

Negotiating the Tangle of Law and Emotion

Laura E. Little

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BOOK REVIEW

NEGOTIATING THE TANGLE OF LAW AND EMOTION

Laura E. Little†

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

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The incipient field of "law and emotion" has produced its first oeuvre, The Passions of the Law, an eclectic and impressive collection of essays edited by Professor Susan Bandes. In this Book Review, Professor Laura Little examines this work, paying close attention to the quality of scholarship on both sides of the "and," while noting the unusual status of emotion studies as an emerging discipline. Observing that much interdisciplinary scholarship lacks an organized theoretical structure, Professor Little identifies the special challenges of law and emotion studies resulting from disagreements within emotion theory itself. She argues forcefully that law and emotion scholarship would improve if organized around theoretical debates within emotion theory itself, such as scholarly dialogues on the definition of emotion and its relation to cognition. However, she applauds the authors in The Passions of Law for their broad-based conception of law and society and for

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*straying from more obvious analysis of issues in criminal law to other legal topics, such as adjudication, legal formalism, and the origins of the law. Professor Little concludes that the law and emotion movement will be a welcome addition to thought in both disciplines and that *The Passions of the Law* is a well-executed herald of this new scholarship.*

INTRODUCTION

The emotions. They won't go away. In fact, from the academy's vantage point, emotions and their influence on scholarly projects are stronger than ever. Good thing, in my view. Emotions are so key to the richness of life that no effort to understand humans and human society could make any claim to accuracy or completeness without taking them into account. So it is that Susan Bandes's anthology of essays, *The Passions of Law*,¹ takes on the very crucial (albeit daunting) task of exploring the intersection of law and emotion.

The challenge of such an endeavor is to fence in the relevant territory for law and emotion study. The subject is so potentially limitless that any attempt to master it could easily become overabstract, trivial, or empty of meaning. Magnifying this challenge, the threat of overbreadth comes from both sides of the "law and emotion" equation. Scholars dedicated to the study of emotions cannot even agree on how many emotions humans experience or how to catalogue them. Likewise, the subject of law is like a storm cloud—amorphous, vast, changeable, and impossible to grasp fully or to pin down—thus adding yet another challenge to the enterprise of *The Passions of Law*.

By operating within the realm of particularity, Bandes's anthology avoids several problems that could result from the vastness of its chosen subject matter. Indeed, most of the essays confine themselves to exploring only one or a handful of emotions. Yet within this constrained universe, the anthology repeatedly rises to its illuminating potential. Skillfully assembled by Professor Bandes, the book is filled with nugget after nugget of insight into human experience, and it should successfully hook new participants into the enterprise of studying law and emotion.

To be sure, the book reflects some perennial problems with anthologies in general and with interdisciplinary legal scholarship in particular. Viewed through its individual pieces, the book is too insular, with each component insufficiently tied to the other components, to theories of law, and to theories of emotion. Viewed as a whole, the book is also too sweeping, with insufficient attention to the complexities of what constitutes law and what constitutes emotion. But even in the face of these limitations, the high points of analysis in *The Pas-*

¹ THE PASSIONS OF LAW (Susan A. Bandes ed., 1999) [hereinafter *PASSIONS*].

sions of Law are so elegant and incisive as to make one experience passion about law and legal scholarship.

I

LAW AND EMOTION: THE EMERGING MOVEMENT

Although many contemporary scholars have focused on what humans do and do not know (rather than what they feel), an assortment of scholars have recently become increasingly interested in emotions. I hypothesize that the focus on emotions may result in part from resurgent romanticism, with scholars growing weary of the disorienting effects of postmodernism. Others attribute the growing mass of emotion literature to the greater prominence of psychology, both inside and outside of the academy, as well as to the growing popularity of the view that knowledge does not derive from pure rationality.²

Whatever the genesis of the scholarly interest in emotions, legal scholars have joined other academics in studying the many ways in which emotion can touch law.³ Although most early efforts fell within the ambit of "law and psychology" or "law and philosophy," recent studies have resisted such cubbyholes.⁴ Until the publication of *The Passions of Law*, legal scholars did little to coordinate their study of

² E.g., Ronald de Sousa, *Emotion*, in A COMPANION TO THE PHILOSOPHY OF MIND 270, 271 (Samuel Guttenplan ed., 1994) [hereinafter COMPANION] (attributing the rise in emotion study to the demise of Bayesian-derived economic models of rational decision and agency); Paul Mattick, *You've Got an Attitude*, N.Y. TIMES, Mar. 26, 2000, § 7 (Book Review), at 28 (reviewing RICHARD WOLLHEIM, ON THE EMOTIONS (1999)) (attributing rise in emotion study to growing importance of psychology studies and the "general conviction that knowledge does represent the product of pure rationality").

³ Professor Bandes is one of the first to frame the study as "law and emotion." Scholars have already brought together law and psychology, law and psychiatry, and related disciplines. E.g., Charles Patrick Ewing, *Introduction to PSYCHOLOGY, PSYCHIATRY, AND THE LAW: A CLINICAL AND FORENSIC HANDBOOK* 1, 3 (Charles Patrick Ewing ed., 1985) (noting that the purpose of the handbook is to assemble "many of the most recent and significant legal, empirical, and clinical perspectives on the growing relationship of psychology and psychiatry to the law"); Roger D. Masters, *Naturalistic Approaches to the Concept of Justice: Perspectives from Political Philosophy and Biology*, 34 AM. BEHAV. SCIENTIST 289 (1991) (exploring concepts of justice through a comparison of western legal and political philosophy with research in the fields of evolutionary biology, economics, and game theory); James R.P. Ogloff, *Introduction to LAW AND PSYCHOLOGY: THE BROADENING OF THE DISCIPLINE* 1, 7 (James R.P. Ogloff ed., 1992) (recognizing law and psychology as an important subspeciality within both the law and psychology disciplines); Peter J. van Koppen et al., *Preface to LAWYERS ON PSYCHOLOGY AND PSYCHOLOGISTS ON LAW*, at iii, iii (Peter J. van Koppen et al. eds., 1988) [hereinafter LAWYERS ON PSYCHOLOGY] (demonstrating the delicate balance between law and psychology). The intersection of law and philosophy is even more traveled, although the precise relationship between these two fields is difficult to articulate. See Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 912 (1996) (elaborating on distinctions among philosophy, "philosophy-in-law," and legal philosophy).

⁴ See, e.g., Symposium, *The Role of Forgiveness in the Law* 27 FORDHAM URB. L.J. 1351 (2000).

law's intersection with emotion.⁵ Bandes herself catalogues numerous works that analyze diverse emotions operating within legal contexts spanning victim impact statements, definitions of illegality, structures of punishment, and beyond.⁶

Bandes also reports on the special challenges of integrating emotion study with law, given the law's traditional sentiment that emotions are somehow inimical to rationality.⁷ A long tradition in philosophy and popular culture regards emotions as highly disreputable. Indeed, the word "emotional" is often derogatory in intent.⁸ Given law's tradition of formality, neutrality, and impartiality, distaste of emotion is magnified. As Bandes suggests, the place of emotions in law is "unruly, complex, and emotional."⁹

Bandes wisely dismisses any suggestion that law and emotion are somehow separable or incompatible.¹⁰ She is not alone in observing that law often integrates emotion. Indeed, a measured contribution to the anthology by Judge Richard Posner acknowledges the inevitable and salutary results of emotion intersecting with law.¹¹ Make no mistake, though, Judge Posner insists that the ideal of the dispassionate, principled decision maker mandates close policing of the connection between law and emotion.¹²

Bandes's attack on law's traditional distaste for emotion relies on the synergy between law and emotion. In so doing, she draws on two distinct benefits of emotion. First, Bandes suggests a deepening of understanding and uplifting of spirit that one hopes will occur when the legal thinker experiences feeling and thus banishes legal analysis's

⁵ See Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520, 1524 (1992) (reviewing MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE* (1990)) (observing that "the nature of emotions and their relation to rational thought is an area legal scholarship has just begun to explore"). After publication of *The Passions of Law*, Chicago-Kent ran a symposium of articles that contained, with varying degrees of overlap, other law and emotion materials. Symposium, *Law, Psychology, and the Emotions*, 74 CHI.-KENT L. REV. 1423 (2000).

⁶ See Susan A. Bandes, *Introduction to PASSIONS*, *supra* note 1, at 1, 2-6.

⁷ *Id.* at 7.

⁸ See, e.g., Simon Blackburn, *Why Do We Need to Feel?*, TIMES LITERARY SUPPLEMENT, Oct. 29, 1999, at 3, 3 (reviewing JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* (1999)) (noting that "[t]he emotions that really engage *Alchemies* are mainly destructive: envy, jealousy, pride and vanity").

⁹ Bandes, *supra* note 6, at 2.

¹⁰ See *id.* at 7 (noting that "[t]he essays in this volume move beyond the debate about whether emotion belongs in the law, accepting that emotional content is inevitable").

¹¹ Richard A. Posner, *Emotion Versus Emotionalism in Law*, in *PASSIONS*, *supra* note 1, at 309.

