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## Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law

Susan A. Bandes

*Centennial Distinguished Professor of Law Emeritus, DePaul University College of Law*

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# FEELING AND THINKING LIKE A LAWYER: COGNITION, EMOTION, AND THE PRACTICE AND PROGRESS OF LAW

*Susan A. Bandes\**

*Generations of lawyers have been taught that thinking like a lawyer requires putting emotion aside. They are warned, for example, that anger will blind them to the facts as they really are. Yet cognitive science rejects the notion that emotion and reason are autonomous, warring spheres. Recently there has been increasing recognition of the harmful consequences of the narrow conception of “thinking like a lawyer” for lawyers’ well-being, but these consequences are generally portrayed as a necessary trade-off between the well-being of lawyers and the preservation of analytical rigor. This Essay will argue that the harm the narrow conception of “thinking like a lawyer” poses to lawyers’ well-being is not simply an ancillary issue or an unfortunate but necessary collateral consequence of engaging in rigorous, logical thinking. A conception of law that attempts to cordon off emotion is poorly suited to the complexities of legal practice and is inconsistent with modern knowledge about how legal, ethical, and moral reasoning—and indeed, legal change and reform—actually occur. This Essay will focus in particular on the emotion of anger and the consequences of attempting to banish it from the realm of legal reasoning.*

## INTRODUCTION

One of the first things I learned in law school was what belonged in my class notes, and what belonged in the margins. When it was okay to say something out loud, and when to just scream silently in my heart. One day not long into my first semester, we read a contracts case about a family whose home was displaced by strip mining. The legal principle I dutifully wrote in my notes was that the family was only entitled to the market value rather than the replacement value of their property, a paltry \$300 that was not close to

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\* Centennial Distinguished Professor of Law Emeritus, DePaul University College of Law. This Essay was prepared for the Symposium entitled *Mental Health and the Legal Profession*, hosted by the *Fordham Law Review*; the Neuroscience and Law Center; the Center on Race, Law and Justice; and the Stein Center for Law and Ethics on November 6, 2020, at Fordham University School of Law. I owe thanks to Bennett Capers, Deborah Denno, Bruce Green, and the *Fordham Law Review* for inviting me to participate in this Symposium and to Kunal Parker, Michael Perlin, Susannah Sheffer, and Scott Sundby for insightful comments on an earlier draft.

being sufficient to replace a home.<sup>1</sup> I added an angry, slightly profane notation in the margin with an exclamation point, but I had already learned that my anger was marginalia—not only irrelevant to the analysis but a sign that I was letting my emotion interfere with my ability to think like a lawyer.<sup>2</sup>

In the early days of law school, students are asked to open themselves to a new way of thinking. Not just a supplementary set of tools but a superseding framework. This new framework requires would-be lawyers to put aside certain ways of understanding the world, certain ideas of right and wrong, certain notions of relevant and irrelevant. This feels disorienting, even dangerous. In exchange for putting these ideas and notions aside, students are promised membership in a guild of rigorous thinkers with its own internal logic and guideposts. In this Essay, I reexamine the arguments for relegating emotions to the margins and take stock of the costs of doing so. The concerns I raise center on both the misguided notion of “putting aside” emotional responses and moral intuitions and on the promise that entry into a rigorous, coherent system of thought awaits those who succeed in splitting their emotions off from their legal analysis. I will argue that a conception of law that treats emotion as antithetical to reason is poorly suited not only to the well-being of lawyers but also to the complexities of legal practice. Moreover, it is inconsistent with modern knowledge about how legal, ethical, and moral reasoning—and indeed, legal change and reform—actually occur.

When judges and other legal decision makers use the terms “emotion” and “emotional,” it almost invariably augurs an adverse ruling or some other negative outcome. In law, these terms are basically catchall pejoratives, a signal that an argument is prejudicial<sup>3</sup> or transparently manipulative or that a witness is unreliable or incredible. It is a conclusory dismissal rather than a reasoned basis for exclusion: emotion is the opposite of reason and therefore should be avoided.<sup>4</sup> What is lacking is any examination or explanation of what it is about emotion that is objectionable, prejudicial, or irrational.

A more current and sophisticated view of emotion would permit nuanced and accurate debates about the role of various emotions in various contexts and about how to enhance the beneficial emotions and discourage those that are detrimental to good decision-making. Across most of the disciplines that

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1. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962) (finding that while the coal company breached its contract with the Peevyhouses, Garland did not have to fix the property or pay for the work necessary to restore the land (estimated at \$29,000) but instead could just pay the Peevyhouses for the difference in land value (estimated at \$300)).

2. See, e.g., Jennifer Mueller, *How to Think Like a Lawyer*, WIKIHOW (Mar. 26, 2020), <https://www.wikihow.com/Think-Like-a-Lawyer> [<https://perma.cc/JT68-5ZUU>] (“*Avoid emotional entanglement.* There’s a reason you might say you were ‘blinded’ by anger or another emotion—feelings aren’t rational and keep you from seeing facts that may be important to solving a problem.”).

3. See FED. R. EVID. 403 advisory committee’s note (explaining that “unfair prejudice . . . means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one”); see also Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1006 (2014).

4. See *Roe v. Wade*, 410 U.S. 113, 116 (1973) (“Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.”).

study decision-making, there is a robust debate about emotion: its definition, its dynamics, its regulation, and its appropriate roles.<sup>5</sup> Like any term that attempts to encompass a complex set of internal phenomena, it can have no fixed, acontextual, cross-disciplinary definition. But in brief, “[e]motions are part of the ‘stuff’ connecting human beings to each other and the world around them, like an unseen lens that colors all our thoughts, actions, perceptions, and judgments.”<sup>6</sup> They are functions and processes that are part and parcel of our cognitive structure, for better or for worse. As Jerome Kagan observes, our understanding of human behavior is hampered by the insistence on ascribing unitary meanings to terms that attempt to capture complex internal states<sup>7</sup> and by the tendency to create oppositional categories that oversimplify and therefore obfuscate our understanding of human behavior.<sup>8</sup> My concern is that the law’s caricatured and inaccurate opposition between thinking and feeling falls into precisely these traps, with highly problematic consequences.

My instinct in first-year contracts to keep quiet about my anger and indignation was the product of norms I had already begun to imbibe. The lesson was not only about the boundaries of allowable discourse but, more generally, about what counted as an allowable influence on judgment. These norms are communicated and enforced in law school and in legal practice, both explicitly and implicitly. And that is a problem for the health and well-being of the members of our profession. It is important to emphasize that this is not a question of trade-offs—rigorous legal analysis and attorney well-being do not exist in opposition to each other. The broad-brush marginalization of emotion (or what is perceived as “emotional”) is a problem for the path of the law too—as both a jurisprudential and a practical matter.

