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Terry A. Maroney

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# Emotional Common Sense as Constitutional Law

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Terry A. Maroney

62 Vand. L. Rev. 851 (2009)

*In Gonzales v. Carhart the Supreme Court invoked post-abortion regret to justify a ban on a particular abortion procedure. The Court was proudly folk-psychological, representing its observations about women's emotional experiences as "self-evident." That such observations could drive critical legal determinations was, apparently, even more self-evident, as it received no mention at all. Far from being sui generis, Carhart reflects a previously unidentified norm permeating constitutional jurisprudence: reliance on what this Article coins "emotional common sense." Emotional common sense is what one unreflectively thinks she knows about emotions. A species of common sense, it seems obvious and universal to its holder—but this appearance is misleading.*

*This Article articulates and evaluates the Court's reliance on emotional common sense in constitutional law. It demonstrates that emotional common sense sometimes imports inaccurate accounts of the world into the law. Justices of every ideological orientation invoke it in a manner that comports with their desired ends. Emotional common sense colors interpretation of evidence, manifests in selective perspective-taking, and shapes jurisprudential choices. Common-sense evaluation of emotions also necessarily embodies underlying beliefs and values; enforcing them on others under the guise of simple truth silently forces a false consensus.*

*Emotional common sense has a limited place in constitutional law. It may be cautiously embraced where an emotional phenomenon is relatively basic and universal. In all other cases, the embrace should be withheld. Evaluating isolated instances in which the Court has looked beyond emotional common sense, this Article shows that a superior path exists.*

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# Emotional Common Sense as Constitutional Law

Terry A. Maroney\*

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## INTRODUCTION

Horse sense. The brains you were born with. Sense enough to come in out of the rain. We respect those who have it and deride those who do not. Similarly, we value the ideas that appear to us as simple

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\* Assistant Professor, Vanderbilt University Law School. Thanks to Kathryn Abrams, Kerry Abrams, Susan Bandes, Lisa Bressman, Rebecca Brown, John Goldberg, Chris Guthrie, Laurence Helfer, Clare Huntington, Owen Jones, Dan Kahan, Margaret Lemos, Robert Mikos, Richard Nagareda, the International Society for Research on Emotions, the Gruter Institute for Law and Behavioral Research, participants in the Law and the Emotions Seminar of Vanderbilt University Law School, and participants in workshops at Vanderbilt University Law School and the Annual Meetings of the Association for the Study of Law, Culture & the Humanities and the Law & Society Association. For excellent research assistance, I thank Adam Benitez, Britt Doolittle, Nicole Lytle, and Katherine Waite.

truths. You can't have your cake and eat it too. All that glitters is not gold. Don't bite the hand that feeds you.

What unites these themes is the concept of "common sense." Commonly defined as "sound practical judgment,"<sup>1</sup> one meaning of "common sense" is having "the knack for seeing things as they are, and doing things as they ought to be done."<sup>2</sup> Common sense is, then, a faculty that *people have*. But the term also has a second primary meaning, signifying unreflective knowledge not reliant on specialized training or deliberative thought.<sup>3</sup> This type of common sense, which we might also call "folk wisdom," is experienced by the holder as simple truth.<sup>4</sup> *Ideas*, then, also may have common sense; they can be *commonsensical*.<sup>5</sup> These dual notions that together comprise common sense unite in their source and location: lived experience. Further, they are necessarily intertwined. One who has common sense is in touch with common-sense ideas, and such ideas emerge from the lived experiences of those commonsensical enough to perceive them.

Common-sense ideas animate legal decisionmaking. Some have claimed that common sense is the "hidden transcript" of law, the "underlying and unconscious framework" guiding judgments as varied as witness credibility,<sup>6</sup> marital property division,<sup>7</sup> the insanity

1. RANDOM HOUSE UNABRIDGED DICTIONARY 413 (Stuart Berg Flexner ed., 2d ed. 1993); see also 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 454 (Lesley Brown ed., 1993) (defining "common sense" as "[g]ood sound practical sense in everyday matters; general sagacity").

2. DICTIONARY OF AMERICAN MAXIMS 76 (David Kin ed., 1989) (quoting H.W. Shaw).

3. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 232 (Frederick C. Mish ed., 10th ed. 1993) (additionally defining the term as "unreflective opinions of ordinary people"); 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 1, at 454 (additionally defining the term as "[t]he faculty by which certain beliefs are generally accepted without philosophical enquiry or influence from religious teaching etc.").

4. Common-sense ideas often are encapsulated as proverbs. See WOLFGANG MIEDER, PROVERBS ARE THE BEST POLICY: FOLK WISDOM AND AMERICAN POLITICS 1 (2005) (explaining that proverbs are an indispensable part of the "treasure trove of folk wisdom").

5. Frits Van Holthoon, *Common Sense and Natural Law: From Thomas Aquinas to Thomas Reid*, in COMMON SENSE: THE FOUNDATIONS FOR SOCIAL SCIENCE 99, 99–114 (Frits Van Holthoon & David R. Olson eds., 1987) [hereinafter COMMON SENSE]. These twin aspects of common sense were in Greek referred to as *koine nous* and *koine ennoia*, and came in Latin to be referred to by the unitary term *sensus communis*. S.E.W. Bugter, *Sensus Communis in the Works of M. Tullius Cicero*, in COMMON SENSE, *supra*, at 83–84 (explaining that *koine ennoia* signified "the notions all men have in common"; *koine aisthesis* the "common root of our senses"; and *koine nous*, the "elementary mental outfit of normal man"). This Article is primarily concerned with that aspect of common sense signified by *koine ennoia*: ideas that appear obvious and universal. The Aristotelian concept of an über-sense unifying all others has not survived as an aspect of the contemporary understanding of common sense and is not discussed here.

6. Richard H. Thompson, *Common Sense and Fact-Finding: Cultural Reason in Judicial Decisions*, 19 LEGAL STUD. F. 119, 119–22, 125–29, 134 n.17 (1995) (citing JAMES C. SCOTT,

defense,<sup>8</sup> and jurors' assessment of eyewitness identifications.<sup>9</sup> Though relatively unexplored in the legal literature, common sense is a crucial element in judicial decisionmaking, including in constitutional jurisprudence.<sup>10</sup> Indeed, a recent citation study claims that common sense, though seldom scrutinized by scholars, was "the single most cited authority for an argument" the researchers could identify.<sup>11</sup>

Consider *Gonzales v. Carhart*.<sup>12</sup> In upholding the Partial-Birth Abortion Ban Act of 2003, the *Carhart* majority declared that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child," that "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained," and that "[s]evere depression and loss of esteem can follow" abortion.<sup>13</sup> Further, according to the majority:

It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.<sup>14</sup>

Chock-full of assertions about love, regret, grief, and sorrow, these passages are proudly folk-psychological. The *Carhart* Court explicitly prefaces its comments by noting that it has "no reliable data to measure the phenomenon" of post-abortion regret; instead, it

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WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE (1983)) (noting that there are few efforts to "address 'common sense' as a legal concept").

7. William R. Riddell, *Common Law and Common Sense*, 27 YALE L.J. 993, 993-97 (1918).

8. Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 4-7 (1990); Michael L. Perlin, "She Breaks Just Like a Little Girl": *Neonaticide, The Insanity Defense, and the Irrelevance of "Ordinary Common Sense"*, 10 WM. & MARY J. WOMEN & L. 1, 24-29 (2003). My formulation of "emotional common sense" owes its rhetorical flavor to Perlin's "ordinary common sense."

9. Richard E. Redding, *How Common-Sense Psychology Can Inform Law and Psychological Research*, 5 U. CHI. L. SCH. ROUNDTABLE 107, 113 (1998).

10. David E. Van Zandt, *Commonsense Reasoning, Social Change, and the Law*, 81 NW. U. L. REV. 894, 934 (1987) ("[T]he promulgation of most legal rules is based on commonsense judgments about the world.").

11. Ronald J. Allen, *Common Sense, Rationality, and the Legal Process*, 22 CARDOZO L. REV. 1417, 1428-29 & n.39 (2001) (asserting that "[t]he words and phrases 'common sense,' 'commonsensical,' and 'sensible,' used as an argument (based on crude sampling) appear upwards of 70,000 times in Westlaw," but noting that "[t]his almost surely grossly understates the reliance on common sense as an argument, for the concept is often invoked in different terms").

12. 550 U.S. 124 (2007).

13. *Id.* at 159.

14. *Id.*

presents its observations about women's emotional experiences as "unexceptionable" and "self-evident."<sup>15</sup> The notion that such observations can and should drive critical legal determinations is, apparently, even more self-evident, as it receives no mention at all.

Importantly, the *Carhart* majority invokes its common-sense views about a very specific domain of human experience: our emotions. It invokes what this Article calls *emotional common sense*. *Carhart* is an exceptional case in many respects.<sup>16</sup> In one important respect, however, it reflects a hidden and previously unidentified practice: relying on emotional common sense when construing law.

"Emotional common sense" is what one thinks she simply knows about emotions, based on personal experience, socialization, and other forms of casual empiricism. It is a deep, rich topic, as emotions form an integral part of the common sense we both bring to and receive from our lives. Indeed, much folk wisdom revolves around emotions. We operate on the basis of common-sense views of emotions' function in human life, their causes and manifestations. Hope springs eternal;<sup>17</sup> there is nothing to fear but fear itself;<sup>18</sup> love is blind.<sup>19</sup> We

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15. *Id.*

16. Much of the extensive post-*Carhart* commentary has focused on this same aspect of the opinion, though none offers the analysis provided here. See, e.g., Chris Guthrie, *Carhart, Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877, 877 (2008) (arguing that the opinion shows a "fundamental misunderstanding of the psychology of regret"); Posting of Julia Frank to Balkanization, <http://balkin.blogspot.com> (May 7, 2007, 7:05 EST) (explaining that it is a common misconception that abortion causes psychiatric disorders); Posting of Andrew Koppelman to Balkanization, <http://balkin.blogspot.com> (Apr. 23, 2007, 18:12 EST) (questioning whether regret is a legitimate reason to curtail constitutional liberties). Numerous commentators have claimed that the above-cited passages mark a radical shift, calling them "startling," Jeffrey Toobin, *Five to Four*, NEW YORKER, June 25, 2007, at 35, and "a major departure from how the court has framed the abortion issue for the past 34 years," Linda Greenhouse, *Adjudging a Moral Harm to Women from Abortions*, N.Y. TIMES, Apr. 20, 2007, at A18; see also Tony Mauro, *Kennedy Swings, Abortion Rights Take Hit*, LEGAL TIMES, Apr. 23, 2007, at 8 (noting that Kennedy's opinion was a "radical departure" from his stance in previous abortion cases); Posting of Jack Balkin to Balkanization, <http://balkin.blogspot.com> (Apr. 19, 2007, 14:50 EST) ("The new rhetoric of pro-life forces is no longer just rhetoric. It's now part of Supreme Court doctrine. That is the big news about *Gonzales v. Carhart*.").

17. THE BOOK OF POSITIVE QUOTATIONS 377 (Steve Deger & Leslie Ann Gibson eds., 2d ed. 1993) [hereinafter POSITIVE QUOTATIONS] ("Hope springs eternal in the human breast." (quoting Alexander Pope)); see also *id.* at 376 ("Hope is the poor man's bread." (quoting Gary Herbert)); *id.* at 374 ("Hope is grief's best music." (quoting Anonymous)); *id.* ("Hope is a vigorous principle . . . it sets the head and heart to work, and animates a man to do his utmost." (quoting Jeremy Collier)); *id.* at 373 ("Hope is the last thing ever lost." (quoting an Italian proverb)).

18. *Id.* at 477 ("The only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance." (quoting Franklin Delano Roosevelt)); see also *id.* at 479 ("He who fears something gives it power over him." (quoting a Moorish proverb)).



also call on common-sense ideas about the legitimacy and reliability of the information emotion imparts and the conclusions it compels. To find happiness, follow your heart;<sup>20</sup> loss shows us what's really important;<sup>21</sup> listen to your fears.<sup>22</sup> And, like all common sense, emotional common sense is thought to spring from the laboratory of life. As Descartes once said, because "every one has experience of the passions within himself, there is no necessity to borrow one's observations from elsewhere in order to discover their nature."<sup>23</sup>

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19. GEOFFREY CHAUCER, *THE CANTERBURY TALES* 270 (Burton Raffel ed., Random House, Inc. 2008) (1400); *see also* WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 2, sc. 6 ("But love is blind, and lovers cannot see/The pretty follies that themselves commit.").

20. *See* POSITIVE QUOTATIONS, *supra* note 17, at 421 ("It is wisdom to believe the heart." (quoting George Santayana)); *id.* at 422 ("It is the heart always that sees, before the head can see." (quoting Thomas Carlyle)); *id.* ("The conclusions of passion are the only reliable ones." (quoting Søren Kierkegaard)); *see also id.* at 35 ("With happiness comes intelligence to the heart." (quoting a Chinese proverb)); *id.* ("Best trust the happy moments . . . The days that make us happy make us wise." (quoting John Masefield)).

21. *See id.* at 678 ("Suffering is the sole origin of consciousness." (quoting Fyodor Dostoyevsky)); *id.* ("Pain makes man think. Thought makes man wise. Wisdom makes life endurable." (quoting John Patrick)); *THE MACMILLAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES* 1040 (Burton Stevenson ed., 1948) ("Grief should be the instructor of the wise." (quoting Lord Byron)).

22. POSITIVE QUOTATIONS, *supra* note 17, at 490 ("Fear is a fine spur." (quoting an Irish proverb)); *id.* ("Fear is an instructor of great sagacity." (quoting Ralph Waldo Emerson)); *id.* ("A good scare is worth more to a man than good advice." (quoting Edgar Watson Howe)). *See generally* GAVIN DE BECKER, *THE GIFT OF FEAR: AND OTHER SURVIVAL SIGNALS THAT PROTECT US FROM VIOLENCE* (1997) (explaining that acts of violence are not random and unpredictable and that our instincts tell us when we are in danger).

23. RENÉ DESCARTES, *THE PASSIONS OF THE SOUL* (1649), *reprinted in* WHAT IS AN EMOTION? CLASSIC READINGS IN PHILOSOPHICAL PSYCHOLOGY 55, 55 (Cheshire Calhoun & Robert C. Solomon eds., 1984) [hereinafter WHAT IS AN EMOTION?].

The "general sagacity" aspect of common sense, too, has an emotional counterpart: persons with particular skill in perceiving and responding to emotional dynamics are, in pop parlance, referred to as "emotionally intelligent." *See* DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* 33–39 (10th anniversary ed. 2005) (explaining that IQ is not always an accurate predictor of success and that our "other characteristics," such as ability to motivate oneself and to empathize with others, are gaining new recognition). The concept of "EQ" as a rival to "IQ" has spawned a cottage industry of theories and products. *See, e.g.,* Consortium for Research on Emotional Intelligence in Organizations, <http://www.eiconsortium.org> (last visited Apr. 10, 2009) (describing the mission of the EI Consortium "to advance research and practice of emotional and social intelligence in organizations through the generation and exchange of knowledge"). Such emotional "horse sense" is, of course, intertwined with the sort of emotional common sense explored in this Article, in the same way that the twin aspects of common sense more generally are intertwined. *See supra* note 6–11 and accompanying text. An emotional reaction to particular stimuli will shape what perceptions of and conclusions about that situation appear commonsensical. The greater degree to which the perceiver is "emotionally intelligent," the greater the "reliability" of those assessments. However, as this Article will demonstrate, even "reliable" assessments of emotion by "emotionally intelligent" persons are profoundly bounded.

If common sense has, despite its importance, received relatively little attention, the extent to which *emotional* common sense animates legal decisionmaking has been overlooked entirely.<sup>24</sup> It does animate legal decisionmaking; and, like other iterations of common sense, its invocation has both virtues and—perhaps more commonly—vices.

This Article articulates and evaluates emotional common sense as constitutional law. It undertakes this task within a deliberately confined universe of inquiry: decisions of the U.S. Supreme Court.<sup>25</sup> Given its high profile and the relative openness with which the Court imports its emotional common sense, *Carhart* provides an analytical window into this previously unquestioned phenomenon. Emotional common sense is not, however, confined to abortion jurisprudence—though it is quite active there. A focus on the phenomenon reveals hidden dynamics in areas as diverse as free speech and the cross-examination of child witnesses.

In Part I, this Article further dissects the concept of “emotional common sense.” As a species of “common sense,” it reflects the merits and limitations of that category. Indeed, it is perhaps one of the most

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24. A small literature identifies certain phenomena falling within what this Article calls emotional common sense. See NORMAN J. FINKEL & W. GERROD PARROTT, EMOTIONS AND CULPABILITY: HOW THE LAW IS AT ODDS WITH PSYCHOLOGY, JURORS, AND ITSELF 47–66 (2006) (describing the “everyday concept of emotion”); Paul Gewirtz, *On “I Know It When I See It,”* 105 YALE L.J. 1023, 1044–47 (1996) (arguing that emotion should be recognized for the important role that it plays in judicial opinions); Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 677–83 (2009) (arguing that emotion should play a role in constitutional law). The degree to which judges do or should call upon their own emotional reactions to guide their jurisprudential choices also is the subject of a small (but growing) literature. See, e.g., William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3, 3–5 (1988) (praising Cardozo for recognizing emotion in judicial decisionmaking); Laura E. Little, *Adjudication and Emotion*, 3 FLA. COASTAL L.J. 205, 218 (2002) (explaining that emotion plays a role in the law but needs an “organizing principle” to ensure that it does not interfere with judicial values); Benjamin Zipursky, Note, *DeShaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1102 (1990) (suggesting that including emotion in judicial decisionmaking would reach a better result in many cases). This Article deals but briefly with that aspect of emotional common sense—which might be termed an *emotional faculty of perception* as opposed to *perceptions about emotion*—leaving a fuller exploration for another day.

25. To say that emotional common sense operates “as” constitutional law incorporates several concepts. It may be used as a tool of legal reasoning or allowed to influence perception and evaluation of relevant facts; it may drive a legal determination or be invoked post hoc as a justification. This Article explores each of these manifestations.

The Supreme Court may be no more prone than other lawmaking institutions to invoke emotional common sense. And while it is possible that constitutional jurisprudence is more emotionally saturated than other areas of law, see *infra* Part III, this should not be presumed. The lessons learned within this confined universe, then, may be taken to other areas of law and to the decisions of other legal actors. Further, the present analysis is largely confined to contemporary Supreme Court jurisprudence; a historical analysis would be well worth undertaking.

entrenched sorts of common sense, as—compared to, say, naïve physics—many believe *folk* wisdom is the *only* sort of wisdom to be had about emotions. Common sense may be regarded as epistemologically legitimate, even privileged, or derided as the crude, uninformed view of the layperson. But whether valorized or denigrated, common sense clearly is shaped and bounded by time, place, and culture; though it may seem simple truth to its holder, others may hold very different views similarly believed to be commonsensical. And just as its epistemological value may be contested and its cultural limits variable, its proper relationship to law is far from clear.

Part II undertakes a “thick description” of emotional common sense within constitutional law.<sup>26</sup> Judgments about emotion are inevitable in constitutional law. Evaluation of a particular emotional experience, such as the impact of seeing a burning cross, sometimes is necessary to application of the relevant constitutional standard. Beliefs about the prevalence or nature of emotional experiences, such as post-abortion regret, may affect the valuation of state interests and may be invoked to expand or limit individual rights.<sup>27</sup> The Court has never displayed any sustained inclination to regard emotions with anything other than a lay perspective. The emotional common sense it therefore brings to these challenges is operationalized just as is all common sense: instrumentally, with spotty reliability, and incorporating a strong evaluative component.

First, emotional common sense has an uneasy relationship with empirical truth. Sometimes the Court’s folk judgment is in substantial accord with the weight of empirical evidence. At other times it significantly conflicts with the weight of such evidence—the Court adopts, as it were, “old wives’ tales.”<sup>28</sup> One important goal therefore would be to reduce instances of the latter. But not all emotional common sense can be characterized as “correct” or not. Most common-sense notions, after all, have an equally well-accepted opposite. Which is true: Absence makes the heart grow fonder, or out

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26. The term “thick description” was coined by Gilbert Ryle in his *Collected Papers*. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5–6 (1973) [hereinafter GEERTZ, *INTERPRETATION*].

27. Further, common sense ideas may sometimes be grounded in emotion; issues such as wartime powers, affirmative action, and eminent domain provoke strong passions, and a Justice’s emotional engagement with an issue may shape what facts and conclusions appear to her commonsensical. See *infra* notes 218–19 and accompanying text.

28. See, e.g., Merriam-Webster Online Dictionary, <http://mw4.m-w.com/dictionary/old%20wives%20tale> (last visited Apr. 10, 2009) (defining “old wives’ tale” as “an often traditional belief that is not based on fact” and as synonymous with “superstition”).

of sight, out of mind?<sup>29</sup> It depends on how much you value the absent person and her return. Members of the Court, then, do precisely what people in general do: they (likely unconsciously) invoke one or the other view, either of which is plausible, depending on how well it moves them toward their desired conclusion.<sup>30</sup>

The weightier point, then, is that emotional common sense is instrumental and value-laden. The Justices' emotional common sense reveals important information about their affiliations, beliefs, and values, and it will be invoked in a manner that comports with their desired normative ends. A deep analysis therefore seeks not merely to judge whether the Court's view is "correct," for there may be "conflicting correct" views.<sup>31</sup> Rather, it seeks also to uncover what emotional common sense reveals about the Justices' underlying worldviews. Analysis of key abortion protest cases reveals that emotional common sense both colors interpretation of evidence and manifests in selective perspective-taking. And, as a deeper reading of *Carhart* shows, reliance on emotional common sense may ignore relevant emotional diversity and serve as a cover for highly contested beliefs and values.

Part III offers a proposed valuation of emotional common sense as part of our constitutional jurisprudence. Though the full reach and implications of this newly described phenomenon surely will unfold over time, it is possible to start that dialogue here. This Part proposes that emotional common sense be cautiously embraced—or at least tolerated—where the legal determination involves extremely basic emotions as manifested in everyday settings, for in that instance emotional common sense may be so likely to be accurate as to be an acceptable source. The (limited) embrace should be largely withheld, though, where the Court is asked to evaluate complex emotions, particularly those of other people. In these situations, the inaccuracy, instrumentalism, and parochialism to which common sense is vulnerable are most likely to be at play. The Court should be particularly attuned to situations in which the emotion in question is amenable to significant diversity, for emotional common sense may

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29. See Robert Epstein, *Folk Wisdom: Was Your Grandmother Right?*, PSYCHOL. TODAY, Nov. 1997, at 46, 47 (giving as another example "birds of a feather flock together" versus "opposites attract").

30. This is precisely the point that Llewellyn made regarding canons of statutory interpretation. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396-97 (1950) (asserting that courts will select among available correct answers according to, inter alia, "the sense of the situation as seen by the court").

31. *Id.* at 395.

push in the direction of a false consensus. The Court should allow other perspectives meaningfully to educate its views—and occasionally, as this Part will show, it does. Finally, where (as frequently will be the case) external evidence is unavailable, in equipoise, or admits of conflicting correct views, the Court's choices should be defended as normative ones and not presented as simple statements of obvious truth.