¹² See *id.* at 321 (arguing that "a number of the strongest emotions, such as anger, disgust, indignation, and love, would be out of place because they would interfere with the problem-solving process.").

slavish quest for reason free of sentiment and warmth.¹³ Second, Bandes argues that emotion actually improves law and decision making because "emotion in concert with cognition leads to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions."¹⁴ Punctuating these specific points, Bandes urges a more general thesis: that law stands to learn much from scholars of emotion theory in other disciplines.¹⁵

Having conducted multidisciplinary research for many years (some of which dealt with the intersection of law and emotion),¹⁶ I approach Bandes's thesis with a strong positive bias. While mindful of the pitfalls of interdisciplinary scholarship, I believe that critics too readily overlook the importance of interdisciplinary research in understanding the seamlessness of life, promoting the advancement of human understanding, and equipping humans with the means for coping with a world of greater and greater complexity. In this age of information explosion, the danger of knowledge fragmentation is greater than ever. Thinkers have long commented on the ill effects of this fragmentation. For example, Max Weber noted anomie or absence of spirit in intellectual specialists,¹⁷ Fyodor Dostoyevsky observed the remarkable blindness of scholars who analyzed parts and overlooked the whole,¹⁸ and José Ortega y Gasset described the "barbarism of specialization."¹⁹ In the short run, the specialist risks becoming "hermetic and self-satisfied."²⁰ In the long run, knowledge

¹³ Bandes, *supra* note 6, at 7, 11; cf. Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 *YALE L.J.* 1059, 1064 (1999) (observing that the law and literature movement responds to the need for "moral uplift," which includes the need to educate lawyers about moral judgments and forms of understanding that are emotional and intuitive).

¹⁴ Bandes, *supra* note 6, at 7.

¹⁵ *Id.*

¹⁶ See, e.g., Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 *HASTINGS L.J.* 47 (2000) (analyzing the role of envy and jealousy in the Framers' separation of powers jurisprudence); Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 *UCLA L. REV.* 75 (1998) (presenting a study of the sentiments possibly concealed in federal jurisdiction opinions); Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 *AM. U. L. REV.* 699 (1995) (discussing the role of certain emotions within federal judiciary's decision making).

¹⁷ See MAX WEBER, "Objectivity" in *Social Science*, in *SOCIOLOGICAL WRITINGS* 248, 248-49 (Wolf Heydebrand ed., Edward A. Shils & Henry A. Finch trans., 1994).

¹⁸ See FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* 199 (David Magarshack trans., 1967). Dostoyevsky's character Father Paissy expounds:

After a ruthless analysis the scholars of this world have left nothing of what was held sacred before. But they have only investigated the parts and overlooked the whole, so much so that one cannot help being astonished at their blindness. And so the whole remains standing before their eyes as firm as ever and the gates of hell shall not prevail against it.

Id.

¹⁹ JOSÉ ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 94-100 (Kenneth Moore ed., Anthony Kerrigan trans., 1985).

²⁰ *Id.* at 98.

threatens to become useless and human self-understanding lessens.²¹ Society is less able to cope with challenges presented. Compartmentalization evokes T.S. Eliot's commentary on Dante's *Inferno*,²² in which Eliot described hell as a place "where nothing connects with nothing."²³

And so, as legal scholars, we must do our best to promote the unity of knowledge. For that reason alone, Bandes's book deserves high praise. However, because the project begins the auspicious task of launching a new movement, it deserves close scrutiny. Under this scrutiny—beyond the "mom and apple pie" thesis that lawyers can learn from other disciplines—the project falters. The anthology's most basic flaw flows from the lack of connection among the essays, which, aside from Bandes's incisive introduction, have little glue to hold them together. As the essays are now presented, one's fears are not dispelled that the various contexts in which law and emotion intersect may be so wide ranging as to make any connection among them elusive or nonexistent. In part this is simply a stylistic criticism.

Yet the deeper source of this criticism rests not in the writing or editing of the anthology, but in the unformed nature of this new movement. Without distinct form and coherence in the movement, we are unable to evaluate Bandes's exciting yet largely untested assertion that law and legal process benefit from emotion because emotion can actually improve perception.²⁴ Only with a deeper, more coordinated understanding of both the *law* and the *emotion* sides of the movement will we be able to test whether Bandes really has it right. In this Review, I explore how both components of the pair "law and emotion" need development, with the aim of identifying how this important field may organize and mature in the future. I begin with the right side of the *and*.

II

THE RIGHT SIDE OF THE *AND*: NEGOTIATING MANY THREADS OF EMOTION

Critics of interdisciplinary legal ("law and") scholarship often focus on shortcomings in understanding, analysis, and presentation of

²¹ José Ortega y Gasset describes the phenomenon as follows: "[The specialist] possesses a portion of something which, together with other portions of something not privy to him, constitutes knowledge. . . . The specialist 'knows' his own minimal corner of the universe quite well. But he is radically ignorant of all the rest." *Id.*

²² See T. S. ELIOT, *THE WASTE LAND* 143 (Valerie Eliot ed., Harcourt Brace Javonovich, Inc. 1971) ("I can connect/Nothing with nothing./The broken fingernails of dirty hands./My people humble people who expect/Nothing.").

²³ Vartan Gregorian, *Keynote Address of the Fifty-Seventh Judicial Conference of the United States Court of Appeals for the Third Circuit*, 70 *TEMP. L. REV.* 1139, 1147 (1997).

²⁴ See Bandes, *supra* note 6, at 7.

the nonlegal discipline.²⁵ Allegations abound that legal thinkers exploring other disciplines lack rigor because they uncritically use materials from other disciplines—appearing as undergraduates groping with half-familiar concepts and drawn by the glitter of big name scholars from another field. This is not a problem in *The Passions of Law*. The book's limitations derive not from any lack of sophistication or unfamiliarity with the literature on emotion or other nonlegal materials. In fact, over half of the anthology's fourteen contributors have primary experience *outside* law, and some are themselves path-breaking emotion scholars.²⁶ Although the anthology would have benefitted from a contribution by scholars presently working with neuroscience or psycho-physiology, even those contributors whose home discipline is law exhibit extensive facility with emotion theory, including psychological materials.

The anthology's limitations derive instead from relative silence on how existing emotion scholarship is itself incomplete and unformed. Herein lies the unique challenge of law and emotion study: not only must participants in this scholarship master more than one area of academic knowledge, but at least half of the undertaking probes a body of literature that is distinct, but not itself yet a discipline.²⁷ Quite understandably the essays in the anthology do not portray any coherent view of human wisdom on emotion. Moreover, an exhaustive survey of existing (albeit splintered) emotion scholarship is clearly beyond the anthology's scope.

²⁵ E.g., Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 193-94 (1991) (arguing that legal scholars do not apply the appropriate standards, propagated within nonlegal disciplines, when using authority from these disciplines); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525 (1995) (discussing the problem of constitutional "professionals" who make historical conclusions with insufficient citation to primary and secondary historical sources). For a review of difficulties with interdisciplinary endeavors, see Jane B. Baron, *Interdisciplinary Legal Scholarship as Guilty Pleasure: The Case of Law and Literature*, in 2 LAW AND LITERATURE: CURRENT LEGAL ISSUES 1999, at 21, 21-39 (Michael Freeman & Andrew D.E. Lewis eds., 1999).

²⁶ Contributors to the volume are: Danielle S. Allen, Susan A. Bandes, Cheshire Calhoun, John Deigh, Dan M. Kahan, Toni M. Massaro, William Ian Miller, Martha Minow, Jeffrie G. Murphy, Martha C. Nussbaum, Samuel H. Pillsbury, Richard A. Posner, Austin Sarat, and Robert C. Solomon.

²⁷ See, e.g., ELSTER, *supra* note 8, at 243 (observing that in light of disagreement among specialists on emotion, "a nonspecialist must tread carefully"); O.H. GREEN, *THE EMOTIONS: A PHILOSOPHICAL THEORY* 1-2 (1992) (observing intense disagreement among academics seeking to understand emotions); Amélie Oksenberg Rorty, *Introduction to EXPLAINING EMOTIONS* 1, 4 (Amélie Oksenberg Rorty ed., 1980) [hereinafter EXPLAINING] (suggesting that understanding of emotions is itself an interdisciplinary undertaking). For a discussion of how this problem plagues many social sciences, see Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 555. Professor Rubin explains that "[w]ithin any given social science field, different theories of causality contend with one another; this produces lines of cumulative research that proceed on parallel paths, or occasionally run headlong into each other, generating a considerable amount of confusion and debris." *Id.*

The anthology does a masterful job of breaking the ice for the development of a law and emotion movement. Nevertheless, scholarship will have a greater impact, and the understanding of both law and emotion will more significantly advance, if those studying the intersection of law and emotion grapple directly and forthrightly with the incipience of emotion scholarship itself. I expand this point, not to undercut the excellent contributions in this volume, but to identify possible areas for further study of law and emotion.

