ARTICLE

Law and the Emotions

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INTRODUCTION

The role of the emotions is much neglected in legal theory. This should be puzzling, because emotions play an important role in many areas of the law. Consider the following examples:

- A person who kills while angry is usually guilty of a less serious crime than a person who kills in a calm, unemotional state, but not if the anger is caused by hatred rather than shame.
- Judges exclude photographs of gruesome crime scenes, even when the photographs have probative value, if the photographs are likely to provoke extreme outrage or disgust. The use of victim impact statements in capital sentencing has been criticized for inflaming the jury against the defendant and defended as a way of enhancing the jury's empathy for the victim.
- A common justification for workplace, environmental, and consumer product regulation is that individuals lack information about the risks that they face. Unexplored is the role that fear plays in decisions to fly on airplanes or use air bags, and how agencies should regulate in response to panics about health risks.
- Mediators have long known that anger and other emotions interfere with bargaining, but these emotions are overlooked in contract theory. Emotional response to breach of contract has important implications for the design of remedies in contract law.
- Market behavior and responses to cost-benefit surveys often reflect emotional reactions that people disclaim when they are calm. Should this information likewise be discounted by agencies engaging in cost-benefit analysis, or should it be treated as valid data on actual preferences?

These examples raise questions about the relationship between emotion and law, but legal theory is unprepared to answer them. One reason for the neglect of emotions in legal theory may be that the dominant strains of normative legal theory—economic analysis, moral-philosophical analysis, and constitutional

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analysis—rely on methodologies that are not well suited to analyzing emotion. Another reason may be the primitive state of the psychology literature on the topic. Psychologists admit that they do not have a good theory of the emotions, in part because research in this area is relatively new. Yet a review of that literature reveals a number of insights that are sufficiently well developed to be of value for legal theory. And, indeed, in the past few years the emotions have begun to interest a small but growing group of legal theorists.[1]

This Article contributes to this small literature by providing a framework for analyzing the relationship between law and the emotions. The theory draws on the economic model of consumer choice, but it does not reduce emotional behavior to rational self-interest. Instead, it relaxes the consumer choice model in order to account for emotional behavior.[2] The framework assumes that people's "calm" preferences—that is, the preferences that they have when they are not emotionally aroused—differ from their "emotion state" preferences, which are skewed toward the stimulus that provokes the emotion. Further, people's abilities and beliefs about the world often differ in calm states and emotion states. Because people can anticipate their emotional responses to various conditions, they will often take steps either to avoid or to pursue these conditions, and to cultivate certain beneficial emotional dispositions. By changing payoffs from behavior taken in emotion states, the law can influence both incentives in the emotion state and incentives to cultivate desirable emotional dispositions.

Although the framework does simplify, it is not simplistic, and it sheds light on the debates discussed above. Its predictions are straightforward; the main contribution is clarifying the relationship between emotions and rational action by placing them in the rational choice framework that is now the standard approach to analyzing private law and some aspects of public law.[3] After discussing the psychology literature (Part I) and laying out the framework (Part II), I analyze emotions as excuses in criminal and tort law (Part III), the manipulation of the emotions of juries (Part IV), regulation of emotion-laden

1. *See, e.g.*, THE PASSIONS OF LAW (Susan Bandes ed., 1999); *Symposium on Law, Psychology, and the Emotions*, 74 CHI.-KENT L. REV. 1423, 1426-29 (2000). Some of these essays and other legal work on the emotions are cited *infra*.

2. This approach differs from existing treatments of emotions in several ways. First, all economists tend to treat emotions as purely irrational states rather than states in which preferences and other attributes temporarily change. Second, Frank and Hirshleifer focus on the evolutionary significance of emotion, namely, how it may enable people to keep commitments or make credible threats. Becker's work is complex and in some ways my account overlaps with it, *see infra* notes 17, 28, but his main focus has been on how envy and altruism affect family behavior, and how people might try to inculcate others with certain emotional dispositions. His discussions of guilt are casual, and he has little to say on emotion as a general category. Third, none of the authors discuss the legal issues that I analyze. *See generally* GARY S. BECKER, ACCOUNTING FOR TASTES (1996); ROBERT FRANK, PASSIONS WITHIN REASON (1988); Jack Hirshleifer, *The Emotions as Guarantors of Threats and Promises*, *in* THE LATEST ON THE BEST 307 (John Dupré ed., 1987); Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71 (1980).

3. For methodological concerns with this approach, see Toni M. Massaro, *Show (Some) Emotions*, *in* THE PASSIONS OF LAW, *supra* note 1, at 92-93.

risks (Part V), bargaining in contract law when parties are emotional (Part VI), and emotions in normative legal theory (Part VII).

I should comment at the outset about the relationship between the current inquiry and the field of law and cognitive psychology or "behavioral law and economics." This field has, so far, focused on cognition rather than emotion. It focuses on errors in judgment, such as the underestimation of small probabilities, the reliance on anchoring devices when making evaluations, and the tendency to value items in hand more than items possessed by others. There is, of course, some overlap with emotion. Some cognitive errors are said to be the result of dread, and some psychologists have recently argued that cognitive biases are best analyzed as the result of emotional dispositions or feelings.[4] But to avoid redundancy with the many legal articles that use cognitive psychology, I confine myself to understandings of the emotions that do not substantially overlap with the cognitive psychology literature.[5]

I. THE EMOTIONS

Although psychology lacks a widely accepted theory of emotion and many fundamental issues about the nature of emotion remain unresolved,[6] much progress has been made in the last thirty years, and agreement on some important issues has been achieved. An emotion is a psychological phenomenon with the following distinctive characteristics:[7] Emotions are usually stimulated by the world, either via the mediation of cognition or through a more primitive stimulus-response-like neurological mechanism. They have a certain feel or affect characterized, usually, by a focus on a particular stimulus with the result that the rest of the environment "fades" (a little or a lot, depending on the strength of the emotion) though does not disappear altogether. An angry person feels a kind of warmth and agitation, which is directed usually at another person, the result of a slight or offense. A person who is disgusted feels a kind of nausea, which is directed at the object that provokes the disgust. The rest of the world remains, but at a remove: An angry person might restrain himself because he does not want to be arrested for assault; a disgusted person might overcome the urge to withdraw because he wants to help a person with a

4. George F. Loewenstein et al., Risk as Feelings (1999) (unpublished manuscript, on file with author).

5. For some interesting arguments about the relationship between economics, law, emotions, and psychology, see generally Anne C. Dailey, *The Hidden Economy of the Unconscious*, 74 CHI.-KENT L. REV. 1599 (2000) (discussing law and emotions from a psychoanalytic perspective); Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537 (2000) (criticizing psychologically impoverished approaches to law and social norms).

6. *See* JON ELSTER, ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS 243 (1999); PAUL EKMAN & RICHARD J. DAVIDSON, THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 97-177 (1994) (describing twelve unresolved questions about the nature of emotions).

7. *See* ELSTER, *supra* note 6, at 246-83; NICO H. FRIJDA, THE EMOTIONS 473-79 (1986); CARROLL E. IZARD, THE PSYCHOLOGY OF EMOTIONS 27-57 (1991); RICHARD S. LAZARUS, EMOTION AND ADAPTATION 3-86 (1991).

disgusting wound or he knows that the disgusting substance is medicine. Although emotions are usually accompanied by physiological changes, there does not appear to be a one-to-one correspondence between the different emotions and physiological states;[8] emotion has an irreducibly mental component.

One useful approach to understanding the emotions is to think about them against the background of the theory of consumer choice. In doing so, I follow cognitive psychology, which got its start by criticizing expected utility theory. I also follow the literature on the psychology of the emotions, which appears to understand emotion against an implicit theory of rational behavior.[9]

Emotions are troublesome for rational choice theory's assumption that people choose actions in a way that is consistent with their preferences. It is common to think of emotions as "outside" forces that compel one to act inconsistently with the interests of the self. This conception is familiar from everyday excuses for offensive conduct. A person might apologize for insulting someone else by explaining that he was angry, depressed, or irritable. The implication is always that the speaker is not fully responsible for his actions because he was taken over by his emotions. The problem with this view is that emotion is never a fully sufficient excuse; the reason for the emotional reaction always matters.[10] If anger was justified by some earlier wrong committed against the agent, then anger may be an excuse. If it resulted from an innocent mistake, then the anger is no excuse. Whether a person's emotional state excuses his conduct depends upon both whether the person could have avoided the emotion or avoided the stimulus that provoked the emotion and whether the emotion reflects acceptable moral beliefs about others and the world.

A better way to think about emotions is to start by noting that a person's preferences might have different emotional valences. *X* has a preference that *Y* not be present. The preference could be more or less intense, but let us fix the intensity by supposing that *X* is willing to pay $100 to avoid encountering *Y*. Economic analysis usually stops at this point, and takes this number as given. But it may also be relevant that *X*'s preferences have an emotional coloring. *X*'s emotions toward *Y* are qualitatively distinct, and this difference cannot be reduced to a dollar amount. *X* might hate *Y*, be angry at *Y*, or be disgusted with *Y*—while in all cases having the same monetized preference to avoid *Y*.

Do these distinctions matter? In some cases, reducing emotionally colored desires for certain world states to a monetized preference ordering is unobjectionable. If we are simply concerned with deterring certain behavior, and if the emotionality of the desire does not result in an idiosyncratic influence on

8. This is William James's hypothesis. *See* WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY (1890).

9. However, the very idea of the separation of rationality and emotion is criticized in this literature. For a vivid example, see ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 191-96 (1994).

10. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 285-89 (1996) (emphasizing the cognitive content of emotion).

decisionmaking, knowledge of an affected person's costs and gains is sufficient for determining policy. Angry and calm drivers are sufficiently deterred if they must pay the social cost of their behavior. But in some contexts the emotional coloring of a preference does have instrumental and normative consequences.

From an instrumental perspective, the effectiveness of different kinds of sanctions often depends on a person's emotion state. An angry person discounts future sanctions, but may be quite sensitive to claims about the provocation. If you push into a person, you are more likely to avoid being punched in the nose if you tell him that you tripped than if you remind him that he could go to jail for assault. Anger is also vulnerable to delaying tactics and cooling off periods. By contrast, hatred is a more constant emotion and is less likely to be extinguished by a reasonable explanation. Further, we expect irascible people to avoid places where their anger is likely to be provoked, just as we expect epileptics to avoid driving or to take drugs that prevent seizures. Fear, disgust, and the other emotions all have their idiosyncrasies, and a well-designed legal system exploits them differently.

From a normative perspective, the bare fact that a person has acted under the influence of emotion does not excuse his conduct. In fact, while some emotions mitigate guilt, others enhance guilt. Anger provoked by betrayal mitigates guilt, but anger provoked by unacceptable moral beliefs may increase guilt. Hate rarely excuses murder, but real fear, even if not fully justified, might mitigate culpability.