The attempt to cordon off emotion from reason is detrimental to lawyering in the obvious sense that separating lawyers from their emotional reactions increases the risk of numbing them to their ethical intuitions. In addition, the progress of law<sup>9</sup> depends on giving voice to moral emotions. The passion for justice is fueled by emotions like moral outrage.<sup>10</sup> The point is emphatically *not* that emotion will tend to lead law in beneficial directions. Rather, it is that the failure to acknowledge and evaluate the emotions that

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5. See, e.g., LISA FELDMAN BARRETT, *HOW EMOTIONS ARE MADE: THE SECRET LIFE OF THE BRAIN* (2017); Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161 (2012).

6. Jeff Goodwin et al., *Introduction* to *PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS* 1, 10 (Jeff Goodwin et al. eds., 2001).

7. JEROME KAGAN, *WHAT IS EMOTION?: HISTORY, MEASURES, AND MEANING* 9 (2007).

8. *Id.* at 21–22.

9. This is *not* to say that there is some consensus view of justice or the progress of law. Acknowledging that emotion plays a role in decision-making does not obviate the need to debate which goals are desirable. This was the central point of my article, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996).

10. Goodwin et al., *supra* note 6, at 8 (“[I]njustice is most closely associated with ‘the righteous anger that puts fire in the belly and iron in the soul.’” (quoting WILLIAM A. GAMSOM, *TALKING POLITICS* 32 (1992))).

inevitably shape our perceptions, reactions, and decisions deprives us of essential knowledge, leaves us vulnerable to unexamined passions, and hampers our ability to reform legal institutions in light of the fullest, most accurate knowledge available.

## I. WHAT WE TALK ABOUT WHEN WE TALK ABOUT EMOTION

### A. Definitions

It is important at the outset to define some terms. The emerging consensus among scientists and social scientists studying cognition is that emotion and reason are not oppositional categories. In fact, it is fair to question whether “emotion” is even a useful category for those seeking to describe the components of decision-making. It is more accurate to view cognition as a set of processes, many of which recruit emotion.<sup>11</sup> These processes include highlighting salience, discerning patterns, shifting perspective to see otherwise invisible patterns, determining what remains in memory, weighing risks, and prioritizing certain actions over others. They are distributed throughout the brain—there is no “emotion center” in which they reside. In common usage, that is, these are all cognitive tasks, but none of them are purely “logical” or “rational” if those terms are defined to exclude emotion.

But to evaluate the effects of the reason/emotion split on legal reasoning and legal practice requires more than just correcting misconceptions about how emotion works. It requires an examination of the inaccurate ways in which the category emotion is deployed in the legal realm. The outcome of the supposed splitting off of emotion from reason is not to banish emotion from the law school classroom or the halls of justice but to privilege certain emotions, certain conceptions of rationality, and certain emotion cultures over others. The law school classroom, the practice of law, and jurisprudence are in fact rife with emotion—emotions, however, that are such a familiar part of the landscape they are perceived as rational. For example, empathy is usually selective—it is hard to take a view from nowhere.<sup>12</sup> But empathy for powerful parties is perceived as neutral and natural. Empathy for the marginalized, on the other hand, is coded as soft, feminine, and suspect, and it is only this sort of empathy that is categorized as emotion.<sup>13</sup> To take another example, anger may be viewed as irrational, out of control, and threatening, or it may be viewed as righteous—a sign of admirable willingness to defend the rule of law. There is evidence that these differences are affected by the gender or race of the subject, among other variables.<sup>14</sup>

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11. See generally LUIZ PESSOA, *THE COGNITIVE-EMOTIONAL BRAIN: FROM INTERACTIONS TO INTEGRATION* (2013).

12. Bandes, *supra* note 9, at 375 n.60 (citing THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986)).

13. See Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 *CARDOZO L. REV. DE NOVO* 133, 135, 147 n.6 (discussing the confirmation process for Justice Sotomayor).

14. See, e.g., Mary L. Schuster & Amy Propen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 6 *J.L. CULTURE & HUMANS* 75 (2010); see also Susan A. Bandes, *Share Your Grief but Not Your Anger: Victims and the Expression of Emotion in Criminal*

We cannot cordon emotion off from legal reasoning or legal practice even if we want to. A better goal is to identify, articulate, and interrogate the whole range of emotions, including empathy, compassion, disgust, and moral outrage. The problem is that once a stance is coded as emotional, we cease to attempt to evaluate it.<sup>15</sup>

Moreover, the attempt to put emotion aside requires work that has tremendous psychic costs. It takes work to create the appearance of disinterestedness and objectivity. It takes work to project a tough exterior and a sense of unwavering certitude. And the distribution of this work falls unevenly based on race, gender, and other types of marginalized status.<sup>16</sup> Emotional reactions are experienced and evaluated through prisms that include the race, gender, and ethnicity of both the subject and the object of evaluation. Whose reactions are coded as righteous indignation and whose are coded as irrational fury? Who is allowed to express anger? Whose anger is likely to be dismissed as nonobjective and self-interested?<sup>17</sup> Who has the luxury of viewing moral outrage as an abstract, optional vantage point rather than experiencing it as integral to one's status and world view?<sup>18</sup> These are issues that can be studied and problems that can be addressed, but first they must be acknowledged.

### B. *The Sociology of Emotion*

Sociologist Arlie Russell Hochschild, in her influential work on the sociology of emotion, explained the notion of “emotion cultures”—

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*Justice, in THE EXPRESSION OF EMOTION: PHILOSOPHICAL, PSYCHOLOGICAL AND LEGAL PERSPECTIVES* 263 (Catharine Abell & Joel Smith eds., 2016).

15. Jamal Greene refers to “an unexamined ambivalence toward the appropriate role of emotion in constitutional discourse,” arguing that the appeal to emotion in judicial opinions is quite pervasive and that we need a more precise and nuanced taxonomy for separating the good uses of emotion from the bad. Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1391 (2013).

16. See generally MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019).

17. See, e.g., Jessica M. Salerno et al., *Women and African Americans Are Less Influential When They Express Anger During Group Decision Making*, 22 GRP. PROCESSES & INTERGROUP RELS. 57 (2017). In a mock jury study regarding holdout jurors, people perceived all holdouts expressing anger as more emotional than holdouts who expressed identical arguments without anger. See *id.* Yet holdouts who expressed anger (versus no anger) were less effective and influential when they were women (but not men) or Black (but not white)—despite having expressed identical arguments and anger. See *id.* Although anger expression made participants perceive the holdouts as more emotional regardless of race and gender, being perceived as more emotional was selectively used to discredit Black and female jurors. See *id.*; see also REBECCA TRAISTER, *GOOD AND MAD: THE REVOLUTIONARY POWER OF WOMEN'S ANGER* (2018).

