

# Michigan Law Review

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Volume 100 | Issue 6

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2002

## The Progress of Passion

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### Recommended Citation

Kathryn Abrams, *The Progress of Passion*, 100 MICH. L. REV. 1602 (2002).

Available at: <https://repository.law.umich.edu/mlr/vol100/iss6/21>

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# THE PROGRESS OF PASSION

*Kathryn Abrams\**

THE PASSIONS OF LAW. Edited by *Susan A. Bandes*. New York: New York University Press. 1999. Pp. xv, 367. Cloth, \$45; paper, \$22.50.

Like an abandoned fortress, the dichotomy between reason and the passions casts a long shadow over the domain of legal thought. Beset by forces from legal realism to feminist epistemology, this dichotomy no longer holds sovereign sway. Yet its structure helps to articulate the boundaries of the legal field; efforts to move in and around it infuse present thinking with the echoes of a conceptually distinct past. Early critics of the dichotomy may unwittingly have prolonged its influence through the frontal character of their attacks. By challenging a strong distinction between emotion and reason, critics kept it, paradoxically, before legal audiences. Moreover, within the context of this approach, refusing the challenge posed by critics remained an intelligible response. Glimpsing, perhaps, the limits of this approach, an emerging generation of critics has embraced a new strategy. By assuming the interpenetration of reason and emotion in law, and turning a keen, evaluative eye to their complex relations, these scholars have introduced new lines of inquiry. They have also often disarmed their opponents: when one is assessing the competing claims of disgust and indignation to direct the criminal law,<sup>1</sup> for example, it becomes more difficult for audiences to assert that emotions have no role in these legal processes.

Susan Bandes's<sup>2</sup> collection, *The Passions of Law*, is a triumphant example of this new genre of critique. "Emotion," Bandes declares in opening the book, "pervades the law" (p. 1) — her collection takes its shape from this transformative assumption. The question raised by the thirteen provocative essays that comprise this volume is almost never, "Can emotion co-exist with the demands of reason in law?" It is, as we learn in Bandes's illuminating introduction, "which emotions deserve the most weight in legal decision making, and which emotions belong in which legal contexts?" (p. 7) It is how to assess the varying functions that law can perform in relation to the emotions — whether ex-

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1. See Martha Nussbaum, *Secret Sewers of Vice: Disgust, Bodies and the Law*, p. 19.
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pressing, identifying, channeling, elevating, or satisfying individual or collective passions. It is how both law and the emotions that inflect it are shaped by elements of the broader culture in which both subsist. The great contribution of this volume is to shift the debate away from familiar dichotomies and toward the vast terrain that can be reconstructed by exploring the pervasive influences of the emotions in law. The gaps and inchoate elements in the collection remind us of just how large a task this may prove to be.

## I. THE PASSIONS OF LAW

*The Passions of Law* is presented in four parts: this framework nominally takes its bearings from the character of the passion to be explored, but other organizing principles come rapidly into view. The first section, "Disgust and Shame," features essays by Martha Nussbaum, Dan Kahan, and Toni Massaro debating the role of disgust, and secondarily shame, in the criminal law. The anchor for this debate is Kahan's brief yet pointed essay, "The Progressive Appropriation of Disgust," in which Kahan continues a sustained scholarly effort to use the force of shared (community) norms to enhance compliance with the criminal law. While Kahan's earlier works focused on the ways that law could enlist the emotion of shame in inducing compliance,<sup>3</sup> this essay turns its attention to disgust: an expression of collective disapproval that might animate the criminal law, and one of the emotions of judgment capable of eliciting shame. Kahan argues that the hierarchical judgments entailed by legal expressions of disgust are not only appropriate condemnations for certain kinds of offenders, but should be appealing to progressives who often resist their inegalitarian character. The kind of comparative judgment reflected in a public expression of disgust is not only inevitable but also valuable: it represents a potent species of expressive capital that should not be ceded to offenders alone. Moreover, competing public expressions of disgust provide occasions for glimpsing and comparing important hierarchies of value.

Nussbaum contests this conclusion by reconstructing disgust. She describes it not as expressing a hierarchy of value, but as reflecting human discomfort with our ineliminable animality, which we seek uneasily to escape by projecting it onto a specific person or group. This projection of animality onto a particular group has often been the predicate for cruel and dehumanizing treatment, in examples from Nazi Germany to the trial of Oscar Wilde. The viscosity of disgust also renders it publicly inarticulate, which causes it to compare poorly to the competing emotion of indignation. Indignation, which reflects

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3. See, e.g., Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

the anger triggered by unfitting treatment, can animate statements of public reason, making it a more suitable emotion for directing criminal legal enforcement.

Massaro, in a far-ranging essay, looks both at the public imposition of shame and at the evaluative emotions, such as disgust, that might animate it. Debates within both emotion theory and the norm theory on which Kahan draws, Massaro claims, raise questions about the use of law to induce shame in broad categories of offenders. Evidence of a broad-based human concern with status, for example, says little about whether the government might deploy that concern, through the imposition of shaming penalties, to induce compliance with law. Scholarship about the emotions suggests that there is too much uncertainty about how they are triggered, and in what combinations, and with what variation across different populations, to support the kind of simplified incentivizing system that Kahan advocates. Massaro also highlights tendencies that could be introduced into criminal justice, if the law were understood as a means of expressing disgust at offenders. Expressions of disgust entail no metric that could assess or limit the extent of punishment, making cruel or disproportionate punishments an ominous possibility. Such expressions might also be rendered banal when articulated in more widespread or ritualized form.