Both of these observations assume that people remain rational while under the influence of emotion; emotion is rarely a mere reflex to some external stimulus.[11] An angry, disgusted, fearful, or sad person usually can deliberate about his behavior and does not (with the possible exception of certain kinds of fear) engage in reflexive action. This suggests that people continue to act rationally while in an emotion state, even though they act differently from the way they do in the calm state. One can capture this point by positing that during the emotion state people experience temporary variations in their preferences, abilities, and beliefs.

Their preferences change so that what psychologists call the "action tendency" of an emotion becomes relatively attractive. The action tendency of anger is to strike out. We can say that a person, while angry, develops a temporary preference to strike the person who offends him. The action tendency of disgust is to withdraw. A person, while disgusted, develops a temporary preference to withdraw from the disgusting object. Grief produces withdrawal from other people and preoccupation with the lost person or thing; fear produces flight from a threat; pity produces aid. But before—and usually after—the emotion state, the person's preferences are constant (the "calm preferences"), so he might disapprove of what he expects to do, or did, in the emotion state. It is

11. This principle is widely recognized. *See, e.g.*, Patricia Greenspan, *Emotional Strategies and Rationality*, 110 ETHICS 469, 471-75 (2000).

this inconsistency over time that makes emotional behavior seem irrational, but it is important to see that a person in an emotion state does not act irrationally given his temporary preferences.

Abilities may also change in the grip of an emotion. When the emotion state occurs, the agent may find himself more alert and vigorous, perhaps stronger, or simply less reliant on slow-moving deliberation. The angry person is aroused; he feels less pain, tires less quickly, responds more rapidly to movement. The anxious or fearful person becomes more alert to the environment and flees quickly from danger. A grief-stricken person may experience a decline in abilities; everything becomes more difficult to do. Evidence of physiological changes—hormonal changes, increase in the heart rate, and so forth—supports the view that abilities change during some emotion states.[12]

Finally, beliefs may change during emotion states. An angry person overestimates the probability that the offender will attack him, or that the provocation was not an accident but the result of intent to harm or humiliate. A fearful person overestimates the probability of harm associated with the threat that causes his fear.[13] Joyful people underestimate risks of harm, while pessimistic people overestimate the same risks.

Thus, my claim is that during the emotion state, a person acts rationally, that is, internally consistently, given the new and usually temporary preferences, abilities, and beliefs that the person has in that emotion state. The actions taken during the emotion state will, of course, affect the agent's endowments, and this may have consequences for the person's behavior after the emotion state is over. Aside from that, I assume that preferences, abilities, and emotions during the calm state are the same before and after the emotion state.[14]

My final point is that agents anticipate their emotion states and take actions in anticipation of them. "Emotional disposition" refers to a person's tendency to feel an emotion. An irascible person is more likely to become angry; a fearful person is more likely to become scared. People usually know their emotional dispositions and can take steps to modify them or to avoid conditions that activate them. Suppose, for example, that a person knows that if he goes to a rowdy bar, he may be insulted, and further he knows that he is irascible. Upon being insulted, he might strike the person who insulted him. To avoid this, he can (1) knowing about his emotional disposition avoid the bar, or (2) earlier on try to overcome his irascibility through meditation or other behavior modification techniques.

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12. *See* RICHARD E. NISBETT & DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH 47 (1996).

13. *See* Arne Öhman, *Fear and Anxiety as Emotional Phenomena: Clinical Phenomenology, Evolutionary Perspectives, and Information-Processing Mechanisms*, *in* HANDBOOK OF EMOTIONS 520 (Michael Lewis & Jeannette M. Haviland eds., 1993) (noting that the fear "system is biased sometimes to evoke defense in actually nonthreatening contexts").

14. To keep the analysis simple, I focus on changes in preferences and generally omit considerations of changes in beliefs and abilities.

One can unify these ideas about the emotions using the metaphor of emotional capacities as information-processing mechanisms.[15] To understand this metaphor, consider the instinctive withdrawal of the hand from a hot surface. One does not deliberate before withdrawing the hand; one just does it. Yet it is possible to resist the impulse and sometimes desirable to do so—for example, in order to withdraw a valuable object from a fire. Evolution explains the instinct as a cognitive shortcut; on average, the individual does better by withdrawing quickly than by deliberating, but in certain cases it is better not to withdraw. There is a kind of psychological compromise. The pain drives the individual to withdraw, but with special effort he can overcome the pain and engage in the desirable action. On average, the individual submits to the pain and withdraws; in special circumstances, he resists the pain.

So with emotions. The best response to a stimulus may be rapid reaction even before enough information is available to make a correct decision. On average, fleeing from a tiger, withdrawing from a smelly substance, striking someone who insults you, and so forth, may be the best thing to do; but in particular cases it may be better to resist the emotional reaction. By supplying the optimal average reaction, the emotional capacities economize on information-processing, but sometimes produce outcomes different from those that would be chosen if there were enough time to deliberate. When a person deliberates in a calm state, he is less likely to deviate from his optimal behavior, but he will spend more time before making the choice. The affect accompanying the emotion—the sense of fear, of nausea—must be overcome as a pain must be overcome, and it will be overcome only when the offsetting considerations are significant.

Emotional capacities in humans evolved in a primitive environment and so are not always attuned to modern needs. But individuals (and their parents) "invest" in these assets in order to bring them closer in line with the requirements of modern living. That means being able to avoid being angered by stimuli when anger will lead to retaliation, jail, or other injuries, or being able to control one's anger after it is stimulated. It means being able to control pity or greed when they are stimulated by conditions for which these emotions are unsuited. The con man exploits these emotions and is particularly successful with businessmen who are alone in strange cities, without friends or associates to reason with them.[16] The doctor, servant, and soldier invest in different kinds of thick skin: the doctor, against disgust; the servant, against envy; and the soldier, against fear. Those who make good investments obtain high returns in their interactions with other people.

The metaphor of emotional capacity as information-processing mechanism helps one see that emotional capacities are a form of human capital, and thus appropriate objects for legal concern. Just as the law affects how one invests in and spends one's human capital, it can affect how one invests in, and uses, one's

15. *See* FRIJDA, *supra* note 7, at 453.

16. *See* DAVID W. MAURER, THE BIG CON: THE STORY OF THE CONFIDENCE MAN 115-18 (1999).

emotional capacities. Consider education, a form of human capital. An educated person acts differently from an uneducated person on average. For example, because the opportunity cost of leisure is higher, the educated person may work more. Similarly, a person who has invested in restraining her sense of disgust is more likely to become a doctor than a person who has not. When the return on an investment is modified by law, people's investment decisions are affected. Just as taxing high incomes may discourage people from obtaining educations, so may punishing people who commit crimes of passion encourage people to cultivate a more peaceful disposition. These and other ways that law affects people's incentives to cultivate, and act on, their emotions, are the subject of the remainder of this Article.

II. A FRAMEWORK FOR ANALYZING LAW AND THE EMOTIONS

A. ASSUMPTIONS

The model of consumer choice assumes that individuals are able to rank the various states of the world that will result from their choices. A utility function maps the states of the world to a number, so that we say that an individual's utility rises as he obtains increasingly preferred states of the world. Individuals have certain abilities, which enable them to engage in a particular action at higher or lower cost. They also have budgets that limit the amount of resources that they can spend in satisfying their preferences.

Economists usually assume that preferences remain stable over the period of time relevant to analysis. If individuals switch from labor to leisure after an increase of the tax on their income, the usual explanation is that the opportunity cost of leisure declines, not that the tax increase happened to coincide with an exogenously caused change in preference; though of course, the latter is possible as a theoretical matter. The reason for this convention is that economics has nothing to say about how preferences change;[17] so any economic, as opposed to psychological, explanation for behavior must look to other factors.

I depart from this model, though I hew as closely as possible. I assume that under certain conditions a "stimulus" will produce an emotion state, during which certain otherwise fixed attributes of the agent change. After some time passes, the emotion state ends, and the attributes return to what they were before the emotion state occurred. The attribute on which I will focus is the preference. During the emotion state, preferences reflect a higher ranking of world states that are relevant to the emotion, or as I will sometimes say, the emotion-relevant good will become more intensely preferred. In addition, abilities may change during the emotion state: The agent may become more or less able to convert inputs, like time and energy, into outputs like labor or attack. And beliefs may change during the emotion state: The emotion may cause the agent to believe that an emotion-relevant probability is higher than the probabilities he attaches

17. *But see* BECKER, *supra* note 2, at 18-19.

to it during the calm state (sometimes, the emotion-relevant probability may be more accurate).[18]

"Stimulus" refers to the set of environmental or interpersonal conditions that, whether via cognitive interpretation or not, set off an emotional reaction. An insult coming from a stranger stimulates anger. The observation of sewage or rotting meat stimulates disgust. Receipt of an award stimulates pride or happiness. Learning about a rival's success stimulates envy. Observation of a child's misery stimulates compassion or pity. In each case, some aspect of the environment provokes the emotional reaction. As should be clear from these examples, emotional reaction to a stimulus is not necessarily a reflex, but often involves an *appraisal* of surrounding conditions and all the cognitive work that this term implies.[19]

My final assumption is that people can cultivate their emotions.[20] People are self-conscious and generally (though not always) knowledgeable about their emotional dispositions, and they can recognize when these emotional dispositions lead them astray as well as take steps to modify them. The idea of cultivating emotions or even emotionless calm is similar to the simpler act of avoiding stimuli of destructive emotions. A person might seek to control her anger or envy through meditation, yoga, religious pursuits, and so forth, or she may also do so by avoidance. She might stop going to bars where people slight her; she might move away from cities or neighborhoods where conspicuous consumption is the norm; she might avoid homeless people. In these cases, the person avoids stimuli of anger, envy, or pity that might get her into trouble or simply be unpleasant to experience. Cultivation of emotional dispositions and simple avoidance are, of course, very different behaviors, but they can be treated as the same for purpose of analysis.

Students of the emotions will notice that the framework is better suited to some emotions (fear, disgust, anger) than others, such as love and jealousy. The "higher emotions" are more complex, have great cognitive content, have less distinctive physiological manifestations, are less uniform across cultures, have fewer obvious correlates in animals, and are—to get to the point—more poorly

18. The notion that preferences, abilities, and beliefs change during the emotion state is meant to capture in a very schematic way the "affect program" theory of the primary emotions (surprise, fear, anger, disgust, sadness, joy). *See, e.g.*, PAUL EKMAN ET AL., EMOTIONS IN THE HUMAN FACE 11-13 (1972). The most important idea associated with this theory is that the primary emotions have a biological basis and evolutionary explanation, and that they act as cognitive shortcuts. As a result, people react in adaptive ways to (often, threatening) stimuli even when this means ignoring certain beliefs. For example, one may be scared in the dark even though one knows that there is nothing to be afraid of. A useful discussion can be found in PAUL E. GRIFFITHS, WHAT EMOTIONS REALLY ARE 77-99 (1997).