Of the shortcomings in emotion scholarship that affect understanding of law and emotion, I focus on two that have occupied the centerpiece of dialogue among emotion scholars: the failure of thinkers to agree on a definition of emotion, and the lack of consensus on the role of cognition in emotion. On the definitional issue, scholars take widely different approaches, with taxonomies ranging from two basic emotions to lists that include forty or more. The second shortcoming—concerning the relationship between cognition and emotion—is arguably not actually a deficiency in emotion theory, but rather a frame for debate among those who have studied the phenomenon. The debate has its roots in the tendency of both Plato and Aristotle to organize thought around cognition²⁸ and was reignited in earnest in the 1980s.²⁹ The emotion-cognition puzzle continues to preoccupy many devoted to understanding emotion.³⁰

A. Many Threads of Emotion: Debates About Taxonomy and Definition

For those scholars pursuing a taxonomic or definitional approach to emotion study, their list making takes on one of two general approaches. The first approach identifies a few fundamental emotions out of which other emotions generate.³¹ Those thinkers generating longer lists tend to posit that each emotion includes some “irreducibly specific component not compounded of anything simpler.”³² Yet an alternative approach identifies a broad continuum of emotions—each composed of a finite collection of qualities. Under this view, a few

²⁸ See Richard S. Lazarus, *The Cognition-Emotion Debate: A Bit of History*, in HANDBOOK OF COGNITION AND EMOTION 3, 5 (Tim Dalgleish & Mick J. Power eds., 1999) [hereinafter HANDBOOK].

²⁹ See, e.g., R.B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151 (1980) (questioning the then-prevalent assumption that affect is postcognitive).

³⁰ See, e.g., ELSTER, *supra* note 8, at 251 (noting controversy about the relation between the cognitive antecedents and emotions themselves); Lazarus, *supra* note 28, at 3 (surveying the debate about the role of cognition in emotion through the lens of historical context).

³¹ See de Sousa, *supra* note 2, at 270 (attributing the genesis of this model to Descartes).

³² *Id.*

basic attributes account for a rich variety of emotions.³³ These approaches yield widely varying lists. Aristotle, for example, provided at least two lists which included as many as sixteen specific emotions and two catchall categories.³⁴ Thomas Aquinas identified eleven basic passions,³⁵ and Augustine reduced his list to one (love).³⁶ By contrast, modern scholars have tended toward inflation, with a recent work identifying forty-four emotions.³⁷

The taxonomy issue is not a battle just about what goes on the list; the issue also goes to the core of what constitutes an emotion and how emotions emerge and transform. Of course, these questions are very much influenced by the emotion scholar's theoretical approach (e.g., Freudian, evolutionary, or social constructionist). Thus, for example, a social constructionist may accept that numerous distinct emotions exist, but would likely reject the hypothesis that emotions can be explained and categorized by their ability to assist human adaptive behavior in handling fundamental life tasks (such as fighting, falling in love, and experiencing loss).³⁸ Superimposed on these varying theoretical approaches are other specific debates about the qualities that inhere in emotions; common ground is minimal, although

³³ See *id.*

³⁴ See IX ARISTOTLE, *Ethica Nicomachea*, in THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH 1105^a, ll. 21-24 (W.D. Ross ed. & trans., 1963) (listing eleven specific and two broad categories: "appetite, anger, fear, confidence, envy, joy, friendly feeling, hatred, longing, emulation, pity, and in general the feelings that are accompanied by pleasure or pain"). In *Rhetoric*, Aristotle discusses the following states: anger and mildness, love and hatred, fear and confidence, shame and esteem, kindness and unkindness, pity and indignation, envy and emulation, pleasure at the deserved misfortune of another, and contempt. XI ARISTOTLE, *Rhetorica*, in THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH 1378^a, l. 31 to 1388^b, l. 31 (W.D. Ross ed., W. Rhys Roberts trans., 1963); see also ELSTER, *supra* note 8, at 61 (summarizing the discussions of emotion in Aristotle's *Nicomachean Ethics* and *Rhetoric*); SUSAN JAMES, PASSION AND ACTION: THE EMOTIONS IN SEVENTEENTH-CENTURY PHILOSOPHY 5 (1997) (same).

³⁵ See JAMES, *supra* note 34, at 6 (discussing Aquinas's classification of basic passions).

³⁶ See *id.* at 114-15 (describing Augustine's analysis of passions as aspects or modes of love); Blackburn, *supra* note 8, at 3 (stating that Augustine "managed with only one" emotion).

³⁷ See ELSTER, *supra* note 8, at 443 (listing forty-four "specific" emotions in the index). Some modern scholars try to reduce their lists by identifying families of emotion. For example, Paul Ekman provides the following list of emotion families, each including a number of related emotions: "amusement, anger, contempt, contentment, disgust, embarrassment, excitement, fear, guilt, pride in achievement, relief, sadness/distress, satisfaction, sensory pleasure, and shame." Paul Ekman, *Basic Emotions*, in HANDBOOK, *supra* note 28, at 45, 55. Most modern lists tend to include "anger, fear, jealousy, and especially intense forms of love." Cheshire Calhoun & Robert C. Solomon, *Introduction to WHAT IS AN EMOTION? CLASSICAL READINGS IN PHILOSOPHICAL PSYCHOLOGY* 23 (Cheshire Calhoun & Robert C. Solomon eds., 1984) [hereinafter EMOTION].

³⁸ See, e.g., Ekman, *supra* note 37, at 46 (describing social constructionist literature on emotion).

thinkers generally agree that emotions “feel” like something and have fairly specific physiological expressions.³⁹

Phenomena sometimes distinguished from emotion include moods (e.g., sadness—which has no object), attitudes (e.g., contempt—which has no point in time when something is “felt”), desires (e.g., hunger—which can be based on the pure biological needs of nourishment and survival), and beliefs (e.g., opinions—which tend to dissipate in the face of contrary evidence).⁴⁰ In a leading work, Robert C. Solomon elaborated on a taxonomy structure that divides passions into emotions, moods, and desires.⁴¹ According to Solomon, emotions focus on particular objects and situations, whereas moods focus on the world as a whole.⁴² Recognizing the distinction is a bit slippery, Solomon acknowledges that sometimes emotions concentrate on objects and situations that are quite general.⁴³ He maintains that the distinction between desires and emotions is even more problematic because many desires are built on the structure of emotions.⁴⁴ He explains, however, that “[d]esires convert mere ‘things’ into goals and instruments, mere ‘facts’ into conquests and frustrations, mere ‘possibilities’ into ambitions, wishes, and hopes.”⁴⁵

Typical of this field, other scholars take an entirely different approach than Solomon and like-minded thinkers. Some thinkers are interested in breaking down (rather than clarifying) any distinctions among emotions and other interpretive or motivational states.⁴⁶ A contemporary scholar representing yet another tack is Jon Elster, who both distinguishes and builds analytical bridges among emotions and

³⁹ Blackburn, *supra* note 8, at 4; *see also, e.g.*, WOLLHEIM, *supra* note 2, at 12-15 (describing the relationship among emotion, belief, and desire); Ekman, *supra* note 37, at 46 (listing qualities of emotions).

⁴⁰ *See* ROBERT C. SOLOMON, *THE PASSIONS* 132-34 (1976) (discussing moods and desires); WOLLHEIM, *supra* note 2, at 13 (defining beliefs); Blackburn, *supra* note 8, at 3-4 (discussing moods and attitudes).

⁴¹ *See* SOLOMON, *supra* note 40, at 132-34; *see also* Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in *PASSIONS*, *supra* note 1, at 123, 124 (distinguishing between emotions and desires in the context of characterizing vengeance).

⁴² SOLOMON, *supra* note 40, at 133. *But see* John Deigh, *Cognitivism in the Theory of Emotions*, 104 *ETHICS* 824, 826 (1994) (arguing that not all emotions have intentional objects and that some cognitivists get around this observation by “excluding experiences of objectless emotions from the class of emotions proper and placing them in some distinct class of mental states, such as moods”).

⁴³ SOLOMON, *supra* note 40, at 133.

⁴⁴ *Id.* at 134.

⁴⁵ *Id.* at 132-33.

⁴⁶ *See, e.g.*, Michael Stocker, *Intellectual Desire, Emotion, and Action*, in *EXPLAINING*, *supra* note 27, at 323 (arguing that sharp distinctions among emotions and other psychological states dissuade good intellectual life and work); Gareth Matthews, *Ritual and the Religious Feelings*, in *EXPLAINING*, *supra* note 27, at 339 (investigating the interplay among emotion, belief, thought, and behavior through the lens of religious ritual); *see also* Calhoun & Solomon, *supra* note 37, at 6 (explaining that Errol Bedford and Jean-Paul Sartre saw emotions as closely related to other mental phenomena such as judgments or beliefs).

other psychological states. In a recent work, Elster approvingly surveyed prior taxonomies for studying and understanding emotions,⁴⁷ and also showed how the boundaries among emotions can break down—explaining, for example, how the human psychological process transforms shameful or dysfunctional emotions into those deemed more constructive or acceptable.⁴⁸

So it is that even in the process of delineating the qualities of emotions, such disagreement and diversity in approach emerge that one emotion scholar has remarked that the academy's "understanding of emotions is in almost singular disarray, so that even if we could frame a coherent explanatory account of basic cognitive concepts, . . . no such account of emotions could be provided."⁴⁹ In her introduction to *The Passions of Law*, Susan Bandes reckons with these problems of definition and characterization.⁵⁰ Forthrightly acknowledging that no consensus exists on what constitutes an emotion, Bandes queries "whether this particular discussion—on emotion's role in the law—can proceed despite the lack of definition."⁵¹

Most other contributions to *The Passions of Law* sidestep this question, treating their chosen emotion as unquestionably meriting that label.⁵² In a closing essay on emotion in the opinions of Justices John Marshall Harlan and Oliver Wendell Holmes, Samuel H. Pillsbury astutely observes the tendency of legal writers "to treat emotion terms as self-defined and as normatively obvious."⁵³ Noting that emotion theorists pursue diverse approaches to defining emotion, Pillsbury does not see this indeterminacy as an obstacle to exploring "emotive influence on judicial decision making."⁵⁴

Although I agree that the problem of defining emotions should not disqualify the study of law and emotions, I am more troubled by the ramifications for a thriving law and emotion movement. By directly reckoning with the definitional problem, law and emotion scholars might not only benefit from integrating the debate into their writing, but might also contribute to creating a consensus definition of emotion. Equally important, explicit discussion of the definitional

⁴⁷ ELSTER, *supra* note 8, at 52-107.

