 3).

Kahan is correct to point out that disgust is not the only emotion that may encourage distancing or excluding the target as an inferior person (as Nussbaum seems to argue) (pp. 51, 54)—indignation often serves to reaffirm social hierarchy¹⁷—Nussbaum properly emphasizes the peculiar danger of disgust because, more so than indignation or other emotions, disgust “treat[s] the criminal like an insect or a slug, outside of our moral community.” (p. 54)

Different cultures deal differently with the emotions that crime and punishment generate. Danielle Allen, a professor of classics, turns to ancient Greek sources as an exercise in comparative sociology (or criminology).¹⁸ Allen suggests a reconception of how modern punishment may deal with the victim’s and the community’s anger at crime. Our society is anxious about punishment: Denying its basis in the retributive emotions of anger and vengeance sounds as false to human nature as Michael Dukakis famously did during his 1988 presidential campaign debate,¹⁹ but admitting it risks tying punishment too closely to those potentially ugly and unruly emotions. Allen observes that Athenians in the classical period seem not to have experienced this anxiety. “The Athenians had no doubts about why they punished: it was simply because someone was *angry* at a wrong and wanted to have that anger dealt with.” (p. 194) But they also viewed crime and punishment, and the anger underlying both, as a “disease in which everyone was implicated”—wrongdoer, victim, and community. (p. 194-95) The object of punishment was not simply to give vent to the victim’s and the community’s anger at the offender, but to restore the communal peace that the crime had disrupted. (p. 197) The annual festival

17. Kahan, *Progressive Appropriation of Disgust* at 77-78 n.33 (cited in note 15); see also Farber and Sherry, 13 *Const. Comm.* at 270-71 (cited in note 14) (identifying “[a]nimus and hostility” as improper motivations for government action insofar as they lead to caste legislation). Note also that fear or anxiety may lead to defensive attribution, by which the decisionmaker distances himself or herself from and blames the person being judged. See Neal Feigenson, *Legal Blame: How Jurors Think and Talk About Accidents* 84-85 (American Psychological Association, 2000).

18. Danielle S. Allen, *Democratic Dis-ease: Of Anger and the Troubling Nature of Punishment*, in *Passions* at 191-214 (cited in note 3).

19. When asked during a debate with then-Vice President George Bush whether he would favor the death penalty if his wife, Kitty, were raped and murdered, Dukakis, “[r]ather than expressing outrage at the very mention of such a brutal crime, . . . gave a detached, emotionless defense of his opposition to capital punishment. The answer was viewed as so damaging to Mr. Dukakis’ campaign that no Democratic presidential nominee since then has opposed the death penalty.” Bill Sammon, *Liberals See Death Penalty As Issue*, *Washington Times* (June 14, 2000), <<http://www.usembassy.lt/pas/hyperfile/efs506.htm>> (visited May 22, 2001).

of scapegoating was a way of acknowledging that the anger and disruption caused by crime was a problem the entire community shared, to be resolved by communal action. (p. 198) Leading philosophers have since directed our attention otherwise: Plato focused on the wrongdoer, not the community, as the sole bearer of "disease," justifying punishment that excluded the wrongdoer from the community, (p. 201) and Kant sought to explain retributive punishment without reference to anger at all. (pp. 201-03) Hence our present inability to resolve the anger that motivates both crime and our responses to it. Allen does not pursue specifically how contemporary punishment might make its retributive core more ethically satisfying, but other work on forgiveness and criminal law has begun to do so.²⁰

As Nussbaum's and Allen's essays show, determining whether to censure or embrace a particular emotion for purposes of legal decisionmaking is a complex matter. No contributor to *The Passions of Law* better appreciates how our imperfect understanding of our emotions ought to complicate the making and interpreting of emotion-relevant law than William Ian Miller.²¹ Miller closely and colorfully analyzes the Uniform Code of Military Justice's proscription of "Misbehavior before the enemy," including running away and other acts of cowardice. Typical is Miller's psychological exegesis of the following recollection by a Union officer during the Civil War:

