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Introduction to the Edward Elgar Research Handbook on Law and Emotion

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The Edward Elgar Research Handbook on Law and Emotion

Edited by Susan A. Bandes,* Jody Lynee Madeira,** Kathryn D. Temple,*** and Emily Kidd White****

Introduction

The role of emotion in law has long been shrouded in mystery. The legal system is built on assumptions about human behavior, including assumptions about emotion. Thus, unavoidably, understanding emotion is an essential part of building a fairer, more effective system. Yet the emergence and growth of Law and Emotion as a field of study has been slowed by the belief that merely by acknowledging emotion, scholars and jurists would undermine the rule of law. It has been further hampered by the suspicion that emotions are too ephemeral or subjective to be understood in any systematic way. For too long, the result has been a strange, unproductive stasis: a legal system buffeted by emotional influences it refuses to investigate—or even to name.

In the past two decades, as fields like philosophy, psychology, neuroscience, sociology, history, anthropology and the humanities discovered (or rediscovered) the importance of reckoning with emotion, legal scholars at last began to develop a more realistic and sophisticated understanding of emotion’s complex role. Even so, we are still in the early stages of this exciting interdisciplinary project. The goal of this volume is threefold: to introduce the general reader to the burgeoning field of Law and Emotion; to bring together voices from a dazzling array of disciplines on a broad range of topics; and to move the conversation forward while identifying important areas for further study.

When the transformative volume *The Passions of Law* was published in 1999, the legal system tended to regard emotion, rather simplistically, as a force that warped and degraded judgment. Even critical law and society scholarship at the time tended to embrace the assumption that law as an institution, a goal, or a set of practices should work to insulate itself from emotion’s influence.¹ *The Passions of*

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Law exposed the cracks in this foundational premise. It revealed that emotions are an integral part of law and legal processes, and an inextricable component of reasoned judgment. Whether one sought to embrace or elude emotion, it was always there, an inevitable element of the human condition. As Susan Bandes noted in her introduction, the essays in the volume told “a far more unruly, complex, and emotional story about the place of emotions in the law”² than the conventional wisdom allowed. *The Passions of Law* was timely because it challenged us not only to discuss the role that emotions play in the law, but also to interrogate individual emotions, their contours, and their interplay.

The Passions of Law announced the birth of Law and Emotion as a field, and the past two decades have witnessed its flourishing, as this volume reflects.³ Law and Emotion scholarship addresses how emotions fill varied roles across a panoply of legal actors, institutional contexts, and legal doctrines. This Research Handbook aims to survey this landscape, providing a snapshot of its richness, depth, complexity, and diversity. It draws from a transnational and interdisciplinary range of perspectives to probe its central questions. One contribution of the volume is the vast survey of methods, theories, and techniques it offers for the examination of emotions in legal study. It is abundantly clear that emotion *can* be methodically studied, but it is crucial to identify the benefits and limits of the methods available. Each author in this volume was asked to speak specifically to the question of methodology, enabling threads of conversation across the chapters. The volume also brings together for the first time three significant and highly influential field-mapping works,⁴ alongside a broad array of new research offering in-depth examinations of emotions in the theory and practice of private law, public law, international law, and criminal law.

Doctrinally, the law and emotion inquiry has moved beyond an early concentration on criminal law to include a broad array of doctrinal legal areas, including bankruptcy, evidence, contract, property, international, and family law—all showcased in this volume. The volume also explores the wide range of emotions

¹ See Abrams and Keren’s seminal article Kathryn Abrams and Hila Keren, “Who’s Afraid of Law and the Emotions?,” *Minnesota Law Review* 94, no. 6 (2010): 1997–2074, reproduced in an edited version in this volume, for a powerful account of the legal academy’s resistance to the study of emotion.

² Susan A. Bandes ed., introduction to *The Passions of Law* (New York: New York University Press, 1999), 1.

³ Terry A. Maroney, “A Field Evolves: Introduction to the Special Section on Law and Emotion,” *Emotion Review* 8, no. 1 (2016): 3-7.