18. See, e.g., Shaun Ossei-Owusu, *For Minority Law Students, Learning the Law Can Be Intellectually Violent*, ABA J. (Oct. 15, 2020, 11:23 AM), [https://www.abajournal.com/voice/article/for\\_minority\\_law\\_students\\_learning\\_the\\_law\\_can\\_be\\_intellectually\\_violent](https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent) [<https://perma.cc/P8FA-V55Q>] (“For many of you who have personally been subject to racial discrimination, the devaluation of minority lives is nothing new. Those experiences alerted you to the law’s inability to mete out our visceral ideas about justice. The difference, though, is that such injustice confronts you at a time when your training demands—and rewards—an emotionally desensitized all-sides-matter approach to law.”).

communities or institutions bound by shared rules about what we ought to feel and how and when we ought to express those feelings.<sup>19</sup> Emotion cultures are perpetuated by rules about what emotions can and cannot be expressed, called “display rules.”<sup>20</sup> More ominously, emotion cultures are also perpetuated by “feeling rules” about what emotions we *ought to feel* in given situations.<sup>21</sup> Hochschild introduced the concept of “deep acting.”<sup>22</sup> She wrote, by way of example, about the insistence that flight attendants not only express a cheerful outward demeanor but also cultivate cheerful inner selves to match.<sup>23</sup> Failure to feel appropriately could lead to ostracization and adverse career consequences. Feeling and display rules may be implicit or explicit, but they are enforced. Those who transgress them suffer consequences.

Professional schools are obvious settings for communicating emotion rules and creating emotion cultures. Take the example of medical school pedagogy—specifically, the well-known acculturation ceremony around the dissection of the cadaver. Students once learned to crack dark jokes that dehumanize the body and create distance between the students and future patients whose illnesses and deaths they will need to learn to confront.<sup>24</sup> Medical schools have recently sought to change the emotion culture of the classroom—including taking specific steps to train doctors in empathy.<sup>25</sup> The emblematic encounter with the cadaver has changed. Students at some schools now learn about the life of the deceased, meet the deceased’s family, and even engage in a ceremony of thanks.<sup>26</sup>

Law schools, law firms, and other legal institutions create emotion cultures. Despite some cultural differences, there is a distinct and widely shared ideology that permeates these institutions: the ideology of thinking like a lawyer. The critique of this goal is not new. The low-hanging fruit is the Professor Kingsfield caricature—the gruff professor who informs students that he will transform their “skull[s] full of mush” into brains capable of lawyer-like thinking.<sup>27</sup> This was actually not a caricature when I entered law school in 1973, by the way, but few of us teach that way today. We are kinder, we are gentler, we are modified Socratic. But as one who was determined not to replicate Kingsfield, I was nevertheless forcefully struck

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19. See generally ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (1983).

20. *Id.* at 60.

21. *Id.* at 56.

22. *Id.* at 33.

23. *Id.*

24. Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 491–92 (2007) (“In the gross anatomy lab, cultural norms around reverence for the body and death are routinely violated, subtly pushing students to give up old attitudes and adopt new ones.”).

25. See, e.g., LESLIE JAMISON, *THE EMPATHY EXAMS* (2014) (recounting the author’s stint as an actor helping medical students learn how to exercise empathy).

26. See Lindsay Kalter, *Compassion Begins with the Cadavers*, AAMC (Apr. 5, 2019), <https://www.aamc.org/news-insights/compassion-begins-cadavers> [https://perma.cc/DBD7-U8SR].

27. *THE PAPER CHASE* (20th Century Studios 1973).

by the implications of law professor and anthropologist Elizabeth Mertz's description of how we inculcate students into a particular version of deliberative reasoning<sup>28</sup>—more specifically, how we transmit and replicate certain hierarchies about what counts as deliberative reason, or proper thought, or an appropriate source of knowledge.

Mertz visited a range of first-year classrooms—the schools were state and private; highly ranked and lower ranked; eastern, midwestern, and western.<sup>29</sup> The professors varied in gender and race.<sup>30</sup> Despite these differences, all the professors she observed communicated and reinforced the same hierarchy. Professors across the board demonstrated a similar laser-like attention to detail on some issues and permission to generalize without systematic evidence on others.<sup>31</sup> Mertz observed professors engaging in painstakingly close readings of the precise language of an opinion or a statute, filled with rigorous feedback.<sup>32</sup> Then when it was time to move to a discussion of real-world consequences via social scientific studies, for example, the tenor would change.<sup>33</sup> The professor would signal a move to an open-ended discussion in which sources and interpretive moves did not need to be examined with precision and rigor.<sup>34</sup> Relegated to that second basket were sources of authority that were viewed as subjective, fuzzy, and ungeneralizable, including not just the social sciences but ethics and morality.<sup>35</sup> As Mertz observed, students trying to raise issues of morality did not get very far in classroom discussion.<sup>36</sup> They were viewed as straying beyond the bounds of lawyer-like analysis.

The most serious problem Mertz identifies is that law presents itself as an autonomous system. The implicit hierarchy of sources of authority is taken for granted. The message is that one should not reach beyond the approved sources to find a correct answer. Like most totalized systems, jurisprudence fails to acknowledge that it is a system. Unlike social scientists who learn the limits of their methodology, we lawyers are not generally trained to ask ourselves systematically what our method cannot do or to question or try to identify the limits of our approach. In general, we are not trained to think of ourselves as engaging in methodology at all. As a consequence, a student expressing indignation or moral outrage might be reined in or asked to

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28. See Mertz, *supra* note 24, at 487; see also ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007). It is certainly possible that first-year instruction has changed significantly in the interim, but I am aware of no studies revisiting this issue.

29. Mertz, *supra* note 24, at 488.

30. *Id.*

31. See *id.* at 495–96.

32. See *id.*

33. See *id.*

34. See *id.*

35. See Senthoran Raj, *Teaching Feeling: Bringing Emotion into the Law School*, 54 *LAW TCHR.* 1, 4 (2020) (citing Duncan Kennedy, *Legal Education as Training for Hierarchy: A Polemic Against the System*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 54 (David Kairys ed., 3d ed. 1998)).

36. Mertz, *supra* note 24, at 508.



reframe her objection in legal language, using legal sources. Her sense of outrage is framed (and even shamed) as untutored, perhaps naïve. In this way, a lesson is communicated about hierarchies of knowledge—but not a very useful lesson. In fact, there are conversations to be had about the role of morality in law (which legal philosophers do engage in) and about the role of emotion in law (which legal philosophers are much less likely to engage in).<sup>37</sup> There are conversations to be had about the limits of our field and our expertise. But emotion is not approached as a possible source of knowledge to evaluate—just as a bad habit to break.