19. *See, e.g.*, LAZARUS, *supra* note 7, at 149-52. Appraisal refers to cognitive processes by which the agent ascertains the personal significance of the stimulus, how it can be dealt with, what it means for his goals, and so forth. *Id.*

20. For a similar idea, see Richard H. Thaler & H.M. Shefrin, *An Economic Theory of Self-Control*, *in* QUASI RATIONAL ECONOMICS 77 (Richard H. Thaler ed., 1991). Thaler and Shefrin analyze self-control as a purely cognitive phenomenon and do not discuss emotions.

understood by psychologists.[21] Fortunately, they also seem to play a smaller role in the law, and I will, for the most part, avoid them.

B. ORDER OF ACTIONS

Our simple model of the emotions assumes a stylized order of events, represented by the timeline in Figure 1:

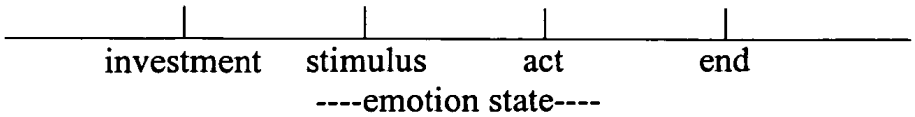

Figure 1: Emotion-State Timeline

The first event is the agent's investment in either cultivating an emotional disposition or avoiding conditions that will stimulate the emotion. The second event is the application of the stimulus that provokes an emotion. Next comes the emotion state. This refers to the actual occurrence of the emotion. It may last for an instant or for a very long time. For example, the agent may be angered when someone pushes him from behind, but the anger disappears almost immediately when he sees that the person who pushed him had tripped on his shoelaces. Envy may fester for months or years; love and grief also may last for a long time. For purposes of analysis it is assumed that the emotion ends at some definite point and the non-emotional or "calm" state returns.

During the emotion state the agent chooses to act, just as he does before the state. The same set of choices presents itself to the agent as before, except the change in environment that stimulates the emotion might introduce new choices. Before the stimulus, the agent has no desire to injure person *P*; after *P* insults him, however, he now has such a desire and may act on it. But he may not. As noted earlier, the emotion state affects the agent by changing his preferences so that the emotion-relevant goods are more heavily weighted, and by increasing or reducing his cost of action. Sanctions and other costs thus continue to influence the agent's choice; what is different is that the costs and benefits of action differ, slightly or greatly, from what they were during the calm state.

After the emotion state ends, the agent returns to the calm state, which means that his preferences and abilities return to what they were in the pre-emotion state. But his actions during the emotion state will have changed his endowments, so he may be better or worse off than he was before the emotion state occurred.

The timeline highly simplifies even the simplest emotions. One problem is that an emotional experience can be relived, not just reimagined, and so an emotion state will "tail off," and sometimes renew itself later in time. I observe

21. *See* GRIFFITHS, *supra* note 18, at 100-06.

a disgusting slime, but I withdraw and soon forget about it. Later the appearance and smell of the syrup I am pouring on my pancakes reminds me of the slime, and I am again disgusted. Similarly, my anger at an insult renews itself every time I am reminded of the insult. This complexity needs to be kept in mind.

C. ANALYSIS

The agent's choice during the emotion state can be represented using the standard graphical rendering of consumer choice, shown in Figure 2. The vertical axis represents the "amount" of the emotion-relevant good (Y). If the agent is angry, the axis represents the degree of injury inflicted on the person at whom the agent is angry. If the agent is disgusted, the axis represents the degree of withdrawal from the object of disgust. If the agent is in love, it represents some measure of benefit to the beloved as experienced by the agent. The horizontal axis represents all the other goods that the agent wants to consume (X).

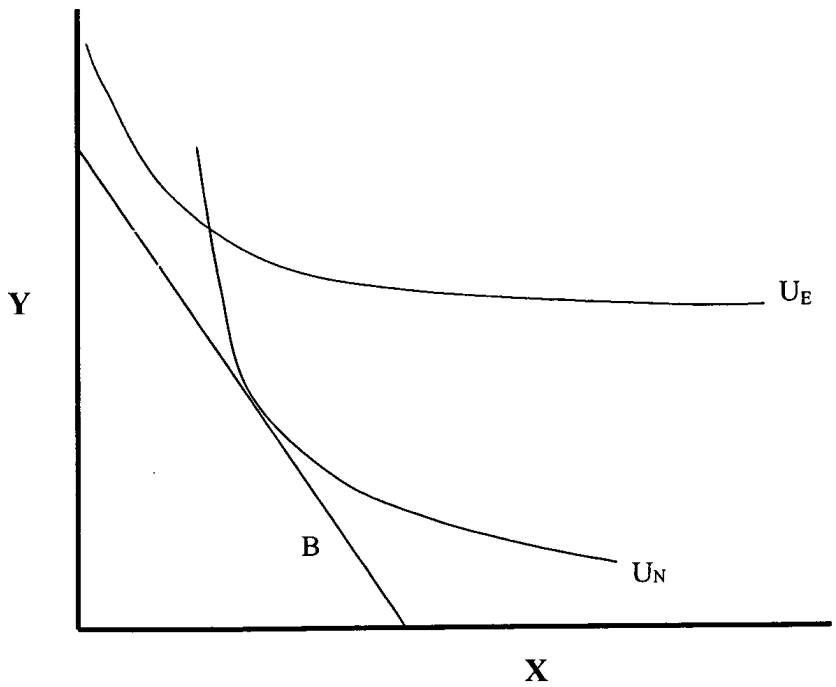

Figure 2: Representing Emotional and Moral Preferences

The graph depicts the agent's "normal" or calm-state indifference curve (U_N) and the corresponding emotion-state indifference curve (U_E). The emotion-state indifference curve is flatter than the calm-state indifference curve, representing the fact that in the emotion state, the agent's preferences for the emotion-relevant good become more intense. The result is that the agent will give up more of the ordinary goods than in the normal state, in return for a constant

increase in consumption of the emotion-relevant goods. The graphical rendering assumes that the budget line (*B*) is the same in the calm and emotion state, though as noted above, it is possible that the budget lines would diverge. The emotion-state budget line might shift out or in—out, if the emotion makes action cheaper (anger); in, if the emotion makes action more costly (grief). One might assume that anger makes all actions cheaper, in which case the budget line shifts out in a uniform manner. Alternatively, one might assume that the emotion makes the emotion-relevant good cheaper, in which case the budget line tilts, as it does when it represents a change in price.

When emotions make action cheaper, consumption of the emotion-relevant good increases, and consumption of the other goods may either increase or decrease. When emotions make action more costly, consumption of the two kinds of goods may rise or fall. Even when emotions do not change the cost of behavior, they do change preferences, so the pattern of consumption will change. As a result, the agent's emotional behavior will usually put him on a lower indifference curve measured by calm-state preferences (the exception being when emotion reduces the cost of action by a sufficient amount). I will call this change the emotion-provoked utility change (EPUC).

A person in the initial calm state knows that his emotional disposition might get him in trouble or benefit him, depending on the environment. A person with an irascible disposition might do well in a shame society: People avoid wronging him because they fear him. But he might do poorly in a well-regulated society: A routine altercation might spiral into a fight, landing the agent in jail. The first person has a positive expected EPUC; the second person has a negative expected EPUC. (EPUC is defined only with reference to the emotion under consideration; the same person might be easily disgusted or not, and this might be beneficial in some contexts but not others.) The second person can be expected to "invest" to minimize his actual EPUC: by cultivating a sense of calm, or by avoiding places, like bars, where he is likely to be provoked.

It is important to emphasize that EPUC is determined by the calm-state preferences, not the emotion-state preferences, even though it is generated by actions taken during the emotion state. This is necessary in order to capture the idea that people in their calm state are different from what they become in an emotion state, and also that, anticipating this, people will "invest" during the calm state.

At the investment stage, the agent knows that he will experience the stimulus with some probability. To keep the analysis simple, let us suppose that during the emotion state, preferences change but abilities and beliefs do not. The difference between the agent's preferences during the calm state and the emotion state depends on the emotion's quality and intensity, which are reflected by the slope of the emotion-state indifference curve. As can be seen in Figure 3, the agent will typically consume a different bundle of goods during the emotion state (*E*) and during the calm state (*N*), because of the change in preferences. This means that after the emotion state has subsided and calm preferences have

returned, the agent will be either worse off (as shown in Figure 3) or better off than he had been in the calm state. We can construct a willingness-to-pay (WTP) measure of the difference by constructing a hypothetical budget line in the usual manner.[22] In Figure 3, the agent would be willing to pay the amount depicted in order to avoid the consumption results of the emotion state.[23]

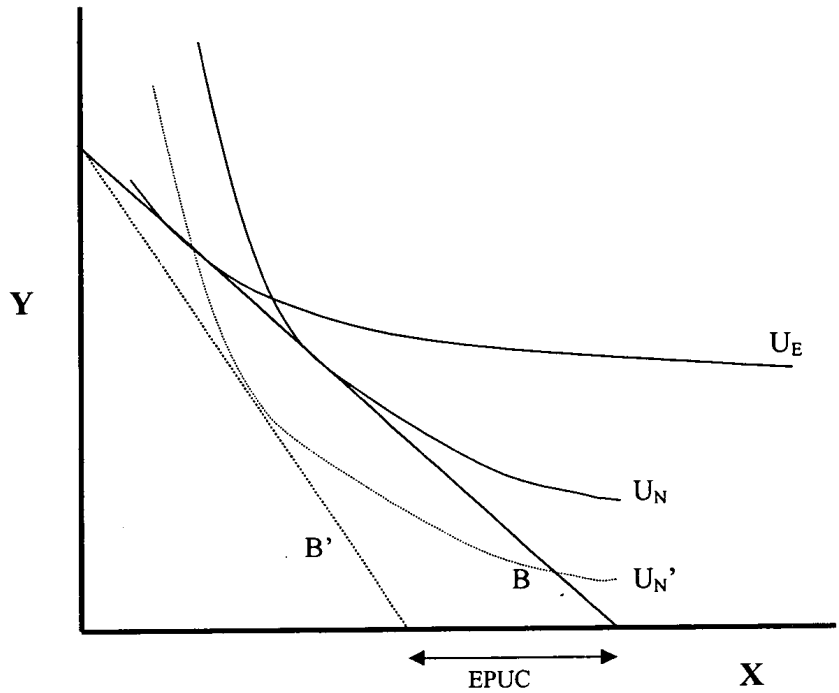

Figure 3: Measuring Emotional Outcomes

Ex ante, the agent knows that the change in consumption caused by the emotional response will occur with some probability, and so initial investment will reflect this expected change. Investment, in the current example, would be to avoid the stimulus or cultivate a less sensitive disposition. Sometimes a dollar of investment will be relatively effective (switching from one bar to another) and sometimes not (developing an ability to turn the other cheek). The effectiveness of the investment in this way will be denoted by the elasticity of the emotional response with respect to the investment. A higher elasticity indicates greater responsiveness. This allows us to make the following prediction: People will invest more in cultivating dispositions or avoiding stimuli as

22. Draw budget line *B'* tangent to the indifference curve U_N', which intersects the bundle of goods consumed in the emotion state, (*E*).