Part II focuses on “Remorse and the Desire for Revenge.” The first of these emotions is explored by Austin Sarat, whose nuanced examination of Tim Robbins’s film *Dead Man Walking* probes our society’s ambivalence about the degree to which we can either demand or recognize genuine remorse in the criminal offender.

The “desire for revenge” is explored in essays by Robert Solomon, Jeffrie Murphy, and Danielle Allen that examine three different variants of this emotion. Solomon’s essay invites us to consider how the often-maligned emotion of vengeance might be embodied in the law. He defends a conception of vengeance as an intense yet “cool” emotion with an element of instrumental rationality that points toward talionic notions of suitability or proportionality. This view permits him to argue that vengeance might not only be expressed, but channeled, elevated, and satisfied through its incorporation in the law. Indeed, the dominant metaphors we use even now to talk about vengeance — metaphors of debt, balance, or pollution — suggest limiting notions that might make vengeance through law containable and might foster a sense of relationship among victims, offenders, and the (legal) avenger.

Murphy, writing about retribution, reconsiders his longstanding support for a retributive theory of punishment. Building on arguments offered by Nietzsche, he questions whether either of the emotions ostensibly underlying the retributive urge, guilt or *ressentiment*, is epistemically reliable enough to provide the impetus for retributive action. More generally, he calls into question the goal of character retribution

— that the state should mete out punishments that respond not simply to the acts but to the “inner wickedness” of the offender. Using insights from Kant and Jesus Christ, he argues that we are neither so perspicacious in assessing the character of the offender, nor so free from our own failings, that we should depart as starkly as this strategy requires from a posture of moral humility.

The final essay, by Danielle Allen, is concerned with anger. Allen examines the use of retribution in ancient Athens to reflect on our contemporary discomfort with retributive justifications for punishment. In Athens, both the public and lawmakers recognized that “wrongdoing and punishment had to do with relations between people” (p. 193). Retributive sanctions thus responded to anger in the community, to an imbalance that had been created through the wrongdoer’s act. It was only, after Plato, when punishment came to reflect a defect in the offender — the “disease” to be cured was baseness in the offender rather than anger in the community — that retributive action took on the problematic character it retains to this day.

Part III of the book treats the most eclectic and far-reaching group of emotions. Cheshire Calhoun explains how laws and legal rhetoric restricting the institution of marriage to “one man and one woman” (p. 237) are based not only on an emotion, but on a socially-constructed emotion: a carefully-scripted notion of romantic love that “exceptionlessly cast[s] heterosexuals in the leading roles” (p. 222). Noting that emotions are often constructed to reinforce social hierarchies, Calhoun argues that denying certain groups the capacity to experience can be a means of subordination. Particular emotions may be “outlaw[ed]” because they presuppose, as philosophers Allison Jaggar and Elizabeth Spelman have argued,<sup>4</sup> “the beginning of a critical social theory.”<sup>5</sup> The argument that gays and lesbians lack the capacity to experience romantic love — a proposition fostered not only by cultural imagery but by the psychoanalytic communities of the 1950s and 60s — thus perpetuates sexual hierarchy. It should be resisted by deconstructing the cultural knowledge on which it rests.

William Miller is concerned with fear and cowardice, as reflected in the Code of Military Justice regarding “misbehavior before the enemy.”<sup>6</sup> Leading the reader on a legal, historical and literary tour of such failings as “running away” (p. 243), “gentle offense versus craven defense” (p. 246), and “throwing away one’s weapons” (p. 250), Miller explores the subtle distinctions among different species of fear and

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4. P. 223-24 (discussing Elizabeth V. Spelman, *Anger and Insubordination*, and Alison Jaggar, *Love and Knowledge: Emotion in Feminist Epistemology*, in *WOMEN, KNOWLEDGE, AND REALITY* (Ann Garry & Marilyn Pearsall eds., 1989)).

5. P. 223 (quoting Alison Jaggar, *Love and Knowledge: Emotion in Feminist Epistemology*, in *WOMEN, KNOWLEDGE, AND REALITY* (Ann Garry & Marilyn Pearsall eds., 1989)).

6. P. 241 (quoting 10 U.S.C.S. § 899 (Law. Co-op. 1997)).

cowardice. He also reflects on the difficulties of inferring these emotional states from the actions of the accused.

In the final essay of this part, Martha Minow asks how legal institutions can address the emotions aroused by mass violence committed under governmental auspices. She surveys innovations such as the United Nations International Tribunal for the former Yugoslavia and the Truth and Reconciliation Commission in South Africa to suggest the role that law can play, not only in gathering facts often shrouded in secrecy, but in “reconnect[ing] individuals with a . . . community committed to establish[ing] and protect[ing] human rights” (p. 269) and providing at least some of them “a way past revenge” (p. 267). Looking both at the asserted benefits of such institutions and at their potential shortfalls, Minow then contrasts them with efforts to attend to the emotional states of participants in more familiar forms of dispute resolutions, such as ADR.<sup>7</sup>

The final portion of the book, “Passion for Justice,” explores the role of passion in the tasks of making or obeying the law. Part IV opens with an essay by John Deigh that describes obedience to the law as being fueled by an emotional bond between the citizen and those who govern him that is akin to — as well as modeled and fostered by — the bond linking children and their parents.

