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# Law and Emotion: A Proposed Taxonomy of an Emerging Field

Terry A. Maroney

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**Abstract** Scholars from diverse fields have begun to study the intersection of emotion and law. The notion that reason and emotion are cleanly separable—and that law rightly privileges and admits only of the former—is deeply engrained. Law and emotion scholarship proceeds instead from the belief that the legal relevance of emotion is both significant and deserving of (and amenable to) close scrutiny. It is organized around six approaches, each of which is defined and discussed: *emotion-centered*, *emotional phenomenon*, *emotion theory*, *legal doctrine*, *theory of law*, and *legal actor*.

Drawing on the analytic value of the proposed taxonomy, any exploration of law and emotion should strive to identify which emotion(s) it takes as its focus; distinguish implicated emotion-driven phenomena; explore relevant and competing theories of the emotions; limit itself to a particular type of legal doctrine; expose underlying theories of law; and make clear which legal actors are implicated. Directions for future research are discussed and cross-disciplinary collaboration encouraged.

**Keywords** Law · Emotion · Affect · Juries · Legal

## Introduction

A number of scholars have, in recent years, turned their collective attention to the intriguing issues that lie at the intersection of emotion and law (Bandes, 1999b; Pildes, 1992; Posner, 2001). These scholars come from many fields, including psychology, law, philosophy, and neuroscience; they include theorists, empiricists, and practitioners; and they have tackled issues ranging from the elusive boundary between emotion and cognition—and the significance of such a boundary to concepts of legal reason—to the nature and import of emotional bonds between attorneys and their clients. “Law and emotion,” it has been suggested, might now be added to a family

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of interdisciplinary approaches that includes, for example, law and economics and feminist jurisprudence.<sup>1</sup>

This article seeks primarily to educate empirical scholars and legal theorists alike about this emerging, yet relatively unexamined, movement exploring the relevance of human emotion to legal analysis. Robustly conceptualized, the movement takes as its subject a wide range of legal constructs, including substantive and procedural doctrine, behavioral models underlying legal rules, and the impact of emotion on law-relevant decision making. Placing the study of emotion and legal decision making, that subset to which most empirical research has been directed, within the broader rubric of emotion and legal analysis better contextualizes that inquiry. Further, awareness of the full range of potential interactions between law and emotion promises to generate new directions for theoretical and empirical research.

The article briefly describes the genesis and development of academic interest in law and emotion;<sup>2</sup> proposes that this scholarship is helpfully conceptualized along six interrelated, but theoretically distinct, foci; and suggests directions for future research and interdisciplinary collaboration. The taxonomy it offers is primarily a descriptive one, seeking to isolate and surface the scholarship's hidden infrastructure. However, this proposed taxonomy, representing as it does an exercise in articulating the movement's goals and theoretical underpinnings, also provides an evaluative approach that may help identify gaps in the existing literature and encourage more thorough, grounded, and carefully contextualized analysis going forward.

#### The emergence of “law and emotion” as a distinct field

The law always has taken account of emotion. One easily conjures ready examples: we sometimes decline to admit relevant evidence (such as gory photos) because we fear that the emotions it will provoke may overcome jurors' ability to reason in the manner required by their institutional role; we consider anger and jealousy when determining whether a given provocation warrants treating a killing as manslaughter rather than murder. Criminal law reflects theories of fear, grief, and remorse; family law seeks (ideally) to facilitate love and attachment; tort law measures emotional suffering; litigants seek emotional satisfaction by invoking legal mechanisms; legal decision makers may have strong feelings about parties in their cases. The point is so obvious as to make its articulation seem almost banal.<sup>3</sup>

But, as other commentators have noted, this relationship has been a rocky one. A core presumption underlying modern legality is that reason and emotion are different beasts entirely: they belong to separate spheres of human existence; the sphere of law admits only of reason; and vigilant policing is required to keep emotion from creeping in where it does not belong.<sup>4</sup> This theoretical model has persisted despite its implausibility as a model of either how humans live

<sup>1</sup> See Introduction, pp. 1–15 in Bandes (1999b); see also Abrams (2002a), Feigenson (2001), Little (2001) (book reviews of Bandes, 1999b); Feldman (2000a), Sanger (2001). It remains an open question whether “law and emotion” is rightly considered a “field” or “movement” in its own right, or whether theoretical and empirical explorations of the law-emotion interaction are merely a content-based point of intersection among various established interdisciplinary fields. This question goes beyond the scope of this article. For present purposes, it is assumed that it is accurate and helpful to call the described scholarship a “field” or “movement,” and certain arguments are offered in support of that assumption.

<sup>2</sup> As the purpose of this article is to explicate the underpinnings of an transdisciplinary academic movement, discussion of how the implicated issues are treated within case law is deliberately limited. Case law is occasionally cited where particularly relevant but a detailed exploration of this important topic is a project for another day.

<sup>3</sup> See Introduction, p. 1 in Bandes (1999b); see also Polletta (2001) (book review of Bandes, 1999b).

<sup>4</sup> This point has been made by virtually every scholar who has delved, even briefly, into this area. See Feigenson (1997); but see Laster and O'Malley (1996).

or how our law is structured and administered (Abrams, 2002a). The emotional aspects of our substantive and procedural law therefore have tended to develop *sub rosa*, consisting largely of unstated assumptions about human nature.<sup>5</sup> Those moments in which emotion plainly surfaces itself—for example, in victim impact statements or hearings on emotional damages—stand out, as if the sole permissible emotional outposts in an otherwise “rational” legal universe. Only recently have scholars begun to speak deliberately about the role of emotion *per se* and to self-consciously reckon with the myriad ways in which the law reflects or furthers conceptions of how humans *are*, or *ought to be*, as emotional creatures.

This development is, perhaps, unsurprising. Not only has law in recent decades become far more receptive to insights from other disciplines, but those disciplines have begun to engage far more deliberately with issues of defining and understanding human emotion. This is most evident in the field of law and psychology; that field has grown exponentially in recent decades,<sup>6</sup> and psychology itself has in the last 10 years seen significant growth in emotion scholarship (Lazarus, 1991; Ortony, Clore, & Collins, 1988; Plutchik & Kellerman, 1980; Scherer & Ekman, 1984; van Goozen, Van de Poll, & Sergeant, 1994). Much exciting emotion work has now begun in neuroscience, cognitive neuroscience, and neuropsychology.<sup>7</sup> Philosophers, sociologists, economists, anthropologists, and feminist scholars also have brought an increased focus on emotion to their respective fields (Abrams, 2005; Harré, 1986; Huang, 2000; Nussbaum, 1990, 2001). These various developments made it possible, or even inevitable, to turn to a more general inquiry into the interaction between emotion and law.

Early such efforts within legal scholarship consisted largely of decrying the construct of a clean division between “emotion” and “reason,” and advocating a more explicit role for the former. The late Justice William J. Brennan, Jr. issued a rallying cry in a 1987 speech in which he denounced “formal reason severed from the insights of passion,” and asserted that passion—defined as “the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason”—could enhance legal reasoning (Brennan, 1988). A series of articles responding to Brennan explored these same themes, which were also taken up by two influential scholars who argued that empathy, in particular, was a vital component of legal decision making.<sup>8</sup> These contributions staked out important ground, but were urging further development rather than resting on an established body of scholarship,<sup>9</sup> and through the early 1990s attention to law and emotion remained at this level of generality.<sup>10</sup>

Within a decade, though, the outlines of a distinct law-and-emotion jurisprudence were forming. The mid-1990s saw publication of articles exploring theories of emotion potentially underlying criminal law (Kahan & Nussbaum, 1996); the emotional content and function of

<sup>5</sup> See Introduction, p. 2 in Bandes (1999b).