23. In Figure 3, the agent's emotion-state behavior results in the bundle of goods located at the tangency of U_E and *B*. This puts him on the lower calm-state indifference curve, U_N'. To make him indifferent between this bundle and the original calm-state outcome, the agent must be paid the amount denoted by EPUC.

(1) the quality of the emotion state differs from the calm state as its intensity increases (that is, as EPUC increases), and (2) the elasticity of the emotion state increases with respect to the investment.[24]

As an example, consider anger. Anger can occur in predictable and unpredictable ways. If the agent already hates a person, then she knows that if she encounters that person, there is a good chance that she will become angry. By contrast, an agent cannot predict when a stranger will offend her, and she might suppose that her anger will be less likely to occur as a result of a random incident involving a stranger than as a result of an encounter with someone she already knows and hates. Thus, it makes more sense to punish people who are provoked to anger by someone they hate and could avoid than to punish people who are provoked to anger during a random encounter with a stranger. The former are in a better position during their calm state to avoid the encounter, and it is during the calm state that they are more responsive to incentives.

Suppose, instead, that an agent knows about his irascible disposition and has taken a number of steps to change it. He attends anger management classes. He avoids rowdy bars. He avoids drinking. Nonetheless, he is provoked to anger and he injures the offender. It again makes sense to reduce the sanction in order to reward and encourage his behavior during the calm state. By contrast, people who cultivate angry dispositions should be punished.

D. OBJECTIONS

The approach I use loosely drapes the emotions over the rational choice framework, rather than reducing emotions to matters of choice, or eschewing rational choice altogether. The benefit of this approach is that it allows one to incorporate emotions into the rational choice literature, rather than start afresh on uncharted terrain.

Nonetheless, one can criticize the framework both for departing too much and too little from the rational choice approach. The departure may be too much because the assumption that preferences and other attributes change during emotion states seriously weakens predictability. This seems to me unavoidable. However, where the rational choice element remains is in (1) the insistence that people remain rational during the emotion state, so that their behavior will bear some resemblance to calm-state behavior, and remain responsive to incentives; and (2) the insistence that people can anticipate and plan around their emotions, by cultivating emotional dispositions and avoiding stimuli. This leaves some room for predictions, as the discussion of criminal law below will show. But the main advantage of the rational choice framework is not the generation of predictions, but the stripping away of conceptual clutter, which allows a careful analysis of the ways in which emotion changes the conclusions of existing rational choice work. The framework also sheds light on the complex normative

24. A natural extension of this argument is that parents will inculcate the relevant emotional dispositions in their children, at least to the extent that parents have their children's interests at heart.

consequences of the fact that people, when calm, often disvalue their preferences while emotionally agitated and sometimes want their emotional behavior to be restrained.[25]

One can also argue that the framework departs too little from the rational choice approach. It is clearly a simplification. Even during the calm state people are affected by emotions. Just imagining the consequences of future actions may provoke an emotional reaction that, though likely to be less intense than the emotions that would be felt during the actions, is still strong enough to affect deliberation, so that preferences may exhibit a muted instability even during the calm state, with the choice of action dependent on the agent's ever-changing imaginative resources. Further, after the emotion state is over, recollection of the stimulus may provoke the emotion anew, and so every emotion state may effect a permanent change in people's preferences. Finally, I have acknowledged that the framework is more suitable for analyzing simpler emotions, and not complex and durable emotions like love.

I have also ignored many difficult philosophical and psychological questions about emotions. My justification is my focus on legal questions. Lengthy discussion of philosophical and psychological questions would distract from the conclusions about the law, and in any event, these questions are already handled by many others. I should note in passing one philosophical issue that has been the subject of prior legal analysis.[26] This issue is the cognitive content of emotion. Some people argue that emotions are constraints on cognition; certain choices available to someone who is calm become unavailable when he is subject to emotion. For example, it appears to be impossible not to jump back from a striking snake. Others argue that emotions are themselves cognitive evaluations of states of affairs: Grief about someone's death, for example, represents a judgment about that person's value to the agent. The emotional response involves an *appraisal* of the person's significance to the agent's well-being. Most of my conclusions assume that emotions have some cognitive component—that emotional responses involve choices based on emotion-state preferences—but I do not mean to take sides in this debate.[27]

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25. *See infra* Parts V, VI, VII.

26. *See* Kahan & Nussbaum, *supra* note 10, at 275-301.

27. Most psychologists agree that some emotional reactions seem to involve no or minimal cognitive content. For example, because there appears to be a direct pathway from the retina, which absorbs light, to the hypothalamus, which is involved in emotional arousal, it is possible that a change in the light may generate fear without any cognitive processing. *See* R. B. Zajonc, *On the Primacy of Affect*, 39 AM. PSYCHOLOGIST 117, 119 (1984). But most psychologists also believe that many emotional reactions involve cognitive processing of the stimuli. For two early contributions to this debate, compare R. B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151 (1980) (taking the noncognitive view), with Richard S. Lazarus, *Thoughts on the Relations Between Emotion and Cognition*, 37 AM. PSYCHOLOGIST 1019 (1982) (taking the cognitive view). A useful discussion of the debate is in IZARD, *supra* note 7, at 35-40. There is also a rich philosophical literature on this topic. *See, e.g.*, Martha C. Nussbaum, UPHEAVALS OF THOUGHT: A THEORY OF THE EMOTIONS (forthcoming Oct. 2001) (advancing a highly cognitivist view of the emotions); John Deigh, *Cognitivism in the Theory of Emotions*, 104 ETHICS 824 (1994) (surveying the literature).

One charge that cannot be ignored is that the rational choice approach is internally inconsistent. This argument is implicit in Elster's discussion of Becker's model of guilt, in which guilt is assumed to be a cost resulting from the violation of a preference not to feel guilt.[28] Elster argues:

> If guilt were nothing but an anticipated or experienced cost, an agent whose guilt deters him from stealing or retaining [a] book should be willing to buy a guilt-erasing pill if it was sufficiently cheap. *I submit that no person who is capable of being deterred by guilt would buy the pill.* In fact, he would feel guilty about buying it. For him, taking the pill in order to escape guilt and be able to steal the book would be as morally bad as just stealing it.[29]

To see the problem with this argument, imagine that the agent has a moral dilemma. He must betray his lover or his country, and in either event, he will feel tremendous guilt. Once he has made the decision, a desire to behave morally does not require the agent to continue to endure the guilt (which may be overwhelming, paralyzing), and surely he should be permitted to take the pill. Indeed, some people recognize that their overwhelming sense of guilt (which they attribute to factors outside themselves, such as a psychologically destructive upbringing) prevents them from doing good things, and would take the pill without becoming, or believing themselves to be, immoral and without losing the capacity to act morally. That shame and guilt can be paralyzing and destructive, at both the individual and social level, is a recurring theme in psychology.[30] The source of Elster's confusion is his entanglement of moral and emotional motivation. A moral person does not want to behave immorally, but he may want to have greater control over his emotions when otherwise his emotions would lead him morally or prudentially astray.

The difference between emotion and morality is clearer when one moves from guilt to other emotions. Consider a skillful doctor who is paralyzed by disgust during surgery, or a soldier or police officer who knows that his fearful disposition endangers other people. Surely, these people can, without self-contradiction, take pills that reduce or eliminate their ability to experience disgust or fear.

III. EMOTION IN CRIMINAL LAW

It is sometimes said that a person who commits a crime under the influence of emotion is less culpable than a person who acts calmly and deliberately. The

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28. *See* BECKER, *supra* note 2, at 152-55.

29. ELSTER, *supra* note 6, at 303.

30. *See, e.g.*, David W. Harder, *Shame and Guilt Assessment, and Relationships of Shame- and Guilt-Proneness to Psychopathology*, *in* SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE 368 (June Price Tangney & Kurt W. Fischer eds., 1995) (discussing the relationship between shame and guilt, and psychological disorders such as depression, substance abuse, suicide, and delinquency).

standard example is the reduction of murder to voluntary manslaughter if the defendant acted in an uncontrollable rage. But the truth is more complex. Certain emotion states reduce murder to voluntary manslaughter, but others do not. For example, under modern hate crime laws a person who kills a gay man because he "hates" gays or is "disgusted" by gays will be found more culpable than someone who kills the same man to get his wallet. This raises the question of whether the criminal law's different treatments of emotion-influenced crime can be explained on deterrence grounds.

There are two relevant considerations in a deterrence approach to emotional crimes. The first consideration is the extent to which an agent in an emotion state is responsive to sanctions. The second consideration is the extent to which an agent can be deterred from being in the emotional state in situations in which that state may lead to harm.

A. EMOTION-STATE DETERRABILITY

A person in an emotion state may be sensitive to sanctions. Deterrability depends both on the type of emotion and its intensity. In the emotion state, a person experiences a heightened preference, relative to the calm state, to "consume" the emotion-relevant good. However, the person has other preferences as well. An angry person wants to strike the offender, but many angry people restrain themselves because they continue to want their freedom, their job, their assets, and the other good things they might lose if convicted of assault or murder. But even putting this aside it is important to realize that most emotions—anger is the conspicuous exception—do not create a powerful preference to harm another person. Disgust typically involves a preference to withdraw, not to attack, and that is why disgust rarely excuses assault or murder. Fear typically involves a preference to flee or freeze, not to attack, though attacking may be a reaction in some cases, and panic may lead to harm when the agent is responsible for the care of a child or incompetent person. Although a disgusted or fearful person's indifference curve will tilt dramatically, it does not tilt in the direction of injuring another person; indeed, that preference will become weak relative to the desire to escape the stimulus.

In addition, a person's emotion state can be more or less extreme relative to the calm state. A person can be made more or less angry by a provocation. A mere insult will, on average, anger a person less than an unprovoked slap on the face. A slightly angry person will suppress the desire to lash out if the consequences are more than trivial, and may, if at all, indulge his preference by complaining about the offender to a third party.