Following this essay, Richard Posner and Samuel Pillsbury take on what is perhaps the most familiar question in the study of law and the emotions: the role of emotion in the life and work of the judge. In Posner’s essay, the question of judicial emotion is one of several, which include the role of hatred and shaming in administration of the criminal law and the role of evidence in providing a filter that seeks to insure the proper emotional state in the judge. But what does Posner have to say about this state? Posner emphasizes the role of emotions in difficult cases that “cannot be resolved by a purely algorithmic procedure but require[] recourse to intuition, moral feelings, the balancing of opposed interest, and political preferences” (p. 321). However, reasserting the traditional dichotomy, he notes that the emotions may be out of place in run-of-the-mill adjudication where “they would interfere with the problem-solving process” (p. 321); and even in the

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7. Though their emotional foci are distinct, these essays share many central themes with those of Part II. As distinct from Part I, they are concerned with the many varied ways in which law can engage the emotions: what we see in essays by Solomon, Allen, Minow and Calhoun is not simply the expression of emotion through law, but the structuring or elevation of emotion, the satisfaction of emotion, and the deployment of emotional scripts to perpetuate hierarchy. These essays are also alert to the shaping of both law and emotion by the elements of the surrounding culture. Calhoun shares this interest in cultural formation with Allen and Sarat. The essays of Parts II and III are also concerned with the epistemic difficulties of identifying emotional states with enough certainty to make them the predicate for legal consequences: here Sarat’s ambivalence about demanding remorse tracks Miller’s uncertainty about fear. Murphy’s epistemic doubts about glimpsing “wickedness” in the soul of the offender offer a similar — though less directly emotive — theme.

more complex cases, emotions can create a danger because “the resistance put up by ‘objective’ . . . considerations will be weaker” (p. 321). One key for judges may lie in identifying the emotions most appropriate to judging, or, as Posner intermittently puts it, distinguishing between “emotion” and “emotionalism” (p. 310). The first emotion that is particularly appropriate to the judge’s task is indignation, which is both “the normal reaction to a violation of the moral code of one’s society” (p. 322) and “the mode by which a violation is identified” (p. 322). The second is empathy, which Posner defines in a characteristically iconoclastic way. The point of judicial empathy is not to make immediate to the judge the plight of those before the court, but rather “to bring home to the judge the interests of absent parties” (p. 323), or to combat “the availability heuristic”: that is, “the tendency to give too much weight to vivid immediate impressions . . . and hence to pay . . . too little [attention] to absent persons likely to be affected by the decision” (p. 323).

Pillsbury, in contrast, argues that the emotions capable of shaping judging in salutary ways may be different for different judges. Forging a genre of inquiry he refers to as “emotive analysis” (p. 331), which combines elements of judicial biography with a search for the influence of emotions on appellate opinion-writing, Pillsbury examines the role of emotions in the work of Justices John Harlan and Oliver Wendell Holmes. Though Harlan appeared to be animated by outrage at group-based injustice and Holmes by a thirst for timeless intellectual achievement, both forms of “passion for justice” (p. 349) may have fueled the unique line of vision achieved by each in his landmark dissents.

## II. CHARTING PASSION’S PROGRESS

It is one of the great virtues of this volume that virtually every essay opens up new lines of argument, incites fruitful differences of opinion, or otherwise merits extensive commentary. The limited space of a review essay thus forces painful choices on one who would assess this provident and lively collection. Instead of touching on each essay briefly, or focusing at length on a subset of essays, I will take another strategy, one specifically tailored to Bandes’s ambitious goals in assembling the volume. In the discussion that follows, I will consider *The Passions of Law* less as a collection of individual essays than as an effort to instigate a new generation of questions about the relation between emotions and the law. I will look at the patterns and relations among the essays as a way of identifying what questions are being raised, and how they are being handled; what issues are being elided or moved to the margins; and what kinds of inquiries might fruitfully be undertaken to supplement the effort reflected here. In so doing, I will respond to individual essays, though perhaps differently, and cer-

tainly at less length, than would be the case with a different evaluative approach. I will organize my analysis around three kinds of questions that appear to be raised most directly by the structure and content of the collection:<sup>8</sup> what is the range of possible relations between the emotions and the law; which emotions should influence or should be enacted through the law and in what contexts; and whose (that is, which actors') emotions are the proper object of attention by legal analysts. In concluding, I will also touch on a fourth question, namely, how might analysis of the "passions of law" affect the sensibilities of those undertaking the inquiry.

### A. *Relations Among Law and the Emotions*

In first-generation analyses of law and the emotions, the engagements or interrelations that were acknowledged between the two were confined to certain well-rehearsed patterns. In the many areas of law in which emotion was regarded as problematic or at least controversial — the act of judging is the most familiar example — emotion was characterized as alien, and perhaps threatening, to the processes of more detached reason that characterized the activity. Revisionary accounts sought to characterize emotion as adding something distinct and valuable to that process;<sup>9</sup> yet the relation remained more or less oppositional. Moreover, to the extent that engagement produced any change in the character of the contending forces, it was emotion that modified the character of law — conceived in this case as abstract

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8. Although my approach is, I believe, suited to Bandes's aspirations in assembling this collection, the categories of questions I identify here do not faithfully track those framed by Bandes in her excellent introduction. This partial divergence may be attributable to the fact that we are most strongly engaged by different questions, or that we frame those questions at different levels of abstraction. Bandes, for example, identifies virtually all the relations among law and the emotions that I discuss below, but does not focus on their (unusual) range or make the kinds of comparisons among them that I undertake here. However, I suspect that the main reason for divergence is the difference in our tasks and the orientations they produce. Because Bandes's goal is to incite an expansion in our thinking about law and the emotions, her conceptualization is provocative and allusive. She identifies a far greater number of organizing inquiries and seeks to destabilize the substantive contribution of each essay by reading it first as oriented toward one set of questions and later as engaging another. Facing this proliferation of issues and aiming toward evaluation, as well as introduction, my analysis focuses on those patterns reflecting broadest or strongest coherence within the work as a whole and imposes greater fixity on the meaning or contribution of particular essays.