I wondered then, and I wonder now equally, at the mystery of bravery. It seemed to me, as I saw men facing death at Fredericksburg, that they were heroes or cowards in spite of themselves. In the charge I saw one soldier falter repeatedly, bowing as if before a hurricane. He would gather himself together, gain his place in the ranks, and again drop behind. Once or twice he fell to his knees, and at last he sank to the ground, still gripping his musket and bowing his head. I lifted him to his feet and said, "Coward!" It was cruel, it was wicked; but I failed to notice his almost agonized effort to command himself. I repeated the bitter word, "Coward!" His pale, distorted face flamed. He flung at me, "You lie!" Yet he didn't move; he couldn't; his legs would not obey him. I left him there in the mud. Soon after the battle he came to me with tears in his eyes and said, "Adjutant, pardon me, I

20. See, e.g., Robert D. Enright and Joanna North, eds., *Exploring Forgiveness* (U. of Wisconsin Press, 1998), especially the chapters by Walter J. Dickey and David Couper.

21. William Ian Miller, *Fear, Weak Legs, and Running Away: A Soldier's Story*, in *Passions* at 241-64 (cited in note 3).

couldn't go on; but I'm not a coward." Pardon him! I asked his forgiveness. (pp. 247-48)

Should this soldier have been subject to court-martial under what is now the catch-all subsection (5), which punishes soldiers "guilty of cowardly conduct," if not also the more specific subsection (8), which punishes a soldier who "willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops"? To warrant prosecution under the Code, cowardly conduct must be motivated by fear, but how do we know that another person was moved by fear, when other emotions can generate fear's prototypical blanching, sweats, or weakness, and when fearful people can suppress these bodily markers? (pp. 245-46) And if this soldier was not afraid, then how to explain his weak legs, which would not obey his conscious will? "Without a convincing account of mind and body, emotion and body, we do not know how to apportion blame as between body and soul." (p. 248) More broadly, which fear-driven fleeing or failing to attack gets punished when almost all soldiers in all ages are presumptively, and justifiably, afraid in battle? Miller proceeds to make much good sense of the statute's amalgam of dictates against fearful conduct, but ultimately what sets his contribution apart from most of the others in the book is his acknowledgment of how difficult it may be to reconcile legal rules with psychological reality in cases in which our grasp of the latter is uncertain.

The essays in *The Passions of Law* indicate the breadth of emotion-in-law inquiry not simply by addressing such an impressive variety of legal topics but also by implicating so many different ways in which emotions figure in law. At least nine are examined: (1) the extent to which the law should recognize specific emotions of legal *actors* by making those emotions explicit (or strongly implicit) factors in or elements of the relevant legal claim or defense;²² (2) how particular emotional reactions to certain acts shared by (the vast majority of?) members of the *community* constitute "the bedrock of many of our moral rules"

22. E.g., Posner, *Emotion versus Emotionalism* at 313-17 (cited in note 3) (disputing that a criminal's hate for the victim [as currently identified by "hate crimes"] should warrant more severe punishment than would the same offense if not motivated by hatred); Nussbaum, 'Secret Sewers of Vice' at 35-38 (cited in note 7) (arguing that a homicide defendant's disgust toward his homosexual victim should not be recognized as a provocation, mitigating his punishment); Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, in *Passions* at 168-90 (cited in note 3) (explaining that popular culture considers a criminal's remorse relevant to the degree of punishment the criminal deserves).

that are also *legal* rules;²³ (3) how popular understandings of particular emotions may contribute to the implicit knowledge frameworks that lead *legislators* to craft laws as they do;²⁴ (4) whether particular emotional reactions by *decisionmakers* are reliable guides to what constitutes an instance of an offense²⁵ or what punishment is deserved;²⁶ (5) the extent to which good *decisionmaking* depends on having or being capable of having a particular *emotional state* or sufficient “emotional intelligence” more generally;²⁷ (6) whether the law should attempt to *induce specific emotions* in convicted criminals;²⁸ (7) how the law should respond to the presence of specific emotional reactions on the part of *victims* of crime or the *community* in which the crime is committed (say, anger)—reject, tolerate, or welcome that emotion (perhaps with conditions) into the decisionmaking process;²⁹ (8) relatedly, how legal processes and institutions may perform a *therapeutic* role by helping victims cope with their emotions³⁰ or communities channel anger at wrongdoing into “building bridges” with transgressors and among themselves;³¹ and finally (9) how *law’s authority* may depend on an emotional bond between the law and its subjects.³² Furthermore, the inclu-