⁴ Abrams and Keren, “Who’s Afraid,”; Susan A. Bandes, “Empathy, Narrative, and Victim Impact Statements,” *University of Chicago Law Review* 63, no. 2 (1996): 361-412; Terry A. Maroney, “Law and Emotion: A Proposed Taxonomy of an Emerging Field,” *Law & Human Behaviour* 30, no 2. (2006): 119-42.

that influence law, including anger, remorse, loyalty, empathy, compassion, moral outrage, disgust, and respect for dignity. In addition, it helps move the conversation about legal decision-making beyond its habitual focus on juries. It widens the lens to include other legal actors, such as judges, lawyers, legal educators, and legislators,⁵ and less traditional sites of decision-making, such as international tribunals.⁶

Law and Emotion is an inherently interdisciplinary puzzle. Psychological research has revealed the importance of studying emotions on a more granular and contextual level. Emotions may lead us astray, but they also play a crucial role in sense-making and decision-making.⁷ Political scientists have explored the role of emotion in the creation and sustenance of norms of democratic governance, and in the dynamics of legal reform.⁸ Historians have detailed how particular emotions, shaped by time, politics, and place, have played fundamental roles in law's past, which intertwine with its present.⁹ Sociologists have studied how emotions arise in the social world, and how they function in negotiating social interaction and

⁵ Madeira chapter

⁶ Karstedt, Sutton, White chapters

⁷ See e.g. Brian H. Bornstein and Richard L. Weiner, eds., *Emotions and the Law: Psychological Perspectives* (New York: Springer, 2010); John Bronsteen, Christopher Buccafusco and Jonathan S Masur, "Hedonic Adaptation and the Settlement of Civil Lawsuits," *Columbia Law Review* 108, no. 6 (2008): 1516-49; "Symposium: Law, Psychology, and the Emotions," *Chicago-Kent Law Review* 74, no. 4 (2002): 1423-1624; Neal Feigenson, Jaihyun Park and Peter Salovey, "The Role of Emotions in Comparative Negligence Judgments," *Journal of Applied Social Psychology* 31, no. 3 (2001): 576-603; Norman J. Finkel, W. Gerrod Parrott, *Emotions and Culpability: How the Law is at Odds with Psychology, Jurors, and Itself* (Washington DC: American Psychological Association, 2006); Chris Guthrie, "Carhart, Constitutional Rights and the Psychology of Regret," *Southern California Law Review* 81, no. 5 (2008): 877-903; Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York: New York University Press, 2003); Jody Lynce Madeira, "Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation," *U.C. Davis Law Review* 40, no. 1 (2006): 137-93; Carol Sanger, "Decisional Dignity: Teen Abortion, Bypass Hearings, and the Misuse of Law," *Columbia Journal of Gender & Law* 18 (2009): 409-99.

⁸ See e.g. Sharon Krause, *Civil Passions: Moral Sentiment and Democratic Deliberation* (Princeton, NJ: Princeton University Press, 2008); George E. Marcus, *The Sentimental Citizen: Emotion in Democratic Politics* (University Park: Pennsylvania State University Press, 2002); James E. Fleming, ed., *Passions and Emotions* (New York: New York University Press, 2013); Deborah Gould, "Rock the Boat, Don't Rock the Boat Baby, Ambivalence and the Emergence of Anti-AIDS Activism," in *Passionate Politics: Emotions and Social Movements*, ed. Jeff Goodwin, James M. Jasper and Francesca Polletta (Chicago: University of Chicago Press, 2001).

⁹ See e.g. Rob Boddice, *The History of Emotions* (Manchester: Manchester University Press, 2018); Susan Broomhall, ed., *Early Modern Emotions: An Introduction* (New York: Routledge, 2017); Thomas Dixon, "'Emotion': History of a Keyword in Crisis," *Emotion Review* 4, no. 4 (2012): 338-44; Susan J. Matt, Peter N. Stearns, eds., *Doing Emotions History* (Springfield, Ill.: University of Illinois Press, 2014); Jan Plamper, *The History of Emotions: An Introduction* (New York: Oxford University Press, 2017); William M. Reddy, *The Navigation of Feeling: A Framework for the History of Emotions* (Cambridge: Cambridge University Press, 2001); Barbara Rosenwein and Riccardo Cristiani, *What Is the History of Emotions?* (Cambridge: Polity Press, 2018); Monique Scheer, "Are Emotions a Kind of Practice (And Is That What Makes Them Have History)? A Bourdieuan Approach to Understanding Emotion," *History and Theory* 51, no. 2 (May 2012): 193-220.

