

2009

## Foreword

Susan Bandes  
*DePaul College of Law*

Follow this and additional works at: <https://via.library.depaul.edu/lawfacpubs>

 Part of the [Law Commons](#)

---

### Recommended Citation

Susan A. Bandes, Foreword, 33 Vt. L. Rev. 387 (2009).

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in College of Law Faculty by an authorized administrator of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).



Content downloaded/printed from

[HeinOnline](#)

Wed Sep 18 10:43:00 2019

Citations:

Bluebook 20th ed.

Susan A. Bandes, Foreword, 33 Vt. L. Rev. 387 (2009).

APA 6th ed.

Bandes, S. A. (2009). Foreword. Vermont Law Review, 33(3), 387-394.

ALWD

Bandes, S. A. (2009). Foreword. Vt. L. Rev., 33(3), 387-394.

Chicago 7th ed.

Susan A. Bandes, "Foreword," Vermont Law Review 33, no. 3 (Spring 2009): 387-394

McGill Guide 9th ed.

Susan A Bandes, "Foreword" (2009) 33:3 Vermont L Rev 387.

MLA 8th ed.

Bandes, Susan A. "Foreword." Vermont Law Review, vol. 33, no. 3, Spring 2009, p. 387-394. HeinOnline.

OSCOLA 4th ed.

Susan A Bandes, 'Foreword' (2009) 33 Vt L Rev 387

Provided by:

Rinn Law Library

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

Use QR Code reader to send PDF to your smartphone or tablet device



## FOREWORD

Susan A. Bandes<sup>\*†</sup>

The conference that led to this symposium, “Emotion in Context: Exploring the Interaction between Emotions and Legal Institutions,” took place at the University of Chicago Law School in May 2008, exactly a decade after the first—and seminal—University of Chicago Law School conference on law and emotion.<sup>1</sup> Significant progress has been made during those ten years. The study of law and emotion has become an accepted focus of legal scholarship.<sup>2</sup> The inquiry has shifted from *whether* emotion plays a role in legal reasoning to *how* emotion and legal reason interact, and to *which* emotions ought to play a role in particular legal contexts. As legal scholar Terry Maroney summarizes the developments in the field:

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

---

\* Distinguished Research Professor, DePaul University College of Law; Visiting Professor, University of Chicago Law School, 2007–2008.

† Many thanks are due to those who made this symposium possible, as well as those who contributed to the success of the conference from which the papers in this symposium volume arose. Oliver Goodenough played an important role in both endeavors. He graciously helped facilitate the publication of the symposium papers in the *Vermont Law Review*, and acted as faculty advisor to the symposium. The members of the Senior Editorial Board of the *Vermont Law Review* and particularly Micaela Tucker, the Senior Articles Editor, deserve special thanks for their professionalism and assiduous work on this volume.

Oliver Goodenough, along with Monika Gruter Cheney and Jeanne Giaccia of the Gruter Institute for Law and Behavioral Research, first suggested to me that we should organize this conference in order to continue the interdisciplinary conversation fostered by our February 2007 conference, “Law and the Emotions: New Directions in Scholarship,” at the University of California, Berkeley. Thus they provided much of the impetus and initial encouragement, as well as generous intellectual, practical, and financial support for the 2008 “Emotions and Institutions” conference. Saul Levmore, dean of the University of Chicago Law School, Richard Epstein, as a colleague and as director of the John M. Olin Program in Law and Economics, and Glen Weissenberger, dean of DePaul University College of Law, were likewise generous in contributing intellectual, practical, and financial support for the conference. Thanks are also due to the contributors to this volume, Scott A. Anderson, Mary Anne Case, Kevin M. Clermont, Christoph Engel, Richard A. Epstein, Oliver R. Goodenough, and Cass R. Sunstein. And finally, I am grateful to Martha C. Nussbaum for her support and guidance in the organization of the conference, for her contributions to the conference, and for her insight and wisdom into the relationship between law and emotion.

1. I organized the May 1998 conference on law and emotion in conjunction with Martha Nussbaum, Ernst Freund Distinguished Service Professor of Law and Ethics, University of Chicago Law School. The conference led to the book *THE PASSIONS OF LAW* (Susan Bandes ed., 1999).