## II. THE COMPONENTS OF LEGAL REASONING

Legal education is first and foremost concerned with identifying principled reasons for judgment and separating them out from the irrelevant, the prejudicial, and the unprincipled. Yet these terms are not self-defining. As the philosopher Mark Johnson explains: any notion of rationality is evaluative through and through, and the values it privileges are chosen and contingent, not built into the essential structure of rationality.<sup>38</sup> What counts as an appropriate justification, a good reason, or a good method of reasoning will depend on the goals of the process.<sup>39</sup>

In the legal realm, the ultimate goal of the process is to create, safeguard, and reform a complex system for predicting, channeling, and modeling human behavior, where the consequences for the participants may include loss of property, liberty, or life. The debate about how to best achieve this goal is not a rarified discussion about the beauty and symmetry of abstract propositions. Entrée into the debate is likely to arise from moral intuitions that grow from our own experiences and take shape in the social world. It requires sifting through the mass of information that bombards us to discern relevant features and patterns. Emotions help us understand relevance from various vantage points, discern patterns of relevant information, and flag what is important and worthy of attention.

In short, emotions are an essential component of the reasoning process. To be clear about what I mean by “essential,” let me begin by contrasting my argument with the conception of emotion embedded in the field of behavioral law and economics.<sup>40</sup> This field purports to acknowledge and incorporate the vagaries of human behavior, but it persists in casting influences like emotion as quick and dirty shortcuts. That is, at best, emotion is a poor substitute for slow, deliberative, “rational” thinking.<sup>41</sup> At worst, it is a detour

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37. See, e.g., Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010).

38. See MARK JOHNSON, MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS 227 (1993).

39. See *id.*

40. See, e.g., BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein ed., 2000).

41. The literature treats affect as a heuristic and a heuristic as a mental shortcut for a more careful evaluation. See, e.g., Paul Slovic et al., *The Affect Heuristic*, 177 EUR. J. OPERATIONAL RSCH. 1333 (2007). The examples tend to involve problems with a quantifiably correct answer. See, e.g., CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE

from it—a bias.<sup>42</sup> It is never accorded its own epistemic value. In comparison, the emerging consensus among affective scientists is that emotion has its own, freestanding epistemic importance—what legal theorist Maksymilan Del Mar calls “epistemic irreplaceability.”<sup>43</sup> The information we glean from emotion cannot simply be replaced by other cognitive processes. Our emotions give us unique, embodied access to key features of knowledge, including the vividness of certain information, its place in memory, and its action tendencies (its ability to motivate us to act or refrain from acting). Judges can recruit their emotions to discern patterns and features they may otherwise miss,<sup>44</sup> empathize with different parties, understand different points of view, and in doing so, perceive other legal frameworks.<sup>45</sup> The progress of law is animated, in part, by perspective-taking of a sort that is not merely cognitive. As the political scientist Sharon R. Krause describes it, impartiality requires more than simply “understanding the concerns of others; it must also include appreciating, even being moved by, these concerns.”<sup>46</sup> It requires affective engagement.

Judges need to decide what characteristics of the parties and their situations are relevant from the standpoint of justice.<sup>47</sup> Consider *DeShaney v. Winnebago County Department of Social Services*,<sup>48</sup> in which the U.S. Supreme Court rejected Joshua DeShaney’s claim that the state of Wisconsin violated a duty to protect him from harm.<sup>49</sup> The use of emotive language in the opinions—and in particular Justice Harry Blackmun’s “poor Joshua!” exclamation<sup>50</sup>—attracted widespread attention.<sup>51</sup> There is also some literature on the related but distinct question of how the emotions of the Justices may have shaped their factual perceptions and their framing of the legal issues.<sup>52</sup> How can we best understand why Chief Justice William Rehnquist’s view of the salient facts was so different from Justice William Brennan’s? Why did Chief Justice Rehnquist construe the relevant pattern as a series of excusable governmental failures to act, whereas Justices

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86 (2005) (comparing perceived and actual risks of nuclear power versus sunbathing). For an in-depth discussion of this topic, see Susan A. Bandes, *Emotions and Risk Regulation*, 62 *STUD. L. POL. & SOC’Y* 219, 227–29 (2013).

42. See Susan A. Bandes, *Emotions, Values, and the Construction of Risk*, 156 *U. PA. L. REV. PENNUMBRA* 421 (2008); see also Bandes, *supra* note 41, at 227–29.

43. MAKSYMILIAN DEL MAR, *ARTEFACTS OF LEGAL INQUIRY: THE VALUE OF IMAGINATION IN ADJUDICATION* 161 (2020); see also Ann Laura Stoler, *The Politics of “Gut Feelings”: On Sentiment in Governance and the Law*, 2 *KNOW* 207, 212 (2018) (“Emotions are not freestanding ‘things’ . . . but accretions of stored deliberation.”).

44. DEL MAR, *supra* note 43, at 160.

45. *Id.*

46. SHARON R. KRAUSE, *CIVIL PASSIONS: MORAL SENTIMENT AND DEMOCRATIC DELIBERATION* 164 (2008).

47. See MARKUS DIRK DUBBER, *THE SENSE OF JUSTICE: EMPATHY IN LAW AND PUNISHMENT* 8 (2006).

48. 489 U.S. 189 (1989).

49. *Id.* at 194.

50. *Id.* at 213.

51. See, e.g., Greene, *supra* note 15, at 1391–92.

52. Most prominently, see Benjamin Zipursky, Note, *DeShaney and the Jurisprudence of Compassion*, 65 *N.Y.U. L. REV.* 1101 (1990).

Brennan and Blackmun saw a series of affirmative governmental actions that placed and kept Joshua in harm's way? Why was Chief Justice Rehnquist so cognizant of the harms of intervention and the burdens on the state of Wisconsin, whereas Justices Brennan and Blackmun were so cognizant of the harms to abused children when the government stands aside?<sup>53</sup> This difference in interpretation of spacious guarantees like the Due Process Clause might flow from a myriad of sources.<sup>54</sup> Justice Brennan himself, just a year prior to the *DeShaney* opinion, credited Justice Benjamin Cardozo with illuminating the process. He noted that Justice Cardozo believed that

judging could not properly be characterized as simply the application of pure reason to legal problems . . . [but] to a complex array of forces—rational and emotional, conscious and unconscious—by which no judge could remain unaffected. . . . [This] interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality.<sup>55</sup>

The philosopher Sabine Roeser argues that some emotions, such as sympathy, empathy, indignation, compassion, and enthusiasm, afford us a visceral awareness of threats to values like autonomy, justice, fairness, and equity.<sup>56</sup> As I have argued, our visceral awareness of threats to security versus threats to autonomy is contextual and may shift over time in reaction to unfolding events.<sup>57</sup> I will speculate that the public understanding of the notion of positive rights has changed since the nation has begun battling a pandemic. The abstract principle on which the *DeShaney* opinion hinged—that the government has no affirmative duty to safeguard the public health and welfare—was always controversial,<sup>58</sup> but its stakes and consequences have become far less abstract in a post-COVID-19 world. These public shifts have a way of animating jurisprudential shifts, as well. For example, the judicial attitude toward the balance between security and autonomy noticeably shifted after the September 11, 2001, attacks. Certain risks became more visceral while others receded.<sup>59</sup> Emotion helps us decide what is important. It moves us to action. It helps us care about the consequences of our decisions. The point is not that these emotions, by themselves, lead us to the correct legal answer. Rather, they are an important species of

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53. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2289, 2292 (1990).