identity.¹⁰ Anthropologists have explored emotions' cross-cultural contours, evolving new theories of emotion from fieldwork.¹¹ Literary theorists provide insight into both how legal texts embody emotion and how the passions of law animating law are represented in literature.¹² Legal philosophers have mined older philosophical traditions to think about the appropriate role in the legal system of emotions like guilt, justice, mercy, remorse, dignity, and fairness.¹³ Scholars have built community and crossed disciplinary boundaries by using prior work to tunnel deeper into law and emotion subject matter and build richer understandings of these complex topics.

Like every work on emotion theory, this volume must confront the reasonable question: What is meant by emotion, exactly? There is a robust debate about whether a consensus definition is important.¹⁴ One overarching theme of this volume is that context matters. Across disciplines, it is unhelpful—and indeed misleading—to treat “emotion” as a monolithic, unchanging entity. A better approach is to state one’s working definition of “emotion,” or of the particular emotions under discussion, with the recognition that all such definitions are provisional and contested.¹⁵ And when evaluating the role of emotion in the legal

¹⁰ See e.g. Stina Bergman Blix and Asa Wettergren, “A Sociological Perspective on Emotions in the Judiciary,” 8 *Emotion Review* 8, no. 1 (2016): 32-37; Mary Lay Schuster and Amy Proppen, “Degrees of Emotion: Judicial Responses to Victim Impact Statements,” *Journal of Law, Culture and Humanities* 6, no. 1 (2010): 75-194; Susan A. Bandes, “Victims, ‘Closure,’ and the Sociology of Emotion,” 72 *Law and Contemporary Problems* 72, no. 2 (2009): 1-26.

¹¹ See e.g. Catherine Lutz and Geoffrey M. White, “The Anthropology of Emotions,” *Annual Review of Anthropology* 15 (1986).

¹² See e.g. *Impassioned Jurisprudence: Law, Literature, and Emotion, 1760-1848*, Nancy Johnson, ed., Bucknell University Press, Lewisburg, PA, 2015; Kathryn Temple, *Loving Justice: Legal Emotions in William Blackstone’s England*. New York, New York: NYU Press, 2019.

¹³ See e.g. John Deigh, *Emotions, Values, and the Law* (Oxford: Oxford University Press, 2008); Maksymilian Del Mar, “Imagining by Feeling: A Case for Compassion in Legal Reasoning,” *International Journal of Law in Context* 13, no. 2 (June 2017): 143–57, doi:10.1017/S1744552317000088; Amalia Amaya and Maksymilian Del Mar, eds., *Virtue, Emotion, and Imagination in Law and Legal Reasoning* (Chicago: Hart Publishing, 2020); Robert C. Solomon, *The Passions: Emotions and the Meaning of Life* (Indianapolis: Hackett Pub. Co, 1993); John Gardner, “The Logic of Excuses and the Rationality of Emotions,” *Journal of Value Inquiry* 43, no. 3 (2009): 315-38.; Amy Coplan and Peter Goldie, eds., *Empathy: Philosophical and Psychological Perspectives* (Oxford ; New York: Oxford University Press, 2011); Martha Craven Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton, N.J: Princeton University Press, 2004); Martha Craven Nussbaum, *Political Emotions: Why Love Matters for Justice* (Cambridge: Belknap Press, 2015); Jeffrie G. Murphy, *Punishment and the Moral Emotions: Essays in Law, Morality, and Religion* (Oxford: Oxford University Press, 2012); Fleming, ed., *Passions*; Benjamin Zipursky, “DeShaney and the Jurisprudence of Compassion. (Case Note),” *New York University Law Review* 65, no. 4 (1990): 1147.