Emotional common sense is importantly operative within constitutional law. It is not simple truth accessible to all; it is complex, unstable, and norm-laden. This Article makes it visible. Once visible, it may be evaluated. Once evaluated, it may be channeled.

### I. EMOTIONAL COMMON SENSE

Weaving together multidisciplinary insights on common sense and wedding them to contemporary psychological research on emotions, this Part presents a unified concept of emotional common sense. Common sense, despite its camouflage as a fixed, stable notion signifying nothing more than the quality of having one's head screwed on correctly and the truths perceived by persons with their heads thus correctly screwed,<sup>32</sup> is a concept with a rich and fluid intellectual history. Emotional common sense, like all common sense, is better suited to some tasks than others and is profoundly shaped by culture. These attributes make emotional common sense a potentially unstable partner with law.

Common sense—to begin the inquiry by defining the attributes of the larger category—is thought to both originate and manifest in lived experience. Commonsensical ideas spring from the laboratory of life, through direct personal experience and lessons imparted—both implicitly and explicitly—by one's family, peers, and culture.<sup>33</sup> Education and analytic reflection are not necessary to common sense,

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32. See, e.g., CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 83 (1983) [hereinafter GEERTZ, *LOCAL KNOWLEDGE*] (pointing out that notions striking the Navajo as commonsensical, or "what anyone with his head screwed on straight cannot help but think," will seem "peculiar" to non-Navajo persons).

33. See, e.g., Paul E. Meehl, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, 27 J. SOC. ISSUES, Winter 1971, at 65, 67–68 ("A shrewd lawyer . . . [may be] right in holding to what he learned at his grandmother's knee or through practical experience."). The same point applies to the faculty-of-perception aspect of common sense. Someone with high intelligence, for example, may reveal herself to be bereft of common sense by reacting poorly to everyday tasks, relationships, and challenges. See POSITIVE QUOTATIONS, *supra* note 17, at 411 ("Many persons of high intelligence have notoriously poor judgment." (quoting Sydney J. Harris)); see also GEERTZ, *LOCAL KNOWLEDGE*, *supra* note 32, at 76 (quoting Saul Bellow: "the world is full of high-IQ morons").

and folk wisdom holds that they might actually be destructive to its thriving. As Gertrude Stein once quipped, "Everybody gets so much information all day long that they lose their common sense."<sup>34</sup>

A second defining feature of common sense is its relative invisibility. It is more commonly "appealed to rather than defined," "assumed [rather] than defended."<sup>35</sup> Like Poe's purloined letter, it "lies so artlessly before our eyes it is almost impossible to see,"<sup>36</sup> and it often is invoked for the rhetorical purpose of accusing an opponent's position of being nonsensical.<sup>37</sup> However, as the eminent anthropologist Clifford Geertz proposed, common sense is not simply "what anyone clothed and in his right mind knows" but, rather, "a relatively organized body of considered thought" whose order may be empirically uncovered and conceptually formulated.<sup>38</sup> In all its iterations, Geertz demonstrated, common sense shares the characteristics of being *natural*, *practical*, *thin*, *immethodical*, and *accessible*.

The *naturalness* of common sense captures its "of-courseness," the way in which it represents matters as "being what they are in the simple nature of the case."<sup>39</sup> It is *practical* in the sense that it both takes as its object that which is necessary to manage the challenges of everyday life and conveys a person's aptitude for managing such

34. DICTIONARY OF QUOTATIONS 966 (Alison Jones ed., 1997) (quoting Gertrude Stein, *Reflections on the Atomic Bomb*, in READINGS IN WORLD POLITICS 491, 491 (Robert A. Goldwin ed., 1959)).

35. Frits Van Holthoon & David R. Olson, *Common Sense: An Introduction*, in COMMON SENSE, *supra* note 5, at 1, 1; *see also* GEERTZ, LOCAL KNOWLEDGE, *supra* note 32, at 77 (explaining that common sense is an "assumed phenomenon" rather than an "analyzed one").

36. GEERTZ, LOCAL KNOWLEDGE, *supra* note 32, at 92. Geertz was one of few serious contemporary scholars to dissect the concept of common sense. *Common Sense as a Cultural System*, a lecture given at Antioch College in the 1960s that later appeared as an article and, finally, as a chapter in *Local Knowledge*, represents his most specific analysis. *See* ADAM KUPER, CULTURE: THE ANTHROPOLOGISTS' ACCOUNT 102 (1999) (noting, though, that common sense was "[a]mong the least well defined elements" of Geertz's impressive "conceptual apparatus").

37. To say that one's point is common sense is to say one's conclusion is the one at which all but the most obtuse must eventually arrive. *See* Van Holthoon & Olson, *supra* note 35, at 1 (noting its tactical and strategic value). This is the purpose for which Thomas Paine invoked the term; his argument had nothing to do with common sense per se. THOMAS PAINE, COMMON SENSE (Thomas P. Slaughter ed., Bedford/St. Martin's 2001) (1776); *see also* Allen, *supra* note 11, at 1420 (pointing out that "common sense" appears in Paine's work only three times and was used to refute "claims of privileged access to truth").

38. GEERTZ, LOCAL KNOWLEDGE, *supra* note 32, at 75–76 (asserting that such a view is profoundly counter to the concept itself, for "it is an inherent characteristic of common-sense thought precisely to deny this and to affirm that its tenets are immediate deliverances of experience, not deliberate reflections upon it"); *see also* Thompson, *supra* note 6, at 121 (quoting Geertz to explain that common sense is viewed as self-evident, unlike other "systems of meaning").

39. GEERTZ, LOCAL KNOWLEDGE, *supra* note 32, at 85.

challenges.<sup>40</sup> To say that common sense is *thin* might be phrased instead as *simple* or *literal*: “the world is what the wide-awake, uncomplicated person takes it to be.”<sup>41</sup> Its *immethodical* tendency is captured by the “shamelessly and unapologetically ad hoc” nature of its content, often displayed in wildly contradictory proverbs rather than in “formal doctrines, axiomized theories, or architectonic dogmas.”<sup>42</sup> Finally, to say that common sense is *accessible* recognizes its egalitarian nature. Any person “with faculties reasonably intact can grasp common-sense conclusions,” for it is a field with “no acknowledged specialists,” one that is “open to all.”<sup>43</sup>

These attributes pull in opposite directions. *Natural*, *practical*, and *accessible* sound positive; common sense helps us make our way through the world as it is, and it is democratically distributed rather than residing only with trained elites. But *thin* and *immethodical* sound negative, as if common sense were skating erratically on the surface of other, deeper, more consistent sorts of knowledge. And, indeed, both characterizations are true.<sup>44</sup> Moreover, both apply fully to the type of common sense that revolves around human psychology,<sup>45</sup>

40. *Id.* at 87 (explaining that the practicality aspect captures the “folk-philosophical sense of sagacity”).

41. *Id.* at 89.

42. *Id.* at 90.

43. *Id.* at 91; *see also id.* at 93 (explaining that common sense often also reflects “earthiness,” as displayed in such phrases as knowing “your ass from your elbow”).

44. These tensions are responsible for many of the historical vacillations around common sense. Extolled by the Greeks and Romans as a bond of common humanity, during the European Enlightenment it came to be seen as “the sum of common ignorance that had kept the human race in the bonds of servitude,” to which the studied ideas of “intellectuals” were the antidote. Allen, *supra* note 11, at 1421; *see also* E.J. Hundert, *Enlightenment and the Decay of Common Sense*, in COMMON SENSE, *supra* note 5, at 133, 138–40 (explaining that during the Enlightenment, common sense was seen as a form of “superstition and prejudice” that separated the enlightened community from ordinary people); Edmund V. Sullivan, *Common Sense from a Critical-Historical Perspective*, in COMMON SENSE, *supra* note 5, at 217, 217–18 (noting that common sense historically has appeared in a contradictory light). Common sense was embraced in the United States because of its “democratic appeal in its privileging of the viewpoint of the common man.” Charles L. Barzun, Note, *Common Sense and Legal Science*, 90 VA. L. REV. 1051, 1071 (2004). For the philosophical debate over common sense, *see* JOHN COATES, *THE CLAIMS OF COMMON SENSE: MOORE, WITTGENSTEIN, KEYNES AND THE SOCIAL SCIENCES* (1996); Van Holthoon, *supra* note 5, at 111.

45. Common-sense ideas abound about any number of subjects, such as physics and medicine. *See* Barry Smith & Roberto Casati, *Naïve Physics: An Essay in Ontology*, PHIL. PSYCHOL., Sept. 1994, at 227, 227–44 (discussing common sense in naïve physics); Online Archive of American Folk Medicine, How to Search the Archive, <http://www.folkmed.ucla.edu/howto.html> (last visited Apr. 10, 2009) (containing a collection of material “intended as a resource for historical, sociological, and folkloristic research”). That subset of common sense about psychology is the site of much academic debate. *See* RICHARD S. LAZARUS, *EMOTION AND ADAPTATION* 14 (1991) (noting “considerable discomfort with what is called, often snidely, *naïve* or *commonsense* psychology”); B. de Gelder, *Commonsense Mentalism*

including emotions. These competing aspects of common sense are particularly relevant, because emotion generally is regarded as being so firmly within the province of common sense that most people would be puzzled by any other sort of approach.<sup>46</sup>

Given the tensions inherent in the category, much of the task of contemporary scholars of common sense has been to chart a middle course in which it is valued for what it offers and discounted for what it does not.<sup>47</sup> That effort has yielded several core insights that inform assessment of the proper relation between emotional common sense and law.

First, folk wisdom is empirical, though casually so, in that it is based on human observation and experience, accumulated and passed on over time.<sup>48</sup> Thus, emotional common sense will embody certain truths that appear both universal and stable.<sup>49</sup> For example, the common notion that emotions are involuntary, quick, and can temporarily overwhelm other mental operations is generally true with regard to a small set of evolutionarily basic emotions, such as fear.<sup>50</sup> It

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and *Psychological Theory*, in *COMMON SENSE*, *supra* note 5, at 277, 277–78 (noting also that common sense generates “considerable uneasiness” in psychology); Harold H. Kelley, *Common-Sense Psychology and Scientific Psychology*, 43 *ANN. REV. PSYCHOL.* 1, 4 (1992) (defining commonsense psychology as “common people’s ideas about their own and other persons’ behavior and about the antecedents and consequences of that behavior,” expressed in “familiar sayings and stories”).

46. Emotional common sense therefore is one of the most powerful forms of common sense. See Gerald L. Clore & Karen Gasper, *Feeling Is Believing: Some Affective Influences on Belief*, in *EMOTIONS AND BELIEFS: HOW FEELINGS INFLUENCE THOUGHTS* 10, 39 (Nico H. Frijda et al. eds., 2000) [hereinafter *EMOTIONS AND BELIEFS*] (“[B]ecause emotional feelings are directly experienced, and arise from within, the personal validity of the information they appear to convey seems self-evident . . .”).

47. Kelley, *supra* note 45, at 22 (discarding commonsense psychology “would require us needlessly to separate ourselves from the vast sources of knowledge gained in the course of human history” and is “unrealistic”); Thomas Luckmann, *Some Thoughts on Common Sense and Science*, in *COMMON SENSE*, *supra* note 5, at 179, 179 (“Just as it is pompous to deny that there is some sense in common sense merely because it is so common, it is being pretentious in reverse fashion to say that common sense is the only sense there is.”). But see Gregory A. Kimble, *A New Formula for Behaviorism*, 101 *PSYCHOL. REV.* 254, 258 (1994) (“The current fad of seeking truth in intuition, argument, common sense, and literature accepts these other understandings without apparent comprehension that they may not be the same as, or even compatible with, scientific truth.”).

48. Meehl, *supra* note 33, at 78. In this sense, it is much like modern empirical science, though decidedly less organized. See, e.g., Luckmann, *supra* note 47, at 194 (“The ‘home base’ of modern science is also the ‘home base’ of common sense.”).

49. Kelley, *supra* note 45, at 2 (“[A] great many of psychology’s basic principles are self-evident . . . [and psychologists] have often been dealing with the obvious and did not know it.” (quoting John P. Houston, *Psychology: A Closed System of Self-Evident Information?*, 52 *PSYCHOL. REP.* 203, 207 (1983))).

50. See, e.g., JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 129–34 (1996) (describing the emotional fear response to dangers in humans



also is largely true that—as most people believe—feelings of fear carry vital information about danger.<sup>51</sup> To the extent that emotional common sense imports into law such stable insights, then, its use is either innocuous or positive.

Second, and in direct contrast to the first point, folk wisdom is often inaccurate and will embody not stable truth but, rather, distortion, myth, and bias.<sup>52</sup> It is most likely to be accurate when referring to familiar, consciously accessible phenomena, and it will be far less so when directed to rapid, nonconscious, largely invisible ones.<sup>53</sup> For example, emotional common sense may be generally reliable when it concerns everyday experiences, such as the way emotions feel. We easily can call to mind the somatic incidents of happiness, such as feeling “light hearted” and smiling, and such accounts will likely vary little across a population. We are significantly less likely to have sound folk beliefs about the bodily mechanisms underlying the distinctive declarative thoughts and physical sensations of happiness. This blind spot, common to virtually all nonconscious processes, also shields from view certain systemic distortions—referred to as heuristics and biases when applied to

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and animals and its proclivity to overwhelm other emotions and thoughts). Even this insight is limited, though, as it fails to account for the sheer diversity of emotions and emotion-eliciting situations. See Klaus R. Scherer, *Evidence for Both Universality and Cultural Specificity of Emotion Elicitation*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 172, 175 (Paul Ekman & Richard J. Davidson eds., 1994) [hereinafter *THE NATURE OF EMOTION*] (noting that emotions and emotional responses to situations are affected by cultural variations).

51. DE BECKER, *supra* note 22 (providing a “pop psychology” treatment of fear as information); see also POSITIVE QUOTATIONS, *supra* note 17, at 420 (“A trembling in the bones may carry a more convincing testimony than the dry, documented deductions of the brain.” (quoting Llewelyn Powers)).

52. Indeed, this point reaches to the very foundation of folk wisdom about the emotions: though laypersons tend to regard them as universal, basic, and easily recognized, distinguished, and understood, virtually no academic psychologist would agree. See Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 167 & n.64 (2005) (describing the human “tendency not to recognize that emotions themselves are complex”). The many academic psychologists who believe that *some* emotions are universal, basic, and easily recognized and understood believe the set to be a small one. See, e.g., LAZARUS, *supra* note 45, at 79 (noting comfort with the idea that “some emotions are more or less universal within the human species”); Phoebe C. Ellsworth, *Some Reasons to Expect Universal Antecedents of Emotion*, in *THE NATURE OF EMOTION*, *supra* note 50, at 150, 150–51 (noting that there is some, but not much, evidence for common emotion elicitors); Nico H. Frijda, *Universal Antecedents Exist, and Are Interesting*, in *THE NATURE OF EMOTION*, *supra* note 50, at 155, 155–57 (presenting evidence for the existence of universal emotions); Jaak Panksepp, *The Basics of Basic Emotion*, in *THE NATURE OF EMOTION*, *supra* note 50, at 20, 22 (asserting that there is something “basic” about emotions).

53. Kelley, *supra* note 45, at 6 (noting that folk wisdom is most accurate when directed to “immediate and direct consequences, time-spans of minutes to days, and face-to-face interaction of small numbers of people”).

cognitive processes—to which emotion is vulnerable and of which we are not aware.<sup>54</sup>

The nonconscious aspect of our emotional experience is not the only area in which common sense shows blind spots. Importantly, similar inaccuracies will plague emotional common sense when used to surmise and evaluate the experiences of others, particularly dissimilar others, and will tend toward imposition of a “false consensus” in which we wrongly assume their emotional lives to be like our own.<sup>55</sup> If emotional common sense imports into law such inaccurate suppositions, its use is either innocuous—if, for example, it concerns a tangential matter unlikely to be given weight in future cases—or negative.

Third, emotional common sense is inseparable from culture.<sup>56</sup> It is shaped and bounded by culture, which imposes on our emotions “a recognizable, meaningful order, so that we may not only feel but

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54. See, e.g., Paul Slovic et al., *The Affect Heuristic*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 397, 397–420 (Thomas Gilovich et al. eds., 2002) (introducing a theoretical framework for analyzing the impact that perception biases have on decisionmaking). For example, we are easily misled into misattributing the causes of our emotions. See JESSE PRINZ, *GUT REACTIONS* 12–13 (2004) (“A state of arousal may be interpreted as resulting from some emotionally significant event even when it really results from another source.”); Blumenthal, *supra* note 52, at 162 n.38 (“[I]t seems intuitive that the experience of an affective state is conscious in the sense that one ‘knows’ one is angry, sad, elated, or aroused . . . . But this intuition may be wrong . . . .”). Another example is systematic error in predicting the intensity and duration of emotional reactions to future events. Blumenthal, *supra* note 52, at 167.

55. Blumenthal, *supra* note 52, at 179–80 & nn.155–57 (2005) (describing “false consensus effect” and “egocentric empathy gaps”); see also *id.* at 190 & n.225 (“[P]redictions regarding others may be even less accurate [than predictions we make as to ourselves]. . . . [Some] data suggest that the more different an outsider is from the target of a prediction, the less accurate predictions will be.”); Kelley, *supra* note 45, at 6 (stating that common beliefs about groups of people are often “exaggerated at best, and wholly inaccurate at worst”).

56. The concept of culture admits of many contested definitions. It here is taken to signify a more or less “concrete and bounded world of beliefs and practices” generally isomorphic with an identifiable society or sub-group within a society. WILLIAM H. SEWELL JR., *LOGICS OF HISTORY: SOCIAL THEORY AND SOCIAL TRANSFORMATION* 156 (2005); see also GEERTZ, *INTERPRETATION*, *supra* note 26, at 4–5 (explaining that textbook definitions of culture embrace concepts as diffuse as “the total way of life of a people” and “a storehouse of pooled learning”); Sherry B. Ortner, *Introduction to THE FATE OF “CULTURE”*: GEERTZ AND BEYOND 1, 7 (Sherry B. Ortner ed., 1999) (describing competing definitions of “culture”).

Dan Kahan and colleagues in the Cultural Cognition Project at Yale Law School have designed a series of empirical studies around a different—but not conflicting—concept of “culture.” They use two fundamental orientations—hierarchist versus egalitarian and individualist versus communitarian—to divide subjects into cultural orientation quadrants. See, e.g., Dan M. Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk* 6 (Cultural Cognition Project, Working Paper No. 73, 2008), available at <http://ssrn.com/abstract=1123807> (describing hierarchy-egalitarianism and individualism-communitarianism). This approach is well suited for empirical survey research but necessarily less thick than that undertaken here.

know what we feel and act accordingly.”<sup>57</sup> The influence of culture is relatively obvious for complex social emotions—for example, what causes shame or guilt varies dramatically<sup>58</sup>—but (perhaps surprisingly) the influence is present even with the most evolutionarily basic emotions.<sup>59</sup> “Not only ideas, but feelings, too, are cultural artifacts.”<sup>60</sup> Thus, despite evidence of some universal aspects of emotion and its expression across culture, gender, race, and other dividing lines,<sup>61</sup> in “humans, the potential for complexity is as universal as anything.”<sup>62</sup> When emotional common sense is used to shape law, then, there is a danger that cultural biases will be enacted or relevant emotional diversity ignored.<sup>63</sup>

Emotional common sense, having been shaped by culture, also reflects it, embodying the “webs of meaning” that constitute and

57. GEERTZ, INTERPRETATION, *supra* note 26, at 80; *see also* Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, in *THE PASSIONS OF LAW* 217, 219–22 (Susan A. Bandes ed., 1999) [hereinafter *THE PASSIONS OF LAW*] (describing cultural “scripting” of emotions).

58. Scherer, *supra* note 50, at 175 (concluding that although “some basic eliciting themes are very similar,” especially for simple emotions like disgust, anger, sadness, and fear, once “norms, values, and cultural practices become important, especially for complex emotions such as shame and guilt, the eliciting situations and their meaning become vastly more complicated and culture will obviously play a much bigger role”).

59. Research shows, for example, that white and black American subjects show persistent, precognitive, physiological fear reactions toward other-race but not same-race persons, even when reporting no conscious feelings of bias. The most plausible evolutionary interpretation is that pairing a cognitive “dissimilar other” judgment with “fear” was evolutionarily adaptive. However, culture provides the specific content of the “dissimilar other” judgment—in this instance, race. *See* Terry A. Maroney, *Comment: Unlearning Fear of Outgroup Others*, 72 *LAW & CONTEMP. PROBS.* (forthcoming 2009) (discussing Andreas Olsson et al., *The Role of Social Groups in the Persistence of Learned Fear*, 309 *SCI. 785* (2005), and Arne Öhman, *Conditioned Fear of a Face: A Prelude to Ethnic Enmity?*, 309 *SCI. 711* (2005)).

60. GEERTZ, INTERPRETATION, *supra* note 26, at 81; *see also* Calhoun, *supra* note 57, at 220–21 (considering social constructionist theories of emotions and assessing “their emphasis on the scripting of emotions”). For a harmonization of innate and culturally constructed theories of emotion, *see* P.N. Johnson-Laird & Keith Oatley, *Cognitive and Social Construction in Emotions*, in *HANDBOOK OF EMOTIONS* 458, 458–75 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000) [hereinafter *HANDBOOK OF EMOTIONS*].

61. *See, e.g.*, LAZARUS, *supra* note 45, at 71–74 (claiming that “facial expressions are part of our hereditary endowment” and may be the most universal aspect of emotion, though diversity remains); Dacher Keltner & Paul Ekman, *Facial Expression of Emotion*, in *HANDBOOK OF EMOTIONS*, *supra* note 60, at 236, 239, 241–42 (noting that some studies have indicated that “across cultures, people judge facial expressions of emotion with levels of accuracy that exceed chance,” though cultural variations remain significant).

62. Ellsworth, *supra* note 52, at 151.

63. Thompson, *supra* note 6, at 119:

[T]he use of common sense, is an inevitable, yet potentially dangerous feature of judicial behavior [because] legal decisions based on common sense understandings of persons and behaviors can hide judicial biases by cloaking them in a dominant (and homogenous) view of human agency and responsibility that may be inappropriate in a highly diverse society.

bound a cultural grouping.<sup>64</sup> By closely interpreting common-sense ideas, we may identify a group's worldview, its members' "picture of the way things in sheer actuality are, their concept of nature, of self, of society,"<sup>65</sup> the "imaginative world" within which they live.<sup>66</sup> By examining situations in which people report sadness, for example, we can infer their valuation of the person or thing that has been lost. Emotional common sense thus conveys meaning, even if not probative of external truths in the world.<sup>67</sup> Where emotional common sense is operative in law, then, it will enact the belief structures and values of those invoking it. While these expressions of worldviews may at times be appropriate, at other times they may ignore the equally legitimate worldviews of others.