54. See, e.g., Scott E. Sundby, *The Court and the Suspect: Human Frailty, the Calculating Criminal, and the Penitent in the Interrogation Room*, 98 WASH. U. L. REV. 123, 129 (2020) (contrasting the application of the Due Process Clause in Justice Blackmun's majority opinion and Justice Lewis F. Powell's dissent in *Fare v. Michael C.*, 442 U.S. 707 (1979)).

55. William J. Brennan Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 3 (1988).

56. DEL MAR, *supra* note 43, at 160; see also Goodwin et al., *supra* note 6, at 10 (observing that "the emotions most directly connected to moral sensibilities, such as shame, guilt, and pride, are especially pervasive as motivators of action").

57. Bandes, *supra* note 42, at 425.

58. See, e.g., Bandes, *supra* note 53; Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

59. Bandes, *supra* note 42, at 425.

information. For, as philosopher Rick Furtak argues, it is “only by feeling emotions that we are capable of recognising the value or significance of anything whatsoever.”<sup>60</sup> Emotion’s exclusion from the ranks of principled sources cuts lawyers off from important wellsprings of information, identification, understanding, and morality. As the neuroscientist Patricia Churchland observes: “Morality does not and cannot emerge from pure logic alone. It cannot be disengaged from our deep desires to care for others and for those with whom our welfare and prosperity are entwined. It cannot be disengaged from our need to live social lives.”<sup>61</sup>

Moreover, we will never truly set emotion aside even if we want to. We simply embrace or redefine some emotions and stigmatize others in ways that are selective and that operate under the radar. We ought to welcome the opportunity to understand it, evaluate it, and use the knowledge gleaned from it where appropriate.

### III. ANGER, MORAL SHOCK, AND MORAL IMAGINATION

Legal thought may be informed, or misinformed, by the whole range of emotions. In this part, I will focus on three related emotions or emotional capacities that might influence legal analysis: anger, moral shock, and moral imagination. I choose these emotions, in part, to emphasize that the argument in favor of acknowledging emotion is not limited to the so-called “positive” emotions, and indeed the positive versus negative nomenclature is highly problematic. The benefit of acknowledgement is that it permits fine-grained, contextual evaluation, including evaluation of how various emotions operate in particular legal contexts and whether they advance particular legal goals.

#### A. Anger

Returning to my reaction to the contracts case,<sup>62</sup> my anger, while certainly not dispositive to the case, or even framed in a way that deftly articulated a legal problem, was nevertheless information that could serve a valuable purpose. The philosophical debate about the moral content and information value of anger dates back at least to Aristotle, who considered anger an “affective perception that points to and is animated by *an offense*.”<sup>63</sup> More recently, philosopher Jesse Prinz observed that anger “may also be a necessary component of morality”<sup>64</sup> and, more strongly, that “[w]e cannot relinquish anger without losing our moral sense.”<sup>65</sup> The philosopher Agnes Callard similarly argues that anger at a wrong arises not only from our

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60. DEL MAR, *supra* note 43, at 161 (quoting RICK ANTHONY FURTAK, KNOWING EMOTIONS: TRUTHFULNESS AND RECOGNITION IN AFFECTIVE EXPERIENCE 3 (2018)).

61. PATRICIA S. CHURCHLAND, CONSCIENCE: THE ORIGINS OF MORAL INTUITION 158 (1st ed. 2019).

62. In retrospect, I was also dispirited at the circumscribed scope of the discussion and what it argued about my legal education.

63. Stoler, *supra* note 43, at 212 (paraphrasing Aristotle).

64. Jesse Prinz, *How Anger Goes Wrong*, 13 BOS. REV. F. 56, 58 (2020).

65. *Id.*

cognizance of moral principles but from our attachment to those principles.<sup>66</sup> Our anger is evoked, not merely by the violation of neutral principles we admire and accept in the abstract, but by the understanding that transgressions against justice, fairness, and equality involve harm to real people.<sup>67</sup> As political scientists Jeff Goodwin, James Jasper, and Francesca Polletta argue, a deprivation can be framed in various ways.<sup>68</sup> For the target of the wrongful act, for example, it can be framed as a humiliation that evokes self-loathing and silence, or it can be framed as an injustice.<sup>69</sup> Injustice frames a wrong in a way that reveals its systemic sources and inspires action. Professor Deborah Gould, writing about the impact of the Supreme Court's decision in *Bowers v. Hardwick*<sup>70</sup> on the fight against AIDS, reports that the decision caused a shift in the collective emotion culture "from quiet nobility to outrage and organized activism."<sup>71</sup>

Certainly, anger as an indicator of injustice can lead us astray—there can be no guarantee that the anger is normatively correct in its target. Brittney Cooper, in her book celebrating the powerful role of "eloquent rage," notes that not all such anger is righteous in nature.<sup>72</sup> And it has long been controversial whether anger is the most functional response to wrongdoing. Martha Nussbaum has recently argued to the contrary, suggesting that anger too often short-circuits grief and otherwise harms those who harbor it.<sup>73</sup> These debates about the role of anger indicate that it is not a black box or a random collection of ephemeral impulses. Anger, like any emotion, can be studied, and its role in various contexts can be debated. There is, for example, substantial evidence about certain deleterious effects of anger on decision-making. Anger moves people to action, but it does so in part by encouraging deliberative shortcuts.<sup>74</sup> It would not be advisable to construct a deliberative regime that relies entirely on anger (or on any emotion in isolation, for that matter), but to study justice and injustice without acknowledging the role of anger is to miss an essential component of the dynamics of legal reform. The anger a decision evokes is not, in itself, an argument. In law, and indeed in a democratic society, the argument for change must ultimately be articulated in ways that all can understand and debate.<sup>75</sup> But anger is a species of information, a signal that a transgression

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66. Agnes Callard, *The Wound Is Real*, 13 BOS. REV. F. 76, 82 (2020).

67. *Id.*

68. See Goodwin et al., *supra* note 6, at 7–13.

69. See *id.*

70. 478 U.S. 186 (1985).

71. Deborah Gould, *Rock the Boat, Don't Rock the Boat Baby: Ambivalence and the Emergence of Militant AIDS Activism*, in *PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS*, *supra* note 6, at 135, 135.