2. For an excellent discussion of the breadth of scholarship on the topic, see generally Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 *LAW & HUM. BEHAV.* 119 (2006).

enterprise, and began to advocate more careful attention to the complexity of emotion theory within other disciplines.<sup>3</sup>

The next frontier is to explore emotions not as fixed and internal states but as dynamic processes that shape and are shaped by social and institutional context. Twenty-five years ago, in *The Managed Heart*, Arlie Hochschild's groundbreaking work on the sociology of emotion, Hochschild identified the tendency to treat emotions as private and internal as one of the major barriers to serious inquiry into the nature of emotions.<sup>4</sup> This tendency remains strong. Psychologist Dacher Keltner, Director of the Berkeley Social Interaction Laboratory, estimates that at least 90% of all studies of emotion involve individual subjects.<sup>5</sup> The failure to study emotions as they take shape in (and help shape) the social world impoverishes our ability to construct and maintain fair and effective legal institutions.

It is becoming increasingly clear that understanding these dynamics is an interdisciplinary project.<sup>6</sup> Recently, a number of disciplines have begun focusing on emotion in social context. The sociology of emotion is now a burgeoning field.<sup>7</sup> Psychologists are increasingly interested in emotion and social cognition, emotional dynamics in group settings,<sup>8</sup> and the interaction between emotion and culture.<sup>9</sup> Political scientists are beginning to think about the role of emotion in democratic deliberation.<sup>10</sup> The emerging field of affective neuroscience is examining the neural dynamics of emotional interchange. One of its founders, Richard Davidson, observes: "You can't

---

3. Maroney, *supra* note 2, at 122 (citation omitted) (citing Susan A. Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 364-65 (1996)).

4. ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 201-03 (1st ed.1983).

5. Email from Dacher Keltner, Professor, Univ. of Cal., Berkeley, to author (May 2, 2007) (on file with author).

6. *See, e.g.*, Arvid Kappas, *The Science of Emotion as a Multidisciplinary Research Paradigm*, 60 BEHAV. PROCESSES 85, 87-88 (2002) (explaining that multiple disciplines contribute to the research programs that study emotion).

7. JONATHAN H. TURNER & JAN E. STETS, *THE SOCIOLOGY OF EMOTIONS* 1 (2005).

8. *See, e.g.*, Eliot R. Smith, Charles R. Seger & Diane M. Mackie, *Can Emotions be Truly Group Level? Evidence Regarding Four Conceptual Criteria*, 93 J. PERSONALITY & SOC. PSYCHOL. 431 (2007).

9. *See, e.g.*, PAULA M. NIEDENTHAL ET AL., *PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES* (2006).

10. *See, e.g.*, SHARON KRAUSE, *CIVIL PASSIONS: MORAL SENTIMENT AND DEMOCRATIC DELIBERATION* (2008); GEORGE LAKOFF, *THE POLITICAL MIND: WHY YOU CAN'T UNDERSTAND 21ST-CENTURY AMERICAN POLITICS WITH AN 18TH-CENTURY BRAIN* (2008); GEORGE E. MARCUS, *THE SENTIMENTAL CITIZEN: EMOTION IN DEMOCRATIC POLITICS* (2002); DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* (2007).

separate the cause of an emotion from the world of relationships—our social interactions are what drive our emotions.”<sup>11</sup>

We know that emotions are not formed, experienced, or expressed in a vacuum. There are likely some basic emotions that exist across cultures,<sup>12</sup> but even as to those, social context shapes not only how they are communicated to others, but also how they are formed, experienced, and interpreted by the individual.<sup>13</sup> And once intergroup behavior is added to the mix, questions arise both about how the expression and interpretation of emotion change in a group context, and about how an emotional climate may arise in a group—through mechanisms like emotional contagion and synchronization.<sup>14</sup>

In short, in a range of disciplines, scholars are just beginning to delve into the complex dynamics of group emotion and individual emotion in group contexts. Given the fact that the legal system seeks to channel human behavior, knowledge about these dynamics is essential to the success of the legal endeavor. We design and maintain legal institutions based on implicit and explicit assumptions about human behavior. For example, institutions are constructed in light of assumptions about how people individually or collectively respond to new information, how they assess risks, how they decide whom to trust or fear, what will encourage them to cooperate for common goals, what motivates them to punish, when they will forgive, and when they will seek vengeance. The interdisciplinary study of emotion has offered valuable insights into whether these assumptions about human behavior are well grounded. The next step is to explore how generalizable