Both these observations explain why, from a deterrence perspective, being in an emotion state is not a sufficient condition for reduced culpability. It makes sense to reduce the sanction for an act committed during an emotion state if (1) the emotion is anger (or another emotion that causes people to injure others, like fear, possibly) and it is quite intense, so that high expected sanctions cannot deter the behavior, and (2) the sanctions are costly, which they are when they

involve imprisonment.[31] The justification is that expensive sanctions should not be wasted on people who cannot be deterred by them.[32]

B. PRE-EMOTION (CALM) STATE DETERRABILITY

Imagine that a person in an emotion state is undeterrable. The sanction cannot be made high enough to prevent him from acting. It does *not* follow that he must be excused from a crime that follows from the action tendency.

To see why, one must observe that a person in the calm state often foresees the stimuli that will provoke the emotion state and also his actions in the emotion state. The calm-state preferences might very well reflect some things (a long-term desire to stay out of jail) and not other things (an immediate desire to strike an offender) that are the reverse in the emotion state. Thus, acting on his calm-state preferences the person might take precautions against entering the emotion state, including cultivating more peaceful emotions or avoiding the stimulus, though he will not take such precautions if he thinks that his irascibility produces returns valued in the calm state, including a reputation for toughness. For this reason, sanctions may be desirable for influencing investment behavior during the calm state.

Reducing the sanction for emotion-state behavior, relative to calm-state behavior, is justified even though the sanction does not deter emotion-state behavior when (1) the calm-state preferences and emotion-state preferences differ only a little (EPUC is low), (2) the agent cannot avoid the stimulus or reduce the intensity of his emotional reaction at relatively low cost (elasticity is low), and (3) sanctions are expensive (incarceration, not fines). (Note that this puts aside the incapacitation goal of imprisonment, which may justify imprisoning dangerous people who engage in undeterrable conduct.) The first factor essentially refers to the benefit the agent obtains by avoiding the emotion state; the second factor refers to the cost of avoiding the emotion state.

Table 1 summarizes the argument so far:

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31. *Cf.* Richard A. Posner, *Emotion Versus Emotionalism in Law*, *in* THE PASSIONS OF LAW, *supra* note 1, at 312-13 [hereinafter Posner, *Emotion*] (arguing that unemotional murder should receive a higher sanction, compared to emotional murder, to the extent that the emotional murderer is less dangerous and easier to catch, but a lower sanction, to the extent that people in the grip of emotion are less deterrable); *see also* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1223 (1985) (positing that "the fact that a given increment of punishment will deter the impulsive criminal less than the deliberate one could actually point to heavier punishment for the former").

32. I put aside the benefits derived from incapacitation, and also the benefits from discouraging provocation by victims. For a discussion on such benefits, see Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1211-17 (1994).

Table 1

		emotion-state deterrability	
		high	low
pre-emotion-state deterrability	high	greater punishment	
	low		lesser punishment

Table 1 shows that the strongest case for reducing criminal punishment on deterrence grounds occurs when the agent cannot be easily deterred in the emotion state and cannot easily avoid the emotion state either by avoiding the stimulus or changing her temperament.[33] The emotion has to be the right type (anger or fear, typically), and it must be intense. When these conditions are not met, the case for reducing the punishment is weaker.

C. SOME EXAMPLES

Murder is reduced to voluntary manslaughter not just when the wrongdoer acts under the influence of emotion. The emotion usually must be anger, not (say) disgust. Anger causes people to attack others; disgust causes them to withdraw. The anger must be intense, not mild; a provocation that would excuse murder in the heat of passion does not excuse murder committed after the passage of time.[34] Distinctions regarding the adequacy of provocation can be understood in terms of the elasticity of investment. People who kill adulterous spouses can hardly be expected to avoid the stimulus. But people who look for trouble in bars, especially homophobes who look for trouble in gay bars, could easily avoid the provocation that leads to murderous rage. Kahan and Nussbaum want to put women who kill brutal husbands and men who kill adulterous wives or girlfriends in the same category as murderous homophobes,[35] so that they can argue that the law's inconsistent treatment of homophobes and these other

33. Again, I put aside incapacitation.

34. *E.g.*, People v. Ashland, 128 P. 798, 802-03 (Cal. Ct. App. 1912). Roman law permitted a father to kill his adulterous daughter, but only if (1) he surprised her during the sexual activities; (2) he killed her *and* her lover ("by one blow and one attack, with equal anger against both"); and (3) killed immediately—"in other words, in a fit of rage caused by the discovery of the illicit relationship." Eva Cantarella, *Homicides of Honor: The Development of Italian Adultery Law Over Two Millennia*, *in* THE FAMILY IN ITALY: FROM ANTIQUITY TO THE PRESENT 229 (David I. Kertzer & Richard P. Saller eds., 1991). A man who killed his wife's lover could escape punishment only if he subsequently divorced his wife; otherwise, "he could be accused of pimping." *Id.* at 234. The law clearly made the emotion state—the fit of rage—a condition of excuse, and the various restrictions interfered with efforts to feign rage or rationalize a cold-blooded murder as an emotional act. The defense of rage was plausible only when the conditions under which rage usually resulted were met; idiosyncratic emotional responses, not justified by the degree of the insult, would not do. Thus, at one point, the killing could go unpunished only if the adultery occurred in the father's or the husband's house (a grave insult), rather than elsewhere. *Id.* at 231-32.

35. Kahan & Nussbaum, *supra* note 10, at 311.

wrongdoers contradicts the deterrence argument. But the abused woman and the wronged husband, unlike the murderous homophobe, can be placed in the southeast or southwest box of Table 1.[36] Both cases involve low pre-emotion-state deterrability. The abused woman cannot—except at a great personal cost—leave the abusive man, or so the proponents of the battered woman defense argue.[37] The wronged husband has no way of anticipating that his wife is being unfaithful. Neither can realistically be expected to invest, while calm, in avoiding the stimulus or cultivating a peaceful disposition. By contrast, the homophobe can relatively easily avoid gay bars and other places where gay people congregate, and thus can be placed in the northwest or northeast boxes of Table 1.

Similar comments apply to the case of fear. Louise Woodward, who was hired as a nanny, was found guilty of killing the infant in her care, but the trial judge reduced a verdict of second-degree murder to manslaughter on the ground that the evidence disclosed "confusion, fright, a bad judgment, rather than rage or malice."[38] Supposing that Woodward really panicked, the explanation for reducing the conviction is that sanctions do not deter people who are gripped by fear, and although most panicking people do not attack others, it is possible that a terrified caregiver might injure a child. One might argue that severe sanctions would deter fear-prone people from becoming nannies, but fear-induced killing is so rare and bizarre that the elasticity of investment with respect to fear must be considered quite low. Should the convicted killer take on a new position as a nanny, however, and while panicking kill that child as well, one would anticipate a very high sanction.

Not all emotions reduce the sanction. Hate crime laws increase, rather than reduce sanctions, even though the racist killer more plausibly acted under the influence of emotion than, say, the contract killer. The reason that hate results in greater punishment, while anger often results in a lesser punishment, is that hate is more susceptible to pre-emotion-state manipulation than anger is. The person who hates members of a particular race can often avoid interacting with them; he can also take care not to carry weapons. The person provoked to anger by adultery is not in a similar position. The two emotions differ on the dimension of elasticity.

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36. Whether the case should be placed in the southeast or southwest box depends on the case. Traditionally, it was thought that the enraged husband is not deterrable; however, it depends on context. For example, an enraged husband may have a chance to cool off while searching for a weapon. Resistance to the battered woman defense may have been based on uncertainty about whether a fearful person is driven to kill. Fearful people usually run away. But it has been argued that the battered woman is psychologically unable to flee, or has no place to flee. A person who is scared and cornered lashes out. This argument is more closely attuned to intuitions about emotion.

37. *See generally* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991).

38. *See* Samuel H. Pillsbury, *Harlan, Holmes, and the Passions of Justice*, *in* THE PASSIONS OF LAW, *supra* note 1, at 355.

Turning now to the defense of duress, Kahan and Nussbaum ask us to compare Woman 1—who commits armed robbery to avoid being beaten up—and Woman 2—who fails to protect her child in order to avoid being beaten up. Woman 1 has a duress defense; Woman 2 does not. Kahan and Nussbaum say that this is inconsistent with the "narrow consequentialist" view that people who are susceptible only to extreme threats do not pose a danger to others, so punishment would be wasteful.[39] But the law makes sense on deterrence grounds. Sanctioning Woman 1 is not likely to change behavior because a person gripped by fear develops a strong preference for self-preservation and ordinary altruistic concerns diminish. But ordinary experience suggests that altruism for one's own child remains salient even for a scared person. When we are threatened, we run away if alone, but grab our children if they are with us. If this is not true for Woman 2, then a heavy sanction might offset her subjective gain, and it is no more surprising that we punish her than it is that we punish anyone who engages in child abuse. Kahan and Nussbaum claim that a consequentialist argument assumes that legal decisionmakers "are prepared to endorse the first woman's valuation of her own welfare but not the second woman's."[40] But this is not right. We want neither woman to commit a crime, but we punish the first woman less because a sanction is less likely to deter her.

A final point is that the criminal law should vary from region to region if there is cross-cultural variation in average emotional disposition. Nisbett and Cohen provide experimental evidence that in the United States, southerners are more easily provoked to anger by an insult than northerners.[41] If, as seems likely, the elasticity of investment with respect to anger states is low, then we would expect southern states to punish crimes committed while angry and in response to provocation to a lesser degree than northern states, holding constant the cost of imprisonment. Because southerners are less likely to respond to sanctions while angry, already take more care to avoid provocation, and are unlikely to be able to modify dispositions that are mostly the result of upbringing, scarce prison resources are better devoted in the South to deterring other crimes than in the North.[42]

D. A NOTE ON TORT

The analysis of emotion in tort law is similar to the analysis for criminal law. Suppose that an individual must drive to work every day but is subject to, and

39. *See* Kahan & Nussbaum, *supra* note 10, at 335.

40. *Id.* at 336.