<sup>6</sup> See Blumenthal (2002) and James R. P. Ogloff, “Two steps forward and one step backward: The law and psychology movement(s) of the 20th century,” in Ogloff (2002).

<sup>7</sup> See Damasio (1994, 1999), Lane and Nadel (2000), and LeDoux (1996). For an overview of contemporary scientific emotion research, including neuroscientific research, see Davidson, Scherer, and Goldsmith (2003). For a compilation of new research into “law and the brain,” see Symposium (2004c).

<sup>8</sup> See (1988) *Cardozo Law Review*, Vol. 10, p. 1 et seq. (articles responding to Brennan, including Henderson (1988)); see also Henderson (1987) and Pillsbury (1989).

<sup>9</sup> “Scholars . . . must explore the complex relation between emotional reactions and legal policy in many different areas of the law. . . . The effort, if successful, will subtly alter the culture of Law so that Emotion is no longer viewed as Evil, but as a broad category of reactions whose nature and origins we must distinguish. . . . This describes a rather grandiose and long-term project” (Pillsbury, 1989), p. 705. See also Henderson (1988), p. 124.

<sup>10</sup> One scholar has characterized early law and emotion work as consisting of a largely ineffectual and possibly counterproductive “frontal” attack on the reason/emotion dichotomy (Abrams, 2002a).

victim impact statements, an issue that attracted broad attention when brought repeatedly before the Supreme Court (Bandes, 1996; Booth v. Maryland, 1987; Payne v. Tennessee, 1991; South Carolina v. Gathers, 1989); and emotion in the language of judging (Nussbaum, 1996). These were followed shortly by explorations of shaming punishments (Massaro, 1997), the nature of disgust (Miller, 1997), and the role of sympathy in legal judgment (Feigenson, 1997). And as the volume of emotion-and-law scholarship increased, its insights became more nuanced and complex. Early efforts had successfully shifted the baseline, creating some broad agreement that it is both undesirable and impossible to exclude emotion from legal analysis. Scholars then began to complicate the model. They recognized that embracing an explicit role for emotion in law is an inherently normative enterprise (Bandes, 1996), and began to advocate more careful attention to the complexity of emotion theory within other disciplines.

This stage of the movement reached a high-water mark with *The Passions of Law* (Bandes, 1999b), which brought together scholars from several corners of the academy—but, in a conspicuous omission, none from psychology or the life sciences—with a series of essays on the relationship between law and a select group of emotions, ranging from disgust to romantic love.<sup>11</sup> The volume aimed to convince readers that “emotion in concert with cognition leads to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions,” and, more modestly, to both provoke debate on the reason/emotion dichotomy and encourage examination of the emotion theories underlying legal schemes.<sup>12</sup> Not surprisingly, *Passions* fell short of its more lofty ambitions, though it did significantly advance the dialogue. The lack of a social science or life-sciences perspective is its most evident shortcoming. The authors largely failed to contend seriously with definitional debates within primary emotion scholarship, though they did attend (if in a sometimes cursory manner) to the parallel debate over the cognitive content of emotions.<sup>13</sup> But whatever ground it left unplowed, the pivotal role of *Passions* in positioning law and emotion as a distinct enterprise is evident. It prompted several book reviews, the first publications in legal journals to describe the emerging field as such (Abrams, 2002a; Feigenson, 2001; Little, 2001; Morse, 2004b; Polletta, 2001), as well as multiple conferences and symposia on law and emotion (Symposium, 2000a, 2001), events that have become increasingly common (Special Issue, 2002; Symposium, 2000b, 2002, 2003, 2004a, 2004b).

Empirical research on law and the emotions followed a roughly parallel trajectory, though its track—notably, proceeding quite separately from that of legal theory—was running perhaps a few years ahead. As early as the mid-1970s researchers began to isolate emotion as a distinct element and think about its unique relevance to law;<sup>14</sup> those efforts became progressively more specific and sophisticated, with a marked increase on both fronts in the late 1990s and continuing today. Analysis of the impact of vivid, gruesome evidence on jurors provides an illustrative example. The first study suggesting emotion’s role in mediating jurors’ processing and valuation of such

<sup>11</sup> See Little (2001), p. 974 (editor’s abstract). *Passions of Law* was developed in conjunction with “a conference on the subject of law and emotion held at the University of Chicago Law School in May, 1998.” Feigenson (2001), p. 447 n. 5; see also Bandes, 1999b, p. xi.

<sup>12</sup> Bandes (1999b), pp. 7, 11.

<sup>13</sup> Little (2001), pp. 984, 987–992; Bandes (1999b), p. 10. Query, however, whether this strong lineup behind the “cognitive view” is uniformly a good thing. See, e.g., Morse (2004b).

<sup>14</sup> Though this empirical work was in important respects “new,” it is worth noting that psycholegal studies’ roots in legal realism had a distinctly emotional flavor. Jerome Frank famously proclaimed that we cannot “get rid of emotions in the field of justice” and encouraged judges to undergo psychoanalysis in order that their emotions would “become more sensitive, more nicely balanced, more capable of detailed articulation” (Frank, 1930, 1931a, 1931b). While Frank’s somewhat shallow reliance on Freudian theory is now regarded as naïve and “died out for lack of heirs,” his core points about emotionality would later be taken up by those working in law and psychology (Feldman, 2000a), pp. 1423–1424; see also Bandes (1996), n. 39.

evidence appeared in 1976; by 1982, Whalen and Blanchard attempted tentatively to test this “emotional arousal interpretation,” and counseled that future research measure emotional arousal directly; and such studies began to appear in the 1990s and continue to be generated.<sup>15</sup>

While the literature that identifies itself as part of a distinct law and emotion field remains small, it continues to grow in both volume and richness. Indeed, well over half of the literature on law and emotion, both theoretical and empirical, has been generated since 1999, the year *The Passions of Law* was published.<sup>16</sup>

In sum, a confluence of influences from a variety of disciplines made it possible deliberately to explore the complex relationship between emotion and law. The aim at first was simply to challenge the prevailing legal narrative of a strict dichotomy between reason and emotion, while later efforts, dominated by law scholars and philosophers, asked progressively more complex questions about the nature of emotion and its role within law. In very recent years, the literature has expanded rapidly, pulling in ever more areas of law and including far greater numbers of contributors from the social and life sciences.

### Approaches to law and emotion

As the above discussion suggests, the range of theoretical and empirical work on law and emotion is wide. I propose here a taxonomy of such scholarship. While this taxonomy is on one level descriptive, it may also have analytic and evaluative value, in that it provides a framework for analyzing the strengths and weaknesses of particular law-and-emotion scholarship and may point to new areas within which such scholarship may fruitfully be pursued.

#### *What counts as law and emotion scholarship?*

Thorny definitional issues arise the moment one proposes to discuss law and emotion. Not only must one indicate just what is meant by “law” in this context, but one must also be careful to specify the intended meaning of “emotion.” While there is debate within legal academia over the boundaries of the former, the latter inquiry has far more practical bite. A sizeable literature has attempted to distinguish between emotions, feelings, mood, and affect, and each such concept both relates closely to the others and contains substantive subcategorizations of its own—for example, “affect” generally refers to the perceived “goodness” or “badness” of a given stimulus, but often is used as an umbrella term encompassing both “emotions” and “mood,” the latter term often defined as a diffuse, non-object-specific feeling-state.<sup>17</sup> Multiple taxonomies of the emotions have been offered, often with different lineups.<sup>18</sup> Further, the same terms may have very different

<sup>15</sup> See Bornstein and Nemeth (1998), Douglas, Lyon, and Ogloff, (1997), Nemeth (2002), Oliver and Griffitt (1976), and Whalen and Blanchard (1982). Another example of this historical trajectory may be found in empiricists’ treatment of remorse. Compare Rumsey (1976) with Bornstein, Rung, and Miller (2002).