⁴⁸ *See id.* at 332-70.

⁴⁹ GREEN, *supra* note 27, at 1-2.

⁵⁰ *See* Bandes, *supra* note 6, at 10.

⁵¹ *Id.*

⁵² Many contributions to the volume do, however, survey more general theoretical approaches to the "emotion" they analyze. *See, e.g.,* Martha Minow, *Institutions and Emotions: Redressing Mass Violence*, in *PASSIONS*, *supra* note 1, at 265, 272-74 (summarizing the description of five approaches to understanding emotions from prior work by Cheshire Calhoun and Robert Solomon).

⁵³ Samuel H. Pillsbury, *Harlan, Holmes, and the Passions of Justice*, in *PASSIONS*, *supra* note 1, at 330, 331.

⁵⁴ *Id.* at 331-32.

problem will provide a common thread, binding what is now a series of uncoordinated efforts in law and emotion scholarship, which does not fall together as a coherent whole. Without clarification of the issue, one is left wondering what ties together a group of work such as the essays here other than the word "passion" in the title. After all, the essays grapple with such diverse phenomena as disgust,⁵⁵ shame,⁵⁶ remorse,⁵⁷ revenge,⁵⁸ love,⁵⁹ forgiveness,⁶⁰ and cowardliness.⁶¹

The anthology's essays on disgust are instructive of how debates about defining emotion can enhance the law and emotion movement. In two potent and elegantly written entries, Martha Nussbaum and Dan Kahan open *The Passions of Law* with dueling arguments on whether disgust has a legitimate role in governance by law.⁶² (Nussbaum thinks not, Kahan thinks yes.⁶³) The passages are particularly well chosen, having the quality of majority and dissenting opinions in a close case (both of which convince the reader of the rightness of their views). One would nevertheless be in a better position to evaluate their merits if the essays presented direct analysis of how and why the specific concept of "disgust" fits in with existing literature on what constitutes an emotion.⁶⁴

If, for example, one subscribes to the view that emotions are part of a subtle continuum, one might be less likely to condemn disgust for all legal purposes, given the possibility that disgust might be related to or confused with a more salutary phenomenon such as outrage or indignation.⁶⁵ Similarly, one might be less likely to embrace Nussbaum's unqualified rejection of disgust if one believed the sentiment was capable of transmogrification into a more positive social force—a

⁵⁵ See Martha C. Nussbaum, "Secret Sewers of Vice": Disgust, Bodies, and the Law, in *PASSIONS*, *supra* note 1, at 19.

⁵⁶ See Toni M. Massaro, *Show (Some) Emotions*, in *PASSIONS*, *supra* note 1, at 80.

⁵⁷ See Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, in *PASSIONS*, *supra* note 1, at 168.

⁵⁸ See Jeffrie G. Murphy, *Moral Epistemology, The Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ*, in *PASSIONS*, *supra* note 1, at 149; Solomon, *supra* note 41.

⁵⁹ See Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, in *PASSIONS*, *supra* note 1, at 217.

⁶⁰ See Minow, *supra* note 52.

⁶¹ See William Ian Miller, *Fear, Weak Legs, and Running Away: A Soldier's Story*, in *PASSIONS*, *supra* note 1, at 241.

⁶² See Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *PASSIONS*, *supra* note 1, at 63; Nussbaum, *supra* note 55, at 19-62.

⁶³ See Kahan, *supra* note 62, at 63; Nussbaum, *supra* note 55, at 22.

⁶⁴ Cf. Nussbaum, *supra* note 55, at 43 (rejecting the view that disgust is a "moral sentiment that should be honored as highly relevant to . . . legal regulation"). In fairness, I note that Nussbaum's entry explicitly engages with the other debates within the scholarship that I discuss below—the intersection of emotion with cognition. See *id.* at 26.

⁶⁵ Nussbaum argues that disgust works in collaboration with evil, is unlike more worthy emotions such as outrage and indignation, and should therefore not be used to guide public action. See *id.* at 22, 26-29, 29-35, 49-55.

process Jon Elster observes that allows humans to make lemonade from sour lemons (rather than sour grapes from sweet ones).⁶⁶

Existing emotion theory would also assist in evaluating Kahan's position. Kahan presents a generally favorable portrait of William Miller's thesis that disgust is indispensable for members of society in making moral judgments and mapping social organizations.⁶⁷ In connection with this later notion, Kahan argues that disgust is remarkably hardy—persisting within social groups “notwithstanding shifts in social norms.”⁶⁸ To deny this, Kahan maintains, is to engage in self-delusion, which in turn can promote lack of candor and accuracy within legal process.⁶⁹

Evaluating this argument in light of the definitional literature, one might look at the work of one prominent emotion theorist who maintains that disgust merits a place on the list of emotions because it possesses several characteristics of basic emotions, including brief duration and “unbidden occurrence” (that is, the onset of the emotion is involuntary or unchosen).⁷⁰ This approach yields mixed reviews for Kahan's claims. Obviously, Kahan's claim that disgust is persistent conflicts with the notion that it lasts only briefly. On the other hand, emotion theory's suggestion that disgust is an involuntary phenomenon reinforces Kahan's view that human governance cannot take place without the influence of disgust. Although Kahan's arguments ring true to me, I take no final position about whether he accurately represents the qualities of disgust. I urge only that his arguments, and others like them, would benefit from scrutiny in light of debates within emotion theory. This would put the legal angle (as well as the emotion theory itself) into sharper focus⁷¹ and would provide a shared dialogue for law and emotion scholarship.⁷²

⁶⁶ See ELSTER, *supra* note 8, at ix.

⁶⁷ See Kahan, *supra* note 62, at 64-69 (evaluating in a favorable light the theses that disgust is both an “indispensable member of our moral vocabulary” and a constitutive feature of hierarchies necessary for social order).

⁶⁸ *Id.* at 69.

⁶⁹ *Id.* at 73.

⁷⁰ See Ekman, *supra* note 37, at 54-55.

⁷¹ I, of course, use Kahan and Nussbaum only as examples. Many other contributors to the volume would similarly benefit from expanding on the definitional or taxonomic issues underlying their analyses. As a contrasting example, take Jeffrie G. Murphy's contribution, for which further discussion of the qualities and distinctions among emotions would be instructive. See Murphy, *supra* note 58. Murphy's piece evaluates the claim that—in the context of retributive punishment—some emotions are epistemically reliable (such as guilt), while others are epistemically unreliable (such as malice, spite, and envy). *Id.* at 150.

⁷² An example of how this common ground could illuminate the scholarship here arises from a comparison of the contributions of Cheshire Calhoun and William Ian Miller. Calhoun's essay describes how the law's position on same-sex marriage is tied to society's conception of romantic love. Calhoun, *supra* note 59, at 217-18. Miller's essay explores how a statute outlawing cowardice expresses disapproval of fear. See Miller, *supra* note 61,

B. Many Threads of Emotion: Debates About Cognitive Content

The Passions of Law has much more to say about the other topic preoccupying emotion theorists: the relationship between cognition and emotion. Because this relationship implicates notions of rationality, the relationship's appearance in a volume on law is not surprising. Indeed, because law is conventionally associated with rationality and traditionally uncomfortable with emotionality, I argue that further law and emotion study should concentrate more explicitly on debates about the cognitive content of emotions.

Like emotion, the concept of cognition defies easy definition. Making matters worse, the cognition/emotion debate begs the question of what constitutes an emotion. In fact, much work on defining emotions proceeds by reference to parallel definitions of cognition.⁷³ Some approaches to defining emotions use differences in "cognitive focus" as the means of organizing and distinguishing emotions.⁷⁴ Thus, the technical materials sometimes take the appearance of a cat chasing its tail, with the uninitiated reader left with no apparent way out of the emotion/cognition circle. Do we start with a definition of cognition or with a definition of emotion?

One toehold for escaping the tautology comes from a simple dictionary definition of cognition: "the action or faculty of knowing."⁷⁵ One scholar expands this for philosophers of the mind, including in this concept "sensation, perception, conception, etc., as distinguished from feeling and volition."⁷⁶

Once they reach beyond the definitional dilemma, thinkers divide the emotion/cognition relationship in a variety of ways. One of the many angles on the question involves examining the role of emotions in structuring frameworks for judgments of reasonableness and explaining the physiological process of obtaining knowledge (i.e., learning).⁷⁷ One popular approach views emotions as reactions to

at 242-43. After reading these two excellent essays, I was dogged with curiosity about their approaches to how society constructs emotions. Is fear socially constructed in the same way as homosexual love? Does understanding why society is not yet able to recognize homosexual love shed light on how we ensure courage in our soldiers?

⁷³ See, e.g., Lazarus, *supra* note 28 (outlining some of the approaches to defining emotion and cognition and inserting another function—motivation—as an integral part of mental process).