72. BRITTNEY COOPER, *ELOQUENT RAGE: A BLACK FEMINIST DISCOVERS HER SUPERPOWER* 31 (1st ed. 2018).

73. See generally MARTHA C. NUSSBAUM, *ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE* (2016).

74. Brittney Cooper talks about the problem of "unchecked rage," where the "emotional work left undone can do real harm." COOPER, *supra* note 72, at 31; see also Bandes & Salerno, *supra* note 3, at 1035–37.

75. KRAUSE, *supra* note 46, at 163–64.

may have occurred, a way to help understand and frame that information, and an impetus to respond to injustice.

### B. Moral Shock

In the wake of the events collectively known as “Ferguson,” the *Journal of Legal Education* published a symposium exploring Ferguson’s effects on legal teaching and scholarship. As guest editor Marc Spindelman described in his introduction, the emotions of the moment were heightened and palpable:

While the contributions . . . issue from a variety of perspectives, they all beat with a deep sense of tragedy about Ferguson, as well as a sense of urgency about the need for new ways of thinking about and teaching law—in our scholarship, in our classrooms, and in our lives, as citizens—that is not business as usual.<sup>76</sup>

In my own contribution to the volume, I described Ferguson as—for some<sup>77</sup>—a moral shock,

the sense of outrage that occurs when an event or newly acquired information shows that the world is not what one had expected. Moral shock combines the cognitive, moral, and emotional realms. It includes “a visceral, bodily feeling, on a par with vertigo or nausea.”<sup>78</sup>

Moral shock can engender feelings of dread and anger, and the way these feelings are understood and framed may be crucial to what comes next. “Dread can paralyze. Anger, on the other hand, can be ‘transformed into moral indignation and outrage toward concrete policies and decision makers,’ and toward a rethinking of one’s moral principles.”<sup>79</sup> I described the sense of pain and betrayal many of my students felt during that highly charged time as they came face-to-face with the limits of Fourth Amendment law and with the legal system’s inadequate response to the use of excessive force by law enforcement. Confronting the limits of legal doctrine may induce vertigo in professors as well as students. It takes us into a realm in which we are no longer in full control.

In addition to helping students read closely and defend and articulate their arguments, we professors also “play an important role in modeling and channeling the ways in which our students express and manage their emotions—emotions that are closely intertwined with moral intuitions and

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76. Marc Spindelman et al., *From the Editors: Ferguson and Its Impact on Legal Education Symposium*, 65 J. LEGAL EDUC. 261, 264 (2015).

77. As Paul Butler noted at the time in relation to a series of videos of police killing unarmed Black motorists and pedestrians, “[a] lot of white people are truly shocked by what these videos depict; I know very few African-Americans who are surprised.” Susan A. Bandes, *Moral Shock and Legal Education*, 65 J. LEGAL EDUC. 298, 299 (2015) (quoting Damien Cave & Rochelle Oliver, *The Videos That Are Putting Race and Policing into Sharp Relief*, N.Y. TIMES (Aug. 12, 2015), <http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html> [<https://perma.cc/2GJQ-2DTV>]).

78. *Id.* at 298 (quoting Goodwin et al., *supra* note 6, at 16).

79. *Id.* (quoting Goodwin et al., *supra* note 6, at 16).

moral reasoning.”<sup>80</sup> Our default reaction is often to “tamp down strong emotions or shift students to a purely cognitive realm”<sup>81</sup> in which we are the recognized authorities. At that moment, I was no longer the student silently raging at the teaching of a contracts case. From my vantage point on the professor’s side of the podium, something else became clear: “that the impulse to reassure my students that we can create intellectual order out of chaos is something I do for myself as much as for them.”<sup>82</sup>

### C. Moral Imagination

We acquire moral knowledge by switching between perspectives—the proverbial putting ourselves in one another’s shoes. I have focused thus far on what are often called the “moral emotions”—the emotion of anger and its cousins, indignation and moral outrage, and the emotional capacity for empathy—arguing that these emotions and capacities, among others, are essential to a field whose goal is the attainment of justice. Elsewhere I have also considered the role of emotions like compassion<sup>83</sup> and love<sup>84</sup> in the pursuit of justice. In Part IV of this Essay, I will argue for an explicit link between our failure to acknowledge these emotions and capacities and the mental health problems that our profession confronts. But first, to conclude this section, I will turn briefly to the question of epistemic emotions.

Epistemic emotions—the emotions evoked by the process of learning—ideally include curiosity, interest, enthusiasm, and wonder.<sup>85</sup> These emotions have their own epistemic significance. They “provide a richness of experience that cannot be substituted by a purely cognitive state.”<sup>86</sup> For the professor, this is likely an uncontroversial proposition—it is a joy to teach a class animated by curiosity and enthusiasm. But not all epistemic emotions are positive and uncontroversial—the category also includes anxiety and doubt.<sup>87</sup> Ta-Nehisi Coates powerfully describes the epistemic role of anxiety when he recounts how it began to strike him during his college years that “the gnawing discomfort, the chaos, the intellectual vertigo” produced by his education was in fact the point of his education—that he should regard these emotions as “a beacon” rather than an alarm.<sup>88</sup>

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80. *Id.* at 302; *see also* Jorge Moll et al., *The Cognitive Neuroscience of Moral Emotions*, in 3 MORAL PSYCHOLOGY 1, 2 (Walter Sinnott-Armstrong ed., 2007) (noting that the taxonomy of moral emotions typically includes “guilt, pity, embarrassment, shame, pride, awe, contempt, indignation, ‘moral’ disgust, and gratitude” and that these and other emotions are instrumental in promoting care for others, cooperation, and reciprocity, though also in fostering blame, prejudice, and group dissolution).

81. Bandes, *supra* note 77, at 302.

82. *Id.* at 305.

83. *See generally* Susan A. Bandes, *Compassion and the Rule of Law*, 13 INT’L J.L. CONTEXT 184 (2017).

84. *See generally* Susan A. Bandes, *What’s Love Got to Do with It?*, 8 WM. & MARY J. WOMEN & L. 97 (2001).

85. DEL MAR, *supra* note 43, at 160.

86. *Id.*

87. *Id.* at 159–61.

88. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 52 (2015).

The role of anxiety in legal education is fraught and complex. The entire acculturation process, particularly in the first year, seems designed to evoke tremendous anxiety and vertigo by removing many of the guideposts students take for granted in exchange for the promise of initiation into a new epistemic and professional culture. What is the appropriate role of anxiety in this new epistemic world? I posit that it *ought to be* a kind of comfort with discomfort—an acceptance of indeterminacy. Embracing indeterminacy is a necessary step toward mastering the richness, fluidity, and context dependence of law. Yet it may be that the boundaries of the field of law allow certain kinds of indeterminacy and ward off others—those that interfere with the sense of control, authority, and hierarchy that characterize our field. To put it another way, although legal analysis embraces a certain defined realm of indeterminacy, it strongly polices the boundaries of that realm to exclude anxieties that threaten its sense of internal coherence. And many of those unwelcome anxieties have to do with emotion.