11. DANIEL GOLEMAN, *SOCIAL INTELLIGENCE: THE NEW SCIENCE OF HUMAN RELATIONSHIPS* 83 (2006) (quoting Richard Davidson, Director, Lab. for Affective Neuroscience, Univ. of Wis.); see also Richard J. Davidson & Steven K. Sutton, *Affective Neuroscience: The Emergence of a Discipline*, 5 *CURRENT OPINION IN NEUROBIOLOGY* 217 (1995).

12. The extent to which emotions are biologically rooted is also an important and burgeoning area of study. See, e.g., ANTONIO DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* 51 (1999). Damasio refers to a group of primary or universal emotions: happiness, sadness, fear, anger, surprise, and disgust, and to a larger group of secondary or social emotions, and argues that although culture and learning can alter the expression and meaning of emotions, all share a biological core. See also Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 *WASH. L. REV.* 1121, 1140–41 (2002) (discussing biologically rooted taste for apology and forgiveness); Peggy A. Thoits, *The Sociology of Emotions*, 15 *ANN. REV. SOC.* 317, 320 (1989) (noting the ongoing debate about socially constructed versus basic or biologically rooted emotions); Andrew Ortony & Terence J. Turner, *What's Basic About Basic Emotions?*, 97 *PSYCHOL. REV.* 315, 315 (1990) (raising the possibility that the concept of basic emotions is an article of faith).

13. See, e.g., TURNER & STETS, *supra* note 7, at 1 (analyzing how emotions are conceptualized sociologically).

14. See, e.g., Sigal G. Barsade, *The Ripple Effect: Emotional Contagion and its Influence on Group Behavior*, 47 *ADMIN. SCI. Q.* 644 (2002). The preceding two paragraphs draw heavily from Susan Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 *L. & CONTEMP. PROBS.* (forthcoming 2009).

these insights are. In other words, do emotional dynamics that operate in any particular context remain stable across institutional contexts? It seems likely that context affects emotions greatly. To take a few examples, rules seeking to promote forgiveness might be workable and desirable in victim-offender mediation involving juvenile offenders, but not in capital litigation, domestic-violence court, or national truth and reconciliation commissions. Individual risk preferences may vary depending on institutional settings, and these preferences may affect the design of health plans, environmental protections, or contract-enforcement mechanisms. The dynamics of emotional contagion in jury deliberations may differ from those in negotiation settings or stratified workplaces. The more closely scholars study emotions in particular contexts, the more helpful and nuanced their findings are likely to be.

This symposium considers the interaction between emotion and institutions in a range of contexts and through a range of disciplinary lenses. The emotions and emotional capacities discussed include guilt, indignation, anger, moral outrage, happiness, “liking,” and the capacity for empathy. Several of the articles in this volume look not just at particular emotions, but at emotional phenomena or mechanisms that influence decision-making<sup>15</sup>—for example, somatic markers (or the related concepts of salience and accessibility), affective forecasting, implicit bias, attitude polarization, moral dumbfounding, and moral numbing.<sup>16</sup> The articles consider how these emotions, capacities, and mechanisms intersect with, among others, sexual harassment in the workplace, capital punishment trials, punitive damages in tort suits, jury instructions explaining burdens of proof, legislative regulation of risk, legislative policy bearing on wealth and property, societal responsibility for the elderly, and intellectual property law. They draw on psychology, philosophy, economics, cognitive neuroscience, and sociology to shed light on the interactions they discuss.

Oliver Goodenough poses several of the overarching questions that emotion scholars will need to address as the study of institutional structure and function progresses. As he usefully points out, institutions are not solely the product of conscious design: “[E]volutionary processes can also lead to the emergence of institutions and to their instantiation in a variety of forms and locations.”<sup>17</sup> Institutional norms and mechanisms may be

---

15. See Maroney, *supra* note 2, at 126 tbl.1 (presenting several analytical approaches to law and emotion).

16. For discussion of the question of how “emotion” ought to be defined, see Bandes, *supra* note 14; JEROME KAGAN, *WHAT IS EMOTION? HISTORY, MEASURES, AND MEANINGS* (2007).