Finally, the most troubling aspect of common sense epistemologically is its extraordinary inconsistency, not just between cultures but within individual subjects. Directly opposing folk beliefs may be held simultaneously and will be selectively invoked "to justify what we already do or believe" and "to suit our current values and ideals."<sup>68</sup> When people believe, for example, both that "haste makes waste" and that "he who hesitates is lost," it is not possible to say one is right and the other is not. Rather, which is presented as true in a given instance signals the subject's evaluation that the particular

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64. GEERTZ, INTERPRETATION, *supra* note 26, at 5–6. To be sure, there are some "basic-epistemic" common-sense ideas that will be widely shared across cultural and temporal divides—for example, the notion that we have bodies and that a physical world outside our bodies exists. See Herman Parret, *Common Sense: From Certainty to Happiness*, in COMMON SENSE, *supra* note 5, at 17, 21–22 (explaining that basic-epistemic ideas are propositions so likely to be true (such as the claim "I exist") that the "likelihood of their 'truth' cannot and need not be increased by additional evidence"). Some emotional common sense might fit this category. See *infra* Part III.

65. GEERTZ, INTERPRETATION, *supra* note 26, at 127.

66. Ortner, *supra* note 56, at 9–10; see also Kelley, *supra* note 45, at 16 ("To the degree that common beliefs reflect accurately observed and encoded experience, [they can serve as] information about reality."); David R. Olson, *Schooling and the Transformation of Common Sense*, in COMMON SENSE, *supra* note 5, at 319, 332 (arguing that common sense "offers a picture of reality, a world view," and will vary considerably as "not all humans live in the same social world"); Geoffrey M. White, *Representing Emotional Meaning: Category, Metaphor, Schema, Discourse*, in HANDBOOK OF EMOTIONS, *supra* note 60, at 30, 30–44 (explaining the role of language in interpreting cross-cultural emotions and emotional meanings).

67. W. Gerrod Parrott, *The Heart and the Head: Everyday Conceptions of Being Emotional*, in EVERYDAY CONCEPTIONS OF EMOTION: AN INTRODUCTION TO THE PSYCHOLOGY, ANTHROPOLOGY AND LINGUISTICS OF EMOTION 73, 80 (J.A. Russell et al. eds., 1995) [hereinafter EVERYDAY CONCEPTIONS OF EMOTION] (noting that although it is not always helpful for discerning "what actually occurs during emotional episodes," self-report is "quite appropriate for inferring the folk conception of those episodes").

68. Epstein, *supra* note 29, at 48.

situation is best handled by slowing down or speeding up.<sup>69</sup> Thus, common sense often will bear no relation to “truth” in an absolute sense but instead will signal a person’s appraisal of the specific attributes of a situation as it relates to her own beliefs, goals, and values.

Common sense, then, including emotional common sense, may be seen to contain a wisdom of its own. Sometimes it ought to be respected as a useful synthesis of collective observation about the domain with which humans are most familiar: our everyday emotional lives. It also may be systematically inaccurate, especially insofar as it purports to understand the deepest workings of our own minds or the experiences of unfamiliar others. It necessarily will be rough-and-ready, responding in a generally acceptable way to the immediate needs of everyday life,<sup>70</sup> and will be ad hoc, admitting of significant inconsistencies, none of which will appear particularly bothersome to the holder.<sup>71</sup> Most fundamentally, common-sense views will provide a window into beliefs, self-perception, and values.

These many attributes of common sense pose particular challenges for law. Some have suggested that common sense permeates law because it is well suited to it; both are eminently practical, concerned with “application of the rules of justice and honesty to the things of this work-a-day world, so full of anomalies and of fallible, imperfect, human beings.”<sup>72</sup> Others—particularly psychologists—have instead urged that law purge itself of its misguided reliance on things commonsensical in favor of studied empiricism.<sup>73</sup> Yet other scholars have reached for a middle approach

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69. Olson, *supra* note 66, at 331 (noting that commonsense beliefs expressed in proverbs “are not just ‘truths’ but . . . social-controlling devices, admonitions to act in a certain way”).

70. *Id.* (“If [commonsense beliefs] are to be practically useful, as well as to help uphold and reinforce a social world, as well as to correctly represent events, they will not do any of these things especially well. They will rather do *all* [of these] things reasonably well.”).

71. See Van Zandt, *supra* note 10, at 929 (arguing that individuals are concerned not with overall coherence but with “pragmatic employability”).

72. Riddell, *supra* note 7, at 995. Indeed, Riddell went so far as to claim that the controlling common law of his time was the embodiment of common sense. *Id.* (“[T]he common law is the perfection of human reason . . . common law is common sense.”); see also Allen, *supra* note 11, at 1426 (“For all the jokes about the law being an ass, in fact it is the embodiment of common sense, as it would have to be. . . . [And] if [the law] were not generated largely from and consistent with the conventional interactions of individuals, it would not survive.”). But see Van Zandt, *supra* note 10, at 936 (arguing that if law were simply common sense, “the coercive force of law would seem to be superfluous”).

73. See, e.g., Meehl, *supra* note 33, at 68 (recounting views of academic psychologists).

in which common sense will sometimes have a proper place in law and sometimes—perhaps more often—not.<sup>74</sup>

This Article seeks just such a middle path. The following Part will demonstrate how the above attributes of emotional common sense are operative within constitutional law: sometimes the Court's suppositions are right, sometimes they are not, they generally are used instrumentally, and they always are imbued with greater meaning than is immediately apparent. Having then a much richer understanding of the phenomenon, Part III returns to the task of delineating the merits of emotional common sense within constitutional law.

## II. EMOTIONAL COMMON SENSE AS CONSTITUTIONAL LAW: THICK DESCRIPTION

Despite the complexity revealed by the preceding Part, one attribute that characterizes common sense is that it everywhere and always retains “the maddening air of simple wisdom with which it is uttered.”<sup>75</sup> Reaching beneath that misleading simplicity, this Part provides a thick description of how emotional common sense operates within constitutional law.<sup>76</sup>

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74. See, e.g., *id.* at 92 (bemoaning the lack of a “touchstone as to pragmatic validity, some quick and easy objective basis for deciding” when common sense is useful in law).

75. GEERTZ, LOCAL KNOWLEDGE, *supra* note 32, at 85.

76. GEERTZ, INTERPRETATION, *supra* note 26, at 3, 6–10 (describing a “thick description” approach as one that attempts to incorporate an understanding of the context and implications of an account in order to obtain a meaningful understanding); see also Ortner, *supra* note 56, at 4 (noting that this interpretive approach once was seen as “terribly soft” but now is highly valued). Ferreting out places in which law relies on emotional common sense is no simple task. See Meehl, *supra* note 33, at 93 (explaining that “[a] taxonomy of fireside inductions . . . might permit a rough ordering . . . as to accuracy,” but the task is “monstrous and thankless”); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1065 (2006) (explaining that “[t]he role of emotion and intuition as important but inarticulable grounds of a judicial decision is concealed by the convention that requires a judge to explain his decision in an opinion” because a judge would be criticized for explaining his decision “in terms of an emotion or a hunch”). The thickly descriptive approach of this Article therefore does not pretend to cover the entire field of emotional common sense within constitutional law as construed by the Supreme Court. This interpretive methodology is well-suited to exploration of a new concept, as it encourages selection of enough stories to identify a trend and a deep exploration of those stories. The insights thus gleaned may then be moved outward to the rest of the domain. The many other sorts of common sense operative in law, less obviously relating to emotion, also merit such an exploration. Cf. *Hudson v. Michigan*, 547 U.S. 586, 611 (2006) (Breyer, J., dissenting) (criticizing the majority’s “support-free assumption” that “civil liability is an effective deterrent”); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 82 (1998) (“Common sense . . . will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same

The Supreme Court's use of emotional common sense in construing constitutional law reflects each of the core attributes of common sense. First, it is intermittently accurate. As revealed through examination of cases involving, first, free speech and, second, the instruction of capital sentencing jurors, at times the Court's folk wisdom is reasonably sound; at other times it is just wrong.<sup>77</sup> There is no obvious predictability in the Court's accuracy, nor is there a transparent theory from which hidden consistency might be discerned. Where emotional common sense provides a distorted account of the world, those distortions should not be embedded in law. However, there is a weightier point: though a sound empirical grounding is necessary to proper invocation of emotional common sense, it is not sufficient. Being contextual and parochial, many of its tenets are true for some people in some circumstances but not others. In those instances, "truth" has little to do with it.<sup>78</sup> Examination of cases drawn from the Court's abortion jurisprudence shows that in such instances emotional common sense is used instrumentally to further normative goals and values, revealing a Justice's affiliations and beliefs—affiliations and beliefs often not generalizable to third parties.

#### *A. The Intermittent Accuracy of Emotional Common Sense*

As the previous Part suggests, one metric by which emotional common sense may be judged is its truth value. If it sometimes embodies stable conclusions of distilled wisdom, the Court's invocation of it sometimes should reflect a largely accurate view of the way the world works; and, in fact, this is so.

The Vietnam War-era case of *Cohen v. California*<sup>79</sup> provides one example. Cohen had been arrested in 1968 for wearing, in a courthouse, a jacket on which the words "Fuck the Draft" appeared.<sup>80</sup>

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sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.").

77. Though this Article refers to "the Court" as a unitary entity, the invocation of emotional common sense is something done by individual Justices. Where this Article refers to "the Court," it is referring to the author of (and, to a lesser degree, the signatories to) the majority opinion being discussed.

78. That is, the Court never should invoke a common sense notion that is never true for the affected persons under the circumstances about which the law is concerned. What to do when the common sense notion may be true for some people, but only sometimes, is a different issue. See *infra* Part II.B; see also Posner, *supra* note 76, at 1053 (arguing that within a "zone of reasonableness" in constitutional cases, "a decision cannot be labeled 'right' or 'wrong'; truth just is not in the picture").

79. 403 U.S. 15 (1971).

80. Cohen was charged under a section of the California Penal Code sanctioning disorderly conduct, including disturbing the peace or using "vulgar, profane, or indecent language within

The Court recognized that the government could not sanction the “underlying message” in opposition to the draft; rather, the arrest must have related to the manner in which that message was conveyed—by use of a vulgar word.<sup>81</sup> That manner of communication, the Court held, was protected by the First Amendment, for “much linguistic expression serves a dual communicative function.”<sup>82</sup> In reaching this conclusion it relied heavily on the idea that particular words convey not only ideas,

but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech[,], has little or no regard for that emotive function which[,], practically speaking, may often be the more important element of the overall message sought to be communicated.<sup>83</sup>

Cohen had testified that his choice of words was designed precisely to “inform[] the public of the depth of his feelings against the Vietnam War and the draft.”<sup>84</sup> The Court agreed, finding that the word “fuck” necessarily conveyed that emotional message and could not be regulated “without effectively repressing Cohen’s ability to express himself.”<sup>85</sup>

The *Cohen* majority simply invoked its own views about the relationship between emotion and speech, reflecting an implicit judgment that *the emotional attributes of speech are so obvious that they need no explanation*. Unpacking its assumptions, the Court appears to have believed that some words or language patterns are more emotionally salient than others, that such emotional speech conveys information, and that such speech conveys different information than does less emotionally salient speech. The Court turns out to have been on empirically solid ground. Each of these assertions is well supported in the academic literature in addition to being commonly believed to be true. Particular word choices can

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the presence or hearing of women or children, in a loud or boisterous manner.” See *id.* at 16 n.1 (citing CAL. PENAL CODE § 415 (West 1974)).

81. *Id.* at 18–19. For an analysis of the cultural taboos associated with the word “fuck” and how they played into the Court’s decision in *Cohen*, see Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1731–37 (2007).

82. *Cohen*, 403 U.S. at 26.

83. *Id.*

84. *Id.* at 16; see also Brief for Appellant at 33, *Cohen*, 403 U.S. 15 (No. 70-299) (“The very fact that the Appellant chose to express his feelings about the draft through the use of a word that many would find shocking is an evidence of a depth of feeling which itself may be a significant factor as to which the self-governing community should take account.” (citation omitted)).

85. *Cohen*, 403 U.S. at 18.



distinctively convey specific emotions,<sup>86</sup> as well as the depth and intensity of emotions; emotional messages do have a distinctive feel and sound.<sup>87</sup> From these essentially sound ideas about emotional communication the Court proceeded to a normative legal rule: the Constitution protects the emotional message and its “crude” packaging to the same extent as the cognitive message and its more “rational” packaging.<sup>88</sup> The legal move hardly follows inevitably, though the Court acted as if it must.<sup>89</sup> But disagreements with this move and with the normative rule directly should not be based on any argued illegitimacy of the *Cohen* Court’s emotional common sense.

In contrast, the jurisprudence of so-called “anti-sympathy instructions” in death penalty cases provides an example of how the empirical underpinnings of the Court’s emotional assumptions can be off-base. In upholding such instructions, the Court invokes common myths about the relationship between emotion, reason, and moral decisionmaking.

86. There is a large body of research on the affective components of language. For one primary tool used to identify such components, see M.M. BRADLEY & P.J. LANG, CTR. FOR RES. IN PSYCHOPHYSIOLOGY, UNIV. OF FLA., AFFECTIVE NORMS FOR ENGLISH WORDS (“ANEW”): STIMULI, INSTRUCTION MANUAL AND AFFECTIVE RATINGS, TECHNICAL REPORT C-1 (1999).

87. See Zoltán Kövecses, *Introduction: Language and Emotion Concepts*, in EVERYDAY CONCEPTIONS OF EMOTION, *supra* note 67, at 3, 3–4 (“Examples include *shit!* when angry, *wow!* when enthusiastic or impressed, *yuk!* when disgusted, and many more . . . [Choice of language also] denote[s] aspects of emotion concepts, such as intensity, cause, control, etc.”); Steven Pinker, *What the F\*\*\*? Why We Curse*, NEW REPUBLIC, Oct. 8, 2007, at 24, 24–29 (discussing “the strange emotional power of swearing”). That emotional language will be distinct is true across cultures, though the manner in which such speech will be distinct will vary dramatically. See, e.g., D.L. Brenneis, “*Caught in the Web of Words: Performing Theory in a Fiji Indian Community*,” in EVERYDAY CONCEPTIONS OF EMOTION, *supra* note 67, at 241, 242–47 (examining the effect of language and arguments on listeners in Bhatgaon); Tom Johnstone & Klaus R. Scherer, *Vocal Communication of Emotion*, in HANDBOOK OF EMOTIONS, *supra* note 60, at 220, 223 (comparing short term changes in fundamental frequency in tonal languages and in Indo-European languages).

88. This aspect of *Cohen* is not always followed where speech occurs in restricted environments. The Eleventh Circuit recently upheld the suspension of high school students who had displayed the Confederate battle flag, offering an emotional-content argument that, under *Cohen*, should have weighed in favor of allowing the speech. See *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1249 (11th Cir. 2003) (per curiam) (“[The confederate flag issue is] highly emotionally charged . . . [and] is not merely an intellectual discourse. Real feelings—strong feelings—are involved. It is not only constitutionally allowable for school officials to closely contour the range of expression children are permitted regarding such volatile issues, it is their duty to do so.”).

89. There is an important distinction between showing that the Court’s emotional common sense is correct (or incorrect) and arguing that the outcome of the case is correct (or incorrect). If the emotional common sense is incorrect but bears no discernable relation to outcome, it is unfortunate but harmless; if it is correct, the Court could nonetheless arrive at a normatively “wrong” outcome for entirely different reasons. But where the emotional common sense is empirically flawed and does influence the outcome, the outcome is to that extent wrong, though perhaps otherwise justifiable.

Since the reinstatement of the death penalty<sup>90</sup> it has become "talismanic"<sup>91</sup> for the Court to insist that imposition of the death sentence must "be, and appear to be, based on reason rather than caprice and emotion."<sup>92</sup> Though the effort to banish "emotion" was motivated in significant part by a desired move away from the racial bias that pervaded the capital system,<sup>93</sup> the horse has long left that barn; the Court now speaks in much more general terms about the supposed perils of emotion. In two important cases, *California v. Brown* and *Saffle v. Parks*, it has approved "anti-sympathy" instructions in which capital sentencing juries are admonished to set aside all "passion" and "sentiment," including emotions ranging from "prejudice" to "sympathy."<sup>94</sup> Such instructions are considered justifiable—perhaps even required—because of the Court's evaluation that a capital sentencing jury's decision must be a "reasoned moral response" rather than "an emotional one."<sup>95</sup> In drawing this key

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90. See *Gregg v. Georgia*, 428 U.S. 153, 218–20 (1976) (per curiam) (upholding death penalty statutes that provided procedural safeguards to ensure that juries are adequately restrained from arbitrarily imposing the death penalty).

91. *Saffle v. Parks*, 494 U.S. 484, 514 (1990) (Brennan, J., dissenting).

92. *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

93. Post-*Furman* cases stressed the need for a "rational" and "fair" system for capital punishment that would prevent the influence of racial biases and channel—and presumably tame—public outcry against particularly "unsympathetic" defendants. See, e.g., *Graham v. Collins*, 506 U.S. 461, 479–84 (1993) (Thomas, J., concurring) (explaining that concern about racial discrimination played a significant role in the development of modern capital sentencing jurisprudence); *id.* at 500–01 (Stevens, J., dissenting) (emphasizing that neither the race of the defendant, nor the race of the victim, should play a part in any decision to impose a death sentence). Anti-sympathy instructions have been upheld by reliance on the "rationalizing" language of those cases. See, e.g., *Saffle*, 494 U.S. at 493 (upholding the use of anti-sympathy instructions based on prior cases, which emphasized that imposition of the death penalty should not be an emotional response to the mitigating evidence).

94. The instruction approved in *California v. Brown*, 479 U.S. 538, 542–43 (1987), was as follows:

You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant [have a] right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

See Petitioner's Brief on the Merits at 30, *Brown*, 479 U.S. 538 (No. 85-1563) (quoting trial transcript). *Brown* objected that this instruction barred jurors from considering and giving effect to his mitigating evidence. In *Saffle*, the Court approved a similar instruction lacking the qualifier "mere" and suggested the instruction might be constitutionally required. 494 U.S. at 493.

95. *Saffle*, 494 U.S. at 493. The *Saffle* prosecutor had argued to the jury that it must eschew all emotional influence. *Id.* at 511 (describing the prosecutor urging the jurors to be "cold-blooded," reminding them they had promised at voir dire not to be moved by sympathy, and urging that: "[I]t's just cold turkey. He either did it or he didn't. He either deserves the death penalty or he doesn't, you know. You leave the sympathy, and the sentiment and prejudice part out of it."). Similar arguments had been made to the jury in *Brown*; the prosecutor argued that

distinction, the Court has asserted that “[w]hether a juror feels sympathy for a capital defendant is more likely to depend on that juror’s own emotions than on the actual evidence regarding the crime and the defendant.”<sup>96</sup> Because emotions are, in the Court’s view, akin to “whim” and “caprice,” they allow “the fate of a defendant to turn on the vagaries of particular jurors’ emotional sensitivities.”<sup>97</sup> Banishing emotion thus furthers fairness and accuracy because sentencing will turn not on the arbitrary factor of “whether the defendant can strike an emotional chord in a juror” but, rather, on a reasoned judgment of moral desert.<sup>98</sup>

Two factual inaccuracies underlie and significantly influence *Brown* and *Saffle*.<sup>99</sup> First, the Court’s assumption as to the necessarily irrational and fleeting nature of emotion is incorrect. Second, emotions and moral decisionmaking are unavoidably intertwined, and it is highly misleading to draw such a critical distinction between the two. These twin errors are assumed, not defended.<sup>100</sup>

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the defense’s proffer of mitigating evidence was a “blatant attempt to inject personal feelings in the case” and that jurors were required by law to “steel [them]selves against those kinds of feelings.” 479 U.S. at 553 (Brennan, J., dissenting) (quoting trial transcript); see also *People v. Brown*, 756 P.2d 204, 209 & n.3 (Cal. 1988) (describing the prosecutor’s argument that the penalty decision was “not a vote from the heart, and cannot be one”); Brief for Respondent at app. A, *Brown*, 479 U.S. 538 (No. 85-1563) (collecting similar arguments in other proceedings).

96. *Saffle*, 494 U.S. at 493.

97. *Id.*

98. *Id.* at 495.

99. For examples of scholarly articles that have explored other complex issues attending anti-sympathy instructions in capital cases beyond the scope of this Article, see Susan A. Bandes, *The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty*, 42 STUD. L. POL. & SOC’Y 1 (2008); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 702–04 (1989) (discussing the risks of anti-sympathy instructions and proposing a jury instruction that recognizes the role of emotion). Moreover, use of similar instructions in the guilt phase of criminal cases (including capital ones) and in civil cases raises distinct issues not addressed here. See, e.g., *People v. Banhauer*, 463 P.2d 408, 414 (Cal. 1970) (approving use at guilt phase); Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 13 (1997) (discussing anti-sympathy instructions in civil cases).

100. See *Saffle*, 494 U.S. at 514 (Brennan, J., dissenting) (asserting that cases have not defined the distinction). This sort of emotional common sense is a slightly different iteration than that invoked in *Cohen*; it reflects a sort that might be called “received wisdom,” concepts that perhaps have been closely considered and debated but now are regarded as so obviously settled as to have become commonsensical. See, e.g., Free Online Dictionary, <http://www.thefreedictionary.com/received> (defining “received” as having been “generally accepted as true or worthy”) (last visited Apr. 10, 2009). It is, of course, difficult to pinpoint precise language necessarily signifying an assertion of common sense. While sometimes the Court uses terms like “common sense,” “self-evident,” “hardly can be denied,” and the like, common sense often is also characterized by the simple assertion that certain things are *just true*. In the anti-sympathy instructions jurisprudence the Justices generally take the latter course, though they do sometimes nod in the direction of drawing on common sense. See, e.g., *California v. Brown*, 479 U.S. 538, 543 (1987) (explaining that the instruction guards against “extraneous emotional

The first assumption is particularly entrenched. One of the most common folk beliefs about emotion is that it is sharply different from rationality.<sup>101</sup> Though the law historically has embraced this crude dichotomy,<sup>102</sup> in recent years it has been shown to be a false one, adherence to which ignores the complex, nuanced relationship between emotion and reason.<sup>103</sup> Indeed, evidence has mounted that reasonably intact emotional faculties are *necessary* to the rational judgment required by law.<sup>104</sup> The *Brown* and *Saffle* Courts, however, hewed to the model of emotions as irrational. This is an entirely inaccurate description of emotions as a general phenomenon, because they are a primary mechanism for understanding and responding to our environment. The cognitive assessments of the world that drive emotions—referred to as “appraisals”—often take place below declarative consciousness (as do many cognitive mechanisms, for example, those involved in vision and memory), but they are environment-driven nonetheless.<sup>105</sup> As Judge Richard Posner has noted, emotion “is a form of thought, though compressed and inarticulate, because it is triggered by, and more often than not

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factors which, *we think*, would be far more likely to turn the jury against a capital defendant than for him” (emphasis added)).

101. Nico H. Frijda et al., *The Influence of Emotions on Beliefs*, in EMOTIONS AND BELIEFS, *supra* note 46, at 1, 2 (noting that this dichotomy is entrenched in “common-sense discourse”); Parrott, *supra* note 67, at 73–84 (noting that lay subjects’ most common descriptors of emotion center on being “irrational” and “out of control”); White, *supra* note 66, at 30 (explaining that the cognitive/affective split is “deeply entrenched both in the English language and in common-sense folk models of the mind”).