23. Posner, *Emotion versus Emotionalism* at 318, 322 (cited in note 3) (enumerating list of “moral offenses”).

24. Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love, in Passions* at 217-40 (cited in note 3) (contending that homosexuals are excluded from popular notions of romantic love, which underlies their unequal treatment under laws such as the Defense of Marriage Act); Miller, *Fear, Weak Legs, and Running Away* at 241-64 (cited in note 21) (investigating fear-inspired cowardice).

25. E.g., Kahan, *Progressive Appropriation of Disgust* at 69-71 (cited in note 15) (arguing that disgust properly signals “hate crime”).

26. E.g., Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the ‘Clumsy Moral Philosophy’ of Jesus Christ*, in *Passions* at 149-67 (cited in note 3) (doubting whether resentment, guilt, or any other emotion properly undergirds retribution).

27. E.g., id. (advocating moral humility); Posner, *Emotion versus Emotionalism* at 322-24 (cited in note 3) (arguing that judges should be capable of indignation and empathy); Samuel H. Pillsbury, *Harlan, Holmes, and the Passions of Justice*, in *Passions* at 330-62 (cited in note 3) (relating the first John Marshall Harlan’s capacity for outrage and Oliver Wendell Holmes’s passion for ideas to their leading decisions).

28. Toni M. Massaro, *Show (Some) Emotions*, in *Passions* at 80-120 (cited in note 3) (arguing against the imposition of shaming penalties to induce humiliation); Posner, *Emotion versus Emotionalism* at 319-21 (cited in note 3) (largely agreeing, though stating his position less forcefully).

29. E.g., Solomon, *Justice v. Vengeance* at 123-48 (cited in note 16) (justifying vengeance, properly construed, as part of the process of punishment); Allen, *Democratic Dis-ease* at 191-214 (cited in note 18).

30. Martha Minow, *Institutions and Emotions: Redressing Mass Violence*, in *Passions* at 264-81 (cited in note 3) (discussing truth and reconciliation commissions and other responses to mass violence).

31. Sarat, *Remorse, Responsibility, and Criminal Punishment* at 178, 182 (cited in note 22); Allen, *Democratic Dis-ease* at 195-98 (cited in note 18).

32. John Deigh, *Emotion and the Authority of Law: Variation on Themes in Ben-*

sion of essays that apply a single emotion to a variety of legal contexts (e.g., Nussbaum on disgust) as well as those that explore the multiple emotions relevant to a single legal context (e.g., Jeffrie Murphy on retributive emotions and moral humility in punishment) hints by a kind of synecdoche at the kinds of interactions that a comprehensive, systematic treatment of emotions in law would survey. By thus suggesting the range and complexity of interrelationships among specific emotions, types of legal problems, and aspects of legal processes, *The Passions of Law* should, at the very least, discourage legal scholars and judges from overly facile treatments of the subject.³³

The particularity of the respective authors' approaches is partly at odds with another generally desirable feature of anthologies, which is that the essays should speak to each other or at least cross paths. Yet the essays here accomplish this to some extent. For instance, in Part I, "Disgust and Shame," Nussbaum and Kahan explicitly engage one another on the relevance of decisionmakers' disgust to their judgments, and Toni Massaro takes on Kahan's advocacy of shaming penalties by arguing, among other things, that the variability of people's susceptibility to, experiences of, and behavioral responses to shame are likely to undermine the goals of shaming.³⁴ In Part II, "Remorse and the Desire for Revenge," Jeffrie Murphy, Robert Solomon, and Danielle Allen each present a different perspective on the extent to which the retributive emotions supply a valid basis for punishment (and Solomon explicitly refers to Murphy's essay). Solomon, Allen, and Austin Sarat also sound a theme that resonates with one of Nussbaum's main concerns: how coming to terms with the emotions that we feel when punishing the guilty can affect relationships among offender, victim, and community, and hence the ongoing well-being of the community.³⁵ And in

tham and Austin, in *Passions* at 285-308 (cited in note 3).