⁷⁴ See, e.g., Gerald L. Clore, *Why Emotions Require Cognition*, in *THE NATURE OF EMOTION* 181, 186-90 (Paul Ekman & Richard J. Davidson eds., 1994) (delineating "three broad classes of emotions distinguished in terms of the cognitive focus involved").

⁷⁵ Alan Garnham, *Cognitive Psychology*, in *COMPANION*, *supra* note 2, at 167, 167 (quoting *Oxford English Dictionary* definition of "cognition"). On the prudence of indulging a less-than-certain starting definition for analysis, see Deigh, *supra* note 42, at 826-27 (arguing that inaccuracies are not always "an overdraft," but can be "a loan that the theory needs to get started and is certain to repay if it prospers").

⁷⁶ Garnham, *supra* note 75, at 167.

⁷⁷ See de Sousa, *supra* note 2, at 271-72.

cognitive states such as beliefs and desires. According to this approach, the emotion of anger, for example, can be a response to the belief that one has been insulted.⁷⁸

Beyond the foundational concepts of desires and beliefs, controversy emerges. The following example is illustrative. According to conventional theory, one could say that the emotion of fear is a response to my belief that a lion is coming at me.⁷⁹ Analytical complication arises when one realizes that my psychological state (and conclusion that my safety is in jeopardy) results at least in part from my belief that lions are dangerous. Emotion theories diverge in delineating what part of the notion "lions are dangerous" is emotion and what part is cognition or knowledge.⁸⁰ Some adopt a one-way explanation: I experience fear because of my belief that lions are dangerous. Other theories describe a "bidirectional" network, with emotion and cognition building on each other: my belief in the danger of lions feeds my fear and my fear in turn reinforces my belief.⁸¹ Some psychiatrists and psychologists have pressed this bidirectional theory further, outlining a "complex dynamical system."⁸² Under this system, my fear of lions derives from a complex of associations, inferences and interpretations that call on cognitive processes as well as affect or feeling.

Representing a related integrated approach, philosopher Richard Wollheim recently explained that emotions exist alongside beliefs (which provide humans with an understanding of the world) and desires (which motivate humans to act in the world).⁸³ Wollheim maintains that emotions arise as positive or negative attitudes about what humans experience as having satisfied or frustrated a desire.⁸⁴ Wollheim would argue that my fear of lions arises from my perception of the dangers they pose and in turn gives rise to my aversion or desire

⁷⁸ William Lyons, *The Philosophy of Cognition and Emotion*, in HANDBOOK, *supra* note 28, at 21, 39. Martha Minow provides a useful review of this approach in her contribution to *The Passions of Law* on institutions for redressing mass violence. See Minow, *supra* note 52, at 272-76.

⁷⁹ See RONALD DE SOUSA, *THE RATIONALITY OF EMOTION* 40-41 (1987).

⁸⁰ See *id.*; see also Calhoun & Solomon, *supra* note 37, at 4 (explaining that determining the precise connection between emotion and belief has become a focal point of controversy); Deigh, *supra* note 42, at 834-35 (exploring the ramifications of the observation "one need only believe that something is a threat to fear it").

⁸¹ Joseph P. Forgas, *Network Theories and Beyond*, in HANDBOOK, *supra* note 28, at 591, 592; cf. Cheshire Calhoun, *Cognitive Emotions?*, in EMOTION, *supra* note 37, at 327, 342 ("[E]motions do go hand in hand with typical beliefs. But this is not because emotions are beliefs. It is because ordinarily we believe that things are as they seem.").

⁸² Marc D. Lewis & Isabela Granic, *Self-Organization of Cognition-Emotion Interactions*, in HANDBOOK, *supra* note 28, at 683, 683-85.

⁸³ See WOLLHEIM, *supra* note 2, at 11-15.

⁸⁴ See *id.* at 1-68 (outlining relationship among belief, desire, and emotions).

to avoid them. In other words: "danger lies on the interface between desire and fear."⁸⁵

The usefulness of these theories for understanding and improving law and legal process is limitless. Many of the essays in the anthology bear out this promise. Indeed, John Deigh's contribution to the anthology takes the emotion/cognition debate as his starting point in arguing that understanding the emotional bond between the law and its subjects is crucial to the sovereign and representative capacities of law.⁸⁶ Likewise, Robert C. Solomon invokes the cognition materials in condemning the false distinction between "stupid" emotions and "rational" responses (such as retribution) and in arguing that "one purpose of law is to rationalize and satisfy the most powerful social passions."⁸⁷ Echoing similar themes, Martha Minow makes substantial use of material on cognitive aspects of emotion in evaluating appropriate institutional responses to mass violence,⁸⁸ as does Judge Posner in his more general piece on distinctions between emotions and emotionalism.⁸⁹

Yet further explanatory potential exists in the interstices of the emotion theorists' debates. For example, some thinkers who impute considerable cognitive content to emotions identify emotions with evaluative judgments.⁹⁰ Others suggest that emotions combine essentially evaluative judgments with other phenomena such as "agitated states of mind, autonomic behavior such as perspiration and goose flesh, and impulses to action."⁹¹ Still others raise the specter of an entirely groundless emotion in which the subject reacts to an object without evaluating it.⁹² Under this view, I could fear a lion without even thinking that it threatens harm.⁹³

While law will not necessarily provide the tool for resolving these theoretical inconsistencies, the debates hold several lessons for law. First, for all of their differences on the precise roles of feeling and

⁸⁵ *Id.* at 64.

⁸⁶ See John Deigh, *Emotion and the Authority of Law: Variation on Themes in Bentham and Austin*, in *PASSIONS*, *supra* note 1, at 285, 287-89.

⁸⁷ Solomon, *supra* note 41, at 131.

⁸⁸ See Minow, *supra* note 52, at 272-76.

⁸⁹ Posner, *supra* note 11, at 310-16, 323. Martha Nussbaum's entry also discusses the intersection of emotion with cognition. See Nussbaum, *supra* note 55, at 26.

⁹⁰ *E.g.*, NUSSBAUM, *supra* note 5, at at 292 (defending view that emotion is "identical with the full acceptance of, or recognition of, a belief"); SOLOMON, *supra* note 40, at 186-87 (explaining that "[a]n emotion is a (set of) judgment(s) which constitute our world, our surreality, and its 'intentional objects'").

⁹¹ Deigh, *supra* note 42, at 836; see also, *e.g.*, PATRICIA S. GREENSPAN, *EMOTIONS & REASONS: AN INQUIRY INTO EMOTIONAL JUSTIFICATION 15-17* (1988) (noting irrational emotional responses that undermine the view that emotions must involve evaluative judgments).

⁹² *E.g.*, Deigh, *supra* note 42, at 837.

⁹³ See *id.* ("Couldn't a garter snake . . . fill one with fear without one even thinking that it threatens harm?").

cognition, the various materials demonstrate that reason and knowledge—two functions of the mind that law prizes so dearly—actually require emotion for their existence and meaning. This revelation helps dispel law's self-defeating fear of emotion. Second, discussion of the differences among cognitive theories provides an opportunity to bring together diverse legal concepts. This alone merits explicit treatment of the debates in future law and emotion studies. Moreover—if we are lucky—increased coherence in the emotion theory and deeper understanding of the legal principles may also result as by-products of explicit discussion.

I illustrate this potential with three essays in *The Passions of Law* that analyze the emotion of empathy.⁹⁴ Arguing that empathy is important to good judging, Judge Posner marshals more positive attention to empathy than other contributors. Highlighting empathy's useful qualities, he reasons:

Empathy is one of the best examples of the cognitive character of emotion. The cognitive element of empathy is imagining the situation of another person; the affective element, which marks it as an emotion and not merely a dimension of rationality, is *feeling* the emotional state engendered in that person by his situation.⁹⁵

From this premise, Posner reasons that empathy enables a judge to integrate into her decision-making remote human interests that are not immediately before the judge, but possibly affected substantially by any decision the judge makes.⁹⁶ Posner's praise of empathy is not without qualification,⁹⁷ perhaps because of his earlier, less favorable reviews of the emotion.⁹⁸ Here, however, Posner emphasizes empathy's potently cognitive character in the hands of an able judge. He suggests that the emotion more likely reflects an evaluation of beliefs, rather than an ungrounded emotional reaction that short-circuits reasoning.⁹⁹

⁹⁴ Samuel H. Pillsbury includes related discussion about sympathy in his analysis of dissents by Justices Harlan and Holmes. See Pillsbury, *supra* note 53, at 344-57. For a discussion of the distinctions between sympathy and empathy as they relate to law, see Justin D'Arms, *Empathy and Evaluative Inquiry*, 74 CHI-KENT L. REV. 1467, 1477-82 (2000).

⁹⁵ Posner, *supra* note 11, at 329 n.21.

⁹⁶ *Id.* at 323-24.

⁹⁷ See *id.* at 324.

⁹⁸ See RICHARD A. POSNER, *OVERCOMING LAW* 381 (1995) (asserting that "the internal perspective—the putting oneself in the other person's shoes—that is achieved by the exercise of empathetic imagination lacks normative significance").