¹⁴ See e.g. Jerome Kagan, *What is Emotion? History, Measures, and Meanings* (New Haven: Yale University Press, 2007).

¹⁵ For example, Bandes and Blumenthal posit that “emotions” are a set of evaluative and motivational processes, distributed throughout the brain, that assist us in appraising and reacting to stimuli and that are formed, interpreted,

system, It is also crucial to identify the purpose of the inquiry. It is unhelpful to discuss the value of remorse, for example, as an abstract matter. Genuine remorse may be valuable in intimate relationships. Whether it should play a similar role in the legal system depends on a host of factors, including normative questions like the purposes of punishment, and practical questions like the capacity of the legal system to evaluate genuine emotion.

In important respects, Law and Emotion is less interested in what emotion *is* than in how the law deploys the category. Law is an academic discipline, but one that studies a set of practices, and these practices have consequences for life, liberty and property. Most often, the legal system uses the category “emotion” as a mechanism for registering disapproval—as a synonym for prejudice, irrelevance, or lack of intellectual rigor—and therefore as a way to exclude evidence, discredit witnesses, and otherwise impose legal consequences. Consequences also flow from assumptions about emotion that are never explicitly defined, for example jurors’ on-the-fly, under the radar understanding of “remorse,”¹⁶ or the legal system’s creation of the quasi-psychological notion of “closure.”¹⁷ The “emotional” label is still frequently applied to individuals with traditionally marginalized status—women, people of color, and individuals lacking social, economic, educational or political capital. Moreover, a burgeoning distrust of experts and their expertise has made more room for a resilient body of “folk-knowledge, portraying emotions as quick, hot, irrational bursts of feeling”¹⁸—an understanding that patently runs counter to scholarly consensus. One important goal of our field is to reveal and interrogate these often-invisible choices.

To that end, our volume begins with Terry Maroney’s invaluable expose of the “emotional commonsense” that pervades the legal system. This folk knowledge shapes preconceptions about what ought to be felt and expressed, and even what counts as emotional (and therefore, in the eyes of the law, irrelevant and

and communicated in social and cultural context. They influence the way we screen, categorize, and interpret information; influence our evaluations of the intentions or credibility of others; and help us decide what is important or valuable. Perhaps most important, they drive us to care about the outcome of our decision making and motivate us to take action, or refrain from taking action, on the situations we evaluate. Susan A. Bandes and Jeremy A. Blumenthal, “Emotion and the Law,” *The Annual Review of Law and Social Science*, 8 (2012): 163-4.

¹⁶ Proeve et al chapter

¹⁷ Bandes chapter

¹⁸ Bandes and Blumenthal, “Emotion and the Law,” 162.

prejudicial). It argues that these unexamined rules often lack support and privilege the powerful.

The future of law and emotions scholarship is expansive and multi-disciplinary. Part I of the Handbook, “Foundations,” highlights several disciplinary approaches, beginning with Maroney’s chapter, which draws from the field of psychology. Maria Gendron’s chapter on neuroscience reviews the neuroscientific evidence that increasingly points to general brain circuitry that is shared across emotional and non-emotional states, challenging classic distinctions between reason and emotion. It also adds a fascinating dimension to the “emotional commonsense” debate. Even as her work identifies the gap between scientific evidence and common understanding of emotion and reason, it also finds emerging evidence that commonsense understandings help shape the way emotions unfold. Robin West’s chapter draws on the methods and tools of legal philosophy to examine the role of sentiments within the liberal legal order, making vivid use of examples from the field of law and literature to illustrate the emotional elements of the liberal conception of the rule of law. Turning the tide on the unsentimental conception of law so commonly forwarded within legal philosophy, West advances the idea that a well-functioning liberal legal order is itself a necessary condition for the flourishing of the moral sentiments. Finally, Gillian Calder’s chapter examines the role of emotions in legal education, with a focus on presenting painful facts in the classroom. Calder draws on a series of challenging cases in Canadian constitutional law to work through a series of pedagogical questions concerning the role of affect and emotions in teaching students about the law, legal ethics, and a humane professionalism.