33. Of the sort for which Pillsbury criticizes Judge Hiller Zobel in the Louise Woodward trial, the famous "Nanny Case." See Pillsbury, *Harlan, Holmes, and the Passions of Justice* at 354-56 (cited in note 27).

34. Massaro, *Show (Some) Emotions* at 84-97 (cited in note 28). Massaro also cautions against Kahan's advocacy (implicit in the title of his essay) that liberals "fight disgust with disgust," explaining: "We cannot assume that the release of our suppressed disgust and revulsion toward criminals will inevitably yield more enlightened justice because we will better contain the excesses of our strong emotions if they are exposed to the light of public scrutiny than if they go underground and resurface elsewhere." *Id.* at 99.

35. See Nussbaum, '*Secret Sewers of Vice*' at 51-52 (cited in note 7) (arguing that validating disgust at offenders tends to treat them as aliens, excludable from the community); Solomon, *Justice v. Vengeance* at 142-43 (cited in note 16) (claiming that vengeance, properly construed, cares about the relationship between victim, offender, and avenger); Murphy, *Moral Epistemology* at 159-60 (cited in note 26) (arguing that moral

Part IV, "The Passion for Justice," Posner disagrees with Kahan on hate crimes.³⁶ Kahan contends that disgust inevitably infuses the law's evaluation of certain crimes and criminals, so liberals would do well, through hate crime legislation (or other means), to see that the law reflects *their* valuations of what sorts of criminals ought to be especially despised (*i.e.*, those who target members of oppressed groups for violence).³⁷ Posner believes this political or ideological component of hate crime laws is precisely why they should *not* be allowed, and dismisses the Supreme Court's ostensibly non-political defense of those laws against First Amendment challenge as "judicial sophistry."³⁸

The topics highlighted by the presence of these colloquies are no less worthy of emphasis than others the editor and/or contributors might have chosen. Of course, any collection of essays is bound to omit some important subjects. Given Bandes's own enumeration of the legal contexts that emotion pervades, (p. 2) readers might also have looked for analyses of the role of emotions in civil (as opposed to criminal) cases³⁹ and in lawyer-client relations and advocacy (as opposed to legislation and adjudication). Some of those analyses would be of particular interest to constitutional law scholars. For example, because the reprehensibility of a tort defendant's conduct is central to the reasonable-

humility forces those who sit in judgment to face the question whether it is superior moral character rather than luck or circumstance that has led them to avoid being the one judged); Sarat, *Remorse, Responsibility, and Criminal Punishment* at 178, 182 (cited in note 22) (stating that "[r]emorse builds a bridge between offender and the community astonished by his deed"); Allen, *Democratic Dis-ease* at 204-06 (cited in note 18) (arguing that classical Athenian criminal procedure tried to resolve anger in order to repair the damage to the community done by the crime).

36. Posner, *Emotion versus Emotionalism* at 313-17 (cited in note 3). Posner cites an earlier article by Kahan and Nussbaum as exemplary of the position with which he disagrees. *Id.* at 315 n.9. See Dan M. Kahan and Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269 (1996).