102. Feigenson, *supra* note 99, at 15 (noting long legal tradition in which “emotional decision-making is thought to be fundamentally irrational” and to “bias decision-makers”); Gewirtzman, *supra* note 24, at 632–45; Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 120 (2006). Justice Brennan, dissenting in *Brown*, took note that the average juror “is likely to possess the common understanding that law and emotion are antithetical, and an instruction that a wide range of emotional factors are irrelevant to his or her deliberation reinforces that notion.” 479 U.S. at 550 (Brennan, J., dissenting).

103. For an overview of such scholarship, see generally Maroney, *supra* note 102; see also generally THE PASSIONS OF LAW, *supra* note 57 (examining the role of emotion in the practice and conception of law and justice).

104. See, e.g., Terry A. Maroney, *Emotional Competence, “Rational Understanding,” and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1400–08 (2006) (discussing the role of emotion in decisionmaking).

105. An overview of the extensive literature on the cognitive basis of the emotions, a point in no serious scientific dispute, goes beyond the scope of this Article. See generally THE NATURE OF EMOTION, *supra* note 50, at 179–234 (collecting prominent scholars’ explanations); PAULA M. NIEDENTHAL ET AL., PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES 13–17 (2006) (examining cognitive appraisal theories); MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 19–79, 139–69 (2001) (exploring the cognitive theory of emotion). See also *infra* Part II.B.2.

produces rational responses to, information.”<sup>106</sup> Juror emotions will be anchored to information, such as the nature and circumstances of the crime and attributes of the defendant. To the degree that certain reactions, such as racial animus, may be normatively undesirable, the problem stems not from their emotional nature but from their objectionable cognitive content. The latter may be specifically addressed, but not by a general prohibition on “passion” or “sentiment.”

Moreover, despite any common belief to the contrary, emotion and the type of moral decisionmaking required of capital jurors are deeply intertwined. This perspective has a long pedigree in philosophy,<sup>107</sup> and many contemporary philosophers and scientists have compiled impressive evidence of an innate connection between emotion and moral judgment—including at the level of neural function.<sup>108</sup> The strongest claim is that emotions are both necessary and sufficient for moral judgments, particularly judgments of a personal nature, such as deciding whether to inflict harm on another

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106. Posner, *supra* note 76, at 1063. To be sure, just as cognitive processes are prone to systemic heuristics and biases, emotions too can be misguided or skewed in their account of the world. See, e.g., Alice M. Isen, *Positive Affect and Decision Making*, in HANDBOOK OF EMOTIONS, *supra* note 60, at 417, 427–30 (discussing several studies that addressed the use of heuristics as opposed to systematic cognitive processing). But, as with cognition, the proper response to that reality is to identify and (when possible) correct for the particular distortion, not to denigrate the entire mechanism. See, e.g., Maroney, *supra* note 104, at 1427 & nn.284–87 (arguing that just as awareness of cognitive heuristics and biases does not denigrate cognition’s contribution to “rationality,” the existence of emotional heuristics and biases does not prove that emotion is inherently “irrational”). Similarly, the fact that certain basic emotions (such as fear) can temporarily overwhelm conscious cognitive control of thought and action, and that profound emotional disorder (such as depression) can do so in a more systemic and long-term manner, does not provide a basis for labeling psychologically normal expression of emotion irrational. *Id.*

107. Hume argued that emotions precede the conscious “reasons” we construct to defend and explain moral judgments. DAVID HUME, A TREATISE OF HUMAN NATURE (1739), reprinted in WHAT IS AN EMOTION?, *supra* note 23, at 93–111; see also Barzun, *supra* note 44, at 1066 (discussing the intertwining of moral sense and emotion in Reid’s Common-Sense philosophy). This Article does not pretend to resolve intractable philosophical debates about the nature of morals beyond asserting a non-negligible role for emotion in personally relevant moral decisionmaking. See generally JESSE PRINZ, THE EMOTIONAL CONSTRUCTION OF MORALS (2007) (providing an extended treatment of related debates).

108. See, e.g., MARC D. HAUSER, MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG 22–31 (2006) (discussing the work of philosopher David Hume and developmental psychologist Martin Hoffman, both of which connected emotions to moral judgment); Gewirtzman, *supra* note 24, at 663–68 (discussing research in social psychology and neuroscience which supports the notion that emotion is indispensable to moral judgment); Jesse Prinz, *The Emotional Basis of Moral Judgments*, 9 PHIL. EXPLORATIONS 29, 30–33 (2006) (noting evidence supporting a link between emotion and moral judgment); Joshua Greene, The Terrible, Horrible, No Good, Very Bad Truth About Morality and What to Do About It 156–69 (Nov. 2002) (unpublished Ph.D. dissertation, Princeton University), available at <http://www.wjh.harvard.edu/~jgreene/GreeneWJH/Greene-Dissertation.pdf> (citing cases which suggest that moral behavior depends crucially on emotion).

human being.<sup>109</sup> The more parsimonious view is that emotions and such moral judgments necessarily—or, even one step more parsimoniously, *usually*—co-occur, but may not be causally related.<sup>110</sup> Taking even the most parsimonious view undermines the *Brown* and *Saffle* Courts' position. That position wrongly depends on the emotion-reason dichotomy, even though jurors are being asked whether to approve the killing of an actual human being with whom they are in direct, if mediated, contact. This is precisely the setting in which emotion appears ubiquitous.<sup>111</sup>

Thus, contemporary anti-sympathy instruction jurisprudence may be called into question for relying on inaccurate suppositions about emotion, reason, and moral judgment. Such instructions might be otherwise justified, but not on the basis of those assumptions.<sup>112</sup>

From these cases we see that the Court sometimes is called on to make constitutionally relevant judgments by describing and evaluating the emotions of other persons. In *Cohen*, it is the speaker (and, to a lesser degree, his audience); in the anti-sympathy

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109. Joshua Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCI. 2105, 2105–07 (2001); see also Joshua Greene's Homepage, <http://www.wjh.harvard.edu/~jgreene/> (last visited Apr. 10, 2009) (providing further details on Greene's research).

110. Bandes, *supra* note 99, at 34 (“Although there is no unanimity about how moral reasoning works,” it is no longer controversial among those studying the role of emotion that moral judgment is the product of both emotion and cognition.); Prinz, *supra* note 108, at 30 (asserting that the fact that “emotions co-occur with moral judgments . . . should not be terribly controversial,” as this comports with ordinary experience and “has been confirmed again and again, in every study of what goes on in the brain during moral judgment”).

111. Indeed, this is the view taken by the *Brown* and *Saffle* dissenters. They were prepared to agree that the defendant is not entitled to “a sympathetic or emotional jury” and that the decision should be a “moral” rather than an emotional one, though Justice Brennan appeared unsure of the validity of the distinction. *California v. Brown*, 479 U.S. 538, 562 (1987) (Brennan, J., dissenting) (arguing that while the death-sentencing decision “might be a rational or moral one, it also may arise from the defendant’s appeal to the sentencer’s sympathy or mercy, human qualities that are undeniably emotional in nature”). But even assuming emotion is simply concurrent with the moral judgment, the result is that “a juror who reacted sympathetically to the evidence would have believed that he was not entitled to consider that evidence at all—not even for its ‘moral’ weight.” *Saffle v. Parks*, 494 U.S. 484, 514 (1990) (Brennan, J., dissenting); see also *id.* at 500 n.3 (“[T]he fact that the evidence is relevant to the jury’s moral judgment about the defendant’s actions does not rule out the possibility that the evidence may also evoke sympathy in the jurors.”). Significantly, one year after *Brown* Justice Brennan wrote an influential article urging greater respect for emotion in law. See Brennan, *supra* note 24, at 3 (arguing that “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”).

112. For efforts to revise anti-sympathy instructions in order to effectively distinguish permissible and non-permissible emotional influences, and to encourage morally appropriate emotional engagement, see Pillsbury, *supra* note 99, at 703–04; Georgia Sims, *Functional or Forbidden? Reevaluating the Role of Emotion in the Capital Jury* 26–33 (May 2, 2008) (unpublished manuscript, on file with the Vanderbilt Law Review).

instructions context, it is the death-qualified juror (and, to a lesser degree, the lawyers and judges). We see, too, that members of the Court have little issue with simply asserting their own views. Sometimes these views—*emotional communication is importantly distinctive*—are in line with the weight of empirical evidence. Sometimes such views—*emotion is an irrational force that disrupts moral decisionmaking*—are against the weight of empirical evidence, though they may be in line with widespread belief.

Taking stock at this point, we see that the Court's emotional common sense is sometimes right, sometimes wrong. We would do well to ask: So what? Many legal rules and interpretive approaches can be used correctly or incorrectly, supported by sound factual assessments or off-base ones. But there is something special about common sense that makes it uniquely prone to such inconsistency, and that is its own inconsistency.<sup>113</sup> As the following Section will show, the inherent inconsistency of emotional common sense lends itself to instrumentalism. Because such instrumentalism serves normative goals that may be disguised under the cloak of "of-courseness," even emotional common sense that is in some sense accurate—for some people, some of the time—might not be a legitimate basis for crafting legal rules.

### *B. The Meaning Structures of Emotional Common Sense*

While the previous Section examined the Court's emotional common sense by the metric of truth value, not all cases can be so examined. In many instances different people naturally (and properly) will regard different views as commonsensical, and in those instances the proper focus is not on *truth*, but on *meaning*.<sup>114</sup> As the *Cohen* Court pointed out, "one man's vulgarity is another's lyric,"<sup>115</sup> and one Justice's common sense is another's blatant implausibility. Indeed, many dissents in these cases consist largely of attacking notions presented as commonsensical by the majority. Perhaps such disagreements reflect basic, consistent divides of opinion on the specific types of facts at issue. More likely, though, they reflect the instrumental use to which common sense, including emotional common sense, is so prone.

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113. See *supra* Part I (exploring the concept of "emotional common sense").

114. This distinction mirrors that between knowledge (judged by reference to truth value) and belief (a psychological construct of meaning). See Frijda et al., *supra* note 101, at 4–5 ("In the philosophical tradition *belief* is distinguished from *knowledge* by reference to the truth value and claim to objectivity of knowledge.").

115. *Cohen v. California*, 403 U.S. 15, 25 (1971).

What does it mean, for example, to cry? In *Weeks v. Angelone*,<sup>116</sup> Weeks argued that jury instructions improperly suggested that jurors had a duty, rather than an option, to impose death if the state proved a statutory aggravator. Calling it a “virtual certainty” that the jury was thus misled, Justice Stevens in dissent said the following:

The most significant aspect of the polling of the jury is a notation by the court reporter that is unique. (At least I do not recall seeing a comparable notation in any of the transcripts of capital sentencing proceedings that I have reviewed during the last 24-plus years.) The transcript states that, as they were polled, “a majority of the jury members [were] in tears.” Given the unusually persuasive character of the mitigating evidence . . . it is at least “reasonable” to infer that the conscientious jury members performed what they regarded as their duty under the law, notwithstanding a strong desire to spare the life of Lonnie Weeks.<sup>117</sup>

Chief Justice Rehnquist, writing for the majority, offered a sharp rejoinder of that same transcript notation. It would be, he noted,

difficult to speculate about [the jurors'] emotions at the time they render a verdict. But if we were to join in this speculation, it is every bit as plausible—if not more so—to think that the reason that jurors were in tears was because they had just been through an exhausting, soul-searching process that led to a conclusion that petitioner, despite the mitigating evidence he presented, still deserved the death sentence.<sup>118</sup>

Here we see two different common-sense views about the triggers for, function of, and information conveyed by crying. In the first, crying is thought to be something people do when frustrated or trapped—in this instance, by being forced to inflict a severe harm they would prefer to avoid. Tears express perception of being in an intolerable situation. In the second, crying is something people do when exhausted and drained, as when they choose to inflict a severe harm but are saddened by having to do so. Tears express depletion, as well as recognition that correct choices are often bitterly hard ones.

Both propositions are plausible and well supported in the academic literature.<sup>119</sup> More importantly, both appear

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116. 528 U.S. 225 (2000) (death penalty case heard on habeas review).

117. *Id.* at 248–49 (Stevens, J., dissenting).

118. *Id.* at 236 n.5.

119. See, e.g., Ad Vingerhoets & Lauren Bylsma, *Crying as a Multifaceted Health Psychology Conceptualisation: Crying as Coping, Risk Factor, and Symptom*, 9 EUR. HEALTH PSYCHOLOGIST 68, 69, 73 (2007) (“[C]rying is much more than simply a symptom of a negative mood state; it is a complex behavior . . . [with] remarkable intra-and-inter-individual differences,” and may be triggered by “stressful situations” of many sorts.); see also TOM LUTZ, *CRYING: THE NATURAL AND CULTURAL HISTORY OF TEARS* 67–150 (1999) (exploring the physiology and psychology of crying).

In an interesting twist—judging not what crying means but how it affects others—a prosecutor’s office has sought to preclude defense attorneys from crying while delivering closing arguments in the penalty phase of death penalty cases. See Sheila McLaughlin, *No Crying in Court: Butler’s Piper Says Defense Lawyers’ Tears Can Sway Jury*, CINCINNATI ENQUIRER, June 20, 2008, at 1.



commonsensical. It is hard to believe Justice Stevens would disavow that sometimes people cry because they are exhausted, including by having to make a hard decision. It is equally hard to believe that Chief Justice Rehnquist would have denied that people may cry when they feel unfairly trapped, including by being forced to inflict harm.<sup>120</sup> In different circumstances, either Justice would regard the other's assertion as eminently obvious. Which interpretation seems obvious in a given instance has to do with the prior assessment as to the attributes of that instance. Is this case one in which the death penalty was appropriate, or is it not? What position does the Justice see himself as occupying: The juror who desires to spare Weeks's life or the one who does not?<sup>121</sup>

The most cynical interpretation is that such instrumentalism is strategic and deliberate: emotional common sense is a stalking horse for precommitments, perhaps ideological ones. But that cynical view is not necessary: it is more consistent with what is known about common sense to presume that the Justices are sincere in expressing what seems to them obvious in any given situation. So when we are in a situation not of empirically *correct* or *incorrect* views but, rather, of *conflicting correct* views—as with how the *Weeks* jurors' tears should be interpreted—a Justice's assertions of emotional common sense are

120. Indeed, Rehnquist's language recognizes this possibility, as he regarded crying to be an ambiguous emotional signal of which multiple interpretations are possible. His stance therefore appeared to be that the Court should ignore it; however, his "handicapping" of its most likely meaning itself signals where his common sense lay.

121. Such instrumentalism reaches down to the most fundamental assessments of emotion's place in law. As Gewirtz has argued, "both conservative and liberal members of the Supreme Court affirm that law is 'reason not emotion' only when it is convenient for them to do so." Gewirtz, *supra* note 24, at 1029 & n.17. Justice O'Connor took a hard line against any influence of emotion when construing anti-sympathy instructions, but subsequently endorsed victim impact statements in precisely those same settings, despite their obvious emotional content. Compare *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion."), with *Payne v. Tennessee*, 501 U.S. 808, 832 (1991) ("I do not doubt that jurors were moved by this testimony—who would not have been?"). Justice Brennan, who argued strenuously against anti-sympathy instructions and separately urged greater respect for the role of emotion in law, joined a majority opinion barring victim impact statements on the ground that they were too "emotionally charged." Compare *Saffle v. Parks*, 494 U.S. 484, 513 (1990) (Brennan, J., dissenting) (challenging the distinction between "emotional" and "moral" responses, as sympathy is "an important ingredient" in capital sentencing), with *Booth v. Maryland*, 482 U.S. 496, 508–09 (1987) ("The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases."), *overruled by Payne*, 501 U.S. at 830. See also Susan A. Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 377–83 (1996) (describing the instrumental use of emotion by judges). Whether emotion is regarded as antithetical to law's reason is not an absolute view; it is proffered as common sense when so doing moves the Justice toward the desired outcome.

best understood as indicators of her underlying normative assessments, based on her worldview.

The following Subsections explore two manifestations of that phenomenon. First, from a close examination of key abortion-protest cases we see that a Justice's emotional common sense varies according to the natural affiliation she displays with different types of people. Emotional common sense therefore is worrisome insofar as it may enact exclusionary affiliations. Second, turning once more to *Carhart*, we see that the Court's emotional common sense silently reflects and projects underlying beliefs and values. This, too, is worrisome insofar as those beliefs and values may be highly contested and, at a minimum, worthy of transparent articulation and justification.

### 1. I Feel You

One's worldview determines with whose emotional reality one naturally will empathize. Those within our imaginative world are like us; we "feel them."<sup>122</sup> In cases concerning First Amendment restrictions on anti-abortion protest, the Justices appear to inhabit very different imaginative worlds indeed, and they therefore "feel" different people. We see in these cases diametrically opposed ideas of the operative emotional dynamic and a correlated difference in judgment as to the degree to which such assessments may be given legal weight. Not surprisingly, Justices believe that their views of emotional dynamics are obvious and should be given weight, while conflicting ones are not and should not. The divisions lie along two general axes: the presumptive emotional impact of protest on abortion providers and patients, and the presumptive emotional motivation and communicative dynamic of the protestor.

Justices who write in favor of significant restrictions—such as Chief Justice Rehnquist and Justice Stevens—see the predominant tenor of targeted anti-abortion protest as one of anger, anxiety, and fear. In *Madsen v. Women's Health Center, Inc.*, for example, a Rehnquist majority easily accepted record evidence that patients were required to run "a gauntlet" of protest to enter the clinics and that this experience caused an unusual "level of anxiety and hypertension."<sup>123</sup>

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122. See Urban Dictionary, <http://www.urbandictionary.com/define.php?term=I+feel+you> (last visited Apr. 10, 2009) (defining the slang term "I feel you"). For an introduction to debates over the role of empathy and perspective-taking in law, one into which this Article dips but briefly, see Bandes, *supra* note 121; Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

123. 512 U.S. 753, 758 (1994). The Court has been asked numerous times to define permissible limitations on protests near clinics and homes, settings in which the impact on

Noting further that noise caused patients “stress”<sup>124</sup> and that “patients and relatives alike are often under emotional strain and worry,” the Court took their “psychological . . . well-being” into account in restricting certain aspects of the protests.<sup>125</sup> Similarly, in *Hill v. Colorado*, the Court took no issue with findings that “emotional confrontations” associated with the protests were detrimental to patients and “scary” to patients and providers.<sup>126</sup> In these and similar cases, the Court cited evidence of violence and property damage to support the view that the threat of physical harm lurks constantly behind such protests.<sup>127</sup> This perception of lurking threat then underlay a legal judgment that non-trivial weight should be accorded to the “emotional trauma” felt by patients and providers.<sup>128</sup>

Other Justices, however—particularly Scalia and Kennedy—have taken quite the opposite view. In *Madsen*, Scalia sharply disagreed that the protests were “set in a background of violence,” except in a perhaps “episodic” or “isolated” way, and did not see them

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patients and employees is considered relevant. The Court has taken an approach that could be characterized as either careful or “Solomonic.” *Id.* at 784–85 (Scalia, J., concurring in the judgment in part and dissenting in part). It has allowed certain restrictions—for example, fixed “buffer zones” around clinic entrances—and rejected others—for example, “floating buffer zones,” invisible bubbles of space surrounding moving persons as they approach or exit entrances. *Hill v. Colorado*, 530 U.S. 703, 740–41 (2000) (Souter, J., concurring); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997).

124. *Madsen*, 512 U.S. at 758.

125. For example, excessive noise and picketing directly in front of a provider’s house were curtailed, while showing visual images, picketing near a house, and approaching a patient in a non-threatening way as she approaches a clinic were allowed. *Id.* at 768–76.

126. *Hill*, 530 U.S. at 710 & n.7.

127. In *Madsen*, for example, the Court noted that protestors had identified abortion providers as “baby killers” in one-on-one contacts with their neighbors, and had confronted those providers’ children when they were home alone. For other cases involving more extensive histories of violence and property damage, see Dianne Olivia Fischer, Comment, *Bray v. Alexandria Women’s Health Clinic: Women Under Siege*, 47 U. MIAMI L. REV. 1415, 1431 (1993). In *Madsen*, the Court appeared to have relied on the cultural backdrop of such violence in *other* instances in order to construe the reasonable fears of providers and patients. 512 U.S. at 784 n.7 (Stevens, J., concurring in part and dissenting in part) (citing record evidence that one doctor had been followed by an “angry” protestor who pretended to shoot him, and that “a physician similarly employed was killed by an anti-abortionist in North Florida”). Those aspects of the cases dealing with direct threats, excessive noise at medical centers, and proximity to private homes have been relatively uncontroversial. *Hill*, 530 U.S. at 752–53 & n.3 (Scalia, J., dissenting); *id.* at 779 (Kennedy, J., dissenting) (citing *Frisby v. Schultz*, 487 U.S. 474, 479, 483–84 (1988)); *Madsen*, 512 U.S. at 810 (Scalia, J., concurring in the judgment in part and dissenting in part).

128. *Hill*, 530 U.S. at 715 (noting government interest in avoiding “potential trauma to patients associated with confrontational protests”); *id.* at 718 n.25; *Madsen*, 512 U.S. at 768 (“[T]argeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held ‘captive’ by medical circumstance.” (citation omitted)).

as creating an atmosphere of anxiety or fear.<sup>129</sup> Providing a detailed account of his view of the events portrayed in a videotape of one protest,<sup>130</sup> he described a diffuse and meandering event in which pro-choice and anti-abortion activists trade chants and songs and wave signs at one another; cars are briefly delayed while waiting for activists of both stripes to get out of the way; and various people stroll about, read books, and shout occasional religious messages and graphic descriptions of abortion.<sup>131</sup> The emotional tenor of the protests in this retelling is largely neutral, punctuated occasionally by moments of harmless—if robust—expression from both sides of a peaceful standoff.

This divergence in assessment of the operative emotional dynamic is in even sharper relief in the context of restrictions on “sidewalk counselors,” people who approach individual women as they walk toward clinic entrances and attempt to engage them in conversation about why those women should not have an abortion.<sup>132</sup> The *Hill* majority noted that while the surrounding protests often had included “emotional confrontations,” the sidewalk counseling itself had not been “abusive or confrontational.”<sup>133</sup> Nonetheless, it relied in significant part on the rationale of “avoidance of potential trauma,” including “emotional harm,” to patients in forbidding such counseling within an eight-foot buffer zone surrounding each patient.<sup>134</sup> Justice Stevens saw the sidewalk counselor’s approach as necessarily creating

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129. *Madsen*, 512 U.S. at 798–99 (Scalia, J., concurring in the judgment in part and dissenting in part) (citing *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957); *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941)). Justice Scalia accused the majority of ignoring the precedent of *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which in his view involved a far greater quantum of actual and threatened violence as a result of a racial discrimination boycott, because *Madsen* concerned anti-abortion protest. *Madsen*, 512 U.S. at 800–01 (Scalia, J., concurring in the judgment in part and dissenting in part); see also *Hill*, 530 U.S. at 742 (Scalia, J., dissenting) (“[T]he jurisprudence of the Court has a way of changing when abortion is involved.”).

130. Justice Scalia’s reliance on the videotape foreshadows the Court’s later approach in a Fourth Amendment case, in which the Justices relied nearly exclusively on their views of a videotape of a car chase. For a detailed analysis of this case, see Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). Compare *Madsen*, 512 U.S. at 786 (Scalia, J., dissenting) (“Anyone seriously interested in what this case was about must view that tape.”), with *Scott v. Harris*, 550 U.S. 372, 379 n.5 (2007) (attaching videotape to online docket and stating “[w]e are happy to allow the videotape to speak for itself”).