In a critical response to Justice Brennan's article on the role of passion in judging,<sup>89</sup> legal scholar Owen Fiss stated that he could accept that "as much as [judges] strive to be rational, emotion and passion inevitably creep into the judicial process . . . [and] could be safely acknowledged, though on the understanding that [passion] must always be disciplined by reason."<sup>90</sup> What he could not accept was Justice Brennan's suggestion that passion *should* enter the decisional process.<sup>91</sup> Fiss's language—the portrayal of emotion as stealthily "creep[ing]," the setting of the bounds of what we can "safely" acknowledge, the assumed need to "discipline[]" emotion—evokes a sense of anxiety at the threatened incursion of something untamed and undomesticated into an orderly world.<sup>92</sup> To be clear, Fiss would firmly reject my characterization. He regarded the turn to passion in the same way he regarded the turn to law and economics. He viewed both as ill-fated attempts to reject indeterminacy—wrongheaded efforts to short-circuit the reasoning process in favor of certainty.<sup>93</sup> His assumption was based on a particular view of emotions—he believed that resort to emotion circumvented the reasoning process because emotions are unanalyzable, subjective, and indeterminate in all the wrong ways. Fiss also believed that the turn to passion was redundant—that any emotional reactions would need to be translated into reasons in any case and that the passions themselves had no independent epistemic value.<sup>94</sup> These were and continue to be widely held views, but they are increasingly out of step with the scientific and social-scientific consensus. Emotions are educable and analyzable, they have independent epistemic validity, and they are inextricably intertwined with reasoning—both moral and legal. Indeed, the passion for justice—and all the emotions that feed it, including moral outrage, moral shock, empathy, and

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89. See generally Brennan, *supra* note 55.

90. Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 797 (1990).

91. *Id.*

92. *Id.*

93. *Id.* at 798.

94. *Id.* at 801.



compassion—are prominent among the motivations that draw so many of us to the law and sustain us in the practice of law.

#### IV. THE MENTAL HEALTH CONSEQUENCES OF PUTTING EMOTION “ASIDE”

Having argued for the value of keeping emotion in the classroom and the legal lexicon more generally, I now turn to the harms of banishing it. More precisely, this part examines the harms of *purporting* to banish emotion, an exercise that has more to do with the way the categories emotion and reason are deployed than with actually creating an emotion-free system.

In my seminar on law and emotion, one of the most poignant texts I teach is the chapter entitled “Not Talking,” from Susannah Sheffer’s moving ethnography about the emotional lives of capital defense attorneys.<sup>95</sup> Sheffer’s subjects specialize in post-conviction appeals and collateral review, and thus they are often the sole remaining hope for their clients on death row. Their job includes managing the hopes of their clients and clients’ family members and—too often—preparing their clients for the inevitability of execution and supporting family members in the aftermath. They rise to these challenges on behalf of their clients time and time again, but they are not nearly as good at taking care of their own well-being. In the chapter I teach, Sheffer’s subjects gradually open up about the internalized pressure to present themselves as hard-as-nails litigators who can absorb terrible losses with no need for emotional support.<sup>96</sup> Often the attorneys would underestimate the pain their colleagues felt and would assume that their own pain was a sign of weakness or at least an individual problem that ought to be privately addressed.<sup>97</sup>

A 2016 study released in the *Journal of Addiction Medicine*, conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs,<sup>98</sup> in line with several previous studies,<sup>99</sup> found that lawyers have the highest rate of major depressive disorder of any occupational group and among the highest rates of alcoholism. The rates were significantly higher than those for doctors, despite the high stakes and grueling hours of the medical profession.<sup>100</sup> One significant difference between the law and many other professions is the way the law, like the military and law enforcement, equates toughness with competence. In these fields, asking for help is too often viewed as a sign of

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95. See SUSANNAH SHEFFER, FIGHTING FOR THEIR LIVES: INSIDE THE EXPERIENCE OF CAPITAL DEFENSE ATTORNEYS 115–36 (2013).

96. See *id.* at 117.

97. See *id.* at 118.

98. Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016).

99. See John Miranda, *Legally Bombed: Young Millennial Lawyers, Same Old Alcoholism*, ABA J. (Oct. 9, 2018), [https://www.abajournal.com/voice/article/legally\\_bombed\\_young\\_millennial\\_lawyers\\_same\\_old\\_alcoholism](https://www.abajournal.com/voice/article/legally_bombed_young_millennial_lawyers_same_old_alcoholism) [https://perma.cc/A882-Z46L] (discussing decades of studies finding elevated rates of alcoholism among lawyers).

100. See Krill et al., *supra* note 98.

weakness. It can wreak havoc on reputations and careers.<sup>101</sup> The military, recognizing that “silent suffering is taking a toll on military readiness,” has been fighting a “war on stigma” for years. The legal system needs to do the same.<sup>102</sup>

As I have argued elsewhere about the field of law, “there may be no other profession whose practitioners are required to deal with so much pain with so little support and guidance.”<sup>103</sup> What is most pernicious about the plight of our profession is how thoroughly the aversion to emotional awareness is imbedded in our very self-conception:

In the conventional view the very acknowledgement of our work’s emotional aspects—of the pain we cause, the pain we experience, the costs of the dissonance between role and conscience . . . seems at odds with law’s essence as a rational and rigorous discipline. In short, acknowledging the role of emotion may brand one as not merely weak, but downright unlawyerlike.<sup>104</sup>

The message that emotion must be set aside, that it is an interference with rigor and rationality, is conveyed early and often. It robs us of information we need, both to practice law and to lead healthy, well-integrated lives. At first glance, this may seem counterintuitive. Certain defense mechanisms are, in certain respects, compatible with success in the law. The Grant Study, an influential longitudinal study of the components of happiness in a group of Harvard men,<sup>105</sup> contains fascinating data on the role of coping mechanisms in attaining work-life balance.<sup>106</sup> The study found that certain coping mechanisms seemed, at first blush, well correlated with success in fields like the law that value detail-oriented, rational analysis. In particular, subjects who used intellectualization (paying attention to external reality to avoid expression of inner feelings) and isolation (leaving the idea in consciousness but stripping it of all emotional affect) did well at pursuits,

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101. David Jaffee & Janet Stearns, *Conduct Yourself Accordingly: Amending Bar Character and Fitness Questions to Promote Lawyer Well-Being*, PROF’L LAW., Jan. 2020, at 3, 3.