37. Kahan, *Progressive Appropriation of Disgust* at 69-71 (cited in note 15).

38. Posner, *Emotion versus Emotionalism* at 316 (cited in note 3) (citing *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)). Posner also disagrees with Nussbaum on the legal significance of disgust and with Kahan on the viability of shaming penalties. *Id.* at 319-22. Also in Part IV, Pillsbury diverges from Nussbaum on the general relationship between emotion and the kind of public discourse ideally reflected in law, largely because they look at different ends of the emotion elephant: Nussbaum at particular emotional *states* that she argues do (indignation) or do not (disgust) support such discourse, while Pillsbury is concerned with individual variations in emotional *traits* (which, of course, would cut against intersubjective agreement of the sort required to support a shared discourse). Compare Pillsbury, *Harlan, Holmes, and the Passions of Justice* at 352 (cited in note 27) with Nussbaum, 'Secret Sewers of Vice' at 26-17 (cited in note 7). Otherwise, the essays in Parts III ("Love, Forgiveness, and Cowardice") and IV do not join issue with each other or with essays elsewhere in the book.

39. Minow, *Institutions and Emotions* at 272-76 (cited in note 30), does address the supposed therapeutic functions of ADR, drawing on cognitive emotion theory.

ness of any punitive damage award,⁴⁰ an examination of how anger and related emotions bear on perceived reprehensibility would be germane to the evaluation of punitive damages under the Due Process Clause. Another worthwhile inquiry could address the relevance of lawyers' emotions and emotional labors (e.g., the suppression of unpleasant emotions or the reduction of dissonance among conflicting emotional commitments)⁴¹ to their clients' right to effective assistance of counsel.⁴²

In addition, while some of the essays provide the sort of detailed legal contextualization which Bandes correctly posits as essential for understanding the roles that emotions do and ought to play in legal judgment, (pp. 9, 12-13) others do not achieve the same specific, practical focus. The essays in Part II on anger, vengeance, and remorse in criminal law, for instance, plainly bear on the heated constitutional litigation regarding victim impact statements,⁴³ about which Bandes herself, among others, has written so well.⁴⁴ Yet the essays in this portion of the book mention victim impact statements only once.⁴⁵

A more serious limitation of *The Passions of Law* is its failure to make better use of available interdisciplinary scholarship on the emotions. Those inclined to take emotions in law seriously need whatever guidance empirical research can offer about how particular emotions work, what stimuli provoke them, and what effects they are likely to have on the various processes of legal judgment, so that they may think most productively about whether and how the law should respond to those emotions. To begin with, the introduction might have situated the essays more

40. E.g., *BMW of North America v. Gore*, 517 U.S. 559, 575 (1996) (holding punitive damage award 500 times the amount of plaintiff's actual harm to be "grossly excessive" and thus in violation of Due Process Clause of Fourteenth Amendment).

41. See, e.g., *The Role of Emotion in Lawyering* (panel presentation by Susan Bandes, Robert Rosen, and Neal Feigenson, Working Group on Law, Culture, and the Humanities, Washington, DC, March 10, 2000) (papers on file with author).

42. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984) (holding defendant's Sixth Amendment right to effective assistance of counsel not violated during capital sentencing phase even though court-appointed lawyer admitted feeling "hopeless" about saving defendant's life and conducted no investigation into possible mitigating factors).

43. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991) (holding Eighth Amendment permits capital juries to hear victim impact evidence in sentencing phase).

44. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361 (1996).

45. Sarat, *Remorse, Responsibility, and Criminal Punishment* at 178, 189 n.53 (cited in note 22). Among the essays lacking in practical focus I would also include Deigh, *Emotion and the Authority of Law* (cited in note 32) (which, to be fair, is a work of theoretical jurisprudence which does not purport to apply to specific, practical legal problems).

firmly in the relevant literatures. During the last decade or so, for instance, a growing number of articles in law reviews and interdisciplinary journals such as *Law and Human Behavior* have drawn on psychology to explore the place of emotion in law. A brief literature review would help establish this context.⁴⁶

The Passions of Law offers much valuable philosophizing about emotion, some of it by the most distinguished persons in the field. Not only is philosophical analysis required to determine whether particular emotions *ought* to figure in legal judgment, but it is hard to imagine useful empirical research on the emotions without philosophical underpinnings that help to shape the research hypotheses and the interpretation of their significance. Greater empiricism, however, would help tether philosophical argument to the book's stated practical purposes.