Part II turns to the examination of particular emotions in the legal system. It begins with Carlton Patrick’s account of the past three decades of disgust and the law, with a focus on the debates over the value of disgust as a moral arbiter. Reviewing many of the empirical findings of the behavioral sciences as well as the normative scholarship of legal scholars and other social scientists, the essay provides an eagle’s eye view of the links among disgust, morality, and jurisprudence and is essential reading for any scholar interested in this highly contested area. Jeffrie Murphy seeks to rehabilitate retribution as a justification for punishment, arguing that the rejection of retribution is premised on a misunderstanding—retribution is based not on anger or desire for vengeance but on respect for human dignity. Drawing mainly on the writings of Kant, Murphy has over the years defended a

retributive outlook on punishment because it is based on the respect that is owed to the dignity of free and autonomous rational beings—a respect that involves holding people responsible for what they do, praising and rewarding those who do right, and blaming and punishing those who do wrong. In recent years, he has withdrawn some of his enthusiasm for retribution because of an increasing awareness that human autonomy is often limited by factors beyond the actor's control and that punishment is sometimes driven by vindictive passions and only a pretense of caring about human dignity. He still believes, however, that retribution, when properly understood, remains a vital part of the story about the justification of punishment and should be taken much more seriously than it is by most of its critics. In her chapter, Susan Bandes explores how institutions shape emotions and emotional expectations, rather than simply reflecting them. Specifically, she studies the meteoric rise of the concept of closure in the criminal justice system, arguing that criminal justice actors have played a powerful role in shaping and creating emotional expectations that align with and advance deeply punitive strands in penology. Reviewing all the available studies on closure, she concludes that despite its tremendous influence, the concept is based on unexamined and unsupported assumptions about the role the criminal justice system can play in healing. Amia Srinivasan takes on the philosophical argument that anger is a corrupting or counterproductive influence on justice. Srinivasan digs deeply into the politics and structure of the emotion to mount a defense of anger, arguing that victims of oppression can feel anger aptly and productively. This powerful chapter introduces a form of injustice, namely affective injustice, which requires oppressed groups to dismiss anger for prudential reasons, even where that anger represents a form of right-seeing, and where that dismissal comes with a heavy psychic burden. Against a long philosophical tradition of stoic (and stoic-like) dismissals of anger from thinking involving the public sphere, Srinivasan revises and revives anger as a vital form of political recognition and communication, and as a source of moral and political knowledge. Finally Steven Tudor, Michale Proeve, Richard Weisman and Kate Rossmanith, the pre-eminent contemporary scholars of remorse, explore the ways in which law engages with remorse as a moral emotion. Drawing from various disciplinary perspectives, including philosophy, psychology, anthropology, and sociology, they question whether each disciplinary account must remain discrete or whether the range of approaches can be integrated into a truly interdisciplinary approach.

Part III shifts the focus to legal actors, and also begins to introduce the emerging literature on how emotion cultures vary. It begins with a chapter by Asa Wettergren and Stina Bergman Blix, who propose a theoretical framework for the comparative study of emotion norms among different Western legal systems. Their framework focuses on how professional norms of appropriate emotion are embedded in emotional regimes, and how the social and cultural norms of these regimes are shaped, communicated, and implicitly enforced. Lisa Flower's chapter draws on a similar framework, analyzing the difficult role of defense attorneys. Defense attorneys routinely encounter gruesome evidence, and must negotiate the moral suspicion that others direct towards them and their clients. Flower recounts how defense lawyers attempt to represent their clients by managing their own emotions and the emotions of their clients, judges, and others, in order to maintain propriety, demonstrate loyalty, and guide expectations. She bases her analysis on interviews with Swedish defense attorneys, in the process revealing some fascinating differences among regional or national emotion cultures. Sharyn Roach Anleu, Kathy Mack, and Jennifer Elek's chapter, like the two preceding it, explores strategies for decoding emotion norms, particularly the norm of judicial dispassion, and for managing emotions in light of these implicit norms. It describes how the inherent emotional labor present within judging contrasts with the conventional understanding of dispassionate justice in the context of two qualitative research projects that document how judicial officers experience, describe, use, and manage emotion in their judging. These interviews illuminate the boundaries of acceptable judicial emotional experience, as participants explore how they manage their own emotions and those of court participants, and use emotion work to accomplish judicial tasks.