41. NISBETT & COHEN, *supra* note 12, at 50-53.

42. Indeed, southern states are more tolerant of domestic violence than northern states, *id.* at 66, which is consistent with the claim that states would not devote prison resources to crimes that cannot easily be deterred. Nisbett and Cohen point out that southern states are more likely to carry out capital punishment than northern states, *id.* at 70, but they do not relate this statistic to provocations. I conjecture that capital punishment and other extreme punishments are less likely to be imposed in the South when murders are provoked by insults.

knows himself subject to, road rage when other drivers cut him off. The individual drives more carelessly while under the influence of road rage than when he is calm. Formally, his emotion-state preference to drive quickly is more intense than his calm-state preference to drive quickly (or, alternatively, the cost of driving carefully increases). For concreteness, suppose that the individual's cost of driving carefully is $100 when enraged, but the cost is only $10 when the individual is calm. Further, suppose that the social cost of driving quickly is $50 in expected accident costs imposed on third parties. A negligence rule, narrowly applied, would excuse the enraged driver from liability, whereas strict liability would require him to pay $50 in expected terms. Strict liability is the superior rule, for it would encourage the calm-state person, who is stuck with the $50 liability imposed on him by his emotion-state self, to switch to public transportation or avoid congested streets where road rage is more likely provoked. Alternatively, the individual could be held negligent for not taking public transportation when he knows himself subject to road rage, just as an epileptic is held liable for driving with knowledge of his epilepsy.[43] The latter alternative achieves the same result as strict liability by counterfactually attributing calm-state abilities and preferences to the emotion-state self that causes the accident.[44]

IV. JURIES

There is a widespread view that jurors should deliberate calmly, rather than in a state of emotion. This is why judges should not admit prejudicial evidence, which includes evidence that may excite the emotions.[45] This view also is behind academic resistance to victim impact statements. But there is an alternative view. Some critics of capital punishment argue that the current sentencing practices suppress jurors' natural empathetic reaction to the defendant's position.[46] These critics seem to argue that emotion should play a role in capital sentencing.[47] And defenders of punitive damages often say that this remedy is an appropriate form of expressing outrage at the defendant's conduct.

To understand this debate, one needs a clear view of what juries are supposed to do. For simplicity, let us focus on the problem of determining liability. Juries are supposed to determine whether a civil plaintiff has proved her case to be

43. A person will not ordinarily be held negligent if he crashes during a heart attack, epileptic seizure, or insane delusion, unless he knows about the condition in advance, in which case he is expected to take precautions, like not driving or taking drugs. *See, e.g.*, Breunig v. Am. Family Ins. Co., 173 N.W.2d 619, 623 (Wis. 1970).

44. This interpretation of negligence is more consistent with judicial practice than the narrow interpretation. The reasonable man standard forbids inquiry into idiosyncratic inability to comply with the standard of care.

45. *See* FED. R. EVID. 403.

46. *See* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1485-86 (1997); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1626 (1998).

47. *See* Haney, *supra* note 46, at 1453-54.

more likely than not. Let us take a simple negligence case in which the only relevant variables are (to simplify again) the defendant's precaution, the probability of the harm given that precaution, and the actual harm.

Suppose that the plaintiff wants to show the jury a photograph of the victim's gruesome injuries. The photograph would predictably elicit a feeling of disgust among the jurors. They will look but avert their faces, feel nausea, and so forth. Let us suppose the feeling of disgust lingers through their deliberations, perhaps because the deliberations involve continual examination of the photograph or they provoke memories of the photograph and with them the sensation of disgust. The question is whether these feelings are likely to interfere with the jury's ability to evaluate precautions, probabilities, and harms.

The answer is probably no. The action tendency of disgust is withdrawal from the object and is felt most strongly in the presence of that object. During that limited period of time, the agent's normal cognitive capacities may be short-circuited. But the farther removed the object is, the less intense the action tendency is, and the more likely the agent is to take account of the rest of the world. This is true even if the image of the disgusting object renews itself in the agent's mind as he deliberates about the appropriate outcome of the case. Moreover, because disgust does not cause people to want to punish, it does not seem likely that a disgusted jury will react by exaggerating the harm imposed on the victim and awarding incorrect damages.

The photograph might also provoke anger or horror. These emotions are more troublesome. If the jurors feel anger at the defendant, they might want to punish him, even though the repulsiveness of the injury has nothing to do with the defendant's culpability. A merely negligent defendant whose tort severely disfigures the victim should not be forced to pay more than a reckless defendant whose tort has purely pecuniary consequences or less disfiguring physical consequences, holding the extent of the harm constant. It is not clear, though, that jurors would make this error. Their anger is not based on a personal insult against them, but is more akin to the indignation that one feels on learning of a wrong. But indignation does not result in the same tendency to inflict harm.[48] On the other hand, some experimental evidence suggests that people in a state of anger or outrage will punish the defendant more harshly than they would otherwise, even though they are not directly harmed.[49] This concern, that

48. *See* WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 188-93 (1997); Martha C. Nussbaum, *"Secret Sewers of Vice": Disgust, Bodies, and the Law*, *in* THE PASSIONS OF LAW, *supra* note 1, at 19, 26-29.

49. This was true even if the anger or outrage was provoked by events (like a movie) that were irrelevant to the case. *See generally* Brian H. Bornstein & Robert J. Nemeth, *Jurors' Perception of Violence: A Framework for Inquiry*, 4 AGGRESSION & VIOLENT BEHAVIOR 77 (1991) (summarizing research); Julie H. Goldberg, Jennifer S. Lerner & Philip E. Tetlock, *Rage and Reason: The Psychology of the Intuitive Prosecutor*, 29 EUR. J. SOC. PSYCHOL. 781 (1999); Saul M. Kassin & David A. Garfield, *Blood and Guts: General and Trial-Specific Effects of Videotaped Crime Scenes on Mock Jurors*, 21 J. APPLIED SOCIAL PSYCHOL. 1459 (1991) (explaining that exposure to crime scene videotape increased bias against defendant in mock juror experiments); Jennifer S. Lerner, Julie H. Goldberg & Philip E.

"blood will have blood," seems to lie behind judicial decisions to exclude gory photographs.[50]

Can emotions improve the jury's ability to make a correct judgment? It is tempting to think so, because emotions are often adaptive. A standard argument about fear, for example, is that it enables an organism to escape threats. If the flight response is often inaccurate, resulting in fear when a threat is not actually present, false positives are, in this context, less important than false negatives.[51] The problem with this argument is that the law takes account of problems of proof with evidentiary and procedural rules and assumes that the jury will simply make its best judgment. To continue with our example, emotion will not improve the jury's ability to determine the cost of the defendant's precaution or the likelihood that the precaution would produce the injury complained of. Emotion will not improve the jury's ability to measure medical costs, financial losses, and similar measurable harms. Also, it seems likely, though the issue is more arguable, that emotion will not improve the jury's ability to measure pain and suffering. Although a gory photograph might bring home to a jury the extent of the injury and the fear it might have produced, there is no reason for thinking that the jury's response will be accurate. The jury that does not see the photograph might underestimate the pain, and the jury that sees the photograph might overestimate the pain, but there is no reason to believe that one estimate will be closer to the truth than the other. And to the extent that the gory photograph helps the jury estimate the pain, this should be understood as a cognitive improvement brought about by increased information. The horror of the situation depicted, if it results in outrage, is likely to produce erratic awards.[52]

Tetlock, *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCHOL. BULLETIN 563 (1998). For some work on juries and emotion, see Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Effects on Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (1999); Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages*, 107 YALE L.J. 2071, 2095-97 (1998) (arguing that feelings of outrage account for awards of punitive damages in experimental settings) [hereinafter Sunstein, Kahneman & Schkade, *Assessing Punitive Damages*]; Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 248 (2000) (same); W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 586-90 (2000) (finding that punitive damages rise when corporations engage in cost-benefit analysis). In Edward L. Glaeser & Bruce Sacerdote, *The Determinants of Punishment: Deterrence, Incapacitation, and Vengeance* (Nat'l Bureau of Econ. Research, Working Paper No. 7676, 2000), the authors speculate that vengeance explains why sentences for vehicular homicide increase when the victim is a woman, which is inconsistent with the economic theory of crime.

50. *See, e.g.*, United States v. Rezaq, 134 F.3d 1121, 1138 (D.C. Cir. 1998) (quoting WILLIAM SHAKESPEARE, MACBETH, act 3, sc. 4, and translating into legalese: "photographs of gore may inappropriately dispose a jury to exact retribution"); Campbell v. Keystone Aerial Surveys, Inc., 138 F.3d 996 (5th Cir. 1998) (excluding photograph of burned and mutilated corpse); Navarro de Cosme v. Hosp. Pavia, 922 F.2d 926, 930-31 (1st Cir. 1991) (affirming exclusion of photograph of decomposing corpse of fetus in medical malpractice case).

51. *See* Öhman, *supra* note 13, at 520.

52. *See* Sunstein, Kahneman & Schkade, *Assessing Punitive Damages*, *supra* note 49, at 2100-04.

These considerations bear on the debate on the use of victim impact statements in capital sentencing. Proponents of the use of these statements argue that by creating pity for the victim and the victim's family, the statements counterbalance the natural sympathy that jurors feel for the criminal defendant, whose presence in the courtroom gives him an empathic advantage. Opponents argue that the statements distract the jury with irrelevant information and inflame it against the defendant.[53] If the purpose of capital punishment is to deter murder or incapacitate murderers, then pity and outrage are surely irrelevant to capital sentencing. The only relevant consideration is the dangerousness of the criminal, something that can be evaluated without emotional involvement. Jurors gripped by fear, pity, or outrage will overestimate or underestimate the danger posed by the defendant. To banish these emotions, victim impact statements like other forms of evidence should contain only relevant facts. There is no reason why victim impact statements should be treated differently from other forms of evidence; they should be permitted unless their prejudicial effects outweigh their relevance.[54]

Little else can be said at this high level of abstraction, but empirical testing would shed light on these issues. It is common in psychological research to test the effect of emotions on decisionmakers by "priming" subjects with emotion-provoking stimuli.[55] One possible experiment would involve giving mock tort or criminal cases to subjects, and asking them to determine liability or guilt, and damages or punishment. The control group would be given a verbal description of the tort or crime; the other group would be given the same description plus a gory picture. One predicts that the latter group would be more likely to find liability or guilt, and more likely to award higher damages or to impose harsher sentences. One could test the extent to which emotions interfere with or promote *accuracy* by ensuring that there is a correct legal answer (for example, award compensatory damages, stipulate that the victim felt no pain and did not suffer in any way, and provide a formula for determining damages). One could also test the effect of gory versus non-gory photographs, for example, by showing the photograph of a mutilated corpse and the photograph of a non-

53. The positions are detailed in *Booth v. Maryland*, 482 U.S. 496, 496 (1986) (holding that victim impact statements in capital sentencing violated the Eighth Amendment), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991).

54. On the emotional involvement of jurors in capital sentencing, see Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000). Garvey found that jurors were more likely to vote for death (in the first vote) when they felt anger or rage toward the defendant and less likely when they felt pity or sympathy—both with statistical significance. *See id.* There was no statistically significant correlation between disgust and the likelihood of voting for death. *Id.* at 63; *see also* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 390-410 (1996) (criticizing victim impact statements for appealing to vengeance and hatred, which interfere with proper evaluation of the defendant's conduct); Posner, *Emotion, supra* note 31, at 325-27 (defending victim impact statements to prevent distortion of "empathetic consideration," which would occur given that defendants can provide evidence intended to elicit mercy from the jury).