Some of the essays are explicitly well grounded in psychology and other emotion research and theory. For instance, Nussbaum, Massaro, and Calhoun all cite sufficiently for purposes of their respective arguments to relevant empirical research, and Massaro and Miller are especially sensitive to the limits of the knowledge on which they draw. (Solomon's citations are less extensive but he writes with the authority of being himself the author of leading works in the field.)⁴⁷ By contrast, Minow, who writes clearly, albeit briefly, about the psychological effects of dispute resolution processes, cites to only one source in the field, a collection of readings, while Posner lists cognitive theorists of emotion in his first footnote but otherwise refers to only two articles in interdisciplinary (psychology and law) journals. More is needed.⁴⁸ Here are a few ways in which research on the emotions can assist legal scholars and practitioners in dealing with specific issues raised in the book.

46. It would also have been helpful to include in the introduction or perhaps in an appendix a brief list of references to leading background literature on emotion research and theory in general, as well as to other work on important specific psychological and other questions that the essays in the book necessarily address in a limited fashion if at all.

47. E.g., *Passions* (Anchor Press, Doubleday, 1976); *A Passion for Justice* (Adisson-Wesley, 1990).

48. Doing better interdisciplinary work by utilizing emotion research and theory better is *not* a matter of first nailing down some consensus definition of "emotion" or agreed-upon theory of how to understand emotions. As Bandes correctly recognizes, there are no such things, and the essays themselves prove that this lack of foundations in the source discipline is no insuperable obstacle to useful inquiry into emotions in law. *Introduction* at 10-11 (cited in note 6). I agree, however, with Laura Little's argument that a deeper understanding of emotion theory would illuminate some of the debates in the present volume. See Little, 86 *Cornell L. Rev.* at 981-86 (cited in note 4).

One obvious and important question raised by inquiries into the proper role of emotion in law concerns the ability of people to regulate their emotional responses and associated behaviors. If and to the extent that reflection leads us to want to discourage the use of certain emotions in legal decisionmaking (as Nussbaum would like to do with disgust, (p. 22) and Posner, (excess) "emotionalism" (pp. 311, 324)) how can this be done, given that proscribing emotion in the letter of the law hardly assures its absence in practice? (Consider, for instance, the admonition in standard civil jury instructions that jurors are "not to be swayed by sympathy for or prejudice against either party.") Conversely, can the law "educate" decisionmakers to *include* desirable emotions in their judgment processes, as Bandes wonders? (p. 14) A substantial literature on emotional intelligence⁴⁹ and emotional control⁵⁰ indicates that decisionmakers may, in some circumstances and to some extent, regulate their emotional responses to the matters before them and the effects of those responses on their judgments. Research also indicates conditions under which attempts at emotional regulation may be ineffective or even backfire, leading to *greater* reliance on the proscribed feeling.⁵¹

Another way to mitigate decisionmakers' use of unwanted emotions is to exclude emotion-provoking stimuli. As Posner recognizes, "[t]he law has an elaborate set of doctrines for fending off dangerous intrusions of emotion into the judicial process A proper understanding and critique of these rules [of evidence] might profit greatly from a careful examination of them in the light cast by the systematic study of the role of emotions in law." (p. 327) This is but part of a broader issue, logically prior to emotional self-regulation, on which emotion research can shed light: How *do* emotions actually interact with non-emotional cognitions to produce legal judgments? Apart from Posner's cogent but incomplete discussion of how empathy can help counter the availability heuristic, (pp. 323-24) the authors do not make much use of the psychological research and theory on emotions and social judgment.⁵² Readers could better

49. See, e.g., Daniel Goleman, *Emotional Intelligence* (Bantam Books, 1995); Peter Salovey and John D. Mayer, *Emotional Intelligence, 9 Imagination, Cognition, & Personality* 185 (1990).

50. See generally, e.g., Daniel Wegner and James Pennebaker, eds., *Handbook of Mental Control* (Prentice Hall, 1993).

51. See, e.g., Kari Edwards and Tamara S. Bryan, *Judgmental Biases Produced by Instructions to Disregard: The (Paradoxical) Case of Emotional Information*, 23 *Personality & Soc. Psychol. Bull.* 849 (1997).