<sup>16</sup> 133 of 217 entries in a bibliography based on the author’s survey of the literature are dated 2000 and later. An additional 8 entries—including one entry for *The Passions of Law*, which contains 14 separate contributions—were published in 1999 alone. The complete bibliography is available from the author upon request.

<sup>17</sup> See, e.g., Ekman and Davidson (1994). Slovic has further defined “affect” as “a faint whisper of emotion,” the “specific quality of ‘goodness’ or ‘badness’ (i) experienced as a feeling state (with or without consciousness) and (ii) demarcating the positive or negative quality of a stimulus” (Slovic, 2004). Affect, he asserts, carries “the meaning and motivational force of fear and other emotions without the necessity of creating an emotional state.” *Id.* at 989. See also Blumenthal (2005) and Ekman and Davidson (1994), p. 51.

<sup>18</sup> There is some agreement on the existence of certain “core” emotions—generally including fear, anger, happiness, sadness, surprise, and disgust—a repertoire on which humans demonstrate many gradations and variations. See, e.g., Plutchik (1980), Russell (1980).

meanings depending on one's perspective and operative definitions. For example, Damasio distinguishes "emotions," by which he means a series of nonconscious processes mapped in the body and brain in response to emotionally competent stimuli, and "feelings," the conscious experiences of happiness, sadness, and so on that are triggered by emotions; but what he calls feelings are what most nonscientists, and some scientists, would call emotions.<sup>19</sup> Further, other psychological phenomena, such as attachment, often are implicated in studies of emotion and its operationalization.

Just as the study of emotion carries with it a perpetual definitional dilemma, so too does any attempt to categorize the literature within the (posited) new field of law and emotion. The question as to at what point any given project is sufficiently about both "law" and "emotion" to productively be claimed for this particular enclave is worthy of greater exploration than is possible here. I offer, nonetheless, two premises, one pertaining to motivation and the other to method. First, contemporary law and emotion scholarship is based on the beliefs that human emotion is amenable to being specifically and searchingly studied, that it is highly relevant to the theory and practice of law, and that its relevance is deserving of closer scrutiny than it historically has received. Second, such scholarship explicitly directs itself to both sides of the "and"; it takes on a question regarding law and brings to bear a perspective grounded in the study or theory of emotions.

Using this framework, some law-and-emotion literature is relatively easy to identify. Certain legal scholars explicitly claim that label and attempt to stake out the field as a distinct enterprise (Bandes, 1999b; Little, 2002; Nussbaum, 2004). Similarly, some empirical studies clearly declare their intention to examine an undeniably emotion-based question—such as the effects of induced anger on decision making—within an unquestionably legal context—the jury room (Lerner et al., 1998).

The movement, however, encompasses more than just such self-identified work. Consider, for example, the debate between Ogletree, who asserts that successful public defenders are motivated by "empathy and heroism" (Ogletree, 1993), and Smith, who urges instead a model of "respect, pride, and outrage" (Smith, 2004). Both claim to offer defenders the best tool for withstanding the significant emotional demands of their profession. Though neither author positions this debate within a law and emotion movement or discusses that literature, both are directly engaged with the questions of what emotions are, how emotions interact with motivation in the context of lawyering, and whether particular emotion-states (such as feeling compassion or anger toward one's client) help or hinder legal reasoning and judgment. No discussion of emotion and law can be complete without considering contributions such as these.

Just as one must consider what to draw into the fold of law and emotion, one must also consider what to fence out. For example, most of the extensive literature on hate crime has little to do with how the emotion of hate is experienced and expressed by the subject or object, focusing instead on the First Amendment, the right to a jury trial on sentence-enhancing factors, and cultural factors shaping approaches to this area of law (Apprendi v. New Jersey, 2000; Jacobs & Potter, 1998; Jenness & Broad, 1997; Maroney, 1998). Only that subset of work analyzing the distinctively emotional components of the "hate" in "hate crime" is usefully conceptualized as part of the

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<sup>19</sup> See Damasio (1994, 2003, p. 146 n.\*). For purposes of this article, reflecting its purpose not to assert the correctness of any particular terminology but instead to capture as fully as possible a wide range of scholarship, the term "emotion" generally is used in a broad sense to signify a spectrum of phenomena encompassing what might instead be called emotion, feelings, affect, and mood; where a more specific meaning is intended, a more specific term is used.



field.<sup>20</sup> Similarly, not every empirical study of a potentially law-relevant operationalization of emotion is law-and-emotion scholarship. For example, Bodenhausen et al. showed that sad (as compared to happy) persons are more prone to anchoring bias, though persons with sad mood generally are less prone to cognitive biases when making judgments. While the authors briefly alluded to this finding's potential relevance to legal judgment, that decision making context was not presented in the study (Bodenhausen et al., 2000). A follow-up study exploring that point would fall within the universe I describe, but the former does not (Li & Roloff, 2004).<sup>21</sup> The core of the relevant literature is that which is fundamentally and centrally grounded in at least one issue of law and one of emotion. Studies at the periphery may be highly relevant and useful to those undertaking the core endeavor, but do not themselves comprise that endeavor.

With some preliminary guidance as to what the law-and-emotion literature is and is not, I now turn to an analysis of what that literature does.

#### *A proposed taxonomy of law and emotion studies*

The law-and-emotion literature all proceeds according to the following analytical approaches, set forth in Table 1.

Like all typologies, this one draws apparently sharp distinctions where looser ones might sometimes be more accurate. While there is utility in teasing out each approach, most (if not all) law-and-emotion scholarship consists of a multidimensional engagement with various foci. Further, I propose that while any given study will have its primary grounding in one (or possibly more) of the described approaches, it generally should attend to the queries central to each of the six. These points are taken up later in this article.

*Emotion-centered.* One approach is to analyze how one emotion—including theories of its origin, purpose, functioning, embedded values, and appropriateness—is, or should be, reflected in law. I call this the *emotion-centered approach*.

Many of the most prominent examples of this approach have focused on disgust. Nussbaum and Kahan, for example—inspired largely by Miller's wide-ranging *The Anatomy of Disgust* (Miller, 1997)—have debated the legitimacy of disgust as a basis for legal rulemaking. Nussbaum has argued that its evolutionary grounding in concepts of contamination and disease renders disgust “antisocial” and dehumanizing; Kahan has sought instead to “redeem disgust,” arguing that there are “situations in which properly directed disgust is indispensable to a morally accurate perception of what's at stake in the law.”<sup>22</sup> The closely related emotion of shame has also

<sup>20</sup> See Abrams (2002b), Moran (2001b), and Sullaway (2004); Dan M. Kahan, *The Progressive Misappropriation of Disgust*, in Bandes (1999b), pp. 69–73; Richard A. Posner, *Emotion versus Emotionalism in Law*, in Bandes (1999b), pp. 313–317). Some scholars see all or most of hate crimes jurisprudence in this light. See Bandes, 1999b, p. 2 and Kahan (1998) (book review of Miller (1997)). Indeed, concepts of emotional harm to victims are relevant to the substantive hate-crime and hate-speech jurisprudence. See *Wisconsin v. Mitchell* (1993) (hate crime is thought to inflict “distinct emotional harms”); *Virginia v. Black* (2003) (noting that burning crosses cause many to “fear for their lives”); *R. A. V. v. City of St. Paul* (1992) (striking down ordinance banning display of a symbol which one knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”).