Part IV focuses on how emotions inform, reflect, and shape legal doctrines. Naomi Cahn and June Carbone trace the evolution of family relationships from a hierarchical, duty-based framework to more flexible egalitarian relationships founded on respect and trust. These changes have also enabled the gradual destigmatization of nonmarital relationships and contributed to the contemporary complexities of co-parenting. The authors conclude that, despite the significant changes in family law in recent decades, its "all-or-nothing" approach wreaks injustice upon modern family ties and emotions. Pamela Foohey's chapter outlines an underexplored topic: what roles emotion play in commercial credit laws, including bankruptcy. Foohey explores how the emotions of assuming and paying back debt are different for business leaders than for consumers with household

debt, linking these characterizations to conventional understandings of who can respectably incur debt, and how. As she demonstrates, these disparate emotional regimes help pave an easier path for businesses than households, leading to emotional encumbrances and stigma for consumers.

Heather Conway and John Stannard examine the emotional dynamics of property law, arguing that property speaks to complex relational ties and social interactions. Ownership rights are not always absolute and unqualified, and the law does not always protect the rights of owners above all else. Drawing on these ideas, the chapter argues that people's perceptions of property and what it means to them are not necessarily replicated in property law theory and doctrine - and that this conceptual disconnect is most apparent when we look at emotional attachments to specific types of property in different scenarios. Emma Jones takes a similar approach to contract law, whose implicit and sometimes explicit premise is that emotion is either irrelevant to or in tension with the formation of contracts. The author argues that emotion is on the contrary integral to contractual transactions and should be explicitly acknowledged and explored. And finally Lorana Bartels and Anthony Hopkins turn to criminal law, with a particular focus on what they identify as the punitive paradigm that reigns in Australia. They argue that this paradigm is driven by fear and a turning away from those we imprison, which propel the citizenry toward increased imprisonment. The authors advocate for a policy informed instead by compassion—a turning toward rather than away; an acceptance of those subject to punishment as fellow human beings.

Part V examines the emotional dynamics of legal decision-making from several disciplinary perspectives. The first two chapters are grounded in psychology. Janice Nadler, Hannah J. Phalen and Jessica Salerno emphasize the importance of taking a granular approach to the study of emotions, and apply this approach to the study of the impact of emotional evidence (for example gruesome photos) on jury decision-making. They consider the question from a number of perspectives, including jurors' reactions to the evidence and the impact of their reactions on their verdicts, the effects of individual differences in juror emotionality on juror reactions, and the impact of various legal actors' emotional expressions on juror reactions. Neal Feigenson also explores the emotional effects of visual evidence, advancing a model of how emotions can influence legal judgment, and using this model to structure a survey of the effect of visual evidence on the emotions of decision-makers. Lee Marsons draws on the field of neuroscience to further break down the well-entrenched binary distinction between reasoning and emotion.

Finding a deep integration among emotion, cognition, motivation, and reasoning, Marsons is principally concerned with developing a linguistic methodology for examining judicial displays of emotions in legal judgments. Jennifer Kilty draws on narrative theory and feminist critique to unearth the implicit emotional assumptions in a high profile Canadian case. Kilty relates how June Callwood's depiction of the Charles Ssenyonga case is an artifact of the moralized AIDS panic and criminalization of HIV nondisclosure. Ssenyonga's character stands at the intersection of three narratives—racialized, deception, and victim narratives—that construct him as an HIV sexual predator in problematic ways redolent of colonial tropes of race, class, gender, and sexuality.