131. *Madsen*, 512 U.S. at 788–90 (Scalia, J., concurring in the judgment in part and dissenting in part).

132. *Hill*, 530 U.S. at 708, 721.

133. *Id.* at 710.

134. *Id.* at 715, 718 n.25; see also *id.* at 728–29 (stating that persons entering health care facilities “are often in particularly vulnerable physical and emotional conditions” and are “under special physical and emotional stress”).

fear of physical harassment; argued that women have the right to be free from “importunity, following and dogging”;<sup>135</sup> and characterized those counselors as “hostile.”<sup>136</sup>

The view from the dissenters could not be more different. They portrayed sidewalk counselors not as hostile, harassing “noodges” of whom women would or should be afraid, but rather as sources of succor.<sup>137</sup> Here we see the imaginative worlds of Justices Scalia and Kennedy actively at work. In their respective *Hill* dissents each provided an imagined monologue in which sidewalk counselors express a message of compassion, care, and empathy. Thus, in Scalia’s constructed narrative a sidewalk counselor may hope

to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart. The counselor may wish to walk alongside and say, sympathetically and as softly as the circumstances will allow, something like: “My dear, I know what you are going through. I’ve been through it myself. You’re not alone and you do not have to do this. . . . Will you let me help you? May I show you a picture of what your child looks like at this stage of her human development?”<sup>138</sup>

Justice Kennedy imagined a similarly empathic atmosphere, perhaps consisting of a gentle request to take a brochure and call a help line “to talk with women who have been in your situation.”<sup>139</sup> He then switched from the constructed voice of the sidewalk counselor to the actual voice of a woman who chose not to abort after being given such a brochure.<sup>140</sup>

These competing narratives, with their competing emotional tenors, reveal a fundamental difference in perspective-taking.<sup>141</sup> In

135. *Id.* at 717–18 (quoting *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921)).

136. *Id.* at 725 (explaining that a buffer zone would prevent approaches from both supporters and opponents of abortion rights, but the latter would be perceived as “more hostile”).

137. *Id.* at 743 n.1 (Scalia, J., dissenting) (opining that “Socrates may have been a *noodge*”).

138. *Id.* at 757.

139. *Id.* at 769 (Kennedy, J., dissenting).

140. *Id.* at 790:

I was scared and all alone. I was too embarrassed to ask for help. . . . I . . . [would have] gone through with my abortion because the only people that were on my side were the people at the abortion clinic. They knew exactly how I was feeling and what to say to make it all better. In my heart, I knew abortion was wrong . . . .

In this narrative the abortion-clinic personnel are portrayed as compassionate, but their emotional support is viewed negatively, as having encouraged an unwanted abortion. It is therefore presented as a false compassion, as opposed to the true compassion of the anti-abortion pamphlet provider.

141. There are, of course, other important iterations of selective perspective-taking in law; this is one that has not previously been explored. See, e.g., Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 92–93 (1996) (explaining that courts “can only consider the case[s] before [them], not the broad story of dashed hopes and centuries-

describing the protests, the *Madsen* and *Hill* majorities gravitate instinctively to the perspective of the health care providers, whom they imagine to be afraid of violence or vandalism; concerned for the welfare of their patients; and beleaguered by attention, noise, and confrontation. They also see themselves in the shoes of patients and families, attempting to enter medical centers under stressful conditions and seeking quiet and calm once inside. The dissenters put themselves in different shoes. They imagine themselves as the pro-life protestors, seeking to use “peaceful and civil means” to persuade others of their “abiding moral or religious conviction” that “abortion is the taking of a human life.”<sup>142</sup> As Scalia’s retelling of the videotape suggests, it is as if the Justices—like the activists—are arrayed on different sides of the street. Scalia’s visual position on the anti-abortion protestors’ side allows him to see what he believes the majority to be ignoring: pro-choice activists are also taking up space and making noise.<sup>143</sup> This perspective-switching is also evident with regard to sidewalk counselors. Stevens’s narrative of harassment is told from the perspective of a patient seeking an abortion from which she does not want to be dissuaded, into whose space the counselor moves; Scalia and Kennedy position themselves as the counselors, even to the extent of providing accounts of their motivations, goals, and voices. Justice Kennedy also urges identification with a different kind of patient: one who does wish to be dissuaded from abortion. From these different vantage points the Justices perceive vastly different emotional dynamics.<sup>144</sup>

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long mistreatment that afflicts an entire people and forms the historical and cultural background of [the] complaint”); Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 285, 286–89 (David Kairys ed., 3d ed. 1998) (comparing the “victim” perspective and the “perpetrator” perspective); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329, 1395 (1991) (describing the “concept of positioned perspective, developed by feminists and critical race theorists”).

142. *Hill*, 530 U.S. at 763 (Scalia, J., dissenting).

143. *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 810 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that anti-abortion protestors will be muzzled while pro-choice ones “can continue to shout their chants at their opponents exiled across the street to their heart’s content”).

144. In these and other cases, Justices Kennedy and Scalia project a strong cultural affiliation with the pro-life movement, which is in many important respects a subculture. For an example of how the movement self-identifies as a “culture,” see Culture of Life USA, <http://www.cultureoflifeusa.org/> (last visited Apr. 10, 2009) (describing Culture of Life USA’s mission and identity). The Justices in the *Hill* and *Madsen* majorities do not, though, necessarily affiliate with some definable opposing cultural group, such as the organized pro-choice movement; it suffices that they simply do *not* affiliate with the pro-life one. One important function of cultural affiliation is to identify insiders and outsiders; the group of outsiders necessarily encompasses all who are not within the cultural imaginative world, regardless of

This default emotional vantage point functions similarly to the “cultural cognition effect” demonstrated by Dan Kahan and his collaborators.<sup>145</sup> First, Justices demonstrate a greater willingness to accept record evidence when it conforms to their emotional commitments and to challenge it when it does not.<sup>146</sup> In *Madsen*, for example, Scalia accused the majority of taking factual findings below “on faith,” impliedly because those findings—about, for example, the extent of patients’ fear—accorded with their own implicit judgments. Second, we see “overconfidence in the unassailable correctness of the factual perceptions we hold in common with our confederates and unwarranted contempt for the perceptions associated with our opposites.”<sup>147</sup> This flows in both directions: one often cannot see one’s own common-sense assumptions, but those of others may seem preposterous. In *Hill*, for example, Kennedy criticized, as based on an unwarranted “supposition” about the nature of sidewalk counseling, the majority’s view that it was protecting women from being “embarrassed, vexed, or harassed as they attempt to enter abortion clinics.”<sup>148</sup> Scalia ridiculed any assumption that sidewalk counseling raises a specter of harassment, derisively citing “the ‘physically harassing’ act of (shudder!) approaching within closer than eight feet.”<sup>149</sup> Those Justices, though, then did precisely the same: they cited those aspects of the record that most accorded with their views about the emotional dynamics of anti-abortion protest and invoked their vision of what likely takes place during sidewalk counseling, literally providing the narrative themselves.<sup>150</sup>

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what other worlds they may inhabit. See Olson, *supra* note 66, at 321–22 (explaining that a group’s common-sense beliefs separate “insiders” from “outsiders”). Outsider status—the fact that these other Justices fail to share the cultural identification—affects their motivation and ability to perceive what those within the group perceive.

145. Kahan et al., *supra* note 130, at 842 (“[P]erceptions of fact are pervasively shaped by our commitments to shared but contested views of individual virtue and social justice.”); Posner, *supra* note 76, at 1065 (endorsing cultural cognition theory).

146. Kahan, *supra* note 56, at 13 (discussing, *inter alia*, “identity-protective cognition,” the “white male effect,” “biased assimilation,” and “group polarization”). Indeed, emotion scholars have proposed that emotional connection with a particular view of events serves similar functions. See Clore & Gasper, *supra* note 46, at 11 (asserting that strong emotions provide an “intensity funnel” and “narrow attention to object-relevant information and emotion-relevant goals”).

147. Kahan et al., *supra* note 130, at 842–43 (“[A]lthough our ability to perceive this type of value-motivated cognition in others is quite acute, our power to perceive it in ourselves tends to be quite poor.”).

148. *Hill v. Colorado*, 530 U.S. 703, 777–78 (2000) (Kennedy, J., dissenting).

149. *Id.* at 762 n.5 (Scalia, J., dissenting).

150. What Kahan and his collaborators describe as “cognitive illiberalism,” then, has a close relative: emotional illiberalism. The emotional aspect of factual perception and interpretation is equally susceptible to such illiberalism, recourse to which crosses ideological divides. See Kahan

The emotional vantage point does not influence only the perception of constitutionally relevant facts; it also influences legal judgment directly. Scalia and Kennedy, while acknowledging that women may feel "annoyed" or even "deeply upset" when approached by a sidewalk counselor, doubt that such feelings will often—if ever—rise to such a level as to warrant legal weight.<sup>151</sup> Indeed, Scalia has urged abandonment of the "emotional upset" justification altogether.<sup>152</sup>

Perhaps most interestingly, Scalia and Kennedy's predisposition to imagine the voice of the compassionate sidewalk counselor alerted them to a legal issue the majority appears not to have considered—the protection due, under *Cohen*, to the unique emotional content of speech.<sup>153</sup> Characterizing as "absurd" the *Hill* majority's assessment that an eight-foot buffer zone left open adequate alternatives for communication, Scalia argued that one cannot converse normally across that distance, implying that the attributes of "normal conversation" are somehow essential to the message.<sup>154</sup> "The availability of a powerful amplification system will be of little help to" the kind, soft-spoken counselor Scalia envisioned.<sup>155</sup> Her message, he argued, requires quiet, intimate conversation, but the "Court would have us believe that this can be done effectively—yea, perhaps even *more* effectively—by shouting through a bullhorn at a distance of eight feet."<sup>156</sup> Kennedy echoed this view, disputing that "these grave moral matters can be discussed just as well through a bullhorn" as "through peaceful face-to-face communication."<sup>157</sup> Though apparently not recognizing the connection

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et al., *supra* note 130, at 843 (asserting that judges should always be alert to the influence of "cognitive illiberalism" and should take the precautions necessary to minimize it).

151. *Hill*, 530 U.S. at 747–48 (Scalia, J., dissenting). Scalia also argues that the inevitable emotional upset depends on the content of the speech, which may not be regulated. *Id.* (arguing that Colorado had impermissibly restricted sidewalk counselors and not other protestors out of an "apparent belief that only speech with this content is sufficiently likely to be annoying or upsetting as to require consent before it may be engaged in at close range").

152. See *Williams v. Planned Parenthood of Shasta-Diablo, Inc.*, 520 U.S. 1133, 1135–36 (1997) (Scalia, J., dissenting) (arguing that the emotional upset rationale was "entirely snuffed by" *Madsen* and *Schenck*). The *Schenck* Court had declined to decide whether patients' "well-being" was implicated. *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 376 n.8 (1997). However, the Court's denial of certiorari in *Williams*, leaving untouched the California Supreme Court's possible construal of emotional upset as one manner in which protestors can deny clinic access, 520 U.S. at 1135 (Scalia, J., dissenting), left the status of that rationale unclear. The rationale was subsequently reiterated in *Hill*, 530 U.S. at 709–10.

153. See *supra* Part II.A.

154. *Hill*, 530 U.S. at 756 (Scalia, J., dissenting).

155. *Id.* at 757.

156. *Id.*

157. *Id.* at 789, 790 (Kennedy, J., dissenting) ("Without the ability to interact in person, however momentarily, with a clinic patron near the very place where a woman might elect to



to *Cohen*, the dissenters asserted that the emotional content of the counselor's message was as important as the cognitive one.

In important respects the dissenters are correct. An eight-foot buffer likely impairs communication of one possible emotional aspect of a sidewalk counselor's message: compassion, which by its nature is best communicated softly and at close range.<sup>158</sup> Though one aspect of the content—"do not have an abortion, it is a grave moral harm"—easily can be conveyed from a distance and at high volume, another aspect—"I understand and care deeply about you as a person"—arguably cannot.<sup>159</sup> To this extent, the dissenters have isolated a legal issue that is missed if one were to take a different intuitive approach. After all, if one does not imagine it possible or likely that honest compassion and empathy would be communicated, why consider constructing a rule around that possibility? If one imagines the emotional motivation and impact of the counselor more aggressively, the buffer zone would not appear to impair the emotional content at all; anger and hostility *can* be expressed through a bullhorn, and they may in fact be *better* expressed through a bullhorn.<sup>160</sup> Under the sound approach of *Cohen*, though, the dissenters' argument merits at least transparent consideration. To be sure, the move from emotional judgment to legal norm ought not be regarded as preordained; the proper balance of rights would still be contested, and such contestation might result in the same outcome.<sup>161</sup> But whether the

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receive an abortion, the statute strips petitioners of using speech in the time, place, and manner most vital to the protected expression."); see also *id.* at 791 ("[The Court] in effect tells us the moral debate [recognized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*] is not so important after all and can be conducted just as well through a bullhorn from an 8-foot distance as it can through a peaceful, face-to-face exchange of a leaflet.").

158. See, e.g., Johnstone & Scherer, *supra* note 87, at 220–35 (noting that different emotional states strongly affect the frequency, volume, speed, and other components of speech and that "given the high recognition of emotions in speech, there must exist emotion-specific acoustic patterns"). It is possible to communicate compassion impersonally and from a long distance—such as in a billboard expressing sorrow for and solidarity with victims of a terrorist attack—but that sort of message is less immediate, urgent, and personal than a face-to-face communication between individuals.

159. *Id.* at 223 (asserting that "over distances the voice is not a particularly private medium" and is "more suitable for the signaling of certain emotions," such as "fear and alarm," while other emotions are best communicated at close range); see *id.* at 222 (stating that "rage" causes distinctive physiological changes causing tension and pressure in vocal production).

160. See *id.* at 226–27 (stating that angry speech is characterized by higher mean frequency and intensity); *id.* at 229 (noting that anger is among the emotions effectively communicated "in a fairly indirect way over long distances").

161. Justices in the majorities might legitimately have determined, based on a more specific factual showing, that hostility is in fact more frequently conveyed than compassion. They might also legitimately have determined that, even if a compassionate approach frequently is presented, the patients' rights still outweigh the counselors' right to convey that aspect of their message in precisely that manner.

debate is even entered into depends on whether alternate emotional realities can be imagined, which in turn depends on the perspective to which a Justice instinctively gravitates.

Thus, identification with different characters in the drama informs one's common-sense view of the emotional dynamic and content of the messages being conveyed. That view tells a member of the Court how the message must be conveyed. These dual evaluations deeply influence formulation of applicable law, both in valuing the weight of state interests and perceiving the nature of the individual rights at stake. This insight articulates a previously unnoticed aspect of these cases that explains how the competing opinions can seem so very far apart. But it also raises warning signals. Whenever one affiliation is privileged, another is overlooked or dismissed. The relative invisibility of common sense suggests that such choices will not be sufficiently transparent as to permit open detection and challenge. In this respect, emotional common sense may silently privilege the views of cultural insiders while failing to account for the perspectives of dissimilar others.

## 2. This I Believe

As the above discussion suggests, one's affiliation is closely tied to values and beliefs; we most intuitively "feel" the perspective of those with whom, we imagine, we agree. However, the sources of emotional affiliation may be varied. Chief Justice Rehnquist, for example, who wrote the majority opinions limiting anti-abortion protest in *Madsen* and in *Schenck v. Pro-Choice Network of Western New York*,<sup>162</sup> presumably did not identify with the emotional experiences of pro-choice protestors and abortion providers because of shared ideology, given his general hostility to abortion rights.<sup>163</sup> Perhaps the "law-and-order" aspects of regulating protest were most relevant to him in those cases; perhaps personal experiences of being a medical patient, an educated professional, and a public person who himself had drawn protest were more salient than the remote possibility of being, or knowing anyone who might be, a protestor.<sup>164</sup> Shared beliefs provide one basis for affiliation, but only one.

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162. 519 U.S. 357 (1997).

163. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944-45 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (asserting that "*Roe* was wrongly decided" and that the Constitution recognizes no fundamental right to abortion).

164. See *Schenck*, 519 U.S. at 376 (citing the importance of "public safety and order"); see also *supra* note 144 (explaining that it is sufficient that the majority Justices do not emotionally affiliate with the pro-life movement, not that they affirmatively affiliate with its opposite).

In other cases, though, emotional common sense directly and necessarily embodies values and beliefs. *Gonzales v. Carhart*,<sup>165</sup> upholding the constitutionality of a congressional ban on a particular abortion procedure, is one of those cases. As emotions are responsive to conscious and preconscious assessments of the attributes of our environment, our emotional experiences—and those we presume others to be having—can be excavated for what they show about such assessments.<sup>166</sup> Such an excavation of the relevant portions of *Carhart* shows that the majority has implicitly adopted specific—and highly contested—views of pregnancy and motherhood, and that those views drive its emotional common sense.

Those critical portions of *Carhart* are the following:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* . . . . Severe depression and loss of esteem can follow. See *ibid*.

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. . . .

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.<sup>167</sup>

Three aspects of this passage are important here. The *Carhart* majority's assertions about what is "unexceptionable" and "self-evident" necessarily rely on, first, a common-sense judgment as to the emotional bond between mothers and children. Second, the majority implicitly imputes this bond to pregnant women and fetuses, and that attribution drives the resulting assessment of emotional reality for post-abortive women. Third, by buttressing its fireside induction with self-reports by post-abortive women, provided in an amicus brief, the majority signals its agreement with the belief structures that drive those women's account of their emotional experiences. The result is an expression of emotional common sense that positively bristles with cultural judgment.

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165. 550 U.S. 124 (2007).

166. See *supra* notes 105–06 and accompanying text.

167. 550 U.S. at 159–60 (most internal citations omitted).

The first of these moves is the least controversial. To speak of the "bond of love the mother has for her child" is to presume that *mothers love their children*, and *this bond of love is deep, basic, and universal*. This is, indeed, deeply consonant with the lived experiences of many (or most) people and would so appear in any number of cultures and at different moments in time.<sup>168</sup> But, of course, this supposed universal does not always obtain. As Justice Ginsburg signals in dissent by qualifying the mother-love assertion with the word "often," mothers sometimes do not love their children.<sup>169</sup> The folk wisdom about mother-love reflects not universal truth but a value that mothers *should* love their children. A failure of mother-love does not signify that one is not a mother, but rather that she has failed to conform to a valued cultural norm; she is a *bad* mother.

Nonetheless, that first supposition is less problematic than the second. In the second move, the majority makes an implicit evaluation that *pregnant women* and *fetuses* belong to the same emotional categories as *mothers* and *children*. This move depends on the belief, for these purposes at least, that pregnant women *are* mothers, and that fetuses *are* children. The first sense in which the Court signals

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168. Perhaps the existence and depth of a mother's love for her child is the sort of emotional common sense about which we should be least worried, as it concerns a common and highly accessible aspect of everyday human existence. See *supra* note 53 and accompanying text; see also *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children."). The many proverbs and platitudes about a mother's love are too numerous to count. See, e.g., MANY THOUGHTS OF MANY MINDS 374 (Henry Southgate ed., 3d rev. ed. 1862) ("The tie which links mother and child is of such pure and immaculate strength as to be never violated." (quoting Washington Irving)). However, this supposedly universal bond admits of significant exceptions, not just in contemporary culture, see *infra* note 169, but across time and culture as well. Romans commonly exposed their infants (generally leading to their death) if the fathers did not recognize them, if born to slaves, or if disabled. Paul Veyne, *The Roman Empire: From Mother's Womb to Last Will and Testament*, in A HISTORY OF PRIVATE LIFE: FROM PAGAN ROME TO BYZANTIUM 9, 9-11 (Philippe Ariès & Georges Duby eds., 1987) [hereinafter A HISTORY OF PRIVATE LIFE]. Tempting though it may be to regard this practice as a brutal violation of the universal principle of mother-love, that view would be ahistoric. Certainly some women felt a strong emotional affinity for their fetuses and newborn infants. See Paul Veyne, *Slavery*, in A HISTORY OF PRIVATE LIFE, *supra*, at 51, 52 (recounting the tale of a slave who "trembles at the thought that her master-lover might kill the child she is expecting by him"). But such a bond was not inevitable, and instead was largely shaped by cultural expectations and norms. Veyne, *The Roman Empire: From Mother's Womb to Last Will and Testament*, *supra*, at 16-17; see also ROBIN LANE FOX, PAGANS AND CHRISTIANS 343 (1986) (noting that cultural norms regarding exposure shifted with the rise of Jewish and Christian belief systems); JOINT ASS'N OF CLASSICAL TEACHERS, THE WORLD OF ATHENS: AN INTRODUCTION TO CLASSICAL ATHENIAN CULTURE 161-62 (1984) (citing the Greek custom of exposing infants).

169. *Carhart*, 550 U.S. at 184 n.8 (Ginsburg, J., dissenting) ("Notwithstanding the 'bond of love' women *often* have with their children, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity." (emphasis added, internal citations omitted)).

this categorization is with language. While sometimes pregnant or post-abortive women are called “women,” they also are referred to as “expectant mothers” or “mothers”; similarly, the fetus is sometimes referred to as such, and at other times—particularly in these passages—is called “the infant life” or an “unborn child, a child assuming the human form.”<sup>170</sup> Through these narrative choices, we see that Justice Kennedy, at least, perceives these labels to be interchangeable.<sup>171</sup> The apparent emotional equivalence of his reaction to the different categories reflects and feeds a belief that they are inherently similar.<sup>172</sup>

The *Carhart* majority, by thus eliding relevant categories, is subtly signaling endorsement of an account of the world in which abortion properly is regarded as the killing of a child by its mother, and the emotional consequences of the former therefore will match those of the latter. This half-submerged judgment is further discernable in the Court’s discussion of post-abortion regret. Setting aside compelling arguments as to why it should not be in the business of preventing regret, at least in this instance,<sup>173</sup> the invocation of such regret sends an important signal of the Court’s evaluation of how post-abortive women *should* feel, which colors how it presents what they *do* feel—which then in turn influences the constitutional judgment.

To say that a person—whether oneself or another—regrets (or is likely to regret) an event is to make a cognitive judgment about the attributes of that event. Emotions are not random, free-floating phenomena: they are determined, in large part, by beliefs.<sup>174</sup> In perhaps the most influential contemporary theoretical account of cognitive appraisal and emotion, Richard Lazarus posited that

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170. *Id.* at 159–60.

171. See *Hill v. Colorado*, 530 U.S. 703, 763 (2000) (Scalia, J., dissenting) (referring to late-term fetus as a “live-and-kicking child”).

172. Clore & Gasper, *supra* note 46, at 29 (“[Under the] emotional categorization hypothesis . . . having the same emotional reaction to two different but related events may help weld them into one category so that the beliefs relevant to each become fungible or transferable from one account to the other.”).

173. See Blumenthal, *supra* note 52, at 166–81 (analyzing potential errors in individuals’ predictions of future emotional states); Guthrie, *supra* note 16, at 902–03 (identifying regret aversion, regret overestimation, regret dampening, and regret learning as four reasons why the Supreme Court’s regret analysis in *Carhart* was “misguided”).