<sup>21</sup> A related example is research on the impact of emotion on negotiation. Much of that research concerns potentially law-relevant but non-law-specific negotiation models. See, e.g., Li and Roloff (2004), Adler, Rosen, & Silverstein (1998), Thompson, Valley, and Kramer (1995). Only a few studies focus specifically on legal negotiation. See, e.g., Huang (2000), cf. Daly (1991).

<sup>22</sup> Martha C. Nussbaum, “*Secret Sewers of Vice*”: *Disgust, Bodies, and the Law*, in Bandes (1999b), pp. 20–21; Dan M. Kahan, *The Progressive Appropriation of Disgust*, in Bandes (1999b), p. 63).

**Table 1** Analytical Approaches to Law and Emotion

Analytical approach to emotion and legal analysis	Defining characteristics
Emotion-centered approach	Analyze how a particular emotion is, could be, or should be reflected in law
Emotional phenomenon approach	Describe a mechanism by which emotion is experienced, processed, or expressed, and analyze how that emotion-driven phenomenon is, could be, or should be reflected in law
Emotion-theory approach	Adopt a particular theory (or theories) of how the emotions may be approached or understood, and analyze how that theory is, could be, or should be reflected in law
Legal doctrine approach	Analyze how emotion is, could be, or should be reflected in a particular area of legal doctrine or type of legal determination
Theory-of-law approach	Analyze the theories of emotion embedded or reflected within a particular theoretical approach to the law
Legal actor approach	Examine how a particular legal actor's performance of the assigned legal function is, could be, or should be influenced by emotion

been studied, primarily within the contemporary debate over the proposed revival of “shaming sanctions” (Massaro, 1991, 1997; Murphy, 1999). Nussbaum, deliberately linking disgust and shame, recently undertook to explain those emotions’ relevance not only to shaming sanctions, but also to areas of law as diverse as prohibitions on same-sex intimacy, the definition of obscenity, and protections for the disabled.<sup>23</sup>

Fear, too, has attracted a good deal of attention. Certainly the law of self-defense incorporates assumptions about fear, both as a psychological and physical experience and, as a social and cultural matter, its appropriate triggers and external manifestations. Research and theory on “battered women’s syndrome” defenses brought those issues to the fore, as advocates made a case for legal recognition of a specific experience of fear and the forms of behavior it may cause.<sup>24</sup> Sunstein has explored the impact of fear, both individual and collective, on legal regulation of public health and safety risks.<sup>25</sup> Recent symposia have explored more broadly the relationship between fear and law, including post-Columbine restrictions on student speech and government responses to terrorism following the events of September 11, 2001 (Symposium, 2002, 2004b).

By delving deeply into a particular emotion, we stand to learn much; but it is here that definitional issues are of greatest salience. Is a stable definition of what constitutes an emotion necessary to the development of a robust emotion-centered literature, or might slavishness to a particular taxonomy close off interesting avenues for exploration? For example, it is quite debatable whether a “passion for justice”—the organizing principle of one section of *The*

<sup>23</sup> See Nussbaum (2004). Miller described disgust as the “flip side” of shame, embarrassment, humiliation, and vengefulness, each of which he examined in Miller (1993). He categorized this latter group of emotions as constitutive of “our experience of being lower or lowered,” and disgust as part of the experience of reacting to the lowly. Miller (1997), p. x. See also Garvey (2003) (discussing guilt and shame).

<sup>24</sup> See, e.g., Becker (2001), Posner (2001), p. 1996, n. 37 (citing Maguigan (1991)), Roberts (2003).

<sup>25</sup> See Sunstein (2002b) (book review of Slovic (2000)) and Sunstein (2005). For a rebuttal see Moran (2002). Much of the fear-related law and emotion work is grounded in the methodologies of law and economics. See, e.g., Adler (2004).

*Passions of Law*—is a distinct emotion in a psychological or neuroscientific sense, but it may, from the perspective of moral philosophy or legal theory, constitute a unique and law-relevant phenomenon worthy of discussion. We also may ask whether the definition of emotion for this purpose will include closely related concepts such as affect and mood (Blumenthal, 2005; Semmler & Brewer, 2002). These questions matter, both because scholars vary in their use of emotion-related terminology and because the questions asked (and answers generated) may vary according to which concepts are operative. Slovic made this point when, writing in a symposium on fear, he asked: “What’s fear got to do with it? It’s affect we need to worry about” (Slovic, 2004). I do not here propose to answer the taxonomy-within-the-taxonomy issue; it may not be amenable to being answered, and insights may emerge from the dialogue it engenders, but it is an area deserving of continued attention.

*Emotional phenomenon.* It is also possible to make a particular *emotion-driven phenomenon* the focus. Though the *emotional phenomenon approach* may at first appear difficult to distinguish from the emotion-centered approach, the former takes as its primary focus a mental process or behavior in which emotion plays a vital role but which is not itself an emotion.

One example of an emotional phenomenon is affective forecasting, or the prediction of future emotional states (Blumenthal, 2004; Guthrie, 2004). Predicting that one will feel happy if she wins a certain level of damages in a civil case against an employer is different from actually being happy (though one may evoke present feelings of happiness through imagining future happiness). Based on such forecasting a litigant may make important legal decisions, such as rejecting a settlement offer that she regards as too low to ensure the desired, projected level of happiness (Guthrie, 1999). As Blumenthal argues, much law is based on the assumption that people are able accurately to predict their future emotions (Blumenthal, 2004).<sup>26</sup> Recent empirical research, however, suggests that such predictions often fail to match our actual reactions when confronted with the previously-imagined set of circumstances (Blumenthal, 2004). On a practical level, taking that phenomenon into account is likely a more useful project than would be thinking generally about litigants’ quest for happiness through damages, if for no other reason than that it is more specific. Awareness of the existence of an emotion-driven phenomenon as separate from the emotions that are its subject thus represents an important analytic step.<sup>27</sup>

A number of other emotional phenomena—notably empathy, the exercise of mercy, and apology—have also been discussed in the legal literature, with varying levels of precision.<sup>28</sup> Henderson, for example, has taken care to define empathy not as an emotion in its own right, but rather as a mechanism through which the emotion of another is perceived and processed, but many elide that point (D’Arms, 2000; Henderson, 1987). Bibas and Bierschbach, in their treatment of the role of apology in criminal proceedings (Bibas & Bierschbach, 2004), similarly take care to define apology as an expression of sorrow, regret, and remorse, an expression which can in turn generate other emotional phenomena, such as manifestations of “forgiveness” and

<sup>26</sup> This assumption is particularly operative in economic theories of law. See, e.g., Posner (2001), p. 1982 (“agents anticipate their emotion states and take actions in anticipation of them”).

<sup>27</sup> Other examples of law-relevant emotion-driven psychological phenomena are “probability neglect,” or the idea that “when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood” (Sunstein, 2002a), and “emotional contagion,” the phenomenon by which people “catch” the affective states of those around them, see Emens (2006) (proposing that the presence of mentally ill persons in the workplace imposes “hedonic costs” because of emotional contagion).

<sup>28</sup> See, e.g., Dressler (1990), (book review of Murphy and Hampton, 1988); Henderson, 1987; Markel, 2004; Murphy and Hampton, 1988; Nussbaum, 1993.

“healing” on the part of crime victims.<sup>29</sup> But they too sometimes elide the distinction between apology and its underlying and resulting emotions, and offer little guidance as to what is meant by the emotional “catharsis” and “healing” apology is claimed to generate.<sup>30</sup> Recent empirical research on the phenomenon of remorse as expressed through apology addresses certain of these issues (Bornstein, Rung, & Miller, 2002; Guthrie, 1999).