⁹⁹ See Posner, *supra* note 11, at 324. Those committed to economic analysis of law may be pleased by his submission that such analysis is "profoundly empathic" because it integrates into decision-making the interests of absent parties. *Id.* I query, however, whether economic analysis truly includes the afterglow of feeling that Posner describes as crucial to the emotional component of empathy. For further law and emotion scholarship related to the economic analysis of law, see Anne C. Dailey, *The Hidden Economy of the Unconscious*, 74 CHI-KENT L. REV. 1599 (2000).

This discussion contrasts with Susan Bandes's treatment of empathy in her introduction. Bandes, who has written about empathy in the context of victim impact statements,¹⁰⁰ states:

The empathy that serves as an important tool for therapists does not easily translate into a necessarily positive emotional tool for legal actors, such as judges. The goals of judging are not necessarily consonant with the goals of therapy. The judge . . . seeks not just to understand but to pass judgment.¹⁰¹

What accounts for the difference in tone here? Bandes and Posner diverge in evaluating empathy's efficacy in decision making. Does this derive merely from difference in context or in how they define the emotion?¹⁰² Do Bandes and Posner possess contrasting views on the cognitive components of empathy, or is Posner merely highlighting the upsides and Bandes highlighting the downsides of the same phenomenon?¹⁰³

The Bandes and Posner analyses provide foils for evaluating arguments about remorse reflected in Austin Sarat's contribution to *The Passions of Law*.¹⁰⁴ While Sarat's primary aim is to describe popular culture's portrayal of remorse,¹⁰⁵ he also submits a more normative argument that remorse is a precondition for a criminal's acceptance of responsibility and reconciliation with victims and society.¹⁰⁶ In so doing, he suggests that remorse contains empathetic components, with the criminal identifying with the victim: "Remorse . . . implies a degree of empathetic pain on the part of the one who has caused the fracture."¹⁰⁷ This empathetic quality, however, eludes characterization in light of the materials on cognition. On one hand, Sarat outlines a process of growth—from committing a criminal deed, accepting responsibility for the deed, and reconciling with society—

¹⁰⁰ See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 377-79 (1996) (endorsing efforts to achieve imaginative understanding of others, yet warning that empathy can merely perpetuate the status quo when it is used to emboss a judge's own preconscious response onto the circumstances of others); cf. Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1569, 1573-77 (2000) (highlighting the tendency of individuals to embrace their own beliefs and viewpoints with more confidence than they should).

¹⁰¹ Bandes, *supra* note 6, at 9.

¹⁰² See Bandes, *supra* note 100, at 373 (noting that empathy is "laden with serious definitional problems" and that the "conceptual utility of empathy varies widely depending on the context in which it is invoked").

¹⁰³ Bandes argues that decision making cannot occur without "selective empathy." Bandes, *supra* note 6, at 6.

¹⁰⁴ See Sarat, *supra* note 57.

¹⁰⁵ *Id.* at 170-71.

¹⁰⁶ *Id.* at 169, 177-85.

¹⁰⁷ *Id.* at 169 (alteration in original) (quoting Harvey Cox, *Repentance and Forgiveness: A Christian Perspective*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 21, 24 (Amatai Etzioni & David E. Carney eds., 1997)).

that strongly suggests a cognitive process tethered to rationality, akin to Posner's account of empathy. Yet Sarat's picture of the empathetic components of remorse has an impulsive, physiological character as well. Not only does he label empathy as painful,¹⁰⁸ but he also opines that "[t]he remorseful criminal joins us in our shock"¹⁰⁹ and that the criminal's "remorse does not diminish . . . the astonishment [the criminal act] engenders."¹¹⁰ This textured portrayal of remorse and empathy is reinforced in his intriguing (if somewhat oblique) statement that "remorse . . . does not challenge reason but seems instead to be a reasonable/rational response to transgression."¹¹¹

Sarat apparently sees the "feeling" component of empathy as essential to bridge-building among criminals, victims, and society.¹¹² If that is the case, Sarat values this "feeling" of empathy as most crucial to law and the legal process—a view that contrasts with the views of Posner and Bandes. No matter which thinker has characterized the emotion most accurately, all three expose the shallowness of law's knee-jerk aversion to emotion. The three essays each contain important insights about the complex structure of empathy and its ability to operate differently in different "legal" contexts—whether harnessing remorse to complement the more formal aspects of the criminal process, improving legal doctrine, or heightening the accuracy of adjudication. The emotion/cognition thread has in turn provided a means to understand how the three diverse approaches to law and legal scholarship intersect. To the extent this discussion about law, empathy, and other emotions continues within the context of the emotion/cognition debate, we stand to benefit.

III

THE LEFT SIDE OF THE AND: NEGOTIATING MANY THREADS OF LAW

Scholars have recently noted problems with interdisciplinary scholarship's failure to develop a nuanced understanding of law.¹¹³ Like those pointing to legal scholars' unsophisticated use of other disciplines, these critics focus on the shallowness of interdisciplinary scholarship. Again, however, *The Passions of Law* dodges this criticism by representing the law in a textured and multicontextual manner.

¹⁰⁸ *Id.* at 178.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 179.

¹¹¹ *Id.* at 169.

¹¹² *Cf. id.* at 178 ("Remorse builds a bridge between offender and the community astonished by his deed.").

¹¹³ *E.g.*, Baron, *supra* note 13, at 1061 (arguing that "[l]aw-and-literature scholarship has not questioned what the category 'law' consists of and has thus tended inadvertently to reinforce the notion of law as autonomous").

The broad variety and deep understanding of law reflected in the anthology is, no doubt, the wise editorial design of Susan Bandes. This quality, however, goes largely unheralded in the book. As with the book's treatment of emotion theory, the essays are not explicit about how their slice of law relates to the whole. As a consequence, the depth of understanding they represent go unappreciated. Consequently, future law and emotion scholarship would benefit from a more self-conscious approach that articulates where the piece of life under scrutiny lies in the undelineated territory of law, culture, and society.¹¹⁴

Although the anthology's essays say little about how they view law, they actually span myriad manifestations of law.¹¹⁵ For purposes of discussion, I catalogue the essays into three categories: creating and modifying legal doctrine, structuring legal institutions, and umpiring the intersection of legal rules, culture, and society. With an eye toward highlighting the contribution of the book and mapping a route for future scholarship, I discuss each category in turn.

A. Many Threads of Law: Legal Doctrine

The anthology's coverage of legal doctrine is both predictable and surprising. Predictable is the prevalence of criminal law matters, including essays on disgust, vengeance, punishment, retribution, cowardice crimes, hate crimes, remorse, and human rights atrocities.¹¹⁶ Convention may dictate this focus on criminal law. Criminal law has often touched emotion, sometimes providing a safe haven for emotion within the social order, identifying which emotions act as valid defenses to crime, indulging the impulse to punish, and occasionally restraining emotional reaction to crime in the name of civility and rationality. Despite criminal law's status as a traditional medium for emotion in law, some of the criminal law essays in the volume bear unconventional results. Indeed, many of the criminal law essays reach beyond a vision of law as a formal, autonomous institution, investigat-

¹¹⁴ In observing that this territory is undelineated, I envision some limitation on what constitutes "law." Otherwise, as J.M. Balkin points out, the investigation of how emotion study touches law would simply be described as "law" rather than "law and emotion." See J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 950 (1996) (observing that "there is 'interdisciplinarity,' rather than 'disciplinarity,' and that this interdisciplinarity is expressed as 'law and,' rather than just 'law.'").

¹¹⁵ See, e.g., Deigh, *supra* note 86, at 287-89 (developing jurisprudential theories); Minow, *supra* note 52, at 265, 272-76 (structuring institutions); Nussbaum, *supra* note 55, at 22 (developing legal doctrine); Posner, *supra* note 11, at 309, 310-16, 323 (structuring institutions); Solomon, *supra* note 41, at 131, 133 (developing jurisprudential theories).

¹¹⁶ This is not the first effort to demonstrate the dominance of criminal law in law and emotion scholarship. See, e.g., LAWYERS ON PSYCHOLOGY, *supra* note 3 (anthology of interdisciplinary works including analysis of sentencing, criminal intent, rape trials, and prison personnel).

ing such matters as the depiction of crimes in popular culture,¹¹⁷ the use of law to justify social passions,¹¹⁸ and the manipulation of emotions to ensure compliance with the criminal law.¹¹⁹

Surprising is the relative absence of one area of doctrine often used to control and to indulge emotion: family law. Only Cheshire Calhoun—in an incisive social constructionist account of same-sex marriage—makes more than passing reference to how emotion theory could help structure family law rules.¹²⁰ Think of the rich possibilities awaiting further scholarship: emotion theory could help fashion doctrine that harnesses the most constructive emotions, identifies beneficial cognitive components of feeling/belief/desire interactions, and encourages negative emotions to transform into those that improve family relationships.

Civil remedies doctrine provides another obvious candidate for emotion theory research. Theoretical boundaries need not stretch in order for emotion theory to help fine-tune doctrines governing the availability of injunctive relief (e.g., how should a court deciding whether to issue an injunction evaluate the plaintiff's alleged fear of imminent harm?), declaratory relief (e.g., does the defendant require the coercive strong-arm of contempt or will she comply with a mere declaration of legal rights?), restitution (e.g., how much profit disgorgement will deter a defendant from acting on future impulse for illegality?), compensation (e.g., how do we measure pain and suffering?), and punitive damages (e.g., does an understanding of remorse, retribution, disgust, and vengeance in the criminal setting translate to punitive civil remedies?).¹²¹ Trusts and estates, property, and contract law also stand to benefit from emotion theory, although the formality characteristic of these areas may initially hinder integration of cognitive lessons from emotion theory.