174. See, e.g., Clore & Gasper, *supra* note 46, at 40 (“[T]he occurrence of an emotion . . . means that the emotional person is committed to particular beliefs about the situation.”); Frijda et al., *supra* note 101, at 1 (describing cognitive appraisal theory, widely accepted in contemporary psychology, in which emotions are thought to “result from how the individual believes the world to be, how events are believed to come about, and what implications events are thought to have”).

emotions are bound to *core relational themes*.<sup>175</sup> Core relational themes are a "psychobiological principle" captured as an "if-then" formulation: if a person appraises his or her relationship to the environment in a particular way then a specific emotion always follows.<sup>176</sup> Thus, "anger" corresponds to the core relational theme of "a demeaning offense against me and mine"; "sadness" corresponds to "having experienced an irrevocable loss."<sup>177</sup> Though "biological universals link the if with the then," individual and cultural factors "affect the if" by influencing the appraisal.<sup>178</sup> All persons who perceive their situation as satisfying one of the core relational themes will experience the corresponding emotion.<sup>179</sup> But that perception is highly variable, for what circumstances are thought to constitute "a demeaning offense" or an "irrevocable loss" will depend on a person's worldview, including internalized norms of her culture as well as her own experience, goals, motivations, and beliefs. These judgments may be lightning fast or more drawn out, but they are not generally a process to which consciousness is drawn; rather than reasoning through whether a given situation constitutes a particular theme, as a general rule we simply perceive it to be so, and the emotion ensues.<sup>180</sup>

The cognitive underpinnings of regret, a relatively complex emotion, can be similarly unpacked. To say that a person "regrets" something is to express that she has made a negative self-evaluation based on past voluntary action now judged to be an avoidable mistake, and that she has coupled that evaluation with a wish for an imagined

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175. LAZARUS, *supra* note 45, at 81–82; see also Richard S. Lazarus, *Universal Antecedents of the Emotions*, in *THE NATURE OF EMOTION*, *supra* note 50, at 163, 164 (arguing that "the appraised significance of what is happening involves a particular kind of *relational meaning*").

176. Lazarus, *Universal Antecedents of the Emotions*, *supra* note 175, at 164–65.

177. *Id.* at 164 tbl.1; see also Paul Ekman, *Antecedent Events and Emotions*, in *THE NATURE OF EMOTION*, *supra* note 50, at 146, 147 (describing a similar view of emotion elicitors); Frijda, *supra* note 52, at 155–56 (endorsing the theory of emotional antecedents).

178. Lazarus, *Universal Antecedents of the Emotions*, *supra* note 175, at 167–68.

179. The theory of core relational themes simultaneously explains human emotional universals (barring severe dysfunction or brain damage, we all are capable of feeling fear, disgust, and so on) and human emotional diversity (what causes such fear or disgust is widely variable). To the extent that true universalities exist, they likely reflect adaptations to "the most important or frequent events our ancestors encountered," such that all humans would recognize the situation as constituting the core relational theme. See Ekman, *supra* note 177, at 147–49 (theorizing that only a limited number of basic and evolutionarily salient antecedents are inherited—such as "anticipation of physical pain" leading to "fear"—and that emotional responses to novel events are acquired through experience, with those most resembling the primary antecedents acquired more readily).

180. Clore & Gasper, *supra* note 46, at 16 ("[A]ttributions for affect are usually completely implicit, rather than being explicit, deliberative, or thoughtful.").

reality that would have obtained had the action been different.<sup>181</sup> Using this theme it is possible to spell out the subtext of the *Carhart* Court's assertions about regret.

To say, in close narrative conjunction with the invocation of mother-love, that women regret abortion is to say something like the following:

- A woman who aborts destroys the possibility of experiencing the profound bond of love she would have had with her child;
- once she realizes this, she will see that her choice to abort was mistaken, and that she could have avoided that mistake; and
- she will imagine the irreplaceable love she could have had and accordingly will suffer regret, perhaps so severe as to cause mental health problems.

This is perhaps not as startling as it may seem (to many) at first blush. After all, the Court does not assert that *all* post-abortive women will follow this chain of thought and come to feel this way, just that *some* will. But unless that "some" is a significant percentage of post-abortive women, it would not be worth mentioning the phenomenon, any more than it would be worth supposing that some post-abortive women will have, say, marital problems.<sup>182</sup> Further, this is not an offhand remark; it is one of the main rationales put forward for a substantial restriction on previability abortion, a restriction the

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181. See Guthrie, *supra* note 16, at 882–83 & n.25 (synthesizing varying definitions of regret).

182. This might be otherwise were the ruling designed to protect an identifiable subset of women, as was the case with striking down marital notification laws. Those laws harmed a relatively small group—those with abusive husbands—but harm to that group was considered legally significant. Importantly, though, that rationale served not to restrict rights for women to whom the concern was irrelevant, but to lift a restriction for *all* women since it might have gravely harmed *some* of them. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 893–94 (1992) ("The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. . . . The analysis does not end with the one percent of women upon whom the statute operates; it begins there."). Had *Carhart* involved a state requirement of extensive factual disclosure prior to choosing an intact dilation and extraction ("D&E") abortion, perhaps such a tight focus might have been permissible, on the theory that disclosure would dissuade only those women who later would regret the abortion had they known of the specific procedures involved, while leaving intact the rights of others. The value of disclosure to that subset would have to be weighed against any negative impact it might have on all other women. See Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1, 36 (2008) (noting potential of graphic disclosure to create a psychologically coercive "emotional bias" against abortion). This would be a different question, though, as *Carhart* involved not a disclosure requirement but a ban on the procedure. See 550 U.S. at 184 (Ginsburg, J., dissenting) ("The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives them of the right to make an autonomous choice, even at the expense of their safety.").

law purports strongly to disfavor.<sup>183</sup> By giving regret pride of place, the *Carhart* majority has signaled that it regards such regret as being a significant part of the natural order of things: women should feel these things, and therefore many of them will.<sup>184</sup>

This conclusion is deepened by looking to the one source of information—other than his common sense—cited by Justice Kennedy: the amicus brief submitted by Sandra Cano and “post-abortion women who have suffered the adverse emotional and psychological effects of abortion.”<sup>185</sup> Close examination of the testimonials in the Cano Brief—culled from responses to a survey by “Operation Outcry” asking “[h]ow has abortion affected you?”—reveals that women who report regretting their abortions do so because of a very specific appraisal of their experiences, one more bluntly stated than that articulated by the *Carhart* Court but sharing a common root.<sup>186</sup> They have come to see themselves as mothers, their aborted

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183. *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“[F]or the period of pregnancy prior to [viability], the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”); see also *Casey*, 505 U.S. at 878–79 (altering trimester framework of *Roe* but affirming viability as an important demarcation by finding that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability”).

184. See Van Zandt, *supra* note 10, at 916 (“Commonsense theorizing provides a natural morality grounded in the way things are thought to be. . . . [P]eople merge the ‘is’ and the ‘ought.’”). By thus “scripting” regret, the Court is attempting also to enact it, to impose regret as the appropriate cultural script for abortion. Cf. Calhoun, *supra* note 57, at 220–22 (describing emotional scripts as the culturally prescribed means by which people learn what emotions are appropriate under particular circumstances).

185. Brief of Sandra Cano et al. as Amici Curiae Supporting Petitioner at 1, *Carhart*, 550 U.S. 124 (No. 05-380) [hereinafter Cano Brief]. Sandra Cano never had an abortion. She surrendered a baby for adoption because (in her words) she “had a natural desire to have [the] baby and to raise her.” *Id.* at app. 4, ¶ 9. Justifying her representativeness, Cano asserted that she “know[s] what it is like to feel like a mother who helped terminate the life of her own child,” because her role in *Doe v. Bolton* led her to feel responsible for the abortions obtained by others. *Id.* at app. 6–7, ¶ 16.

186. Operation Outcry is a project of The Justice Foundation, which authored the Cano Brief. See The Justice Foundation, <http://www.txjf.org/> (last visited Apr. 10, 2009) (describing its mission as “protecting the fundamental freedoms and rights essential to the preservation of American society”); Operation Outcry, <http://www.operationoutcry.org> (last visited Apr. 10, 2009) (explaining that Operation Outcry is a project of The Justice Foundation). The testimonial excerpts appended to the brief are from 178 women, selected from “the approximately 2,000 on file with The Justice Foundation.” Cano Brief, *supra* note 185, at app. 11. The *Carhart* majority cited specifically to pp. 22–24 of the Cano Brief, 550 U.S. at 159, which (1) present the findings of David Reardon, a pro-life activist and one of the most controversial figures in the post-abortion syndrome debate, see Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES MAG., Jan. 21, 2007, at 40 (describing Reardon as the Moses of the pro-life activists); Wikipedia, the Free Encyclopedia, [http://en.wikipedia.org/wiki/David\\_Reardon](http://en.wikipedia.org/wiki/David_Reardon) (last visited Apr. 10, 2009) (noting that Reardon is a pro-life activist who has written numerous articles and books on the “controversial issue of mental health effects associated with abortion”), and (2) synthesizes some of the women’s testimonials and refers the Court to the Appendix. This choice of focus was not



fetuses as dead children, and the abortion as murder. These beliefs drive the emotional consequences, including regret.

The self-reported pain of these testimonials is acute. The declarants report being depressed; considering or attempting suicide;<sup>187</sup> and experiencing guilt,<sup>188</sup> sadness, grief,<sup>189</sup> “low self-esteem” or diminished “self-worth,”<sup>190</sup> and damaged relationships and marriages.<sup>191</sup> Every single woman either explicitly or implicitly (and usually the former) attributes these ill effects to her having had one or more abortions. Many of these regretful women believe that their abortions caused serious harm to their mental health. Indeed, they believe the mistake of abortion to have been so enormous as to infect virtually every aspect of their lives. They describe eating disorders and weight problems,<sup>192</sup> drug and alcohol abuse,<sup>193</sup> and promiscuity.<sup>194</sup> Some complain of lowered grades in school and trouble at their jobs.<sup>195</sup> Quite a few report problems relating to the children they now have, most frequently describing themselves as overprotective mothers,<sup>196</sup> but also reporting difficulty bonding with and “feeling natural

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lost on The Justice Foundation, which continues to solicit testimonials. See Operation Outcry, <http://www.operationoutcry.org/> (follow “Why Operation Outcry is Collecting Declarations” hyperlink) (last visited Apr. 10, 2009) (“The power of testimony touched the Supreme Court, which cited pages of sworn testimony—not the legal arguments of The Justice Foundation.”).

The Cano Brief also reports on the process and findings of the South Dakota Task Force to Study Abortion, created in 2005 to study, *inter alia*, abortion’s effect on mental health and “the nature of the relationship between a pregnant woman and her unborn child.” Cano Brief, *supra* note 185, at 16–21 & n.59 (citing REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 6 (2005) [hereinafter SOUTH DAKOTA TASK FORCE], available at <http://www.dakotavoices.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>). Those findings rested on a similar folk data set—2,000 affidavits of post-abortive women, collected by Operation Outcry—as well as on testimony of persons identified as experts and laypersons who both supported and objected to abortion rights. *Id.* at 17. Similar affidavits were offered in support of Norma McCorvey’s 2003 motion for relief from the judgment in *Roe v. Wade*. See *McCorvey v. Hill*, 385 F.3d 846, 850 & n.6 (5th Cir. 2004) (Jones, J., concurring). Moreover, Texas has relied on such narratives in drafting standard pre-abortion disclosures. See TEX. DEP’T OF HEALTH, A WOMAN’S RIGHT TO KNOW 16 (2003), available at [www.dshs.state.tx.us/wrtk/pdf/booklet.pdf](http://www.dshs.state.tx.us/wrtk/pdf/booklet.pdf) (warning of emotional risks in choosing abortion).

187. *E.g.*, Cano Brief, *supra* note 185, at apps. 11, 13, 14, 15, 16, 17, 18, 20.

188. *E.g.*, *id.* at apps. 11, 13, 17, 18.

189. *E.g.*, *id.* at apps. 12, 13.

190. *E.g.*, *id.* at apps. 13, 14, 18, 20.

191. *E.g.*, *id.* at apps. 11, 12, 14, 38, 55, 60, 62, 74 (“I became a doormat.”), 85 (“When my husband verbally or emotionally abused me, I allowed it because I felt I deserved it.”).

192. *E.g.*, *id.* at apps. 13–14 (“morbid obesity”), 30 (bulimia), 32 (“overweight-thin”), 45 (weight problem), 98.

193. *E.g.*, *id.* at apps. 16, 17 (alcoholism), 19 (drug addiction).

194. *E.g.*, *id.* at apps. 14, 15, 22, 24.

195. *E.g.*, *id.* at apps. 14, 17, 55, 60.

196. *E.g.*, *id.* at apps. 23, 32, 45, 51, 65, 76.

maternal feelings" toward their children;<sup>197</sup> some even report abusing their children.<sup>198</sup>

These testimonials are legitimate on their own terms, as they reflect how these women perceive the effects of abortion on their lives; they are a window into each testimonial writer's inner worldview, a worldview she shares with affiliated others. In this sense, then, the Cano Brief proves Justice Kennedy's point: some women regret having abortions.<sup>199</sup> But the worldview underlying their emotional reality is not properly generalizable to other people, for it relies on culturally contestable—and, indeed, profoundly contested—beliefs and values.

Operation Outcry makes its underlying belief system explicit: it clearly states that its goal is to end abortion because it constitutes the killing of a human infant by its mother, and that by gathering testimonials it intends to show that mothers suffer emotionally when they kill their children.<sup>200</sup> While most declarants simply self-report negative emotional effects without making that worldview explicit, quite a few do, and those that do tell the same story. They make clear that they regret their abortions because they have come to believe, as they had not before, that the fetus belonged to the category of "child" and they to that of "mother."<sup>201</sup> They therefore now perceive

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197. *E.g.*, *id.* at apps. 48, 49, 55.

198. *E.g.*, *id.* at app. 75; *see also id.* at 22 (presenting views of Dr. David Reardon, who summarizes many of the above reports).

199. *See* Ekman, *supra* note 177, at 146, 148 (noting that self-reports tell us "how people represent their emotional experience"). The Cano Brief does not, of course, prove anything about the extent of this phenomenon, including the percentage of post-abortive women who feel regret. The biased sampling problem is obvious. Operation Outcry requests "testimonies of mothers who have taken the life of their own unborn babies and of others who have suffered harm from abortion, so as to protect women, men, and children from the destruction that abortion causes." The Justice Foundation, <http://www.txjf.org/> (last visited Apr. 10, 2009). Declarants are asked whether The Justice Foundation may "file Friend of the Court briefs on [her] behalf to ban or restrict abortion." Operation Outcry, Women's Declaration Form, How My Abortion Affected Me, <https://www.assuresign.net/ASR2801/Signature/DeclarationFormF.aspx> (last visited Apr. 10, 2009). It therefore is entirely predictable that all or nearly all the women submitting statements would share the organization's perspective. Indeed, the South Dakota Task Force noted that ninety-nine percent of the post-abortive women's statements asserted that "abortion is destructive of the rights, interests, and health of women and should not be legal." SOUTH DAKOTA TASK FORCE, *supra* note 186, at 7. The Cano Brief did not submit a single testimonial from a woman who reported having her abortion by intact D&E.

200. *See* Operation Outcry, About Us, <http://www.operationoutcry.org/pages.asp?pageid=27784> (last visited Apr. 10, 2009) ("OPERATION OUTCRY is the project . . . to end legal abortion by exposing the truth about its devastating impact on women, men and families.").

201. Many women express anger that they were not told—particularly by medical providers—that the fetus was a human being, and report feeling duped into committing murder. *See, e.g.*, Cano Brief, *supra* note 185, at apps. 70, 75, 92 ("[M]y baby whom they called my 'fetus' . . ."), 98 ("I was told that . . . [the fetus] was just a seed, [or] a blob of blood."), 99 ("[O]n public TV, I saw an abortion and realized [the fetus] was alive and I was guilty of murder."), 102, 105–06 (stating that it was not a fetus, but a baby; not fetal tissue but a life); *see also* Operation

themselves as being guilty of deliberate infanticide, a cognitive recasting of the experience that causes them great pain.<sup>202</sup> Many explicitly tie this view of themselves to religious beliefs. These women describe a relationship with God and express the strong view that having aborted was a transgression against God, because of which they have suffered and for which they have sought divine forgiveness.<sup>203</sup>

Though these may be sincere and deeply held beliefs for these women, they are not beliefs to which other women may be required or expected to conform. To reject any aspect of the underlying belief structure disrupts the resulting emotional consequences of abortion. Whether a woman will experience “guilt,” to pick one commonly expressed emotion, depends on whether she views herself as having “transgressed a moral imperative.”<sup>204</sup> Thus, to use the religious belief example, one who believes that God is the source of morals, that God has set a moral standard forbidding abortion, and that she is answerable to God’s moral commands, will feel guilt for having an abortion. Similarly, the core relational theme for shame is “failing to live up to an ego-ideal.” If that woman would like to see herself as one that always follows God’s commands, she also will experience shame at having failed to live up to her expectations.<sup>205</sup> But one who does not hold those constituent beliefs will not experience that guilt or shame.

Even the attribution of subsequent emotional problems to abortion is reflective of an underlying belief system. Abortion is, for most, a heavy-heart event; that much is safe to generalize.<sup>206</sup> Even a woman who desires to terminate her pregnancy and who rejects the

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Outcry, About Us, <http://www.operationoutcry.org/pages.asp?pageid=27784> (last visited Apr. 10, 2009) (“OPERATION OUTCRY exposes the two great lies surrounding legalized abortion: 1) abortion is good and safe for women; and, 2) it is not a baby being aborted.”).

202. See Cano Brief, *supra* note 185, at 23–24 & nn.84 (“After killing my children, I did not deserve to be a mother.”), 88 (“The hardest part was knowing that ‘it was my choice’ that caused my baby’s death.”; “I cannot get my children back. They are dead.”; “Only afterward did I realize the TRUTH! . . . I had killed my child!”). These testimonials are in the portion of the Cano Brief specifically cited by the *Carhart* majority. 550 U.S. 124, 159 (2007).

203. *E.g., id.* at apps. 12–14, 21, 25, 27, 31, 34, 37, 39, 43, 49, 50, 52, 55, 59–61, 66–68, 72, 75, 79, 83, 87, 92, 96, 100, 102.

204. Lazarus, *Universal Antecedents of the Emotions*, *supra* note 175, at 164 tbl.1.

205. *Id.*

206. See, *e.g., Carhart*, 550 U.S. at 184 n.7 (Ginsburg, J., dissenting) (“The Court is surely correct that, for most women, abortion is a painfully difficult decision.”). Even those strenuously objecting to the idea that abortion is psychologically damaging to women agree that, for most, being in the position of considering or having an abortion is emotionally difficult. See, *e.g.*, Am. Psychological Ass’n, Briefing Paper on the Impact of Abortion on Women 2 (2005) [hereinafter APA Briefing Paper] (“Freely chosen legal abortion, particularly in the first trimester, has not been found to be associated with severe psychological trauma, despite the fact that it occurs in the stressful context of unwanted pregnancy. The time of greatest stress is before the abortion.”).

abortion-is-murder belief system is likely to feel some cluster of negative emotions, perhaps even acutely.<sup>207</sup> She may be angry or resentful at having been impregnated and put in the position of having to choose; she may be fearful of the effect an unwanted child would have on her life; she may be embarrassed by failing to prevent the pregnancy; she may be anxious about the medical procedure; she may feel hurt that others did not support her in the way she wanted; she may feel sadness that she did not feel capable of having a child at that moment.<sup>208</sup> But these emotional experiences will be as diverse as are her judgments about the peculiar attributes of her situation. Absent a set of beliefs identifying the abortion as a grave moral harm that marks her as an extremely bad actor, she is not likely to regret *the abortion* but rather the circumstances surrounding or necessitating it. Nor is she likely to attribute every difficulty in her life as being caused *by the abortion itself* as opposed to those surrounding circumstances or other life causes.<sup>209</sup> But the strong emotions experienced by women who do make these cognitive attributions regarding the abortion itself feed in on and continually reinforce themselves: their intensity makes the underlying beliefs seem particularly valid, and this intensity serves as internal feedback that the attribution is a correct one.<sup>210</sup> It is the depth of the Cano declarants' commitment to the assessment of themselves as the

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207. APA Briefing Paper, *supra* note 206, at 2 ("A woman's emotional responses after experiencing an unwanted pregnancy terminated by abortion are complex and may involve a combination of positive and negative emotions."); Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9 GUTTMACHER POL'Y REV. 8, 11 (2006) (noting that "it is not unusual for a woman to experience a range of often contradictory emotions after having an abortion, just as it would not be unusual for a woman who carried her unintended pregnancy to term" and interviewing hotline founder who states that "there is no 'right' way to feel after an abortion").

208. See, e.g., Brenda Major, *Psychological Implications of Abortion—Highly Charged and Rife with Misleading Research*, 10 CAN. MED. ASS'N J. 1257, 1257–58 (2003) (stating that research shows that abortion itself is "psychologically benign" for most women but is chosen because of difficult circumstances such as financial instability, lack of a supportive relationship, lack of psychological readiness, or poor mental health).

209. See, e.g., Clore & Gasper, *supra* note 46, at 15–21 (describing emotional attribution processes); see also APA Briefing Paper, *supra* note 206, at 2 ("The effects of abortion cannot be separated from the effects of the experience of unwanted pregnancy and from the context in which the pregnancy occurred. . . . [I]n some cases it is the unwanted pregnancy that is the source of stress, not necessarily the abortion."). Indeed, there is reason to believe that women with a complex constellation of beliefs about their abortions are less likely to have strong, belief-reinforcing emotions than are women who believe, simply and clearly, that they murdered their children. See Clore & Gasper, *supra* note 46, at 37 (noting evidence that "simpler mental structures" about an event, such as a clear cognitive schema, "lead to more intense emotional reactions").

210. *Id.* at 24–26, 30 ("[S]pecific emotions . . . implicate particular beliefs, so that the sensory feelings involved in the emotion may act as evidence of the truth of that belief and others consistent with it. . . . [Such emotions] increase certainty or commitment.").

ultimate *bad mothers*—ones who deliberately and needlessly killed their own children—that drives their attribution of nearly all of their emotional difficulties to the abortion.<sup>211</sup>

For the *Carhart* Court to endorse so explicitly—and rely on so heavily—the phenomenon of post-abortion regret as articulated by the Cano declarants, and particularly to do so in order to cabin the rights of all pregnant women (and abortion providers), even those for whom regret is a nonissue, is therefore to validate and privilege that contested set of underlying beliefs. This privileging is made quite clear in a report of the South Dakota Task Force to Study Abortion, which in recommending an outright ban on abortion considered an expanded version of the same testimonial data set from Operation Outcry:

[T]he pregnant mother is not told prior to her abortion that the procedure will terminate the life of a human being. The psychological consequences can be devastating when that woman learns . . . that this information was withheld. . . . Her anger at being deceived . . . is exacerbated by her realization that she was implicated in the killing of her own child in utero. . . . [T]he psychological harm of knowing she killed her own child is often devastating. . . .