As the above examples demonstrate, the emotional phenomenon approach can be complex, as it requires drawing distinctions between emotions and the mechanisms of their operationalization and expression in the world, an exercise that then asks the author to carefully parse both aspects of the analysis; and many fall short of that ideal.

Further, because so many psychological phenomena implicate emotion, this is a category that could expand so far as to erase the conceptual advantage of thinking specifically about emotion *qua* emotion. While this issue warrants more consideration than is possible here, I propose that only scholarship about phenomena as to which emotion plays a primary or driving force belongs in this category. To illustrate: affective forecasting necessarily revolves around emotion; selective attention does not, though the emotional competence<sup>31</sup> of competing stimuli may play a role in how a person’s attention is directed. Exploration of the legal impact of the former always will belong to the law-and-emotion literature; literature on the latter will only if directed specifically to the emotional-competence question rather than the phenomenon in general. This is a determination largely of degree, and will admit of some difficult cases.

*Theory of emotion.* A different approach is to focus on a particular *theory* (or theories) of emotion, and then to posit that the law currently reflects that theory; analyze how accepting that particular theory would affect the law; or argue that the theory should be adopted. I call this the *emotion-theory approach*.

In the context of this taxonomy, it is helpful to think of a “theory” as incorporating both methodological or disciplinary categories as well as more finely-grained claims as to how emotion may be approached or understood. One might identify both her chosen disciplinary approach—for example, cognitive neuroscience, philosophy, or psychoanalysis—and also a particular theory of the emotions within that universe—the somatic marker theory, the virtue ethics tradition, or Freudian models—and explain why that particular theory (and the methodology used to test it) is a valid lens through which to examine the chosen issue regarding emotion’s role in law.

Law-and-emotion literature that derives its energy primarily from a theory of the emotions is scant. Its most prominent specimen within legal scholarship remains *Two Conceptions of Emotion in Criminal Law*, in which the authors proposed that criminal law simultaneously embraces two competing theories of emotion, which they coined “mechanistic” and “evaluative” (Kahan & Nussbaum, 1996). This article may be (and has been) criticized for overly simplifying the relevant psychological theories of emotion: the “mechanistic view” Kahan and Nussbaum describe has few supporters within the modern science of the mind, and their cognition-driven “evaluative view” fails to recognize that most emotion theories within the sciences accept some role for cognition, but still find ample points of departure from one another.<sup>32</sup> It is undeniable, however,

<sup>29</sup> For an example of another such effort, see Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, in Bandes (1999b), pp. 168–190.

<sup>30</sup> See Bibas and Bierschbach (2004), p. 116 (quoting Strang and Sherman (2003)).

<sup>31</sup> Emotional competence is used here in the sense meant by Damasio (2003).

<sup>32</sup> Most psychologists accept that human emotion has some cognitive content. See, e.g., Ortony, Clore, & Collins (1988). That (limited) consensus does not end debate over the precise interrelation between emotion and cognition.

that their attempt to explicate the theoretical underpinnings of an area of law by explicit reference to emotion theory was in important respects groundbreaking.

The issue in this domain is somewhat different for empiricists. The nature of applied science virtually guarantees that empiricists will state their methodology, and their chosen discipline generally is evident, so the operative theories are likely to be transparent. However, with the likely exception of studies now emerging in cognitive neuroscience, seldom does a particular theory of emotion overtly drive the inquiry, as opposed to being assumed as the proper mechanism for getting to the “real” question. One illustrative exception is Lieberman’s examination of the attractiveness cue—the robust (if not entirely consistent)<sup>33</sup> finding that physically attractive defendants receive more lenient legal judgments—in light of “cognitive experiential self-theory (CEST).” The purpose of the study was not to revisit prior attractiveness-cue research but, rather, to test CEST’s theory that humans process information either experientially or rationally, the former mode defined as an “emotionally based system,” associated with “affect” and entailing disproportionate use of heuristics (Lieberman, 2002).

The diversity of theories regarding the origin, content, nature, functioning, and purpose of emotion need not be debilitating to the utility of this approach. Close analysis of any one of these can (and sometimes does) teach us important things about the law. It should, in fact, be quite difficult to conduct any study of emotion and the law without clarifying one’s choice as to the operative theory or theories of emotion and grappling in some manner with competing theories. In practice, though, many fail to do so.<sup>34</sup> Moreover, those—particularly legal scholars—who do actively seek to unmask their underlying emotion theories often punt on the hard question of which theory (or theories) should be accepted as valid (D’Arms, 2000; Posner, 2001). Perhaps even more common is the tendency to pick out morsels of insight from a variety of theories without cleanly distinguishing among any of them. To be sure, various theories of emotion often can (and perhaps should be) brought to bear; for example, evolutionary and social constructionist theories both may be relevant and even complimentary in the context of any given project. But even if this is so, invocation of multiple theories should be deliberate and thoughtful—what Miller has called a commitment to methodological promiscuity (Miller, 1997)—rather than reflecting casual choices from “a theoretical smorgasbord, from which each scholar can choose the definitions or concepts most amenable to her particular legal argument.”<sup>35</sup>

*Legal doctrine.* Though the above-described approaches to law and emotion take as their starting point ideas related primarily to the emotion side of the “and” (Little, 2001), it is equally possible to make law the driving factor. Some scholars choose as their focus one particular type of *legal doctrine* or *legal determination*, and analyze how that area of law incorporates, or could or ought to incorporate, emotion. I call this the *legal doctrine approach*.

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See Paul Ekman and Klaus Scherer, *Questions About Emotion: An Introduction*, in Scherer and Ekman (1984), p. 3; Richard S. Lazarus, *The Cognition-Emotion Debate: A Bit of History*, in Dalglish and Power (1999); compare, e.g., Lazarus (1984) and Zajonc (1984).

<sup>33</sup> See, e.g., Abwender and Hough (2001) (the effect obtains for female mock jurors but reverses for males); Stewart (1980) (attractiveness related to sentencing but not to conviction/acquittal); Sigall and Ostrove (1975) (effect reverses when crime related to attractiveness); Friend and Vinson (1974) (effect reverses when mock jurors commit to be impartial and disregard defendant characteristics). See generally Mazzella and Feingold (1994) (finding an overall attractiveness effect, but finding moderators as well).

<sup>34</sup> For example, one author applied Freudian psychoanalytic theory to lawyer-client relationships, but did not undertake to explain the choice of psychoanalysis or to explore and reject alternative models. See Silver (1999b). In contrast, Anne C. Dailey explicitly discusses treatment of the emotions within cognitive psychology and psychoanalysis, and argues that the latter better accounts for law-relevant emotional behavior (Dailey, 2000).

<sup>35</sup> Introduction in Bandes (1999b), p. 8.

Much of this literature takes as its subject criminal law and procedure. Perhaps the most obviously emotion-related area of criminal law is the murder-manslaughter distinction, in which attention is directed specifically to whether a crime was committed in the “heat of passion” or while “under the influence of extreme mental or emotional disturbance” (Kahan & Nussbaum, 1996). The main insight of legal scholars here has been to argue that manslaughter determinations embody deeply culture-and-era-specific notions of “appropriate” emotions and acceptable modes of their expression (Dressler, 1982; Nourse, 1997). Lending support to the idea that jurors enforce cultural notions of appropriate (and possible) emotional control is research suggesting that their murder/manslaughter distinctions are unaffected by judges’ instructions to assess the defendants’ emotions from an “objective” or “subjective” perspective, but instead are affected by the degree to which a defendant is perceived to have “dwelled upon” his emotions (and, potentially, the nature of the triggering emotion), suggesting that we expect others to “control” their emotions in a particular way and that such underlying theories of emotional appropriateness drive the legal determination (Finkel, 1996; Spackman, Belcher, Calapp, & Taylor, 2002; Spackman, Belcher, & Hansen, 2002).