B. Many Threads of Law: Structuring Legal Institutions

Of all the essays in *The Passions of Law*, Martha Minow's contribution discusses emotion in institutional structure most explicitly.¹²² Surveying triggers for negative emotions and the role of emotions in negotiating social relationships, Minow outlines alternatives for re-

¹¹⁷ See Sarat, *supra* note 57.

¹¹⁸ See Solomon, *supra* note 41.

¹¹⁹ See Massaro, *supra* note 56.

¹²⁰ See Calhoun, *supra* note 59; see also Bandes, *supra* note 6, at 6 (referring to bitter divorce litigants); Minow, *supra* note 52, at 271, 273-74 (referring to no-fault divorce and how "go for broke" strategies in conventional divorce litigation undermine relationships).

¹²¹ Cf., e.g., Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1435 (2000) (analyzing the role of emotion in evaluating juries' authority in determining tort liability).

¹²² See Minow, *supra* note 52.

dressing mass violence.¹²³ In so doing, she provides an important sketch of how emotion theory helps us evaluate the efficacy of conventional litigation and alternative dispute resolution techniques.¹²⁴ Focusing largely on the perspectives of parties (victim and perpetrator), Minow describes how society and individuals pursue the task of identifying an instrument for restoring victims, acknowledging injustice, and forging stronger communities.¹²⁵

The balance of the book's structural discussion focuses less on emotions of affected citizens than on the emotions of government agents staffing institutions. In particular, the process of adjudication (usually in the dominant legal institution of courts) garners the attention of several contributors. In addition to discussing victim impact statements considered by criminal juries, contributors focus on the consciousness of judges, performing content review of opinions as well as surveying theories on how emotions influence decision making.

Several commentators explain how emotional guides improve judicial decision making. Undergirding many of the works in *The Passions of Law* is the relatively uncontroversial proposition that emotion (at least controlled emotion) improves perception, which in turn improves decision making.¹²⁶ More specifically, Samuel H. Pillsbury suggests that good judging results when a judge possesses an emotional attachment or passion about ideas and abstract concepts because she will more likely embrace those concepts even in the face of "professional and personal obloquy."¹²⁷

In an entirely different argument, Judge Posner submits that much of law embodies a moral code reflecting inarticulable emotions rather than formalistic reasoning.¹²⁸ Since he maintains that "it is not the proper business of judges to dismantle the moral code of their society," Judge Posner concludes that a judge's emotional reactions to an issue provide a valuable shortcut in efficient decision making.¹²⁹ He supports this claim with his description of the salutary effects of empathy,¹³⁰ adding that indignation, which provides a shorthand for society's moral condemnation of certain acts, is another useful emotion for adjudication.¹³¹

123 *Id.* at 266-71.

124 *See id.* at 272-77.

125 *See id.* at 266.

126 *See, e.g.,* Bandes, *supra* note 6, at 7 ("[E]motion in concert with cognition leads to truer perception and . . . better . . . decisions.").

127 Pillsbury, *supra* note 53, at 332-33.

128 Posner, *supra* note 11, at 322.

129 *Id.* at 322-23.

130 *See id.* at 323-25.

131 *See id.* at 322.

Judge Posner's remarks suggest a number of directions for future research. One particularly promising connection implicates recently reignited debates among legal scholars on the merits of formalism in decision making. By formalism, I refer to the jurisprudential approach to law characterized by adherence to norms without searching evaluation of the goals the norms are meant to achieve.¹³² Modern proponents enunciate a number of virtues of formalism, including restraint, efficiency, reduction in error, and consistency in decision making.¹³³ Interestingly, these qualities parallel many of the same benefits Judge Posner identifies in empathy and indignation, qualities he contrasts with formalistic reasoning.¹³⁴

As juxtaposition of these two lines of argument suggests, formal legal thinking's aversion to emotion holds some irony. Antipathy to emotions forgets that they can actually act as handservants to formalism. Not only do some emotions aid in adjudicating with consistency as Judge Posner suggests,¹³⁵ but awareness of emotions can help legal actors achieve the type of clearheadedness presumably valued by formalism's focus on rules.

Given the synergy between law and emotion, unqualified condemnation of emotion does not serve formality. At the same time, critics of formalism may find aid and comfort in the law and emotion enterprise. In observing the possibilities for healing and resolution made possible by remorse in the criminal process, Austin Sarat observes the violence that can be done by "fidelity to rules," which can "short-circuit . . . judgment" and undermine "justice in individual cases."¹³⁶

Another direction suggested by Judge Posner's remarks concern perspectivalism and debates about subjectivity in adjudication. His observation that empathy enables judges to consider perspectives of interested parties not before the court is reminiscent of works on postmodernism and competing points of view. For many decades legal scholars have struggled with the unavoidability of competing view-

¹³² Larry Alexander, "With Me, It's All er Nuthin'": *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 531 n.2 (1999); see also Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 612-17 (1999) (identifying several forms of formalism, including "apurposive rule-following").

¹³³ See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 158-59 (1991) (arguing that formalism reduces factors that may be legitimately used to resolve disputes); Alexander, *supra* note 132, at 534 (arguing that formalism makes possible coordination and efficiency in decision making); Pildes, *supra* note 132, at 613 (critiquing another commentator's view that formalism reduces error in decision making and ensures deference "to the greater expertise of rulemakers as against rule appliers").

¹³⁴ See Posner, *supra* note 11, at 322-23.

¹³⁵ See *id.* at 322-24.

¹³⁶ Sarat, *supra* note 57, at 174.

points and the judge's challenge of integrating those viewpoints into conflict resolution.¹³⁷ Emotion theory has much to contribute to this struggle, particularly through the light it sheds on subjectivity.

Most sophisticated thinkers reject the view that because emotions are subjective, they reflect nothing but the specific consciousness of the individual experiencing them. Rejecting the view that subjectivity is coextensive with point of view, emotion theorists recognize that while emotional states are perspectival, this "need not bar them from being cognitive or playing a role in cognition."¹³⁸ Understanding how an essentially subjective phenomenon such as emotion relates to a cognitive function such as developing beliefs can surely assist an adjudicator in understanding and considering perspectives of those interested in the outcome of a dispute.

Law and emotion studies also implicate a related issue in adjudication theory: judicial candor. While some scholars adopt a nuanced (sometimes utilitarian) view of the merits and demerits of candor, most recognize its importance in maintaining judicial integrity, educating the public and governmental actors about the meaning of the law, and fulfilling a judge's duty to litigation parties.¹³⁹ *The Passions of Law* contributes its own angle, with many essayists grappling with the wisdom of a judge being candid about her own emotional reaction to a particular case. Some scholars, such as Posner and Nussbaum, suggest that full emotional disclosure may validate emotions such as anger, hatred, or disgust, whose legitimacy in dispute resolution is

¹³⁷ See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 149-50 (1991) (describing the inevitability of competing perspectives); Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372, 375-80 (1996) (describing the creation of different characterizations of one set of facts); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 70 (1987) (suggesting that one should reach beyond the assumption of "one reality" to accept that "[t]here is no neutrality, no escape from choice"); see also Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1626-28 (1986) (recognizing that no judge acts alone, outside social context).

¹³⁸ de Sousa, *supra* note 2, at 271; see, e.g., Klaus R. Scherer, *Appraisal Theory*, in *HANDBOOK*, *supra* note 28, at 637, 637 (explaining that appraisal theory maintains that "emotions are elicited and differentiated on the basis of a person's subjective evaluation or appraisal of the personal significance of a situation, object, or event").

¹³⁹ See, e.g., Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 737 (1979) (contending that the function of judicial opinions is to "compel the writing judge and his colleagues to understand what they are deciding and why, and to provide the parties and their counsel with the same information" (footnote omitted)); Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 TEMP. L. REV. 629, 657 (1991) (arguing that full discussion of arguments on both sides of an issue serves to ensure that judicial opinions best fulfill their role of guiding future courts and litigants); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 54-55 (1988) (urging the importance of a full statement of reasons for decision); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 741-42 (1987) (commenting on uncertainty flowing from lack of candor). For qualifications to an uncritical call for judicial candor, see Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990), and Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995).

suspect.¹⁴⁰ Others, such as Kahan, are more fearful of incomplete disclosure. Kahan criticizes the attempt to mute disgust, calling it self-delusion, which can transform judicial opinions and public reaction to them into obstacles to justice.¹⁴¹

The Passions of Law carefully analyzes another topic that loosely relates to the task of structuring institutions: identifying and reinforcing sources of law's authority. For organizational purposes, I discuss this immediately below as a question pertaining to culture, critique, and social change. Many other structural issues, however, await attention by those interested in law and emotion. Some topics that would likely lend themselves to ready analysis in light of emotion theory include identifying appropriate emotions held by nonadjudicatory governmental actors (such as legislators and executive branch officials),¹⁴² developing techniques for helping litigants understand and cope with emotions at play in a particular dispute, and evaluating recent experiments with therapeutic justice.¹⁴³

C. Many Threads of Law: Culture and Society

Those wishing to understand the nature of law likely benefit from tracing the roots or sources of law's authority. As recent work in law and society reveals, this quest for the source of authority uncovers meaningful insights into the relationship among law, culture, and social order. The contributions to *The Passions of Law* expose an important role for emotion in this complex tangle of relationships. In the process of negotiating this tangle, the essays collectively present a broad picture of how law fully permeates society.