. . . [I]t is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child.<sup>212</sup>

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211. While there is no need to question the declarants' sincerity or the depth of their pain, there is every reason to be skeptical about their attribution to abortion of all of the diverse phenomena they report. Several testimonials make clear the dangers of accepting these assertions at face value. Perhaps the most extreme case is one declarant's claim that she "became pregnant later and [the] baby was killed in [a] car accident," an accidental death she believed to be "because of [the earlier] abortion," presumably as divine retribution. Cano Brief, *supra* note 185, at app. 99. Though this may be a cherished and sincerely held belief for that individual, it is not one that others should be compelled to credit. A number of other women report serious mental illness, which though possibly magnified by an abortion perceived as traumatic is highly unlikely to have been caused by one. *See, e.g., id.* at app. 26 ("Abortion made my bi-polar disorder worse!"). Other women report involuntary psychiatric hospitalizations, *id.* at app. 30 (stating that she was hospitalized post-abortion for anxiety and depression), 52 ("I . . . ended up in the psychiatric ward of a mental hospital."), 104 ("I suffered a nervous breakdown and spent six weeks in mental hospital."), and extensive treatment with psychotropic medications, *id.* at app. 24 ("[I] have been prescribed as many as 10 different psychotropic medications."), 93–94 (describing how she repeatedly sought psychiatric help and was put on many different medications). Many of the reported phenomena are exceedingly common, such as difficulties in marriage and child-raising. Some are particularly common for women, such as eating disorders. There is no reason to credit their sole attribution to abortion when such phenomena are widespread and admit of so many other, more quotidian causes. Rather, the extreme degree to which these women believe the abortion to be the cause of such wide-ranging problems underscores the strength of their underlying belief system and the extent to which they believe themselves to have transgressed valued cultural norms.

212. SOUTH DAKOTA TASK FORCE, *supra* note 186, at 47–48; *see also* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U.

This belief-driven view of what emotional consequences “naturally” flow from abortion similarly animates the *Carhart* Court, though the Court’s articulation is nowhere near so blunt. Women who abort have killed their children; they are bad mothers; and when they realize this, assuming they are not insane, they should and will suffer enormous regret.

The final level of *Carhart*’s regret analysis—centering on the specifics of how the fetus is removed by intact dilation and extraction (or “intact D&E”)—similarly reveals meaning structures. Having set forth that a significant number of women will regret abortion, and having endorsed the idea that preventing such regret can justify a state’s restriction on (otherwise protected) abortion, the *Carhart* majority announces that abortion by intact D&E particularly will be regretted, because it is disgusting.<sup>213</sup> In this portion of the discussion the Court includes a graphic description of piercing the skull and vacuuming the “fast-developing brain” of the fetus.<sup>214</sup> Justice Kennedy displays a strong emotional reaction to these facts, calling them “shocking” and “brutal.”<sup>215</sup> But most invasive surgical procedures would appear extremely disgusting if fully described.<sup>216</sup> The disgusting aspect of this procedure is regarded as noteworthy only because it involves destruction of a semi-developed fetus, and this regard reflects a moral valuation—reliant on the belief system revealed above—of the status and worth of that fetus.<sup>217</sup> Kennedy’s morally infused emotions

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ILL. L. REV. 991, 993 (analyzing “the state’s claimed interest in protecting women from abortion” and showing “that these justifications rest on gender stereotypes about women’s capacity and women’s roles”).

213. The Court gave two descriptions of the physical reality of intact D&E. The first, provided by (in the Court’s words) “an abortion doctor,” is relatively clinical. *Gonzales v. Carhart*, 550 U.S. 124, 138 (2007). The second, given by a nurse observing a procedure, is far more vivid and graphic, and focuses on movements by the fetus suggestive of those made by live babies. *Id.* at 138–39 (“Then the doctor stuck the scissors in the back of his head, and the baby’s arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. . . . [The doctor] sucked the baby’s brains out . . . [and] threw the baby in a pan.”). The second narrative adds little of technical importance, but clearly conveys a more salient and powerful emotional message; additionally, it repeatedly uses the word “baby” in lieu of “fetus,” the term used by the doctor.

214. *Id.* at 160.

215. *Id.*

216. “Envelope violations,” or violations of the external bodily “envelope” that reveal bodily fluids, internal organs, and the like, are a core elicitor of disgust. See Paul Rozin et al., *Disgust*, in HANDBOOK OF EMOTIONS, *supra* note 60, at 637, 641–42 (“[Humans have] fragile body envelopes that, when breached, reveal blood and soft viscera . . .”). Intact D&E recruits this sort of instinctive disgust reaction because of the breach of the female’s body through the vagina and a breach of the fetus’s body through the head, exposing developing brain material.

217. See *id.* at 643–44 (asserting that disgust is recruited in response to activities regarded as morally contemptible, and that such “moralized” disgust “guards the sanctity of the soul as well as the purity of the body”); see also MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY*:

are so strong that he believes that most doctors would decline to provide those details to patients, that many patients who were to hear them would decline to have an abortion at all, and that any patient who did have an intact D&E abortion she later came to regret would be traumatized significantly by later learning those details.<sup>218</sup> But this chain of supposition presumes that doctors and patients will share Justice Kennedy's evaluation of the procedure as morally (not just physically) disgusting.<sup>219</sup> Thus, a Justice's personal emotional engagement with a situation can profoundly shape the facts that appear to him commonsensical; further, its strength can obscure his ability to perceive equally legitimate perspectives.

This is the great error of the *Carhart* majority's invocation of emotional common sense. When the Court adopts as relevant to the rights of others the amicus parties' stories of grief, guilt, loss, and lowered self-esteem, it adopts the valuations and beliefs leading to those emotional outputs and forces a false consensus on them. When it privileges the individual Justices' own emotional stake in abortion and reaction to the intact D&E method, it ignores other permissible meaning structures as to those phenomena. These are not empirical errors. These are cultural judgment errors. Under the guise of emotional common sense, the Court has smuggled in an account of the world as it is and should be on precisely the core contested issue: whether previability abortion properly is regarded as the killing of an infant by its mother. It is diversity of belief on that issue that our current law of reproductive choice purports to protect,<sup>220</sup> and the *Carhart* Court has taken sides while pretending to be stating nothing more than common sense about basic emotional reality.

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DISGUST, SHAME, AND THE LAW 13 (2004) (arguing that shame and disgust "are especially likely to be normatively distorted").

218. *Carhart*, 550 U.S. at 134 (stating that "a necessary effect" will be to reduce the "absolute number of late-term abortions," prompting the medical profession to find "less shocking methods").

219. Arguably, one must also assess that the procedure was not justified by some greater good, for example, avoiding giving birth to a child with such profound defects as to cause its immediate post-partum death or enormous suffering—factors that are particularly likely to be present when intact D&E is chosen. See Brief of Respondents at 5, 9, *Carhart*, 550 U.S. 124 (No. 05-1382) (describing medical testimony that intact D&E may be especially useful in presence of fetal abnormalities and of greatest benefit to patients with serious medical conditions).

220. *Roe v. Wade*, 410 U.S. 113, 163 (1973):

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question.

As this Part has shown, then, emotional common sense is a highly complex phenomenon dressed up as a simple one. While emotional common sense sometimes may be judged by its empirical legitimacy—for sometimes a folk belief about emotions really is just true for just about everybody, and sometimes it is just wrong for just about everybody—that metric is not always sufficient. Emotional common sense represents one way in which law may pass contentious judgments of value *on* by passing them *off* as uncontestable matters of fact.<sup>221</sup> Thus, in the great expanse of conflicting correct views a different metric is needed, one that looks to the values of transparency, inclusion, and diversity.

### III. EMOTIONAL COMMON SENSE AS CONSTITUTIONAL LAW: A PRELIMINARY PRESCRIPTION

Emotional common sense permeates law. Certain constitutional issues simply cannot be resolved without analysis of emotion: as the discussion of anti-sympathy instructions demonstrated, unless one has a view as to the meaning and function of “sympathy” and “sentiment,” it is not possible to formulate *any* rule. To the extent that judges’ own emotional stakes in issues and instinctive affiliations with different constituencies influence their seemingly commonsensical assessments, constitutional jurisprudence may be particularly saturated with emotional common sense. The indeterminacy of much constitutional law creates a “zone of reasonableness” within which emotion, intuition, and other traditionally disfavored factors may assume a greater role.<sup>222</sup> But emotional common sense is of uneven epistemological value. It is prone to instrumental use. It influences how the Justices perceive relevant facts and law and provides a fig leaf under which to impose contested views of social justice and the good life. It is largely invisible to its holder but absurd to one whose common sense lies elsewhere.<sup>223</sup> Nor is a natural stopping point clear. With common sense, to some degree, it is “turtles all the way down.”<sup>224</sup> What to do?

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221. I am grateful to Dan Kahan for suggesting this elegant description of the phenomenon.

222. Posner, *supra* note 76, at 1053, 1059 (in describing those elements, “[p]olitics” is not quite right,” but ideology—defined as “a body of more or less coherent bedrock beliefs about social, economic, and political questions, or, more precisely perhaps, a worldview that shapes one’s answers to those questions”—comes closer).

223. Frijda et al., *supra* note 101, at 3 (emotional “arguments cherished by one side are regarded as meaningless by the other side, and vice versa”).

224. GEERTZ, INTERPRETATION, *supra* note 26, at 28–29:

There is an Indian story . . . about an Englishman who, having been told that the world rested on a platform which rested on the back of an elephant which rested in



The trick with emotional common sense as constitutional law is, as with common sense more generally, to chart the sensible middle course.<sup>225</sup> The essential first step is—as this Article has attempted thus far to do—to identify its presence. The second step is not to take the well-worn path in law and seek to eliminate it; this is entirely impractical and might be destructive even were it possible. A starting principle, then, is that emotional common sense surely has a proper place *somewhere* within constitutional lawmaking.<sup>226</sup> We must seek to recognize when law's embrace of emotional common sense entails an unwitting absorption of inaccurate evaluations of the world, when it silently enacts avoidable favoritism or embodies a judgment to which all members of the affected citizenry may well not—and should not have to—ascribe, and when it truly tells law what it needs to know.<sup>227</sup>

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turn on the back of a turtle, asked (perhaps he was an ethnographer; it is the way they behave), what did the turtle rest on? Another turtle. And that turtle? “Ah, Sahib, after that it is turtles all the way down.”

Indeed, even this author's identification of instances of emotional common sense rests—necessarily—on her own. The nature of common sense is to make itself visible when one disagrees with it. It therefore is particularly important that other scholars follow this first effort and identify the emotional common sense they see in law, for it may well be different, and those differences may matter in ways this author cannot predict.

225. Meehl, *supra* note 33, at 93. It is worth reiterating that the objective is not to arrive at a definitive account of the proper *role of emotion in law or in judging*; this is a life's work, a many-faceted project to which many people are devoted. *See, e.g.*, Maroney, *supra* note 102, at 119–23, 134–36 (discussing how “many scholars—from fields as diverse as psychology, law, philosophy, and neuroscience—have begun to study the intersection of emotion and law”). It is, rather, to delineate within the confines of Supreme Court constitutional jurisprudence the proper role for *emotional common sense*, an implicit corpus of beliefs, theories, and perspectives about emotion. This too is, of course, a long-term project, though it is possible to begin it here.

226. *See* Gewirtzman, *supra* note 24, at 626 (seeking to articulate “emotion's positive impact on constitutional culture”).

227. Meehl, *supra* note 33, at 93 (suggesting that though “it would be nice to have some sort of touchstone as to pragmatic validity, some quick and easy objective basis for deciding where to place our bets” when evaluating common sense in law, no easy test presents itself).

This topic is closely related to several others, beyond the scope of this Article, that have received more attention in the literature: the proper attitude of law toward social science generally; “judicial notice” and non-evidentiary facts; and whether jurors are preferred as fact-finders because they embody the perspective of common people. *See* Richard M. Fraher, *Adjudicative Facts, Non-Evidence Facts, and Permissible Jury Background Information*, 62 IND. L.J. 333, 342–43 (1987) (discussing unclear relationship between “adjudicative facts” and jurors' permissible use of background knowledge, the latter being thought to include “unanimity of belief, common knowledge, knowledge shared by the community, a common fund of knowledge, data notoriously accepted by all, information generally known, facts beyond reasonable dispute, or information whose accuracy cannot reasonably be questioned”); Meehl, *supra* note 33, at 66 (discussing potentially conflicting roles of empirical social science and “fireside inductions” (commonsense, anecdotal, introspective, and culturally transmitted beliefs about human behavior) in making and enforcing the law); Redding, *supra* note 9, at 111–13 (detailing the “highly neurotic, conflict-ridden ambivalent affair” between law and social science, particularly psychology); Van Zandt, *supra* note 10, at 939 (noting that the entire project of legal realism was concerned with “the interaction of law and commonsense ideas”).

*A. Evaluating Categories of the Supreme Court's  
Emotional Common Sense*

This Part proposes that emotional common sense is most likely to provide a legitimate basis for law where it takes as its subject consciously accessible emotional experiences amenable to no significant diversity. However, such reliance entails risk. Justices (and, for that matter, all lawmakers) are likely to overestimate vastly the extent to which situations meet those criteria, and in so doing they may enshrine inaccuracy and oversimplification. Emotional common sense is least likely to provide a legitimate basis for law when Justices seek to evaluate the complex emotional experiences of others. In so doing they often will project their emotional reality—their emotional stake in a particular issue, for example, or their beliefs as to how they would feel in a given situation—onto the supposed reality of others. This projection creates the dangers of false generalization and value imposition. As potential for illegitimacy increases, sources outside the Justice's own worldview—organized empiricism, lessons from history, perspectives of amicus parties, and the like—become progressively more important. However, recourse to other voices and to noncasual empiricism is far from a panacea. In many situations the normatively proper stance is for legal decisionmakers to recognize the value-reflective nature of their common sense and to justify openly its imposition on others.

The first point—that the Court is on relatively solid ground in invoking a common-sense view about emotion that is highly likely to be substantially true for all affected persons—is well illustrated by a return to our examination of *Cohen*. The *Cohen* Court relied on its understanding of the manifestation and function of emotional speech in ordinary communication.<sup>228</sup> Its emotional common sense was relatively likely to be accurate given that the emotional aspects of verbal and written interpersonal communication are the stuff of everyday life for most people, including the Justices.<sup>229</sup> Further, the

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228. See *supra* Part II.A.

229. This applies equally to the fighting words doctrine as explicated in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the application of which drove, in part, the reasoning in *Cohen*. The test for fighting words relies in significant part on emotional common sense, as it requires courts to determine what words, "when addressed to the ordinary citizen," are "as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Chaplinsky*); see also Fairman, *supra* note 81, at 1731–32 (showing changing cultural norms in fighting-words doctrine concerning the word "fuck"). Moreover, the fighting words doctrine privileges folk judgments—"ordinary men" of "common intelligence" can tell when the conditions are met, and the job of the judge is to stand in the shoes of those ordinary men. *Chaplinsky*, 315 U.S. at 573.

emotions at issue in *Cohen*—primarily anger—were relatively basic and universal,<sup>230</sup> and the communication in question was short and unambiguous. This pervasive, simple, and consciously accessible domain is one of those in which emotional common sense is most likely to reflect stable truth.<sup>231</sup> While it may have been better to shore up that commonsensical evaluation with other data, there is so little diversity on the bottom-line issue—*emotional communication is distinctive*—that doing so may not have been worth the effort.<sup>232</sup>

As the discussion of anti-sympathy instructions revealed, though, where parameters are more complicated the Court is more likely to invoke empirically erroneous views.<sup>233</sup> The task given capital sentencing jurors—group-based moral decisionmaking about whether a particular individual will live or die at the hands of others at some point in the future—is highly complex, and assessment of complexity creates more room for error. Further, such moral decisionmaking involves at least partially nonconscious mental processes. The Court's erroneous views on emotion's role in moral decisionmaking are perhaps most convincingly shown by scientific studies designed to illuminate such processes, but that level of understanding is inaccessible via common sense.

Unfortunately, errors of the second sort are likely to outnumber safe calls of the *Cohen* sort. People—including the Justices—so frequently believe complex emotional phenomena to be basic, and ones that admit of significant diversity to be universal, that they will wrongly assume emotional common sense adequately answers too many situations. For example, as the sidewalk-counselor issue in *Hill* involved an aspect of emotional communication to which significant complexity and diversity apply—precisely *how emotional communication will be distinctive* in a given situation—greater effort to look outside one's own “obvious” perspective was required.<sup>234</sup> We

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230. See *supra* note 52 (discussing the small universe of evolutionarily basic emotions).

231. See *supra* notes 47–53 and accompanying text (presenting the view that common sense sometimes is a legitimate epistemological source and suggesting contexts in which it is most likely to be such a source).

232. Though further research will illuminate similar situations relevant to constitutional jurisprudence, some situations come easily to mind. For example, it is relatively clear that a person faced with imminent physical danger is highly likely to be afraid. See Lazarus, *Universal Antecedents of the Emotions*, *supra* note 175, at 164 tbl.1. The Court therefore would be on solid ground in supposing that a detainee credibly threatened with torture by police or military officials would be afraid and would seek to shape his behavior to reduce both the danger and his fear. However, how he might shape his behavior, and what impact fear will have on the truthfulness of statements made while in its grip, would be far more complicated issues.

233. See *supra* Part II.A.

234. See *supra* Part II.B.1.

therefore should be hesitant to conclude that a case fits these criteria. The Court should be educated about the types of emotional phenomena that are more complex than it may imagine, particularly before making pronouncements affecting the decisionmaking parameters applied to others.

We also should be alert to the ways in which the Court may use its own commitments as the primary tool for supposing the emotional reality of others. Justices may interpret, as in *Weeks*, the information imparted by third parties' emotional signals in a manner consistent with their own views. They also may invoke what they believe about *their* emotions as if that belief applied equally to those of others, ignoring critical differences. For example, it matters to the anti-sympathy instruction cases that the Court reviews death penalty cases regularly and at a remove; capital sentencing jurors experience only one, and directly. Even accepting (counterfactually) that the Court should and does decide these cases "without emotion," when it applies to jurors what it believes about its own moral decisionmaking processes, it ignores enormous differences in emotional context.

Finally, judgments about emotion frequently will rely on contested meaning structures as to which diversity is either allowed or encouraged, thus enacting favoritism and imposing a false consensus. Given that judgments as to the emotional lives of dissimilar others are particularly likely to be distorted, they should be regarded as especially suspect. As Justice Ginsburg points out in her *Carhart* dissent, the only people *to* whom the majority's statements of emotional common sense could apply are women,<sup>235</sup> and every member of the majority, *from* whom the evaluation came, was a man. Folk wisdom, already on shaky ground, is even shakier when those invoking it are not even part of the affected "folk."

### *B. What Might Take the Place of Emotional Common Sense?*

If the Court were to eschew emotional common sense where it is not properly generalizable to other people, either as a description of their reality or a boundary on their rights, what might take its place?

One plausible solution is to require that the Court resolve disputed questions about emotional phenomena by reference to external sources of data such as history, mind science, and the other

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235. *Gonzales v. Carhart*, 550 U.S. 124, 185 (2007) ("Though today's majority may regard women's feelings on the matter as 'self-evident,' this Court has repeatedly confirmed that '[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society.'").

social sciences.<sup>236</sup> In evaluating the viability of this approach, it is informative to note that the Court has sometimes sought to do just that. It has done so in at least two situations: in judging the Confrontation Clause implications of allowing child witnesses to testify outside the presence of the defendant in sexual abuse cases, and in determining the First Amendment consequences of criminalizing cross-burning.<sup>237</sup> It is not immediately evident why the Court has approached these particular corners of constitutional jurisprudence in a relatively non-folk manner. But that such an approach has at times been attempted shows the viability of cultivating it.

In both *Coy v. Iowa*<sup>238</sup> and *Maryland v. Craig*<sup>239</sup> the Court was asked to determine whether the Confrontation Clause requires children to provide in-court, face-to-face testimony in sexual abuse cases even if such a requirement might cause those children “serious emotional distress.”<sup>240</sup> A plausible common-sense assumption would be that such testimonial conditions would be quite traumatic, especially for a child who is not merely a witness but has himself been sexually abused by the defendant with whom he is faced. The *Coy* Court, though, refused to accept a “legislatively imposed presumption of such trauma.”<sup>241</sup> The Court did not dispute that such testimony would often

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236. This approach is strongly suggested by *supra* Part II.B.

237. The Court also has avoided a commonsense approach where it would be inconsistent with settled principles of parental autonomy. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 67 (2000) (finding unconstitutional a Washington State statute allowing any person to file petition for forced visitation). The *Troxel* Court rejected as legally insufficient the Washington Superior Court’s expressly commonsensical reasoning that “it is normally in the best interest of the children to spend quality time with the grandparent.” *Id.* at 70 (relying on parents’ right to be the primary arbiters of what is in their children’s best interest); *see also* *Smith v. Org. of Foster Families*, 431 U.S. 816, 853–54 (1977) (recognizing a foster parent’s liberty interest “rooted in the emotional attachments that develop over time between a child and the adults who care for him,” but finding such interest to be “significantly weaker in the case of removals preceding return to the natural parent”).

238. 487 U.S. 1012, 1015 (1988).

239. 497 U.S. 836, 838 (1990).

240. *Id.* at 841 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(1)(ii) (1989)) (describing procedure in which such children could instead testify via closed circuit television); *see also Coy*, 487 U.S. at 1014–15 (describing procedure in which children testified from behind a screen). As discussed at *infra* notes 265–66 and accompanying text, the issue of trauma in sexually abused children became highly relevant in a later case having to do with the death penalty for persons convicted of raping children.

241. *Coy*, 487 U.S. at 1021 (insisting instead that a “generalized finding” is no substitute for “individualized findings that these particular witnesses needed special protection”). Interestingly, Justice Scalia’s majority opinion relied heavily on a different bit of folk wisdom: that face-to-face confrontation of witnesses may “emotionally unstring” a “false witness” and therefore is essential to fairness. *Id.* at 1019 & n.2 (“The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it.”).

be upsetting to the child, but it would not sign off on the proposition that such upset was inevitable or always would reach such a level as to justify curtailing the defendant's confrontation rights.<sup>242</sup> Two years later, the *Craig* Court allowed some loosening of the traditional testimonial requirements only if the trauma were shown rather than presumed. It therefore approved Maryland's procedures for out-of-court testimony when the trial court makes a specific, individualized finding that face-to-face testimony "will result in the child suffering serious emotional distress such that the child cannot reasonably communicate."<sup>243</sup> The Court buttressed this conclusion by reference not just to the "widespread belief in the importance of" protecting children in that circumstance but also to a "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court."<sup>244</sup> Thus, in this area of law the Court has been relatively careful to take a contextualized approach that takes seriously the perspective of trained professionals—such as forensic psychologists—and legal personnel closer to the ground—such as trial judges. It thus has recognized that where the state offers emotional harm as a justification for limiting rights, the state's assertion must be closely analyzed to ensure it is neither overgeneralized nor specious.