Other areas of the criminal law also have drawn interest, particularly with regard to punishment (Karstedt, 2002; Pratt, 2000). The emotive content and consequences of victim impact statements, one of the earliest topics taken up by the field and one of a select few to have been discussed extensively in case law, continues to attract research.<sup>36</sup> Capital sentencing, too, and its direct engagement with sympathy, fear, anger, and a desire for retribution, remains a frequent focus (Bandes, 2004; Eisenberg, Garvey, & Wells, 1998; Garvey, 2000; Pillsbury, 1989). Other punishment-related questions—such as constitutional limits on “three strikes” laws imposed by a proposed doctrine of “emotive due process” (Pillsbury, 2002)—and certain areas of criminal procedure—such as the relevance of emotional harms to determinations of what constitutes a Fourth Amendment search (Taslitz, 2002)—also have gotten air time.

The emphasis on criminal law has been mirrored in the empirical work, though legal scholars and empiricists alike increasingly have begun to explore the emotive content of noncriminal areas of law, taking on topics as varied as tort schemes (Feldman, 2000), the regulatory state (Sunstein, 2005), workplace humiliation (Fisk, 2001), freedom of speech (Hudson, 2002; Wright, 2003), and compliance with international environmental law (Huang, 2002). Evidentiary rules have also garnered attention. For example, Edwards and Bryan’s finding of a “rebound effect” for instructions to disregard emotionally charged evidence—which paradoxically may increase the influence of such evidence—calls into question the use of such instructions (Edwards & Bryan, 1997). Consider as well the “excited utterance” exception to the hearsay rule, which presumes that statements made by one experiencing extreme emotional arousal are likely to be truthful because in such situations “raw” emotion trumps the cognitive function necessary for deception.<sup>37</sup> While to date little attention has been paid to this area of doctrine, there are at least preliminary indications that its various underlying assumptions may not be accurate (Orenstein, 1997).

The range of possible applications of the legal doctrine approach is as wide as the range of legal doctrine. It therefore promises to be an exciting area to watch.

<sup>36</sup> A recent key cite of Bandes (1996), showed 104 references, most generated since 2000. See 2004 WL 1588549. See also Bandes (1999a), Blume (2003), Myers et al. (2002).

<sup>37</sup> See *Federal Rules of Evidence* 803(2); see also Feigenson (1997).

*Theory of law.* If the legal doctrine approach is the “law-side” corollary of the emotion-centered approach, the *theory-of-law approach* complements the emotion-theory approach. This approach entails taking as the baseline a particular *theoretical approach to law* and analyzing the theories of emotion embedded or reflected therein.

The most provocative work within this category has been in law and economics. When emotion is factored into rational choice models, it—like the many types of cognitive bias at the core of behavioral law and economics research—can be seen as a systemic source of bounded rationality and distortion for which legal systems should account and correct.<sup>38</sup> Some instead have posited that emotion contains its own rationality, which law must understand and anticipate (Posner, 2001). The distinction between these two premises would appear to be no more than the positive or negative attitude they reflect about emotion; and regardless of spin, it is evident that those from the law and economics school increasingly are seeking to incorporate emotion research into this vital area of legal theory (Adler, 2004; Farnsworth, 2002; Posner, 2002; Sunstein, 2005). Huang, in particular, consistently has sought to expand rational actor and game-theoretical paradigms, claiming that when fundamental insights about emotion from other disciplines are incorporated into law-relevant economic models, “a diverse range of previously inexplicable factors are capable of being explained” (Huang, 2000), an insight he asserts can illuminate areas of law ranging from property-law bargaining, to decisions to litigate, to securities regulation (Huang, 2003, 2004).

The fact that this dialogue is taking place within law and economics potentially bodes well for an examination of emotion within other theoretical approaches to law. Indeed, it is surprising that more scholars from other corners of jurisprudential theory have *not* yet joined the project. Perhaps emotion is less relevant to certain areas of legal theory; perhaps those areas are methodologically less suited to exploring the intersection; or perhaps other scholars have not been convinced of the rigor and usefulness of the law and emotion perspective (Posner, 2001). Some exceptions merit mention. Certainly many early contributions were made by feminist legal scholars, reflecting the strong historical association between emotion and “the feminine,” and the attendant devaluation of both; but to date such works have focused primarily on empathy, compassion, and (to a lesser degree) intimate violence, and their volume counterintuitively has decreased as the field overall has grown (Abrams, 2005; Bandes, 2001; Henderson, 1988; Ward, 1994). There is a certain synergy developing among those who analyze law as a site of cultural and social meaning,<sup>39</sup> and some have addressed the emotional elements of “therapeutic jurisprudence” and “restorative justice” (Barton, 1999; Scheff, 1998). One would expect the theory-of-law approach to expand its offerings in coming years.

*Legal actor.* The *legal-actor approach* focuses on the humans that populate legal systems and explores how emotion influences and informs, or should influence or inform, those persons’ performance of the assigned legal function.

Not surprisingly, this is the area of highest concentration of empirical work. However, that work has not been evenly distributed across the universe of legal actors—including defendants, victims, plaintiffs, prosecutors, attorneys, judges, jurors, legislators, executive officials, regulators, and police—but has focused primarily on jurors.<sup>40</sup> This lopsided focus is unsurprising, as

<sup>38</sup> See Kaufman (1999). Cf. Moran (2004) (“Because the information processing approach” proposed by Sunstein “equates fear with distorted risk assessment, this emotion becomes nothing but lapsed thinking.”).

<sup>39</sup> See Moran (2001b), Woodward (2002), Austin Sarat, *Remorse, Responsibility, and Criminal Punishment* in Bandes (1999b), p. 168; Cheshire Calhoun, *Making Up Emotional People*, in Bandes (1999b), p. 217.

<sup>40</sup> For a survey of empirical research on how mood and emotion influence law-relevant decision-making, see Feigenson (2000, 2003).

juror decision making is particularly well-suited to experimental manipulation. And to be sure, the jury work, which has tested hypotheses relevant to both criminal and civil trials, is immensely important, in part because the role of the jury remains central to North American notions of fairness and justice, particularly in criminal cases (though query whether that perceived importance bears adequate relation to a contemporary legal system in which the overwhelming majority of cases, both civil and criminal, are now resolved via settlement and guilty pleas). Scholars have examined the impact on jurors (or, far more commonly, on mock jurors) of victim impact statements,<sup>41</sup> gruesome photographs,<sup>42</sup> video recreations of emotionally arousing events underlying tort liability (Fishfader, Howells, Katz, & Teresi, 1996), predeliberation inducement of anger (Lerner, et al., 1998), instructions to disregard “emotionally charged information,”<sup>43</sup> perceptions of murder defendants’ emotional intensity (Spackman, Belcher, Calapp, & Taylor, 2002; Spackman, Belcher, & Hansen, 2002), witness expressions of emotionality (Kaufmann, Drevland, Wessel, Overskeid, & Magnussen, 2003; Salekin, Ogloff, McFarland, & Rogers, 1995), and the emotional impact of serving as a juror.<sup>44</sup> The boundaries between emotion and related phenomena, particularly mood, are salient here as well. For example, one study found that mock jurors in whom a sad mood had been evoked, when contrasted with those in a neutral mood state, displayed more “careful, detailed, and analytical processing” of eyewitnesses’ testimonial inconsistencies.<sup>45</sup>

Jurors are not the only legal actors to have drawn the spotlight, which has shone as well on judges. Traditional legal theory either presumes that judges have no operative emotions about the litigants and issues before them or mandates that any such emotions be actively suppressed, reflecting an untested, commonsense wisdom that emotion distorts the objective legal reasoning demanded by the judicial role. Overt sentimental expression in judging—such as Justice Blackmun’s famous cry of “Poor Joshua!” in *DeShaney*—has attracted public debate and even derision.<sup>46</sup> In response to these dynamics legal scholars have posed broad questions about the role of emotion in judging, and have looked to judicial determinations—particularly verbal cues embedded in written opinions—for clues as to judges’ feelings about parties and

<sup>41</sup> See, e.g., Myers et al. (2002) (finding that the “affective demeanor of the witness” had no effect on jurors’ sentencing judgments).