John Deigh's contribution contends that "the authority of law is conditioned on an emotional bond between the law and its subjects."¹⁴⁴ After surveying how this view relates to the theories of Bentham, Rawls, Hart, and others, Deigh explains that the authority of law comes not only from the subjects' (admittedly emotional) vulnerabil-

¹⁴⁰ See Nussbaum, *supra* note 55, at 26-55; Posner, *supra* note 11, at 313-19, 321.

¹⁴¹ See Kahan, *supra* note 62, at 69-73. Arguing powerfully that humans (presumably human judges included) must embrace moral humility, Murphy also contributes to arguments in favor of judicial candor. See Murphy, *supra* note 58, at 160-61.

¹⁴² For an example of scholarship analyzing emotions in executive decision making, see Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501 (2000).

¹⁴³ Beyond this, the possibilities for using emotion theory to enhance and critique therapeutic justice are vast, though somewhat indistinct. See, e.g., DENNIS P. STOLLE ET AL., *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (2000) (discussing diverse matters including restorative justice, holistic lawyering, and alternative dispute resolution). I refer most particularly to innovations such as drug courts and dependency courts. See, e.g., Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

¹⁴⁴ Deigh, *supra* note 86, at 287.

ity to punitive sanctions, but from their independent willingness to be governed by law, "to subordinate their own ends to the ends the law sets for them."¹⁴⁵ He likens law's authority over its subjects to parents' authority over their offspring: both children and law's subjects reach beyond fear of punishment to develop respect for the authority, as well as personal identity (or self-definition) and conscience.¹⁴⁶

Several commentators provide specific examples of this theme integrating law, emotion, social control, and personal identity. Toni Massaro describes social mechanisms that can manipulate emotions such as shame to ensure compliance with law.¹⁴⁷ From a different perspective, Austin Sarat shows how remorse can complement the legal process in confronting criminal acts and promoting healing in social relations injured through criminality.¹⁴⁸

In his study of vengeance, Robert C. Solomon joins Sarat and Massaro in demonstrating how society harnesses emotions in order to complement or invigorate law.¹⁴⁹ In particular, Solomon argues that by accommodating vengeance, the law performs an important "cleansing" function.¹⁵⁰ But Solomon avoids reducing the relationship to a one-way street in which emotion reinforces law. Instead, he describes a complicated dynamic by which law and society cultivate, rationalize, and satisfy emotions as well.¹⁵¹

This dynamic of law, society, and culture is vividly portrayed in Cheshire Calhoun's account of same-sex marriage.¹⁵² Calhoun starts with the proposition that legal doctrine most often condemns same-sex marriage using a definitional argument—asserting the notion that

¹⁴⁵ *Id.* at 295.

¹⁴⁶ *See id.* at 295-96.

¹⁴⁷ *See* Massaro, *supra* note 56.

¹⁴⁸ *See* Sarat, *supra* note 57.

¹⁴⁹ *See* Solomon, *supra* note 41. Danielle Allen presents a similar theme in arguing that unease about the law's justification for punishment stems from ignorance about how punishment is related to failed relations among members of a community and society's need to restore disturbed relationships. *See* Danielle S. Allen, *Democratic Dis-ease: Of Anger and the Troubling Nature of Punishment*, in *PASSIONS*, *supra* note 1, at 191, 191-94.

¹⁵⁰ Solomon, *supra* note 41, at 129, 131, 140-44.

¹⁵¹ *See id.* at 126-44. For other current work on emotions and social control, see Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 *CHI.-KENT L. REV.* 1537 (2000). In addition, Solomon's analysis suggests interesting intersections with legal literature about the educative aspects of law and psycho-physiologist literature on the crucial role of emotion in learning. *See, e.g.*, Jim Chen, *Law as a Species of Language Acquisition*, 73 *WASH. U. L.Q.* 1263 (1995) (exploring law, linguistics, and learning); de Sousa, *supra* note 2, at 271 (observing that humans do not learn unless the limbic system—the brain part "most actively implicated in emotional states—is stimulated at the time of learning" (citing ISRAEL SCHEFFLER, *IN PRAISE OF COGNITIVE EMOTIONS* (1991))).

¹⁵² *See* Calhoun, *supra* note 59. Austin Sarat's contribution also provides an important account of the interplay of a specific emotion (remorse) in culture, substantive legal principles, and legal process. *See* Sarat, *supra* note 57.

marriage necessarily requires one man and one woman.¹⁵³ What accounts, she asks, for this stalwart, ipso facto, yet weak, approach? She ultimately finds an explanation in “the cultural construction of a particular emotion: romantic love.”¹⁵⁴ In persuasively establishing the social architecture for romantic love, Calhoun identifies matters such as the individuals whom society disqualifies from experiencing the emotion (e.g., children),¹⁵⁵ the tendency of romantic movies to end with the “promissory note of a blissful future” between two perfectly compatible persons,¹⁵⁶ and constitutional law’s occasional treatment of the marriage bedroom as a sacred place—where sex that is more than mere sex takes place.¹⁵⁷ Contrasting this evidence with constructions of “loveless homosexuality,” Calhoun demonstrates how recognizing same-sex marriage would make conceivable what culture, myth, law, and social institutions have made inconceivable: romantic love outside the context of a two-gender, permanent, stable partnership.¹⁵⁸

Calhoun thus traces how culture (as partially constituted by law and reinforced by a background of social norms, relationships, and beliefs) creates an emotion (romantic love) that lays at the root of a cultural construction (marriage). The cultural construction of marriage in turn feeds the social policies behind law (condemnation of homosexuality), which themselves influence the structure of legal doctrine itself (only one man and one woman can comprise a valid marriage). This is stunning legal analysis. Whether or not as legal scholars we should be surprised that one whose primary discipline is not law has developed these insights, it is clear that through continued discussion of the interplay among emotion, society, and culture that Calhoun outlines, we stand to learn much about law, and perhaps one day we may be able to chart its boundaries.

CONCLUSION

Scholars frequently criticize “law and” scholarship for its lack of an organized theoretical structure or a defined body of knowledge.¹⁵⁹

¹⁵³ Calhoun, *supra* note 59, at 217.

¹⁵⁴ *Id.* at 218.

¹⁵⁵ *Id.* at 224.

¹⁵⁶ *Id.* at 226.

¹⁵⁷ *Id.* at 227-28.

¹⁵⁸ *See id.* at 230-36.

¹⁵⁹ *See, e.g.,* Baron, *supra* note 13, at 1062 (observing that the law and literature movement is so fractured that the phrase “law and literature” leads some to dismiss the movement as “an empty vessel, a phrase devoid of content”); Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597, 598 n.1 (noting that “sociology of law as a field of study has not produced an integrated and inclusive body of knowledge” (quoting Rita J. Simon & James P. Lynch, *The Sociology of Law: Where We Have Been and Where We Might Be Going*, 23 LAW & SOC’Y REV. 825, 843 (1989))). *See generally* Charles W. Collier, *Interdisciplinary Legal Scholarship in Search of a Paradigm*, 42

No doubt this phenomenon results inevitably from the large number of participants and random selection of interests pursued as part of interdisciplinary scholarship.¹⁶⁰ Yet the law and emotion movement may be specially poised to avoid some of the incoherence plaguing other "law and" movements. As a new development, law and emotion stands to benefit from the considerable body of literature critiquing the paths taken by other interdisciplinary legal movements. Some of that literature even suggests that interdisciplinary legal scholarship allied with social science (such as psychology) benefits greatly from the self-discipline and theoretical precision required of social science methodology.¹⁶¹ Ironically, law and emotion scholarship may also benefit from its greatest obstacle: the incipience of emotion theory itself. As both the law and emotion movement and emotion theory develop simultaneously, special opportunities for integration and coordination will likely present themselves. Only through explicit dialogue about the limitations in emotion theory and the multidimensional qualities of law in society, however, will interdisciplinary scholars make the most of these opportunities. Susan Bandes's *The Passions of Law* does a wonderful job selling its subject matter. What is needed now is a coordinated effort to fulfill its promise.

DUKE L.J. 840 (1993) (arguing that interdisciplinary legal scholarship has never confronted its foundational and methodological problems).

¹⁶⁰ Cf. JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* 145 (1987) (noting that scientists maintain that relationships among three or more bodies in a system are "most often impossible" to predict).

¹⁶¹ See, e.g., Jonathan R. Macey, *Law and the Social Sciences*, 21 HARV. J.L. & PUB. POL'Y 171, 173-75 (1997) (arguing that the focus required on particular theories and resulting self-discipline makes law and social science projects more credible than other "law and" interdisciplinary approaches); see also Robert C. Ellickson, *The Market for "Law-and" Scholarship*, 21 HARV. J.L. & PUB. POL'Y 157, 159, 170 (1997) (arguing that the market for legal scholarship has fostered an increase of social science work among legal scholars and that the market for legal scholarship "works passably well"); Rubin, *supra* note 27, at 539-40, 553 (noting that the social science methodology of verification has escaped the significant criticism aimed at social science grand theory and that social science is the "discipline to which legal scholars should turn").