17. Oliver R. Goodenough, *Institutions, Emotions, and Law: A Goldilocks Problem for Mechanism Design*, 33 VT. L. REV. 395 (2009).

imbedded in internalized psychological expectations and assumptions. Thus he suggests that current work on how our emotions link with our internal psychological commitments can be usefully mined for insights about how legal institutions can effectively channel social inclinations toward cooperation and conflict. Law may reflect internalized norms, but may also be needed at precisely the point at which such norms, or moral intuitions, leave off. Law may intervene to supplement or supplant our intuitions when our reactions are “affectively cold” (for example, our intuitions toward the protection of intellectual property), or to slow them down when they are “overly hot” (for example, our initial angry or vengeful reactions in the wake of a shocking crime or an outrageous financial arrangement like the current AIG bonus imbroglio).

Cass Sunstein evaluates institutional arrangements in light of current neuroscientific knowledge about dual-system processing. In his view, a primary role of legal institutions is to ensure that quick, automatic, intuitive judgments (System 1) are subject to override, when necessary, by slower, more reflective judgments (System 2). In his paper for this symposium, he considers moral indignation as a species of intuitive, System 1 processing, in contexts including homicide trials, administrative and legislative risk regulation, and punitive damages assessments. As he explains, the lessons to be drawn from the dual-processing model are complex. The two systems are not necessarily antithetical. More accurately, they act in concert. Moral indignation, for example, is a valuable signal of norm violation and can be a valuable prod to action. Moral indignation can work to inform our evolving legal judgments. For instance, he suggests that revulsion about sexual harassment helped move the law toward a more expansive conception of discrimination. Eventually these understandings might “migrate” to,<sup>18</sup> or inform, our more deliberative System 2 thinking about legal rights and remedies. Nevertheless, moral indignation often needs to be tempered or subjected to the demands of coherence. It can lead to a narrow frame based on individual vivid accounts. The legal system’s responsibility is to “produce institutional safeguards to ensure against the risk that legal and political outcomes will respond to unjustifiably intense indignation, or that democratic societies will remain passive simply because the relevant harms are not of the sort that stir System 1.”<sup>19</sup>

My article considers the claim that anger, outrage, and the other strong emotions provoked by repellent crimes interfere with rational deliberation. There is no doubt that heinous murders and other shocking crimes place an

---

18. Cass R. Sunstein, *Some Effects of Moral Indignation*, 33 VT. L. REV. 405 (2009).

19. *Id.* at 433.

enormous strain on the criminal justice system and may exert a destructive influence on institutional process. I argue, however, that before considering how anger interferes with rational deliberation, it is necessary to explore more fully the concept of rational deliberation. I argue for an understanding of rational deliberation that recognizes its pervasive emotional content. The legal system tends to marginalize certain approaches and responses as “emotional,” and therefore off-limits, based on misconceptions about the nature of emotion. In large part, these misconceptions reflect the failure to view emotions as dynamic processes that take shape in the social world. The law, instead, tends to view emotions as private and internal, and as unaffected by institutional, social, cultural, or temporal context.

I illustrate the consequences of these misconceptions in one particular context: the capital punishment arena. There, as elsewhere, the legal system tends to take three approaches to emotion: requiring it to be “set aside” (e.g., the antisympathy instruction), permitting it to be “introduced” (e.g., the victim impact statement), and ignoring it (e.g., the refusal to clarify the meaning of life without parole despite evidence that juries misunderstand the term).

Scott Anderson draws on moral philosophy to examine the role of guilt (an emotion that has, rather surprisingly, received very little attention in the law-and-emotion literature) in expanding the ambit of our ethical and moral responsibility. In doing so, he asks an essential question, and one that bedevils many emotion theorists: Assuming emotions are partially cognitive, do the emotions convey any valuable information beyond that contained in their cognitive components? He concludes that the emotion of guilt may help create a sense of ethical connectedness between individuals and their moral communities. He further posits that this expanded sense of community may supply the impetus to create institutions that can act on behalf of collective needs, such as the needs of the elderly, the disabled, or other marginalized groups that might otherwise be left to fend for themselves. Conversely, institutions may relieve individuals of guilt for some conditions that are better addressed on an institutional level.