<sup>42</sup> See, e.g., Douglas, Lyon, & Ogloff (1997) (various self-reported scales of emotional distress predicted the extent to which mock jurors believed the accused was guilty); see also Nemeth (2002).

<sup>43</sup> See Edwards and Bryan (1997). But see Feigenson (1997), p. 68–69 (describing research suggesting that sympathy, in particular, can be “regulated” and “controlled,” though perhaps other emotions may be harder to set aside).

<sup>44</sup> See Dabbs (1992), Feldmann and Bell (1991). Both articles take special note of the “unusual” sensitivity of the observed trial judge to the emotional needs of jurors; one suggested that the emotional challenges presented to jurors were compounded by their feelings of guilt for experiencing emotions, “because of their conception that they are expected to remain unemotional” (Dabbs, 1992, p. 205).

<sup>45</sup> See Semmler and Brewer (2002). It is worth noting that some studies of emotion use measures of mood, such as the Profile of Mood States (POMS). See Nemeth (2002), pp. 58, 82 (acknowledging that different measures of emotion “may yield different relationships between emotions and mock jurors’ verdicts. . . the validity, in this context, of various emotion/mood scales may vary”); see also Fishfader, Howells, Katz, & Teresi (1996) (using POMS to measure emotional reactions); compare Douglas et al. (1997) (using self-reported “scales of emotional distress”).

<sup>46</sup> *DeShaney v. Winnebago Soc. Svcs. Dep’t* (1989) (Blackmun, J., dissenting) (“I would adopt a ‘sympathetic’ reading, one that comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.”); see also Rosen (1994), at 13 (Zipursky, 1990).



issues or their theories of “appropriate” emotionality (Bandes, 2003; Cloud, 1990; Little, 2002; Nussbaum, 1996; Ray, 2002; Resnik, 1990).<sup>47</sup>

Lawyers, too, have been studied as emotional creatures, as the debate between Ogletree and Smith reveals (Ammar & Downey, 2003; Bandes, 2000; Morse, 2004b; Silver, Portnoy, & Peters, 2004; Volpp, 2002). Others have examined female defense attorneys’ experience and management of emotional stress, as well as “emotion-focused cognitive defenses” among a sample of female law firm associates (Siemsen, 2000; Haas, 1988). A small literature is also developing on fashioning legal education—particularly clinical programs—better to capture, reflect, and “train” the emotions of law students (Fletcher & Weinstein, 2002; Juergens, 2005; Silver, 1999a). And just as the emotions of jurors, judges, law students, and lawyers matter, so too do those of litigating parties. Huang and Wu have proposed that litigants’ anger and pride can increase the number of cases brought to trial and make the threat of trial more credible (Huang & Wu, 1992). Emotion-related work related to other legal actors, though limited, includes studies of domestic violence victims’ participation in divorce mediation (Suozzo, 2000), property crime victims’ police-reporting decisions (Greenberg & Beach, 2004), effects of emotional arousal on eyewitnesses,<sup>48</sup> and the emotional effects of death sentences on both condemned inmates and their families (Cunningham & Vigen, 2002; Smykla, 1987).

#### *The taxonomy as an analytic and evaluative tool*

As the above discussion suggests, the law-and-emotion literature contains few examples of “pure” applications of the six approaches delineated in the taxonomy. Rather, they commonly are combined. This makes sense, for to do otherwise generally would lead to unworkably large topics. Consider the immense difficulty of examining “love,” in all its permutations, and asking how “the law” (including, say, family law, trusts and estates, criminal law, and tort) can, does, or should take love into account.<sup>49</sup> Instead, the usual method will be to weave together various approaches, the result being more specific inquiries informed by a complex multidimensionality. And, generally speaking, the more deliberate and thoughtful such multidimensional engagement, the more rigorous and valuable the resulting work.

It is here that the proposed taxonomy acquires its analytic traction. If the six approaches are regarded not simply as descriptive of the types of analyses from which specific studies draw their centers of gravity, but also as focal points through which studies can and possibly should rotate, they gain evaluative power. Careful consideration of the analytical approaches potentially implicated in any given project will help identify blind spots or force unstated assumptions to the surface, and may further encourage scholars to justify *why* they make the choices they do.<sup>50</sup> Thus, academic inquiry into the intersection of law and emotion should identify which emotion(s) it takes as its focus; carefully distinguish between those emotions and

<sup>47</sup> Morse describes such work as “causal analysis,” in that it seeks to explain how emotions cause a judge’s behavior, and posits that while it “has no necessary normative implications . . . it is interesting in its own right” (Morse, 2004b, p. 603).

<sup>48</sup> There is, of course, an extensive literature on the effects of various stimuli on eyewitness memory; some of that research is emotion-relevant. See, e.g., Deffenbacher, Bornstein, Penrod, and McGorty (2004).

<sup>49</sup> To be sure, some have undertaken such enormously ambitious endeavors. See, e.g., Nussbaum (1990, 2001, 2004).

<sup>50</sup> See Morse (2004b), pp. 602, 603 (“exposing assumptions,” both about any given scholar’s approach to law and emotion and about the “otherwise hidden assumptions” about emotion lurking in particular areas of law, will move the scholarship forward considerably). Consider, for example, a study proposing to examine how fear affects the creation and administration of sex-offender registries. Looking to the full range of possible theoretical

any implicated emotion-driven mental processes or behaviors; explore relevant and competing theories of those emotions' origin, purpose, or functioning; limit itself to a particular type of legal doctrine or legal determination; expose any underlying theories of law on which the analysis rests; and make clear which legal actors are implicated. While the respective weight given to each approach will vary according to the nature of the project, each choice, and those choices' unique combination, ideally should be considered, explained, and, to the extent possible, justified.

### Directions for future research

Having described how the current scholarship on law and emotion developed and gained some traction, and having analyzed theoretical approaches to such scholarship, described the extant literature within those categories, and reflected on the taxonomy's utility in guiding future developments in law and emotion, it is appropriate now to turn to a discussion of future directions for such research.<sup>51</sup>

Looking first to the *emotion-centered* approach, it is evident that the bulk of extant work focuses on “negative” emotions such as shame, disgust, fear, and anger, while “positive emotions,” discussed primarily within the context of empathy, have received relatively short shrift.<sup>52</sup> Scholars may want to explore the legal relevance of a wider range of emotions—including positive ones such as loyalty, gratitude, generosity, elevation, and awe—in greater depth.<sup>53</sup> Family law—particularly the law of child custody—necessarily implicates notions as to how best to encourage “good” and “appropriate” manifestations of familial love, affection, and attachment. To date, however, little of the self-identified law and emotion literature has entered the arena of family law, nor has the family-law literature sought specifically to extract useful insights from the emotion-and-law field.<sup>54</sup>

Similar avenues for exploration emerge from comparing each of the proposed approaches with the extant literature. Our understanding of emotion and law could benefit from looking more searchingly at a broader range of *emotional phenomena* (for example, affection and emotional

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approaches, blind spots in this formulation reveal themselves. The only clear choices of approach here are of an emotion—fear—and a legal doctrine—the law of conditions of release for and supervision of sex offenders. The author might then be asked to justify why she has not explicitly chosen or advocated any particular *theory* (or theories) of *emotion*, an exercise that might expose a weakness in her treatment of fear. Perhaps she has unwittingly drawn on fear scholarship from a number of different schools and has combined them without considering how inter- and intradisciplinary differences might affect her claims. Or perhaps she has actually adopted a theory of fear, but has not articulated it; that failure will have an impact on others' ability to engage with and respond to her project, as would a failure to make clear any theory of law—for example, that of therapeutic jurisprudence—on whose premises her argument hinges. Further, the author might ask whether she has adequately considered the relevant *legal actors*: whose fear is she considering—that of offenders, defendants, victims (or potential victims), judges, legal-system consumers, or legislators?