55. *See, e.g.*, Goldberg, Lerner & Tetlock, *supra* note 49 (priming by having subjects watch outrage-inducing movie); Lerner, Goldberg & Tetlock, *supra* note 49 (same).

mutilated corpse. An issue of interest is whether a jury punishes criminal or civil defendants who engage in exactly the same amount of harm, on the morally and legally irrelevant basis of whether the harm is bloody or otherwise disgusting or horrifying.

Another potential experiment would test the claim that disgust, unlike anger, has little influence on jurors' deliberation. The key here is to use a photograph that is disgusting but unlikely to provoke anger, because the defendant is not responsible for the harm. Suppose, for example, that an insurance company must pay an insured an amount that will compensate her for the loss of her husband's earnings after the husband dies in an accident. The sole issue at trial is that of calculating the loss. Let that calculation involve the valuation of a number of imponderables. Though one would expect variation in the awards, my claims about disgust imply that jurors shown a photograph of the mangled corpse would not systematically award higher amounts than jurors who are given a verbal description.

V. COST-BENEFIT ANALYSIS AND RISK REGULATION

In a recent article, Timur Kuran and Cass Sunstein argue that cognitive biases can lead to panicked government action that is socially harmful.[56] They focus on the availability heuristic, "a pervasive mental shortcut whereby the perceived likelihood of any given event is tied to the ease with which its occurrence can be brought to mind."[57] Because people rely on the availability heuristic and other cognitive shortcuts, they fear risks not solely on the basis of the expected harm, but on the basis of irrelevant factors such as the degree to which the risks are subject to public discussion, the harm is vivid, the technology is new, the results are irreversible, and so forth. In the meantime, dissenting views are ignored. Dissenters are treated with opprobrium, and so dissent is suppressed. As a consequence, initially exaggerated beliefs about risks can feed on each other, resulting in an "availability cascade," in which a minor risk is blown up into a major threat. Kuran and Sunstein's main examples are the Love Canal scare, the Alar scare, and the response to the crash of TWA Flight 800. In all these cases, a relatively trivial risk or benign explanation is overtaken by events, resulting in a panic in which the worst case is widely believed.

A notable aspect of Kuran and Sunstein's explanation is that it is purely cognitive. People are assumed to be rational except to the extent that cognitive biases interfere with rational choice. Their argument predicts that availability cascades would occur even in a hypothetical world in which people had no emotions. But there are some reasons for being skeptical of this view. Start with the semantic point that Love Canal, and similar events, are often called "scares" or "panics." Kuran and Sunstein's account of the Love Canal affair repeatedly

56. *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 735-46 (1999).

57. *Id.* at 685.

notes the emotional character of the events: "frightening tales spread quickly";[58] "residents feared" various dangers;[59] "[a]ngered by claims in" a newspaper, one resident organized a petition drive;[60] a woman at a meeting "started crying hysterically";[61] "[h]er anxieties and fears came to be shared by the entire community";[62] one activist was "furious . . . . Now very emotional, I said: 'You can't do that! That would be murder!' ";[63] "fears would not dissipate."[64] Although Kuran and Sunstein could argue that the emotional responses were epiphenomenal, and that cognitive bias fully explains the phenomenon, the role of emotion cannot be discounted. Most panics, as the term suggests, are characterized by fear.

It was mentioned earlier that many psychologists regard fear as an evolutionarily adaptive mechanism for processing information about potential threats to the organism. It is evolutionarily more costly for an organism to fail to respond to a threat than it is for the organism to respond incorrectly.[65] That is, you are less likely to survive and reproduce if you sometimes neglect to flee from a tiger than if you occasionally flee from a shadow that looks like a tiger. Certain genetically determined or learned stimuli (such as a fear of snakes) are processed in a rough way by a part of the brain before being subject to cognition, a bit like the reflex action of withdrawing one's hand from a hot object.[66] Thus, fear (and anxiety as well) has benefits and costs; it allows the organism to respond quickly to a threat, but it also appears to cause the organism to overestimate the probability of the threat.

The connection between an individual's fear and a social panic occurs as follows: First, fear is contagious. A person who observes that another person is fearful is more likely to become fearful than a person who does not make such an observation. This may be rational in a sense, but it also seems to be a purely psychological or even physiological response.[67] Second, fear feeds on itself. Upon observing that another is fearful, one may experience heightened fear of one's own. Third, fear, unlike an emotion such as anger, can persist for quite a long time, sometimes in the form of a general anxiety. Fearful and anxious people continue to overestimate the probability of a threat and to reinforce each other's incorrect beliefs.

The emotion perspective can be seen as a supplement to Kuran and Sunstein's cognitive theory, which indeed itself can be seen as a supplement to a

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58. *Id.* at 691-92.
59. *Id.* at 692.
60. *Id.*
61. *Id.* at 693.
62. *Id.* at 692.
63. *Id.* at 693 (quoting LOIS MARIE GIBBS, LOVE CANAL: THE STORY CONTINUES . . . 30 (1998)).
64. *Id.* at 694.
65. Öhman, *supra* note 13, at 520.
66. *See id.*
67. *See generally* ELAINE HATFIELD ET AL., EMOTIONAL CONTAGION (1994) (discussing the conditions under which emotions spread among individuals).

rational choice view based on information imperfections. It is *rational* to infer that a threat exists if others believe that a threat exists and these others have information unavailable to the subject.[68] This inference may be strengthened by the availability heuristic, a *cognitive* bias. And the inference may be strengthened further by the *emotion* of fear, which leads the fearful individual to exaggerate (relative to calm-state beliefs) not any widely publicized risk (as suggested by the availability heuristic), but in particular, those risks that pose threats that engage the fear-centered portions of the brain.

This last observation leads to the question of normative implications. Kuran and Sunstein's analysis of availability cascades leads them to call for greater insulation of decisionmakers, greater reliance on scientists and other experts, and greater use of analytic tools like cost-benefit analysis.[69] These are surely appropriate responses when panics are the result of fear as well as cognitive biases. But it also would be useful to know whether different panics have different explanations, and therefore justify different government responses. A bank panic, for example, is calm-state rational. Given that the bank's liabilities exceed its liquid assets, I am rational to withdraw my money if I believe others will withdraw their money. Bank panics would occur even if people never made cognitive errors or experienced intense emotions. This may explain why bank panics are so easily ended: The government just needs to make a credible promise to reimburse all depositors.

By contrast, the preference for driving over flying appears to be emotion driven. I conjecture that people are more anxious about flying than about driving because when danger provokes fear, driving does not prevent one from fleeing (one pulls over to the shoulder) but flying does (one is stuck in the airborne aircraft).

A frequent criticism of aggressive airline safety regulation is that costly precautions cause people to substitute to automobiles for short trips, which in fact are more dangerous, so certain airline safety regulations may increase fatalities rather than reduce them.[70] An objection to this argument is that people's subjective discomfort with airline travel should be counted as a social cost. Although airline safety regulation may increase aggregate fatalities as people substitute to automobiles because of cost, it may still increase social welfare as the travelers experience less emotional discomfort.

The problem with this response is that fear, dread, and anxiety are not sensitive to changes in low probabilities.[71] A person who feels an overpowering

68. *See, e.g.*, Abhijit V. Benerjee, *A Simple Model of Herd Behavior*, 107 Q. J. ECON. 797, 815 (1992).

69. Kuran & Sunstein, *supra* note 56, at 746-60.

70. Robert W. Hahn, *The Economics of Airline Safety and Security: An Analysis of the White House Commission's Recommendations*, 20 HARV. J.L. & PUB. POL'Y 791, 804-07 (1997) (arguing that proposed regulation requiring infant seats in airplanes would increase the number of fatalities by causing people to switch to driving for short trips).

71. *See* Loewenstein et al., *supra* note 4, at 18.

feeling of dread while riding on an airplane will feel the same amount of dread whether the probability of an accident is 1 in 1,000,000 or 1 in 10,000,000. So the safety precaution does not increase that person's subjective well-being beyond the reduction of risk. If the person rationally anticipates her dread, she will treat it as a fixed cost regardless of the probability of accident (within constraints, obviously), so her determination whether to fly or drive will depend entirely on the pecuniary costs. This observation rescues the standard criticism of safety regulation from the objection; subjective (emotional) discomfort should not play a critical role in safety regulation.[72]

As another example of what is at stake, consider the problem of genetically altered food, which is widely avoided in Europe. On the rational herding view, individuals in Europe avoid this food because others avoid this food. Each person, individually rationally but collectively disastrously, infers that every person acts on statistically independent pieces of information. The reason that this story is probably false is that in the herd behavior models, the suboptimal equilibria are fragile.[73] If genetically altered food poses risks no greater than those that people already face, and if people were rational, then the panic would not have lasted as long as it has.[74]

There is likely some truth to the cognitive view of this panic. Concerns about genetically altered food probably stem from the mad cow disease problem in England, which was a salient event.[75] But we know that emotional reactions often interfere with cognition. The argument in favor of genetic alteration of food—the method is not much different from the breeding that has occurred for thousands of years—does not stick in people's minds, and it may be that it does not for the same reason that a person will not drink out of a sterilized cup that had once been used to hold urine. This argument requires a jump from the primal fear or disgust response, to a more complex, culturally mediated fear/disgust response; a response about which little is known. But it is a reasonable hypothesis.

The cognition and emotion theories leave much unexplained. If the British had all become vegetarians in response to mad cow disease, the theories could have rationalized that response as well. This methodological difficulty does not alter the fact that it matters which view is correct. Consider the question whether it is appropriate for automobile manufacturers to install switches that allow consumers to deactivate air bags. Reluctance about permitting these

72. *See* Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 J. LEGAL STUD. 1105 (2000) (discussing when government should discount preferences).

73. *See* Benerjee, *supra* note 68, at 800.

74. *See* Donald G. McNeil, Jr., *Protests on New Genes and Seeds Grow More Passionate in Europe*, N.Y. TIMES, Mar. 14, 2000, at A1 ("In Europe, the debate over genetically modified food is as much about passion as it is about science.").

75. *See* Warren Hoge, *Britons Skirmish over Genetically Modified Crops*, N.Y. TIMES, Aug. 23, 1999, at A3.

switches stems from a concern that publicity about the risks that air bags pose to children and small adults may lead people to deactivate air bags even when doing so enhances the net danger to passengers.[76]

The proper regulatory action depends on the source of people's false beliefs about air bags. If the incorrect belief that air bags are dangerous results from rational ignorance, the proper response is to post labels explaining that people should activate the air bags unless a child or small adult is in the front seat. If the belief is the result of a cognitive bias like the availability heuristic, the label may be an insufficient response. Perhaps a great deal of advertising would be necessary in order to shift people's beliefs. Alternatively, if nothing can shake people's beliefs, then the best response is to make it impossible to deactivate the air bags.