In the cross-burning context the Court also has turned to alternative sources, primarily historical materials, to illuminate the relevant emotional context. In *Virginia v. Black*, the Court considered the validity of a statute prohibiting burning a cross with the intent to intimidate.<sup>245</sup> While one can imagine the Court having simply asserted that "of course" a burning cross causes fear, the *Black* majority went to some significant effort to ascertain the range of emotional reactions by locating that act in its historical, cultural, and ideological context. After discussion of the Ku Klux Klan, the Court concluded that a

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242. *Id.* at 1020. This conclusion is interestingly parallel to Justice Scalia's assertion that approaches from a sidewalk counselor will often be upsetting but that such an upset will not necessarily (or ever) reach a constitutionally significant level. See *supra* Part II.B.1 for a discussion of Scalia's view. It is also similar to the question as to whether the emotional trauma of child rape might justify imposition of the death penalty. See *infra* notes 265–66 and accompanying text for examination of this issue.

243. *Craig*, 497 U.S. at 841 (citing statute).

244. *Id.* at 853, 855 (citing, inter alia, Amicus Brief of American Psychological Association in Support of Neither Party). The *Craig* court did not require any particular sort of testimony in support of this individualized finding.

245. 538 U.S. 343, 348 (2003). "Intent to intimidate" was defined as intentionally putting "a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from mere temperamental timidity of the victim." *Id.* at 349 (jury instruction).

burning cross frequently is a “tool of intimidation and a threat of impending violence,” a true threat that engenders powerful fear in its targets.<sup>246</sup> States, it held, are therefore free to outlaw it when intended to cause such fear.<sup>247</sup> A plurality, though, went on to invalidate the statute because it allowed the jury to treat cross-burning as *prima facie* evidence of intent to intimidate, thus allowing conviction of a cross-burner whose sole intent was to communicate an ideological point of view or solidarity with like-minded people. That subset of cross-burnings, such as those at a private Klan rally, the plurality opined, might inspire “hatred or anger” among those who learn of it, but not fear.<sup>248</sup> The *Black* majority and plurality opinions therefore show the Court eschewing pure emotional common sense in favor of a more nuanced, contextually grounded, and externally validated view. In this particular case the effort led a Court plurality to legitimate part of the statute—*some significant portion of cross-burnings is intended to, and does, cause extreme fear*—but not all of it, on the view that *some portion does not have that purpose or effect*, no matter how distasteful.

The non-folk approach modeled in these cases is better than reliance on emotional common sense. It is better because it gives adequate opportunity for assumptions to be challenged and allows space for contrary voices. It also gives appropriate due to important interests at stake—the right of a defendant to confront witnesses or the right of a racist to express his abhorrent views—and demonstrates that such rights are not to be abridged on the basis of supposition as to their emotional impact on others.

But the non-folk approach is far from being a magic bullet. Opinions still will clash, sometimes strongly. Sometimes individual Justices will believe that the Court has not removed itself sufficiently from the realm of common sense. In *Maryland v. Craig*, Justice Scalia protested that the Court had been driven by “widespread belief,” rather than being a bulwark against it; had engaged in “speculation”; and had wrongly ignored evidence that some child witnesses are vulnerable to suggestion and fantasy, attributes that could be

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246. *Id.* at 352–57.

247. *Id.* at 363 (distinguishing *RAV v. City of St. Paul*, 505 U.S. 377 (1992), which criminalized cross-burning on the basis of its subject matter, and noting that cross-burning with the intent to intimidate “is a particularly virulent form of intimidation” when judged “in light of [its] long and pernicious history”).

248. *Virginia v. Black*, 538 U.S. 343, 366–67 (plurality opinion of O’Connor, J.) (*prima facie* element of the statute “ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate”).

uncovered by face-to-face confrontation.<sup>249</sup> And in dissenting from denial of certiorari in a later case, he complained that the evidentiary standard of trauma was being satisfied by such a miniscule quantum of proof that it was “no showing at all”—that is, that the Court had devolved to emotional common sense while making a show of not doing so.<sup>250</sup>

At other times, Justices will take issue with the scope of the external data consulted by their fellows. As Justice Thomas makes clear in his strongly worded *Virginia v. Black* dissent, even to entertain the notion that some cross-burning causes anything other than terror is to ignore reality from his perspective.<sup>251</sup> Agreeing with the majority’s look to history but regarding its discussion as insufficient,<sup>252</sup> Thomas adds additional historical evidence, including personal testimonials, to demonstrate his view that cross-burning causes widespread and “well-founded fear of physical violence” and nothing else, particularly for African Americans.<sup>253</sup>

Herein lie the primary—and significant—limitations of seeking support in external sources. The set of sources one consults and regards as credible is shaped by one’s priors; those sources are themselves shaped by the values and belief systems of those who generate them; and their conclusions often will be interpreted in such a way as to conform to one’s precommitments.

These limitations were recognized by Thomas in his *Black* dissent, in which he argued that the other Justices’ cultural worldviews warped their ability to conduct a full inquiry and draw valid conclusions from it. Even when appearing to look outside themselves, Thomas seemed to say, other Justices are cultural outsiders to the experience of the burning cross, and their outsider status blinded them to what, to him, seemed “common knowledge.”<sup>254</sup>

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249. *Craig*, 497 U.S. at 861, 868–69 (Scalia, J., dissenting). Justice Scalia was dissenting from an extension of the *Coy* opinion he authored.

250. *Marx v. Texas*, 528 U.S. 1034 (1999) (Scalia, J., dissenting from denial of certiorari).

251. 538 U.S. at 388 (Thomas, J., dissenting).

252. *Id.* (“[A] page of history is worth a volume of logic.” (quoting Justice Holmes)).

253. *Id.* at 390–91 (describing aftermath of cross-burning for a woman left “crying on her knees in the living room,” with “feelings of frustration and intimidation and fear[ing] for her husband’s life,” as for a “black American” the burning cross meant “[m]urder, hanging, rape, lynching”; “months after the incident, the family still lived in fear” (quoting *United States v. Skillman*, 922 F.2d 1370, 1378 (9th Cir. 1991))); see also *id.* at 391 (“In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.”).

254. *Id.* at 388 (“In every culture, certain things acquire meaning well beyond what outsiders can comprehend.”); *id.* at 389 (citing “common understanding of the Klan as a terrorist organization”); *id.* at 394 (finding that “even segregationists understood the difference between intimidating and terroristic conduct and racist expression”).



Further, Thomas argued, their view was so constrained that the harms they perceived were dependent on the types of people affected. Contrasting the *Black* approach to African American targets of hate speech with the Court's efforts in *Hill* to guard against "emotional trauma" to patients, he argued:

That cross burning subjects its targets, and sometimes, an unintended audience . . . to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.<sup>255</sup>

Touché indeed. Whether one agrees entirely with Justice Thomas's characterization of the Justices in the *Black* plurality, or regards him as similarly limited by *his* worldview, he surely is correct that those worldviews are shaping what is perceived as important.

Thus, our effort to look beyond emotional common sense is an imperfect one. Even when the Court looks outside itself for answers, the way it shapes the inquiry, the evidence it finds sufficient and credible, and the relative valuation it assigns to competing rights and values will continue to be shaped by the Justices' worldviews. As Justice Scalia asserted in a different context, the temptation is enormous to "look over the heads of the crowd and pick out [one's] friends."<sup>256</sup> Thus, the *Carhart* majority (which included, of course, Justice Scalia) relied on testimonials from amicus parties with whom it agreed. Justice Ginsburg, in her *Carhart* dissent, cited to a large number of scientific studies showing that mental health outcomes for women who have abortions are no worse than for women who choose not to abort.<sup>257</sup> The majority, had it chosen to, could have retorted to her retort by citing other studies purporting to show just the opposite.<sup>258</sup> Indeed, such studies are referenced in the cited Cano Brief. The reality is that data sometimes are conflicting, and the sciences—like all disciplines, including law—are affected by the

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255. *Id.* at 400.

256. *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting) (complaining about the Court's choice to credit amicus briefs about neurological and psychological differences between adolescents and adults submitted by, inter alia, the American Psychological Association).

257. *Gonzales v. Carhart*, 550 U.S. 124, 183 n.7 (2007) (Ginsburg, J., dissenting).

258. See, e.g., David M. Fergusson, *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 16, 22 (2006) (finding that having an abortion is correlated with increased risk of mental health problems); David C. Reardon et al., *Psychiatric Admissions of Low-Income Women Following Abortion and Childbirth*, 168 J. CAN. MED. ASS'N 1253, 1253 (2003) ("Overall, women who had an abortion had a significantly higher relative risk of psychiatric admission compared with women who had delivered for every time period examined.").

premises of their practitioners. Further, even when relying on empirics people tend to conform their view of the facts to their values and to credit only that empiricism that confirms prior views.<sup>259</sup> There is, therefore, a danger that recourse to empirics will make the problem worse. It is no solution for the Court to continue to draw on its emotional common sense but paper it over with a few cherry-picked cites to value-confirming external sources. Such papering over can further obscure the value-projective nature of the Court's conclusions. Turtles upon turtles upon turtles.

We should be soberly aware of these significant limitations, but they provide no reason to abandon the effort completely. Just as emotional common sense sometimes reflects stable truth, empirical evidence sometimes does weigh strongly in one direction. It often is possible—though with perhaps more interpretive effort than courts (particularly appellate courts) are accustomed to exerting—to separate wheat from chaff among competing empirical stories. Bad science or inaccurate history often can be exposed as such, and clear answers often can be found. Sometimes common sense and the weight of reliable external data will concur, a “delightfully harmonious situation.”<sup>260</sup> At other times, the weight of the evidence will strongly conflict with common sense, and in those instances Justices should abandon their common sense.<sup>261</sup>

A non-folk approach raises the odds of having this discussion openly, which in turn raises the odds of correct empirical stories (where they exist) being acknowledged and embraced. If emotional common sense raises a smooth, white perimeter wall around legal judgment, then the fraught, imperfect, messy world of facts, clashing narratives, complex data, and competing rights is a climbing wall; we can see where the climber is located and can pinpoint and take issue

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259. See Kahan, *supra* note 56 (examining the interaction between cultural orientation and the perception of facts); Kahan et al., *supra* note 130 (same); see also Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POLY REV. 149, 150 (2006) (showing, inter alia, that cultural orientation predicts whether or not one believes as a factual matter that the death penalty deters crime).

260. Meehl, *supra* note 33, at 95.

261. *Id.* In knowing in which universe we are, we would do well to heed Meehl's proposal that “the degree of skepticism toward a dictum of commonsense psychology should increase as we move into those areas of social control where our efforts are hardly crowned with spectacular success.” *Id.* at 66–67 (giving as an example the prevention and “curing” of crime). However, if the conflicting evidence is particularly new, novel, isolated, or otherwise suspect, and the commonsense notion a particularly engrained one, “similar skepticism should be maintained toward experimental research purporting, as generalized, to overthrow it.” *Id.* at 97; see also Redding, *supra* note 9, at 142 (suggesting though common sense is law's “natural bedfellow” and social science “only an occasional mistress,” we still should regard the former with “healthy scientific skepticism”).

with the specific supports to which she clings. At times, that open battle over discernable inputs will change priors and result in compromise and consensus.<sup>262</sup> When it does not, the terms of future debate will be set.

There is, of course, another alternative. The Court can openly defend its judgments about emotion as normative ones.<sup>263</sup> As this Article has strongly suggested, this is the approach best suited to a great many constitutional determinations, to which conflicting correct views may attach. It is presumptively the best approach where clear external data are unavailable, in true equipoise, or reveal a diversity of permissible interpretations.<sup>264</sup> It is also the best course where there is general consensus on the nature and prevalence of the emotional phenomenon but disagreement on the weight it should be accorded in the jurisprudential calculus. That is a plausible description of one clash within *Kennedy v. Louisiana*, in which the Court barred imposition of the death penalty for the crime of child rape.<sup>265</sup> All concurred that child rape causes profound emotional harm, though the dissent urged a more forceful view of that harm.<sup>266</sup> But the real issue

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262. It is worth considering whether self-consciousness about the way in which one chooses and interprets empiricism to conform to one's prior beliefs and values would lessen the degree to which that is so.

263. See Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1078 (2006) (arguing that judges should "justify and debate their value choices" rather than present them as dictated by the Constitution).

264. See Meehl, *supra* note 33, at 96 ("One hardly knows what to suggest in such collision situations except the social scientist's usual 'more research is needed.'"); Paul E. Meehl, *Law and the Fireside Inductions (with Postscript): Some Reflections of a Clinical Psychologist*, 7 BEHAV. SCI. & L. 521, 544 (1989) ("The plain fact is that some fireside inductions are sound, others are unsound, and most are a mixture. I know of no way to find out which, when a dispute arises, except to collect facts in the systematic manner of the social scientist.").

265. 128 S. Ct. 2641, 2650–51 (2008), *as modified*, 2008 WL 4414670. This is also a plausible description of the dispute over the legal weight to be accorded the "emotional upset" of those targeted by anti-abortion protests.

266. Compare *id.* at 2658 (citing academic sources for proposition that "[r]ape has a permanent psychological, emotional, and sometimes physical impact on the child"), with *id.* at 2676–77 (Alito, J., dissenting) (citing legal and academic sources for propositions that the "immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped," that "[l]ong-term studies show that sexual abuse is 'grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and sexual development,'" that "as many as 40% of 7- to 13-year-old sexual assault victims are considered 'seriously disturbed,'" and that there are proven "correlations between childhood sexual abuse and later problems such as substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness," as well as later perpetration of sexual abuse and involvement in prostitution). Note that Chief Justice Roberts and Justices Alito, Thomas, and Scalia all joined Justice Kennedy's "common sense" approach to regret in *Carhart* but took issue with the scope of his empiricism with regard to the seriousness of trauma suffered by victims of child rape.

was how such harm was to be regarded within the relevant Eighth Amendment parameters and how it was to be compared, morally and legally, with the harms of murder. No empiricism can answer those questions. Certainly our answers should not rest on demonstrably inaccurate premises, and looking for guidance from credible external sources is better than simply invoking one's own off-the-cuff views on deeply complex issues. Indeed, recourse to such sources may reveal points of agreement. But we should harbor no delusions that external data will supply all answers in the universe of conflicting correct views, and we should demand that such views be articulated and justified.

Transparency is, of course, its own virtue. But it is not the only one. If forced to defend previously implicit theories (*of course the world works this way*) in normative terms (*I see the world in this way, and I will require that you do as well*) some Justices will, sometimes, change course entirely. It is worth wondering whether Justice Kennedy would have been willing in *Carhart* to defend openly the belief systems and values underlying his judgments about regret. If emotional common sense provides a ready cover for smuggling in contested meaning structures, perhaps removing the cover will allow fewer of them to sneak in.

One final, happy consequence of a move beyond emotional common sense—in all but the limited domain suggested at the start of this Part—would be a marked improvement in the quality of the Court's rhetoric. Asserting that one's own view is commonsensical never will persuade someone to whom it appears otherwise, but it will instead come across as maddening, wrongheaded, even insulting. Emotional common sense thus contributes to a legal culture in which opinions are "marked by a rhetoric of certainty, inevitability, and claimed objectivity, a rhetoric that denies the complexity of the problem and drives to its conclusion with a tone of self-assurance."<sup>267</sup> A rhetoric that admits instead of multiple perspectives on emotional reality is more likely to be persuasive. It also avoids the condescension of presenting one's own views as simple truths with which all sane persons surely must agree.

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267. Gewirtz, *supra* note 24, at 1042. Moreover, lower courts often borrow or rely on the Court's rhetoric, not just its holdings, and irresponsible commonsense rhetoric—particularly if it is pithy or folksy—easily may work its way into other legal determinations in ways not foreseeable to its author. See Guthrie, *supra* note 16, at 880 ("[I]n the pit of actual application . . . one good quote is worth a hundred clever analyses of the holding." (quoting Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (book review))).

## CONCLUSION

This Article has shown that the Supreme Court uses emotional common sense in construing constitutional law. This new lens on constitutional jurisprudence reveals previously hidden dynamics in a wide array of cases. The phenomenon is not isolated to any single Justice or ideological niche of the Court; everyone does it, and they do it to a lesser or greater degree depending on how they evaluate any given situation in light of their beliefs, values, and goals. Emotional common sense may be a permissible basis for law in very limited circumstances having to do with simple emotional experiences arising within common, consciously accessible contexts. Beyond that core, reliance on emotional common sense may enshrine dangerous myths into law and disserve both the complexity of human emotion and the diversity of our pluralistic society. Members of the Court must be open to being honestly educated about the limits of their own expertise in emotion and must bring varying perspectives to bear in a deliberate, transparent, nuanced, and grounded manner. They must also be willing to air openly the many judgments underlying their common-sense views.

Such an approach is vital, for important constitutional judgments will continue to hinge on evaluation of emotions, and the Justices do not have—and cannot have—all the answers as a matter of simple common sense.

The recent case of *Carey v. Musladin* makes this clear. In *Musladin* the Court was asked to determine the permissibility of allowing family members of the deceased, Tom Studer, to wear buttons showing Studer's face while attending the murder trial of the man accused of killing him.<sup>268</sup> The state appellate court had rejected Musladin's objection to the buttons based on its assessment that they "[were] unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of [a] family member."<sup>269</sup> The oral argument was a chaotic parade of emotional common sense. Justices Breyer and Roberts echoed the state's assertion that a typical juror would see the buttons as just a sign of "normal grief."<sup>270</sup> Justice Scalia asserted that the jury would understand the buttons as a plea to consider the case carefully because the deceased was loved and is

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268. 549 U.S. 70, 72–73 (2006). Musladin argued self-defense, so Studer's "innocent victim" status was directly at issue.

269. *Id.* at 73 (quoting the opinion of the California Court of Appeal).

270. Transcript of Oral Argument at 27, 30, *Musladin*, 549 U.S. 70 (No. 05-785); see also *id.* at 25 (argument of Gregory A. Ott for Petitioner) ("[S]imple buttons bearing only a photo did not convey any message of blame, guilt, anything other than grief of this family.").

missed.<sup>271</sup> The Justices and the attorneys mused about the permissible limits of emotional displays by spectators, conjecturing what rule would obtain if the family members were to sob aloud during the proceedings.<sup>272</sup> The relevance of *Cohen's* protection of the emotional content of speech was briefly raised and dropped.<sup>273</sup> Justice Souter wondered aloud whether the dividing line between permissible and impermissible emotional display hinged on whether the family was doing what people "naturally do" when grieving, as opposed to "going out of their way to do something that people in mourning do not normally do."<sup>274</sup> Competing possibilities drawn from emotional common sense played out in the amicus briefs as well. The National Association of Criminal Defense Attorneys insisted that the buttons conveyed the "obvious" message that Studer was an innocent victim and that Musladin did not act in self-defense.<sup>275</sup> In contrast, the New Jersey Crime Victims' Law Center insisted that the buttons simply conveyed "the message that the family was upset and mourning his death" and would be thus "understood by jurors in a common sense fashion."<sup>276</sup>

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271. *Id.* at 22 (statement of Scalia, J.) ("They just say we have been deprived of a loved one. This is a terrible matter. Please, jury, consider this case carefully. That's all it necessarily says."); *see also id.* at 22–23 (argument of Petitioner's counsel) (arguing that a jury would understand the message in the way Scalia suggested). *But see id.* at 22 (argument of Petitioner's counsel) (arguing, in response to a question from Justice Souter, that the jury would understand the button to convey the "sentiment" that Musladin should be hanged).

272. *Id.* at 33–37.

273. *Id.* at 35.

274. *Id.* at 37. Souter also asserted that the real problem with the buttons was that they raised the danger of creating "sympathy" for Studer's family, creating the risk "of emotionalism in the jury's deliberation as opposed to dispassionate consideration of courtroom evidence" at the guilt stage. *Id.* at 38; *see also id.* at 45–46:

[I]t created a risk simply of an emotional approach to the determination of guilt or innocence. The jurors are more likely to feel sorry for the family members sitting there a few feet away from them. Perhaps they may be more likely to feel sorry for the victim, but certainly for the family members. And it would be that improper influence of emotionalism as opposed to a particular message that is the problem here . . .

The respondent's attorney first resisted this characterization, focusing instead on the impermissible message arguably conveyed by the buttons, and then endorsed it. *See id.* at 46 (stating that he "[d]id accept that").

275. Brief of the National Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 9, *Musladin*, 549 U.S. 70 (No. 05-785). Further, even accepting the Court of Appeals' contention that the buttons displayed "normal grief," the NACDL asserted that such displays of grief are irrelevant to issues of guilt and innocence and create too great a risk of prejudice. *Id.*

276. Brief of the New Jersey Crime Victims' Law Center as Amicus Curiae in Support of Petitioner at 3, 11, *Musladin*, 549 U.S. 70 (No. 05-785); *see also id.* at 3 ("Their presence and association with the decedent is understood, obvious, and expected. For these individuals to wear a small button with the photo of the victim is as commonly understood as is their presence. Common sense dictates this.").

*Musladin* came to the Court through its habeas jurisdiction, so the Court was able to dodge all of these questions by finding that the state court's determination was not unreasonable because the proper course had yet to be clearly established.<sup>277</sup> The question, and others like it, surely will come back. In the meantime, lower courts have no greater guidance than before, and the jurisprudence on allowable emotional displays in the courtroom will remain a morass.<sup>278</sup> Emotional common sense—imperfect, invisible, value-laden—cannot possibly be the best way to decide difficult issues of such import.

There is a better way: recognizing the dangers of emotional common sense and being willing sometimes to set it aside. This path does not require that we eschew a role for *emotion* in law, including constitutional law. What it requires is that we take a more catholic view toward the sources of information about emotions, and a more humble view toward the universality of our own.

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277. 549 U.S. at 76–77; *see also id.* at 82 (Souter, J., concurring) (raising same questions about the risk of creating in jurors a “sympathetic urge to assuage the grief or rage of survivors with a conviction,” and wondering if the spectators might have a First Amendment right to express grief).

278. *Id.* at 76 (acknowledging that “lower courts have diverged widely in their treatment of defendants’ spectator-conduct claims”). A similar point pertains to the proper limits on victim impact evidence. Though such evidence generally has been allowed despite its evidently emotional character, *see supra* note 121 (documenting the Court’s treatment of victim impact evidence), it may be excluded if “so unduly prejudicial” as to render the trial “fundamentally unfair.” *Payne v. Tennessee*, 501 U.S. 808, 809, 825 (1991). The Supreme Court recently denied certiorari in two cases in which capital sentencing jurors were shown video montages of the victims’ lives, complete with music and narration. *See Kelly v. California*, 129 S. Ct. 564, 564 (2008) (Stevens, J., dissenting) (attaching a link to one of the videos, [http://www.supremecourtus.gov/opinions/video/kelly\\_v\\_california.html](http://www.supremecourtus.gov/opinions/video/kelly_v_california.html)). The Supreme Court of California opined that the videos were “not unduly emotional.” *People v. Kelly*, 171 P.3d 548, 558 (Cal. 2007). Justices Stevens and Breyer perceived the videos’ overt emotionality—particularly the use of music and other enhancements—as crossing the line (blurrily) drawn in *Payne*. *Kelly*, 129 S. Ct. at 567–68 (2008) (Breyer, J., dissenting) (“[T]he film’s personal, emotional, and artistic attributes themselves create the legal problem. They render the film’s purely emotional impact strong, perhaps unusually so . . . the due process problem of disproportionately powerful emotion is a serious one[.]”); *see also id.* at 564, 567 (Stevens, J., dissenting) (decrying the Court’s lost opportunity to provide “long-overdue guidance” on such emotionally laden evidence).

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