Mary Anne Case also considers the relationship between internalized norms and external institutional structure. In the context of sexual harassment in the workplace, she argues that law is necessary but not sufficient. Like Anderson, Case explores the ability of internally held emotional commitments to influence institutional commitments. She argues for an internalized incest taboo prohibiting sex between employees in a reporting relationship. She observes that in many workplace harassment situations, although the law assumes a binary relationship between victim and perpetrator, in fact “it is hard to see who the unaffected third parties

are.”<sup>20</sup> The incest taboo would reflect and instantiate a broader notion of harm than the one that currently animates sexual harassment law. Case warns that dating and sexual intimacy represent only one aspect of the larger problem of favoritism and coercion in the workplace, and raises the fascinating question of whether “liking,” affection, bonding, and friendship should be subject to regulation as well.

Christoph Engel and Kevin Clermont contribute an intriguing debate about the emotional dynamics surrounding jury instructions on burdens of proof. Engel argues that Continental European instructions, which demand that the trier of fact subjectively believe a party’s claim in order to find in favor of that party, have the effect of making the decision-maker’s responsibility salient. He compares this approach to that used in the United States, which tends to ask for an objective weighing of factors or assessment of probabilities. In Engel’s view, the U.S. system reflects not only a different epistemological approach to the possibility of ascertaining truth, but also a fear of the intuitive, automatic system of decision-making. For Engel, the Continental approach induces the decision-maker to invest more cognitive time and effort and to remain open to a greater complexity of thought. It makes salient the risks of a faulty or questionable verdict. Cognitive science teaches that human judgment is prone to “coherence shifts”: once we settle on a convincing narrative, we begin to undervalue evidence that conflicts with this story. Articulated standards of proof are an important reminder that these coherence shifts occur and that we must vigilantly guard against them. Engel also argues that the Continental approach is a more accurate reflection of the way in which decision-makers actually arrive at their verdicts.

Kevin Clermont raises a number of concerns about Engel’s claims. Most centrally, he views the question of level of confidence in a verdict as distinct from the question of burden of proof—a decision-maker may be highly confident, as a subjective matter, that a verdict meets a low standard of proof (e.g., preponderance of the evidence) as an objective matter. For Clermont, the question of the decision-maker’s subjective feelings is not one that law should address. The crucial role of standards of proof is “to force the fact-finder, in the final decisional step, to link its inside mental state to the outside real world.”<sup>21</sup>

Richard Epstein asks, “What does an accurate account of human nature tell us about the choice of a desirable set of social institutions?”<sup>22</sup> The

---

20. Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, 33 VT. L. REV. 551, 554 (2009).

21. Kevin M. Clermont, *Standards of Proof Revisited*, 33 VT. L. REV. 469, 483 (2009).

22. Richard A. Epstein, *Happiness and Revealed Preferences in Evolutionary Perspective*, 33

particular question of human nature on which he focuses here is the burgeoning literature on happiness, and the challenges it poses to the account on which neoclassical economics is premised. His stated goal is not to defend the classical model, but “to offer a sympathetic but critical evaluation of this worldview in terms of evolutionary theory, which, when properly understood, bolsters the case for the classical liberal synthesis of legal norms and institutions.”<sup>23</sup> In doing so, he critiques the tendency of the happiness literature to reduce all “emotional states to a single notion of happiness or utility.”<sup>24</sup> He raises concerns about the reliance on survey methods as a means of measuring happiness, arguing for the importance of approaching the data with caution and supplementing it with common-sense observation of human behavior. He concludes that a more nuanced account of happiness, and, more broadly, of what it is that motivates people, will reveal that the happiness literature provides no reason to reassess current understandings of the role of social institutions in guiding social interactions.

Legal institutions have always been constructed according to assumptions about emotional dynamics. The problem is that these assumptions are too rarely subjected to scrutiny in light of the growing body of interdisciplinary knowledge about how we in fact make decisions about our own behavior and the behavior of others. The articles in this symposium demonstrate how much can be accomplished when scholars from a range of disciplines explore and debate the interaction between emotions and institutions. They also make clear how many of the questions are still being formulated, and how much work remains to be done.

---

VT. L. REV. 559, 559 (2009).

23. *Id.* at 560.

24. *Id.* at 570.