9. See, e.g., Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988); Judith Resnik, *On the Bias: Feminist Reconsideration of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877 (1988). In noting the limits of these analyses, I do not intend a backhanded critique — these were provocative interventions at that stage of the inquiry (indeed, at that point, one might more appropriately have called it a debate). It is simply that the conversation these first interventions initiated has progressed. One might take as indicative the fact that Martha Minow, one of the leading contributors to the early stages of this debate in law, has conceptualized the relations between law and the emotions in a distinct and more complex way in this volume.



reason — rather than the other way around. In those few areas — such as the criminal law — in which emotion was viewed less as an unwelcome intruder than as an organic part of the legal process, relations tended to be unidirectional and expressive; emotions explained or animated the structure of the law. The criminal law was understood as giving voice, for example, to our retributive urges in the face of wrongdoing.

One of the great surprises — and great pleasures — of *The Passions of Law* is the rich range of relations it conceives between the emotions and the law. The early relations are amply and interestingly represented. Posner's essay evokes the traditional tension between reason and the emotions, yet with the acknowledgement that the enrichment of the former by the latter is possible, and with the additional hybridity implicit in judges' efforts to confront the "availability heuristic" (p. 323). Kahan's and Nussbaum's essays reflect criminal scholars' interest in the expressive functions of the law, yet extend this interest by exploring the animating emotions of disgust and indignation. Massaro branches out from these traditional concerns by writing, critically, about the role of law in evoking certain responses in offenders. And Sarat and Miller explore, with mixed fascination and ambivalence, the conditioning of legal outcomes on decision makers' abilities to identify certain emotions, such as fear or remorse, in those who stand accused by the legal system.

Perhaps most novel and evocative, however, are a group of essays that envision a more complete interpenetration of law and particular emotions, and focus, in particular, on the way that law may shape or construct the emotions. Robert Solomon's essay on vengeance and the criminal law, Danielle Allen's analysis of approaches to collective anger at wrongdoing in ancient Athens, and Martha Minow's exploration of procedures for addressing emotions aroused by mass violence are particularly illuminating in this regard. None of these essays regards the expressive function as fully capturing law's relation to emotion, although each acknowledges this role. These essays are more concerned with the ways in which law can act on — perhaps one could say shape or construct — the emotions of individuals or communities. Solomon is concerned with the potential of law to "rationalize and satisfy" (p. 131) the constellation of collective emotions we identify with the desire for vengeance in the face of wrongdoing. Allen similarly takes up the theme of "satisfying" emotion — with an emphasis perhaps less on refinement than on catharsis — when she writes about addressing the collective "dis-ease" of anger in ancient Athens. Minow's emphasis is on the law's engagement with individual emotions — in this case, the emotions of the victims of mass, state-sponsored violence. She focuses on the ways that legal investigation, publicity, and affirmation, both of one's experience of violence and of countervailing human rights norms, can make it possible to move beyond a desire for venge-

ance, or to replace that urge with a less consuming desire to hold wrongdoers responsible, so that one can get on with one's life. Minow memorably quotes Jadranka Cigelj, a Muslim victim of Serbian rape, torture and detention, who collected testimony from other survivors and pursued prosecutions in the UN International Tribunal for the former

Yugoslavia:

When you think of a 15-year-old girl whose entire world was destroyed . . . how her youth was stolen and how she was turned into a wounded animal, you realize that what is important is to work toward a way to hold these people responsible and punish them. Then one day you wake up and the hatred has left you, and you feel relieved because hatred is exhausting, and you say to yourself, "I am not like them." (p. 267)

For Cigelj, the law, acting on a character of remarkable resiliency, has helped transform overwhelming hatred into a more bounded desire for accountability and justice that permits the resumption of the more familiar aspects of her life.

One factor that has made possible this view of the emotions as constructed by and through law is a set of new understandings of the emotions themselves. Both Minow and Massaro point to shifts in emotion theory that characterize emotions not as raw, unmediated affect, but as having a cognitive structure or an evaluative component. Cheshire Calhoun gives this insight a more explicitly political valence when she talks about "outlaw emotions" (p. 223) as containing the seeds of a social critique. For Solomon, perhaps most clearly, his careful reconstruction of the emotion of vengeance is closely connected to its capacity to be elevated or satisfied by law. When he characterizes vengeance not as a burst of anger but as a "cool" emotion with "its kernel of rationality" (p. 127), he describes an emotion that is capable of being purified or satisfied by law, often without resort to violence. The rationality, and the conceptual limits implicit in vengeance — highlighted by Solomon in his discussion of the three metaphors most consistently associated with discourse about vengeance — are what provide law its purchase when it begins to act on this passion.

This notion of the emotions as both cognitively inflected and (therefore) malleable shapes a related, fascinating feature of this collection: its view of the emotions, and the law that acts on them, as sculpted by the wider cultural context in which both exist. This view comes across most clearly in Calhoun, who writes about emotions as being "scripted" by cultural representations that are underwritten by certain forms of knowledge; but one also finds it in Allen, who contrasts the Athenian understanding of the collective "dis-ease" created by wrongdoing, with the more contemporary cultural understanding that locates the disease within the offender. Sarat envisions a more mutually reinforcing relation between law and culture when he opines that particular cultural representations, such as *Dead Man Walking*,

may reflect our ambivalence about our emphasis on, and ability to assess, remorse.