52. See, e.g., Joseph P. Forgas, ed., *Emotion and Social Judgments* (Pergamon

evaluate Posner's call for judicial empathy, for instance, if they knew more about empathy's other effects on judgment, including the subjectivity and other biases to which the perspective-taking inherent in empathy has been shown to lead.⁵³ Without drawing on that kind of research, legal scholars can hardly hope to determine whether and when "emotion in concert with cognition [may] lead[] to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions," as Bandes believes it does. (p. 7)

Several essays debate whether it is better to bring to the surface and thus confront the emotions that may be driving our decisions than to ignore or suppress them, especially emotions that are likely to be destructive.⁵⁴ In addition to the work on emotional intelligence and control mentioned above, which would help legal scholars understand the limits of our abilities to recognize and respond to our emotions, psychological studies of the health and other effects of individuals' suppression or expression of emotion⁵⁵ could (to the extent these findings are generalizable from individual to group effects) help the legal community evaluate the likely consequences of welcoming versus excluding particular emotions from legal decisionmaking.

Finally, a number of the essays raise the issue of how individual variations in emotional experience and behavior should affect legal policy and decisionmaking.⁵⁶ Massaro supports her argument on this point with references to psychological work on shaming, but does not make use of research on emotional state variations across individuals more generally. And Pillsbury, who

Press, 1991); Joseph P. Forgas, ed., *Feeling and Thinking* (Cambridge U. Press, 2000). For references to the literature and analyses of the effects of particular emotions on legal judgments, see Feigenson, *Legal Blame* at 74-86 (cited in note 17).

53. See Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 *Tenn. L. Rev.* 1, 46-64 (1997).

54. See Massaro, *Show (Some) Emotions* at 98-101 (cited in note 28) (Massaro disputes Kahan's contention that it is better for the law to express disgust with a criminal than to suppress it); Allen, *Democratic Dis-ease* at 205-06 (cited in note 18) (arguing that community may benefit by acknowledging and attempting to resolve the anger behind the urge to punish).

55. See, e.g., James Pennebaker, *Confession, Inhibition, and Disease*, in Leonard Berkowitz, ed., 22 *Advances in Experimental Social Psychology* 211 (1989); Keith J. Petrie, Roger J. Booth, and James W. Pennebaker, *The Immunological Effects of Thought Suppression*, 75 *J. Personality & Soc. Psychol.* 1264 (1998).

56. See Bandes, *Introduction* at 13 (cited in note 6) (raising the issue); Massaro, *Show (Some) Emotions* at 82-89 (cited in note 28) (arguing that individual variations in experience of and response to shame undermine validity of shaming penalties); Pillsbury, *Harlan, Holmes, and the Passions of Justice* at 334-49 (cited in note 27) (discussing effect of judges' emotional traits on their decisionmaking).

alone in the anthology analyzes the effect of individual differences in emotional *traits* on legal decisionmaking, does not cite to any of the psychology literature on this subject.⁵⁷ A more thorough consideration of what psychology and other empirical disciplines have learned about this and other subjects would help Pillsbury (and other legal scholars) to achieve not only his stated goal of overcoming "the conceptual and terminologic inadequacy of most current discussions of emotion in law," (p. 331) but also the broader Realist aim, which Pillsbury endorses, (p. 331 n.4) of attuning law to the psychological reality of emotion.

The Passions of Law is an excellent introduction to a topic that is bound to grow in importance. The contributors present careful and sophisticated investigations into a variety of interactions between emotions and legal issues. Their work should enhance interest in and respect for interdisciplinary work in this field. As legal practice and discourse increasingly embrace popular forms of communication, including emotion-laden visual displays of all kinds, the impact of emotions on legal judgments will only become more compelling and more in need of critical analysis. Further inquiries in the directions explored in this book, making even better use of emotion research and theory in other disciplines, would help to answer this need.

57. For a brief introduction to a range of views on the subject, see Ekman and Davidson, eds., *The Nature of Emotion* at 321-43 (cited in note 11).