Part VI turns to issues of history and context, examining how legal emotions have been constructed differently in different times and places. Emilia Musemeci regales the reader with an account of the debate on the crime of passion in late nineteenth-century Italy. In describing the debates among 19th-century Italian criminologists over the relationship between crimes of passion and free will, Musemeci provides a window into late Enlightenment approaches to criminology, to intent, and, inevitably to gender relations around issues of jealousy and love. The essay concludes by positioning the work of these 19th-century Italian criminologists in the context of emotions relevant to law, on the one hand, and the new neuroscience of culpability on the other. Simon Stern's contribution suggests an intriguing departure from the common methodology of examining the explicit display of strongly marked negative emotions in the courtroom. Shifting the focus, this chapter examines William Fulbeck's *A Direction or Preparation to the Study of the Law* (1600), the first common-law text to focus primarily on legal methods, rather than on a particular field of law. Through a careful examination of this work Stern reveals the emotions Fulbeck seeks to elicit from law students, and suggests, by way of example, how we might seek out other contexts besides concrete legal disputes for studying the history of legal affect. Nicole Wright further expands our understanding of appropriate historical sources for scholarship in the history of law and emotions, examining the use of slang as a window into the historical persistence of fear and resentment toward legal authority. To pursue her study of affective responses to law enforcement and governmental authority, Wright draws on unique, non-traditional sources—ranging from the so-called “canting dictionaries” of the 1600s and 1700s, to the notorious UrbanDictionary.com of the 2000s—to glean perspectives on opposition to legal authority in Britain and America. To gauge the perspectives of disenfranchised groups, scholars must look

beyond canonical literature and official records, and probe deeply into the non-canonical repositories that reflect the emotions of the disenfranchised. Amy Milka and David Lemmings explore the “lawyerization” of the English criminal trial during the eighteenth century, and the ways it encouraged litigants to bring emotion to the courtroom in order to manipulate judges, witnesses, and juries. Such emotional manipulation in part replaced religious emphasis on divine punishment with the new feeling rules of the rising middle classes. The chapter explores the importance of emotions in this transitional period, whether invested in the belief in divine providence, or skillfully interrogated and performed by a lawyer through gesture, action, and eloquence. Finally, Kathryn Temple’s essay examines the value of emotions to understanding law’s fundamental aims and purposes, drawing on Giorgio Agamben and Duncan Kennedy to examine the role emotions play in creating just societies. The internalization of just precepts that guide our behaviors is not simply a matter of following the law but instead involves an emotional attachment to law that overrides feelings of coercion and alienation. Through contrasting Agamben’s representation of the Franciscan monks’ response to law with Blackstone’s depiction of the English legal system, Temple demonstrates both the limitations and promise of law as a “form of life.”

Part VII widens the lens, moving from traditional venues like the jury room or the courtroom to other sites of decision-making, including legislatures and international tribunals. In “Soft Targets,” Jody Madeira and Catherine Wheatley use “Stand Your Ground” legislation as a case study in the role of emotion in the legislative process. The authors examine how anecdotes, statistics, and doctrinal legal arguments played diverse and largely competing roles in the passage of an Indiana state bill that proposed to expand civil protections for individuals who use deadly force against others and then allege self-defense. As they recount, supporters strategically used a powerful personal anecdote to create a particular empathic emotional regime that overcame representative information, including statistics and technical accounts, to persuade others that the victim or the victim’s family should bear the emotional and financial burdens of a wrongful death suit.

The remaining three chapters of this Part focus on the role of emotion in international laws and tribunals. Susanne Kardstedt examines the emotional dynamics and outcomes of truth commissions and other transitional justice arenas, arguing that gains in societal healing and reconciliation come at the expense of victims’ and survivors’ own emotional well-being. Rebecca Sutton’s chapter examines in subtle detail the affective and perceptual judgments of legal actors

working in the field of international humanitarian law, and the impact of these affective and perceptual judgments on both the application and possibilities for this body of law. The chapter examines the on-the-ground feelings of hostility and detachment that legal concepts and distinctions can generate in the emotional lives of humanitarian actors. And finally, drawing on analytical philosophical methods, Emily Kidd White maps out a series of images regarding the reach and range of emotions within the analytical philosophical literature to see what questions they might press on the theories and practices of international law, and on the authority of international law. Kidd White advocates studying the emotions that appear integral, epiphenomenal, or even disruptive to the human practices constituting international law. She argues that that this focus can assist in understanding how existing legal practices either support or fall short of the principles and norms of application they profess.