If the intriguing variety of the relations envisioned between law and the emotions is the great strength of this volume, one of its small disappointments is its failure to spell out, at least in some cases, the implications of these relations for specific legal interventions. Kahan's discussion of disgust makes the closest approach to implementation, although even here it is not clear whether he aims simply at enhanced penalties for hate crimes, or favors some ritualized official expressions of disgust. A more important question — whether he views the legal system as a forum for airing competing conceptions of disgust or systematically implementing one conception over another — also remains unresolved. Yet most American legal scholars, I would suspect, have some feel for an expressive approach to law and the emotions; in the criminal field, as I note above, it is not entirely new. The more compelling questions concern those legal regimes that might effect the construction or transformation of emotion. This conception seems less familiar, and perhaps more daunting; I found myself reading breathlessly to see how it might be accomplished. However, few of these more inventive essays venture far into the realm of implementation. Solomon stops with the introduction of a series of metaphors, by which we might structure a legal approach to vengeance. Allen offers a vivid portrait of the satisfaction of collective anger in Athens, but neglects to tell us whether or how the temporal and cultural distance might be bridged so as to make her example germane to contemporary law and policymaking. Minow's essay goes the farthest in this regard, interlacing explanations of various factfinding and reconciliation commissions with narrative accounts of their emotive effects on survivors of mass violence. Yet her essay provides only a brief tour of these innovations and quite intentionally raises as many questions as it answers.<sup>10</sup> These questions of implementation are crucial, because they touch on issues — raised both by Minow, and more extensively, by Massaro — about the limits of our knowledge of the emotions and the challenges of acting on a force as volatile and variable as emotion with an instrumentality as crude as law. These reservations might seem to apply with greatest force to Kahan's work on shame, because he projects such confidence that one can use law to produce emotional states, and because his efforts to incentivize compliance with criminal law through the production of shame in offenders envision the most direct or mechanical relation between law and emotion. Yet these questions also apply to approaches that use law not to produce but to assuage, satisfy, or transform emotion: these too may require an understanding

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10. A more sustained treatment is provided in Minow's excellent book, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER MASS GENOCIDE AND VIOLENCE* (1998), from which her essay is taken.

of the factors that influence the experience of emotion, or the role of law in effecting changes in emotional states that exceed what we currently have to offer.

### B. *Varieties of Emotion*

Which emotions are most appropriately reflected or embodied in law, and in what contexts? In answering this central question, the volume strives for both breadth and depth. The organization of the book highlights the range of passions that may be brought to bear in the legal context. Part III is especially valuable in probing emotions, such as love, fear, and forgiveness, whose life within the law has less frequently been explored. Part IV's discussion of judging contributes to the elaboration of a cognitive strand in the emotions. Pillsbury argues convincingly that the desire for transcendent intellectual achievement — an interpersonally detached and cognitively oriented emotion — played a pivotal role in the work of Oliver Wendell Holmes. And Posner's description of judicial empathy as an effort to combat the "availability heuristic" (p. 323) offers a potent, counter-intuitive challenge to readers, although I remain undecided as to whether this argument reflects a serious effort to reconstruct empathy, a partially ironic project of colonizing discourse on the emotions with the analytic frame of Chicago-style law and economics, or perhaps some combination of the two.

The collection's effort to assess the contributions of different emotions to the work of the law is another of its strengths. The opening trio of essays on shame and disgust are among the very best in the book. Nussbaum's humane and learned essay argues convincingly that the etiology of disgust in human discomfort with our irreducible animality makes it an unreliable and dangerous basis for legal enactments; she also effectively highlights the greater proportionality and articulacy of indignation. Massaro reminds us that the current state of knowledge about the emotions raises serious questions about whether they can be strategically evoked and deployed by law. This insight sounds a cautionary note, not only in relation to Kahan, but in relation to others of the authors who propose to shape emotion through law. Perhaps the greatest frustration of this excellent section is that Kahan has no opportunity to respond to these critiques. His essay is admirably focused and provocative, and he makes the interesting strategic choice of pitching it to progressives, rather than to his more natural intellectual allies on the right; yet he has almost no opportunity to address the dazzling range of reservations raised by Nussbaum and Massaro. I would have liked to hear Kahan defend the clarity of disgust's public voice or explain whether and how shaming can be combined with the re-integration Massaro takes as crucial. It would have been fascinating to hear him reflect on whether the subtle, variable,

often elusive processes of emotional response can be harnessed by a force as crude and inflexible as law. Critiques of this quality almost demand a public response; providing one would have strengthened a theory that aspires to broad influence and enriched what is already one of the most thoughtful and provocative exchanges in the collection. Part II's reconsideration of the desire for revenge also offers powerful evaluative perspectives. Solomon's reconstruction of vengeance is valuable not only for its identification of a cool, cognitive strand in what is often conceived as fiery, impulsive emotion, but for its introduction of a series of metaphors that draw out the sense of proportionality implicit in the emotion and its potential to underscore the ties of community among the offender, the accused, and the agency of vengeance. And Murphy's essay on retribution is memorable for its vision of a major scholar explaining, with the care and humility he advocates in approaches to punishment, why Nietzsche, Kant, and Jesus have led him to change his mind on retribution.