<sup>51</sup> Other commentators also have offered agendas for law and emotion studies. See Feigenson (2001), pp. 456–460 (advocating research of emotion's role in civil cases and lawyer–client relations); Little (2001), pp. 993–1000 (research possibilities abound in civil remedies, therapeutic justice, emotions of legislators and executive officials, trusts and estates, property and contract law, and “the interplay among emotion, society, and culture”).

<sup>52</sup> See, e.g., Abrams (2002), pp. 1613–1615.

<sup>53</sup> See Haidt (2003) and Keltner and Haidt (2003); see also Petersen (1998). But see Posner (2001), p. 1986 (asserting that “higher” or “more complex” emotions such as love and jealousy play a smaller role in the law than do “simple emotions” such as fear, anger, and disgust).

<sup>54</sup> See Little (2001), pp. 993–994. But see Sanger (2001), p. 112 (briefly sketching emotional implications of legal schemes regulating open adoption); Cheshire Calhoun, *Making Up Emotional People*, in Bandes (1999b).

attachment between children and foster parents)<sup>55</sup> and *theories of emotion*. Jones has made this latter point in the context of behavioral biology, suggesting that our understanding of contemporary law, as well as our ability “to design social and legal systems that more effectively regulate behaviors in ways that further our shared social values and goals,” would be greatly enhanced by taking into account the evolutionary history of human emotion and emotion-driven behaviors.<sup>56</sup> Such work remains largely undone.

Most *legal doctrine* scholarship to date has focused on the criminal law, with relatively little attention to civil and administrative law.<sup>57</sup> This imbalance has begun to correct itself, but the sheer volume of noncriminal legal doctrine counsels an even greater increase. It may be particularly fruitful to analyze the law of emotional-distress torts—and valuation of damages for emotional harms—in light of contemporary scientific and sociological advances in the understanding of emotion.<sup>58</sup> As to *theory of law*, as previously noted, more new work would be expected from feminist legal theorists; and surprisingly little is being generated by critical race theorists, even though cultural notions of the “appropriateness” of emotional expression, social constructs as to division of emotional labor, and other law-relevant emotion issues strongly implicate race.<sup>59</sup> Finally, both empiricists and theorists may find it fruitful to examine the emotional motivations and behaviors of a wider variety of *legal actors* and to apply to those actors some of the methodologies developed to study jurors. The cast of characters involved in legal decision making is large; attention to each of these *dramatis personae*—particularly lawmakers, executive branch officials, civil litigants, prosecutors, legal activists, and the police—would enrich the literature.<sup>60</sup>

Perhaps the most promising direction for future research would be, simply, an increase in collaboration. Much of the law and emotion literature is confined, both in perspective and in reach, to the academic niche within which its author is housed. One result is a division between those who embrace and explore philosophical and psychological theories of emotion, despite the fact that these two disciplines “have converged in recent years in agreement that our emotional responses influence our judgments” (D’Arms, 2000). We see as well a persistent divide between empiricists and theorists. The lack of dialogue across these dividing lines lessens opportunities

<sup>55</sup> Such work would not, of course, begin on a clean slate far from it. See, e.g., Goldstein, Freud, and Solnit (1973, 1979). Emotional attachment is a factor in legal doctrine regarding child custody and adoption, though its legal import remains highly charged and hotly contested. See, e.g., *Smith v. Organization of Foster Families for Equality and Reform* (1977) (“(f)oster care of children is a sensitive and emotion-laden subject”; the existence of “deep emotional ties” between foster parents and children may not create a constitutionally protected interest in the children’s continued placement and could even justify removal); *Lofton v. Secretary of Dept. of Children and Family Svcs.* (2004) (upholding ban on adoption of needy children by gay and lesbian foster parents despite “deeply loving emotional bonds”). Additional studies on these issues would be timely and useful.

<sup>56</sup> See Jones (1999); see also Morse (2004b), p. 601 (noting lack of attention to evolutionary theory within law and emotion studies).

<sup>57</sup> This disproportionate focus mirrors that in empirical psycholegal research generally. See Ogloff (2002), p. 465, 474.

<sup>58</sup> For a partial overview of the law’s treatment of these topics, see Partlett (1997) (book review of Mullany and Handford (1993)) (characterizing American jurisprudence on emotional distress as “chaotic” and “schizophrenic”). See also Poser, Bornstein, and McGorty (2003) (“hedonic damages,” of which emotional damages are a subset, “have received scant empirical attention”).

<sup>59</sup> But see Chambers (2004) (marking on differences between what is feared by black men and by those who are not black men); Taslitz (2000); cf. Davis (1989) and Moran (2001a).

<sup>60</sup> See Polletta (2001), p. 482 (“No scholar . . . has made emotions the centerpiece of his or her study of legal mobilization.”). To the extent that the literature discusses “governmental emotions,” Abrams (2002a), p. 1616, it tends to treat the “government” as a unitary entity whose emotional expression—for example, of disgust toward criminal defendants—reflects that of a unitary “community,” and does not generally explore the emotion-driven motivations of individual governmental actors. But see Rapaport (2000) and Welch (1997).

for cross-fertilization. We therefore would do well to foster dynamic collaborations among social scientists, those trained in the life sciences, philosophers, lawyers, and legal scholars.<sup>61</sup> The exercise of forging such collaborations would encourage creation of a common language, and resulting scholarship would be both more complex and more accessible to those across the range of implicated disciplines.

## Conclusion

Law and emotion studies are an exciting and relatively new site of cross-disciplinary research and insight. This emerging field is not, however, without its problems and pitfalls. “Emotion theory” is not itself a recognized discipline. Rather, emotion is a topic taken up by scholars within a variety of established disciplines; but even within those disciplines, approaches vary enormously, and the state of research and theoretical agreement is far from stable. When this somewhat wobbly compendium of thought on human emotion is paired up with “law,” a term encompassing a breathtakingly large domain of social regulation, the enterprise seems perilously unsteady.

This is not an idle concern. Certainly, the tremendous variety within emotion theory may be more destabilizing than is, for example, the range of economic theories potentially underlying law, for economics is a separate discipline in which law-and-economics work is grounded.<sup>62</sup> But the inevitability of emotion’s influence on law, and scholars’ evident interest in exploring that relationship rather than continuing to push it underground, counsels moving forward with the project notwithstanding such fluidity. There is an infrastructure lurking within the field of law and emotion. Awareness of and attention to that infrastructure will maximize possibilities for rigorous, sophisticated work without sacrificing the dynamism inherent in the interdisciplinary exercise.

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<sup>61</sup> Examples of such collaboration include Feigenson et al. (2001).

<sup>62</sup> See Morse (2004a) (scholarship on law and the emotions “is much newer than law and economics research and has not yet had much time to exert its influence, but I predict that it will have considerably less impact in the long run”); but see Morse (2004b), p. 602 (urging a careful comparison of the “usefulness and potential reception of emotion theory to law and economics,” and suggesting that the “theory and database” of the former may develop as did the latter).

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