In Part XIII, Classic Articles, we present three of the field's early, foundational articles (two of them in shortened form)¹⁹. The first is "Empathy, Narrative, and Victim Impact Statements," an influential 1996 article by Susan Bandes that was, in large part, an appreciation of the emerging scholarship on law and emotion. However, the piece also argued that the early scholarship tended to treat emotions as monolithic, unambiguous entities, and needed to more effectively contend with the complex, unruly field of emotion theory. While it acknowledged that the scholarly focus on benign emotions such as empathy, compassion, and caring had been crucial in challenging the marginalization of these emotional modes in the legal context, it cautioned against relying on the categories of "positive" and "negative" emotions, or "soft" and "hard" emotions, going forward. This article argued that whether a particular emotion ought to be encouraged or discouraged by the legal system depends on the context and the values we seek to advance.

Second is Terry Maroney's invaluable and widely used taxonomy of Law and Emotion scholarship, published in 2006. Maroney set out, first, to articulate some parameters for the field—she asked "what counts as law and emotion scholarship?" She then suggested a typology to help guide both readers and researchers seeking to navigate the field. Her goal was partially descriptive--to delineate the varying approaches taken by existing work—and partially normative-- to encourage future scholars to better articulate their assumptions, approaches, and methodologies. She advised that "any given study within the law-and-emotion rubric will have its

¹⁹ The Maroney article, less lengthy than the other two, is presented in its entirety.

primary grounding in at least one of these approaches, but should strive to attend to each. Thus, it should identify which emotion(s) it takes as its focus; distinguish between those emotions and implicated emotion-driven phenomena; explore relevant and competing theories of those emotions' origin, purpose, or functioning; limit itself to a particular type of legal doctrine or legal determination; expose any underlying theories of law; and make clear which legal actors are implicated..”

The final classic article is Kathy Abrams’ and Hila Keren’s powerful “Who’s Afraid of Law and Emotion?” In 2010, Abrams and Keren perceived that Law and Emotion scholarship had reached a critical moment. It had become a “varied and dynamic body of work, mobilizing diverse disciplinary understandings to analyze the range of emotions that implicate law and legal decisionmaking.” They questioned why mainstream academics, despite their embrace of law and behavioral economics and law and neuroscience, treated law and emotion with ambivalence, and posited one explanation: law and emotion:

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...And it is more plural in its normative aspirations: it does not aim simply to correct legal subjects’ decision-making in favor of rationality - the primary normative impetus in behavioral law and economics scholarship, but to modify legal doctrine to acknowledge and encompass affective 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, and therefore has less pragmatic value. 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.

Conclusion

As this collection demonstrates, research on law and emotions has become a thriving field in recent years; the site of vigorous and varied investigations into how emotions influence and are influenced by legal contexts. This scholarship is richly interdisciplinary, melding contributions from psychology, history, sociology, literature, critical theory, neuroscience, and other fields. One of its most important contributions lies in how it undermines our received notions about emotions and prompts us to reexamine them. When we ask whether closure is an emotion, for instance, we challenge what has become a juridical norm in the absence of careful consideration or study. Investigations into different ways of expressing remorse similarly challenge us to examine our own and the legal system's normative and naturalized ideas about emotional expression.

Future research could fruitfully examine the roles that emotions play vis-à-vis the myriad other factors that shape legal outcomes. Also sorely needed are comparative studies addressing the role of emotions across legal contexts and systems both within and across national borders. Important investigations will uncover how emotion can best be “guided, channeled, and educated” to promote best practices and pursue just and equitable outcomes.²⁰ Finally, as the body of law and emotion research continues to accumulate, it becomes a crucial task to document how these conclusions can be best applied to protect and advance justice, equity, and human rights. As those dedicated to pursuing law and emotion inquiries know, these are difficult and discomfiting challenges that demand an intense sensitivity to context and nuance, a deep commitment to reflectiveness, a scholarly ethic of service, the courage to challenge convention, and a creative commitment to pursuing change. But these are the very factors that have drawn so many to interrogate the interrelationship of law and emotion, and that will continue to make these areas of study so vital and salient.

²⁰ Bandes and Blumenthal, “Emotion and the Law,” 171.

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