Yet notwithstanding these considerable virtues, there are ways in which this feature of the collection falls short of its aims. Despite Bandes's efforts to cull essays reflecting a range of emotions and contexts, *The Passions of Law* retains a persistently criminal flavor. Of the contributors to the book, only Calhoun and Deigh steer consistently clear of criminal contexts; large segments of the book explore the motives, effects, and meanings of punishment. There is also a striking, recurrent emphasis on the reassessment — even the rehabilitation — of dark, potentially hierarchical emotions such as vengeance, anger, retribution, shame, and disgust. These features may be unsurprising, given the longstanding primacy of the criminal law within analysis of law and the emotions. They may also be fueled by movements within the contributing disciplines themselves. Explaining his focus on vengeance, Solomon notes:

[I]t seems to me that moral philosophy has for too long been suffocating from a bad case of “political correctness.” Self-righteousness and professional peer pressure have converged to produce a literature that is utterly unrealistic. Praise of virtue and gentility have become *de rigueur*. To even consider the brutal opinions of hoi poloi is to place oneself out of bounds. And so we dismiss as beneath contempt and unworthy of discussion those powerful negative feelings that in fact move most people and help form their political views and opinions on social issues. (p. 125)

While Solomon may accurately describe the landscape within moral philosophy, no such “political correctness” is choking off discussion of “powerful negative feelings” in law. On the contrary, Miller's landmark treatment of disgust and contempt,<sup>11</sup> and Kahan's writings on shame and disgust<sup>12</sup> have created a virtual cottage industry focused

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11. WILLIAM MILLER, *THE ANATOMY OF DISGUST* (1997).

12. Dan Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621

on these harsh and hierarchical emotions. Perhaps academic lawyers, unlike their philosophical colleagues, pride themselves on their ability to look unflinchingly at the ugliest of human emotions and to redirect them for social benefit.

In a collection in which such emotions are so thoughtfully challenged and defended, however, the question is not why they occupy the authors, but why they are not accompanied by essays probing emotions of a different sort. The virtues may be overattended in moral philosophy, but it is hard to argue that the same is true of law. And some of these virtues involve emotional states that would make promising objects of legal scholarly attention. What about courage? Miller elaborately traces the ways that the military code identifies and seeks to root out cowardice. But are there other means by which military regulations seek to foster courage? How does tort law bear on what we see in others and expect of ourselves? What is the nature of that courage that fuels a judicial departure from *stare decisis*? Or a fiery or provocative dissent? Such inquiries may seem to press against strongly engrained liberal instincts. To explore the relationship between law and emotions connected with the virtues might seem to breach the liberal requirement of government neutrality with respect to competing visions of the good life. But while this argument may explain an instinctive resistance to this kind of inquiry, it provides no real justification. The government, as many legal scholars have pointed out, contributes to the cultivation of what it believes to be virtues in a variety of direct and indirect ways: the tax code, the welfare laws, and the regulation of sexuality are only a few of the most obvious examples. The robust health of both libertarian and communitarian argument in law and public policy reflects this sometimes precarious balance, as well as the possibility of adjusting it in various ways through public debate. Far from placing legal scholars in conflict with the demands of a liberal conception of government, a careful mapping of the relations between the law and “virtuous” emotional states could ultimately strengthen it. It could help readers understand more precisely how law fuels, fosters, prefers, incentivizes, or reflects ambivalence toward certain virtues in our present incarnation of liberal democracy, and permit more informed debate over whether and how this engagement should be changed.

One might also think about emotions that are not so easily situated on the grid of vice and virtue. What about curiosity — surely as much an emotion as the thirst for intellectual achievement? Or the complex pleasure of what Vicki Schultz has called a “life’s work”?<sup>13</sup> Or, for that matter, sexual desire? These emotions may not spring to mind as readily as disgust, vengeance, or even courage; but they are passions

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(1998); Kahan, *supra* note 3.

13. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

that, to take Solomon's terms, motivate many of us in our engagements with others and shape our political and social views. Why have legal scholars neglected to consider how we serve these emotions within the law? Some feminist legal scholars have recently argued that one answer lies in the ways that legal scholars think about law. We envision law as having a set of more or less direct relations to those states of affairs it seeks to bring about: it may enact certain institutional arrangements or prohibit certain behaviors;<sup>14</sup> it may express certain kinds of collective emotions. Not only laypersons but even legal scholars tend to think far less about contexts in which the law plays a more partial, facilitating role. Thus, the more indirect, supportive role that law might play in relation to desire does not claim the attention of legal thinkers, and desire itself falls off the legal radar screen.<sup>15</sup> Yet one of the great strengths of this collection is its ability to envision the law in a range of different roles in relation to the outcomes with which it is concerned, including emotional outcomes. This facilitative relation, for example, forms a part of Minow's argument about healing the wounds of mass genocide: the law cannot produce healing or demand forgiveness; it can, however, help create preconditions which make the experience of these emotions more likely.<sup>16</sup> How this looser, more contingent understanding of legal effect might bear on emotions such as sexual desire is one of the questions the authors of such a volume would have been in a good position to answer.

### C. *Actors and Emotions*

Whose emotions should be the objects of attention in legal analysis of this genre? This is a question to which *The Passions of Law* gives many answers. Kahan, Nussbaum, Solomon, and Murphy focus on the emotions expressed by the government, as it speaks for the community in the enforcement of criminal law. Allen addresses the emotions of the community as distinct from the enactments of the government. Deigh considers the emotions of the governed in their relation to the

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14. See Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605, 1617 (2001) ("Law has too often been conceived as a means of prohibiting or bringing single-handedly into being particular arrangements or behaviors."); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 207-08 (2001) ("[H]ave [feminist legal theorists] . . . fallen victim to the myopia of which our discipline in general suffers: thinking of rights and liberties primarily in negative . . . terms?").