102. Susan A. Bandes, *Why 1 in 3 Lawyers Are Problem Drinkers*, LAW.COM (Feb. 29, 2016), <https://www.law.com/nationallawjournal/almID/1202750792679/Why-1-innbs3-Lawyers-Are-Problem-Drinkers/> [<https://perma.cc/D78R-9L8S>].

103. Susan A. Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 342 (2006); see also Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 125–26 (2002) (pointing out that if our “paradigms, teaching methods, or other practices exert pressures that undermine the physical health, internal values, intrinsic motivation, and/or experience of security . . . [and] self-worth . . . of our students” we should not be surprised that “studies of law students (and lawyers) consistently demonstrate: major deficits in well-being, life satisfaction, and enthusiasm, and flourishing depression, anxiety, and cynicism”).

104. Bandes, *supra* note 103, at 342.

105. See Joshua Wolf Shenk, *What Makes Us Happy?*, ATLANTIC (June 2009), <https://www.theatlantic.com/magazine/archive/2009/06/what-makes-us-happy/307439/> [<https://perma.cc/SRN7-73ZC>]. The term “Harvard men” is not used to encompass both genders—the subjects of the study were all men. See *id.* See generally GEORGE E. VALLIANT, ADAPTATION TO LIFE (1977).

106. See Shenk, *supra* note 105.

like the law, that value this set of traits.<sup>107</sup> As one standard work on psychoanalytic terms noted, these mechanisms may make thought “more efficient” by “avoiding the distraction associated emotions might cause.”<sup>108</sup> One might question whether “efficient thought” is a meaningful metric for success in the law, and certainly the legal profession has become gradually more cognizant of the role of empathy, emotional intelligence, cultural competence, conflict resolution skills, and facility at communication in the complex modern-day world of legal practice.<sup>109</sup> But whatever the metric used for professional success, those who habitually use these coping mechanisms find themselves at risk for professional and personal distress and dysfunction. The mechanisms prove hard to cabin. Suppression that is adopted as a temporary coping strategy too frequently evolves into psychic numbing, repression, and denial of a more permanent sort. George Valliant, one of the main authors of the Grant Study, found that though suppression is generally correlated with professional success, it is highly susceptible to overuse. For those who became reliant on it, “their lives hurt.”<sup>110</sup>

As one lawyer put it: “All of a sudden you are involved in intellectualizing or rationalizing every thought you have, and then you become distanced emotionally from your loved ones, your colleagues and even your clients. You are distanced from your own feelings, and you kind of lose your humanity.”<sup>111</sup> And as we have seen, this sense of distancing begins early in the first year of law school. When students enter the liminal space in which their familiar guideposts are removed and they await induction into a new epistemic order, they may be beset with anxiety. The problem is not the anxiety itself<sup>112</sup> but the coping mechanisms available to deal with it. John Mixon and Robert Shuwerk found that “[s]tudents try to deaden the psychic pain . . . by using ‘anxiety-muting defenses’ in ever broadening areas of their lives to ‘block emotional awareness.’”<sup>113</sup> Additionally,

“[m]any law students will progressively surround themselves with a suit of psychological armor that makes them more and more impervious [not only

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107. VALLIANT, *supra* note 105, at 384–85.

108. Bandes, *supra* note 103, at 356.

109. Gillian Calder put it well: a lawyer’s toolkit must include “planning, communicating, information-gathering, counseling, negotiation, conflict resolution, mediation, assessing the emotion of others, advocacy in dispute resolution, selling a jury, [and] framing a storyline,” among other skills. Gillian Calder, “*Whose Body Is This?*”: *On the Role of Emotion in Teaching and Learning Law*, in THE EDWARD ELGAR RESEARCH HANDBOOK ON LAW AND EMOTION 62, 72 (Susan Bandes et al. eds., 2021). Calder persuasively argues that a “different kind of pedagogy is necessary to . . . enable [students] to see that both emotion and cognition significantly impact human decision-making, especially decisions where social and moral questions abide.” *Id.*

110. VALLIANT, *supra* note 105, at 121.

111. Adrienne Drell, *Chilling Out*, ABA J., Oct. 1994, at 70, 71–72.

112. See *supra* notes 87–88 and accompanying text.

113. John Mixon & Robert P. Schuwerk, *The Personal Dimension of Professional Responsibility*, 58 LAW & CONTEMP. PROBS. 87, 94 (1995) (quoting Andrew S. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 13 (1963)).

to the immediate stresses of the classroom setting but also] to the emotional aspects of most, if not all, situations.”

Perhaps the most profound and far-reaching consequence of this adaptation is its significant impairment of character formation, with a resultant crippling of a student’s ability to behave in a professionally appropriate manner once in practice.<sup>114</sup>

These sorts of consequences—burnout, isolation, unacknowledged psychic pain, and impaired ethical judgment—are on nobody’s list of desired outcomes. Why, then, would we choose an epistemic approach that cuts students and lawyers off from fruitful sources of knowledge and wisdom, from the excitement that drew them to the law in the first place and is most likely to sustain them, and from the support of others?<sup>115</sup> There is a rich literature on the development of Langdell’s case method, legal formalism, and the implicit rules of the autonomous system of legal thought,<sup>116</sup> among other sources of insight into the epistemological foundations of law and legal pedagogy.

My contribution to the debate is to suggest that law’s reflexive and deeply rooted affective attachment to a particular notion of rationality is a major culprit. Many of the legal system’s concerns about the role of emotion in the reasoning process were at one time widely shared by other fields that study human behavior. But in the past several decades, there has been an explosion of knowledge about the dynamics of cognition and decision-making, and the consensus is that the old reason/emotion split is, quite simply, outmoded. It is a kind of malpractice to hang on to it, and certainly not a choice rooted in a rational openness to new information.<sup>117</sup> The current account of cognition and emotion leads to the conclusion that emotions cannot be excised from the reasoning process but should be embraced as a species of knowledge—one that can be critiqued and educated like any other. The effort to exclude emotion from the legal conversation leads to below-the-radar choices that deprive us of valuable information. It blocks opportunities to evaluate the role of emotions in a range of legal contexts and to reform legal institutions

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114. *Id.* at 95 (second alteration in original) (footnote omitted) (quoting Andrew S. Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 13 (1963)).

115. See Calder, *supra* note 109, at 64 (“Students come through the doors at law school, bright, engaged and passionate, and yet for the most part they don’t leave that way.”).

116. See, e.g., DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (2004); Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1589 (2001); Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609 (2019).

117. Warding off new information to protect a cherished set of beliefs is decidedly an emotional exercise (though of course it often flows from other political, economic, and practical sources as well). Elsewhere I have discussed in detail the emotional dynamics of loyalty to ideas and refusal to consider new information threatening to those ideas. See, e.g., Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006). For the classic article about fear of emotion in the legal realm, see Abrams & Keren, *supra* note 37.

in light of the best available knowledge. And it has contributed to the psychological distress of generations of lawyers.