15. Franke seems to offer a similar hypothesis in *Theorizing Yes*. Franke, *supra* note 14, at 207-08.

16. See Abrams, *supra* note 14, at 1617 ("[L]aw can enable by removing constraints and . . . by establishing material conditions, shaping expectations, or creating entitlements . . . . [I]t may be best [in certain contexts] . . . to view law simply as making possible (in both senses of that word) certain practices, responses, or explorations."); Franke, *supra* note 14, at 208 ("[I]t may be that the best we can aspire to, as feminist *legal* theorists, is a set of legal analyses, frames and supports that erect the enabling conditions for sexual pleasure.").

government. Sarat, Miller, and Massaro focus on the emotions of the accused. Minow is concerned with the emotions of victims, in this case of mass governmental violence; and Calhoun is concerned with the “outlaw emotions” (p. 223) of politically marginalized groups. Posner and Pillsbury are concerned with the emotions of the judge. Yet notwithstanding this promising variety, there are subtle patterns in the actors to whom the collection does and does not attend, that suggest the need for additional kinds of inquiry.

The first pattern one observes is the predominance of the focus on government. This may, in one sense, be unsurprising, as this collection examines *law* and the emotions, and the government — in many specific institutional guises — is responsible for promulgating, enforcing and interpreting the law. But there are characteristics of the focus on the governmental actor in these essays — many of which stem from the criminal emphasis of the volume — that limit what we can learn from their exploration of “governmental emotions.” The first is an assumed continuity between the government and the “community” for which it ostensibly speaks. The government, in Kahan or Solomon, vindicates *our* disgust or desire for vengeance: it expresses or effectuates these emotions on behalf of a collectivity of citizens. This representative fiction elides many questions about what such representation — particularly expressive emotional representation — means in the context of a morally and politically plural society. This fiction is standard, yet already strained, in the context of the criminal law: the domain is sufficiently vexed that many groups feel the government does not speak for them when it undertakes a certain prosecution or imposes a certain penalty. Sarat alludes to this tension in his discussion of *Dead Man Walking*, where the examination of remorse is played against a broader backdrop of roiling social contention over the death penalty. Yet this strain may become particularly acute when the government expresses not a behavioral rule but a presumed emotional state. What is the experience of, and the recourse available to, a citizen who does not seek vengeance, who feels indignation rather than disgust, or who finds disgust antithetical to the aspirations of a democratic society? Is it different from that of a death penalty abolitionist who must endure the spectacle of executions imposed (ostensibly) on his behalf? Is there something particularly acute about the words placed in the mouth of the citizen by this representation when they are not words, in fact, but feelings? These are interesting and difficult questions, and they do not always get the attention they deserve in these essays. Sarat, as noted above, points to the problem through the implicit parallel of social ambivalence about remorse and ambivalence about the death penalty. Nussbaum describes disgust as creating in-groups and out-groups, making inevitable the situation where the government does not speak for large groups of those it ostensibly represents. Kahan himself seems to suggest that the law might provide a



public forum in which competing accounts of disgust can be advanced and evaluated, though it is difficult to see how a dissenting citizen would not feel eclipsed by the kind of publicly-articulated official expressions of disgust that Kahan seems to favor. All of the essays concerned with governmental expression of emotion might benefit from a more frontal consideration of these dilemmas, yet none takes it on directly. Perhaps the closest attempt comes in an essay not primarily concerned with the expressive conception: in exploring ancient Athens, Allen evokes a time and place where the “community” on whose behalf the criminal law was enforced was a less fictional entity than is true today, and whose emotions and needs were prior to, and could be discussed apart from, the specifics of governmental action. Yet to glimpse this distinction in the context of ancient Athens is no more than the first step toward saying what it would be to see and act on it today.

The criminal backdrop of the book has a second major consequence: it means that most of the emotional contexts explored concern interactions between the government, as enforcer of rules, and citizens as accused of, or victimized by, violations. This triangulation of relations, however, is not always paradigmatic. Many pervasive emotions that law undertakes to address also arise in the relations between citizens, with the government entering in only later, in a ratifying or a remedial posture. Relations of oppression or discrimination constitute one potent example. The emotions associated with such relations are not absent from this book. Nussbaum highlights a discriminatory dynamic that is fueled or facilitated by disgust: projecting onto a stigmatized group the features of animality one finds repugnant in oneself. Calhoun identifies the way in which denying the validity, indeed the possibility, of certain emotions within a stigmatized group denies that group a resource from which it might build a social critique. Yet the emphasis is on the emotional-related repertoire of the government as a discriminating entity; this is only part of what we need to learn about the emotional dynamics of discrimination. Discrimination can be prompted by many different emotional states, particularly if emotion is understood as having a cognitive thread: fear or anxiety about, or disgust at, that which is “other”; callousness or insensitivity to certain kinds of harm or pain; (unwarranted) confidence about the universalizability of one’s own experience. Taking the government as the paradigmatic discriminator will not reliably help us learn about the quality of these emotion states, as governments do not themselves have emotions; they only imperfectly represent — or enact and ascribe — those of their citizens. The focus on the government also diverts attention from the experience of the victim. Victims again are not ignored in this volume. The criminally accused are the focus of Sarat and Miller, albeit in the context of assessing governmental factfinding about their emotional states. And the victims of discrimination are considered by

Nussbaum, Massaro, Calhoun, and Minow (the “mass violence” of whose essay is frequently a matter of racial or ethnic antagonism). Yet with the exception of Minow’s essay, the emotional states of victimization are not explored in this collection. This is surprising, as this is not untilled ground in law-related scholarship. The subjective experience of both oppressor and target has been productively explored in feminist theory, critical race theory, and the emerging field of critical white studies. It remains to be systematically related to the study of emotions, although the derogation of emotion stemming from the traditional dichotomy has underwritten some of the criticism of this line of work.<sup>17</sup> This collection would have been a fine occasion for beginning a dialogue between these complementary bodies of thought; that it was not represents a lost opportunity.

Yet the practice of discrimination is not the only topic about which readers might have learned from a greater focus on citizen-to-citizen interactions. Probing the emotional states of market actors, and the way that these states are shaped by instances of governmental intervention is another question that might have added range and variety to the collection. Market actors have paradigmatically been characterized as subsisting entirely within the domain of rationality; the doctrinal areas of contract or commercial transactions are frequently taught and discussed as though they were insulated from the upheavals of emotion that vex criminal or antidiscrimination law.<sup>18</sup> This is perhaps one place in which the traditional dichotomy continues to reside: in the tendency to make emotion the distinctive province of particular (potentially marginal) actors and domains, while preserving the priority of reason in its pristine state in other more central legal realms. Pressing these assumptions by exploring the sentiments of greed, betrayal, generosity, and trust that seem as likely to infuse this area as others seems a promising way of contesting this final refuge of the dichotomy. Learning about the ways that contract or commercial law intervene in these emotional states will also help us to understand better these bodies of doctrine and the norms that they seek to vindicate. Such an exploration would have added range and provocation to this volume, and might profitably be undertaken in the future.

Finally, as the government comes to represent the community or the instrumentalities of discrimination in this volume, so too does the

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17. For an account connecting the critique of experimental or narrative scholarship with a defense of reason, see DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

18. There are occasional, salutary exceptions to this general rule. The work of Peter Huang and Lynn Stout, for example, reflects thoughtfully on the emotions in commercial and corporate contexts. See, e.g., Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001); Peter H. Huang, *Reasons within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435 (2000).

judge come to represent the universe of potential legal actors. It is difficult, in some ways, to object when the topic is so interestingly and provocatively covered. Between Pillsbury's exploration of varied and sometimes atypical emotions that fuel judicial exceptionalism and Posner's recasting of judicial empathy, a great deal is said about the possibilities of emotion in judging that has not been said before. Yet, in other respects, a focus on judging departs least from the first-generation critiques, in ways that may ultimately reinforce the reason/passion dichotomy. If you suspect that emotion may indeed be atypical in, if not antithetical to, the law, you may be most absorbed with finding and exploring it within that central bastion of legal rationalism, judicial decisionmaking. If you believe that emotion, as Bandes boldly declares, pervades the law, the presence of emotion in judicial decisionmaking becomes less remarkable. It becomes more interesting, and imperative, to explore the operation of emotion in other legal roles, and to contrast this operation with the life of emotion in the judicial domain. It is relevant not only how emotion fuels the work or organizes the experience of the great judicial dissenters, but also how it shapes the efforts of eminent legal strategists, such as, for example, Charles Hamilton Houston. It becomes fruitful to consider whether or how emotion shifts or changes when one moves from a role of advocacy to a role of adjudication, like Ruth Bader Ginsburg, Thurgood Marshall, or Louis Brandeis. Beginning a second-generation inquiry into the emotions of a range of legal actors is an effort that might productively have been commenced in this volume and should be undertaken in the future.

### III. CONCLUSION: EMOTION AND THE SENSIBILITIES OF LEGAL SCHOLARS

As *The Passions of Law* makes clear, the conceptual gains to be reaped from the study of law and the emotions are larger even than its early proponents suspected. But to think solely in terms of analytic progress risks recharacterizing law as a purely rational enterprise. If learning about law is an enterprise that engages our emotional sensibilities, in endlessly varied interaction with our capacity for reason, we might also ask how this new genre of inquiry affects the emotions of those who take part in it. It is a question that cannot be answered conclusively by reflecting on their work product, for scholars with certain kinds of emotional sensibilities may be more drawn to this field than to others, and their topics may make them atypically aware of the emotional states that they are communicating as they write. Yet one of the most striking features of this collection is a largeness of spirit, a vivid, non-instrumental interest in the human subjects of its inquiry. This lively and generous interest manifests itself in many different ways, but it is strikingly distinct from studied detachment or arch,

sometimes contemptuous, humor that are too often the emotion valences associated with scholarship about the law. Nussbaum's moving evocation of Whitman's *Song of Myself*, as a healing answer to the disgust rained on gays and lesbians; the generosity of spirit and flashes of humor with which Miller treats the narratives of those accused of "throwing away [their] weapons" (p. 250); the humility and candor with which Murphy explores the possibility of error in a substantial portion of his scholarly work; the respectful attention, inflected with wonder, that Minow brings to the story of Jadranka Cigelj — these are rare moments in law-related scholarship and great gifts to the readers of this collection. They invite us to imagine a future in which the study, and perhaps the operation, of the law might be a more humane experience for all those involved.

A new generation of scholars has ceased the frontal assault on the dichotomy between law and reason. They have inhabited the abandoned fortress and are exploring its nooks and crannies, asking how it can be rebuilt and reintegrated into the landscape it once policed. The consequences, as *The Passions of Law* suggests, may transform not only the legal domain but those who participate in the effort as well.