If people switch off air bags because of anxiety or fear, then labels and advertisements can do no good. One or more of the following responses might be appropriate: One, permit installation of the switch, because emotion states tend to weaken and then disappear as time passes. As people become accustomed to the presence of air bags, they will be less likely to deactivate them inappropriately. Two, prohibit installation of the switch, because emotions are, even more than cognitive biases, impervious to reasoning. When panicked people trample each other to escape a sinking ship, no amount of reasoning will save them. Three, permit installation, and fight emotion with emotion. When people are afraid, make them feel ashamed; when they are angry, make them feel pity. Lawyers, politicians, advertisers, and many other professionals are skilled in the tricky art of manipulating people's emotions. Commercials have already been used to encourage the use of seat belts by cleverly framing seat belt use as an obligation that people owe to their loved ones rather than as a means of protecting themselves. Similarly, commercials could be used to show that air bag use is necessary to protect loved ones.[77]

VI. BARGAINING, CONTRACT LAW, AND PROPERTY AND LIABILITY RULES: A CRITIQUE OF SPECIFIC PERFORMANCE

Much economic analysis of property rights argues that when transaction costs are low, it is more important for courts to ensure that property rights are clear and easily tradable, rather than to ensure that they are assigned to the more efficient user, because the ability to trade ensures that the property right will end up where it is most valued.[78]

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76. *See* Air Bag On-Off Switches, 62 Fed. Reg. 62,406, 62,414 (Nov. 21, 1997) (noting that widespread fear of air bags would lead to deactivation of them if that were possible, even when they enhance safety).

77. Without expressing any opinion as to whether such commercials are effective, I will just note that Madison Avenue, as well as the government, usually produces vivid, emotionally stimulating commercials, more so than dry recitations of facts.

78. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096 (1972). For more recent work on the topic, see

Ward Farnsworth informally tested this view by interviewing lawyers who represented individuals involved in nuisance suits.[79] Lawyers reported that plaintiffs who obtained judgments in nuisance cases *never* sold their rights to the defendants. The most plausible reason emerges from the descriptions of the cases. "[The parties] hate each other."[80] A client's reaction to an offer "would have been to say 'not only "No" but "Hell, no." ' "[81] There was "too much bad blood."[82] They "disliked each other intensely."[83] One imagines that in every case the plaintiff was angered by the nuisance, which was considered unneighborly. The defendant was angered by the plaintiff's complaints and lawsuit. Irritation became enmity as the usual indignities of litigation ensued. By the end, anger and hatred were so intense that (in Farnsworth's view) not even a mutually beneficial trade would have been possible.

These case studies conform to the common sense intuition that anger interferes with bargaining.[84] An angry person's action tendency is to harm the offender, even at cost to oneself. When two sides of a dispute are angry with each other, they may both prefer inflicting costs on each other in the form of continuing litigation rather than by settling. If each party gains more by injuring the other than by being injured himself, this game is not a prisoners' dilemma; harming the other person is both the dominant strategy for both parties and the welfare-maximizing equilibrium. At the same time, a person's ex ante calm-state preference is to avoid fighting and to trade when there are (nonspite-related) gains from doing so. The calm-state and emotion-state preferences are in conflict, and, if the former are to be privileged then the emotion-state preferences must be discounted.

These considerations suggest that the assignment and protection of property rights should be sensitive to the emotional valence of disputes. Consider the well-known defense of specific performance. If the value of performance exceeds the cost, the promisor ought to perform, and specific performance (unlike expectation damages) does not require an error-prone judicial determination of the promisee's valuation. If the value of performance is less than the cost, the promisor can pay the promisee to release him from the contract. The advantage of the damages remedy is that it enables the promisor to breach

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Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996).

79. *See* Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, *in* BEHAVIORAL LAW AND ECONOMICS 302 (Cass R. Sunstein ed., 2000). As Farnsworth notes, the sample is too small for the results to be statistically significant. *Id.* at 310. There are other puzzles as well, which suggest problems with the methodology; it is, after all, common knowledge that parties to lawsuits settle more often than they litigate, and it would be surprising that whatever factors interfere with bargaining would increase sharply at the time of judgment.

80. *Id.* at 305.

81. *Id.* at 306.

82. *Id.* at 307.

83. *Id.* at 308.

84. This is also a common assumption in the literature on mediation. *See* ROGER FISHER ET AL., GETTING TO YES 29-32 (1991).

efficiently without negotiating; but given low transaction costs this advantage has little value, and transaction costs are likely to be low when there are only two parties.[85] Thus, specific performance is superior to damages.

The problem with this argument is that the promisor's breach may provoke the promisee's anger, and the promisee—feeling insulted—will refuse to release the promisee from the contract. This is very much in the spirit of Farnsworth's interviews. This potential refusal might not matter if the promisor tries to buy out the promisee rather than breaching first, but there are two further points of concern. First, broaching the subject of nonperformance might elicit an angry reaction, which would then interfere with negotiations. Second, negotiations would, in any event, occur in the shadow of the promisee's angry reaction to breach.

Imagine, then, that an exogenous event causes a seller's cost to exceed the buyer's valuation. Under specific performance, if the seller breaches, she must either perform or pay the buyer's entire valuation. But if the buyer is angry, the buyer will incur a cost to spite the seller, and this means that the buyer may insist on performance even though he values it less than a proposed payment equal to the entire surplus. Anticipating this, the seller performs rather than breaches. By contrast, under expectation damages the seller would breach and pay damages equal to the buyer's valuation, with the inefficient trade avoided. Expectation damages are superior to specific performance because the plaintiff cannot prevent an efficient trade in order to spite the promisor.[86]

A premise of this argument is that the law should respect the buyer's calm-state preferences and not his emotion-state preferences. If, instead, the law should respect the buyer's emotion-state preferences, specific performance would be the correct remedy, given the difficulty of determining the amount of money that would make an angry buyer indifferent between performance and breach. Ex ante the buyer most likely would prefer that his emotion-state preferences be discounted. If that view is entitled to respect, then courts should award expectation damages; otherwise, the seller will pass the expected cost of specific performance on to the buyer and the buyer will be forced, against his calm-state preferences, to purchase the right when angry to spite the seller! Some buyers might want this right, but this would seem unusual. As long as calm-state preferences are to be counted, and buyers want their calm-state preferences to be counted, expectation damages are superior to specific performance when breach would lead to anger.

Notice that emotion introduces an asymmetry into the standard analysis of contract remedies. The person who breaches will not feel any anger, while the

85. *See generally* Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 27 (1979).

86. One response to the argument so far is that under specific performance the seller will bargain with the buyer prior to breach. If the buyer is not angered by a proposal to bargain, then the potential anger does not distort pre-breach bargaining. The seller will give the buyer the entire surplus in order to avoid angering him, but the buyer, while calm, would not demand more, because he would not, given his calm preferences, do better by inducing his own anger and then refusing to trade.

victim of the breach is likely to become angry. The reason is that the contract sets up a background norm of performance, and the person who breaks that norm injures the person who complies with it. If it is not desirable for a trade to occur, which will often be the case, expectation damages have the virtue of giving the property right to the calm person, whereas specific performance has the defect of giving the property right to the angry person. Taking ex ante calm-state preferences as the normative baseline, specific performance reduces the value of contracts.

Further factors might bear on the choice between remedies in specific situations. Anger subsides rapidly when the agent realizes that the offensive act was unintentional or in some way justified. If you push me, I might get angry, but my anger dissolves when you explain that you tripped and grabbed me to prevent yourself from falling, or that you were running away from a mugger. Similarly, anger—and, thus, specific performance—may pose fewer problems when a breach is excusable rather than willful. It is notoriously difficult to distinguish excusable from willful breaches in contract cases, but one possible approach is to distinguish breaches when the trade is ex post inefficient (the seller's cost exceeds the buyer's valuation) from breaches when the trade is ex post efficient. The latter can only be an attempt to hold up the promisee for a higher payment, and so seem willful; the former are at least jointly value-maximizing, making them somewhat less objectionable.[87] If this is so, specific performance is the appropriate remedy for less willful breaches, and expectation damages for more willful breaches.

One can see this point from another angle. If, as Robert Frank argues, emotions evolve to enable people to make credible their threat to retaliate if another person breaks a promise,[88] then this adaptation constrains the ability of the law to ensure that welfare-maximizing exchanges are made. Frank argues that people restrain themselves from breaking promises and engaging in other opportunistic behavior, in part, because they fear retaliation. Retaliation is not always individually rational, but may be compelled by emotion. Thus, emotion solves a problem of cooperation. But if emotion causes people to retaliate without carefully weighing the costs and benefits, people will retaliate even when breach is efficient and both sides would do better if the promisor compensated the promisee but did not perform. Giving the enraged promisee the tool of specific performance enables her to exact retaliation when, given the availability of a more modest legal remedy like expectation damages, both sides would do better (as measured by calm-state preferences) if retaliation did not occur.

The normative implication of this discussion contradicts current law. Specific performance and harsh remedies like punitive damages should not be available when the promisor's breach is egregious and thus likely to lead to an emotional

87. *See, e.g.*, Groves v. John Wunder Co., 286 N.W. 235, 236 (Minn. 1939).

88. *See* FRANK, *supra* note 2, at 43-46.

response from the promisee. Expectation damages are more appropriate. The same is true for nuisance suits. Money damages are the superior remedy when the nuisance creates anger and hard feelings, assuming away the cost of determining damages. Injunctions are more suitable when emotion is unlikely to interfere with bargaining.[89]

VII. NORMATIVE ISSUES

Normative economic analysis evaluates laws on the basis of their contribution to social welfare. Social welfare is usually defined as a function that aggregates individual utility functions, which themselves are representations of the preference orderings of every citizen. If a person prefers outcome *X* to outcome *Y*, then a law that changes *Y* to *X* increases that person's utility, and if the law has no other effect, it also increases social welfare.[90]

Emotion has a complex relationship to a person's well-being,[91] but we can focus on two aspects. The experience of an emotion state can be an *intrinsic* good or bad, or an *instrumental* good or bad. A person might seek joy or euphoria for its own sake and avoid fear or anxiety because they are unpleasant sensations. An acrophobe, for example, avoids high places that are perfectly safe because the sensation of fear is disagreeable. A person might also seek an emotion state as a means toward an end. For example, he might mentally conjure up past insults in order to generate a feeling of outrage prior to confronting a bully. Or a person might use mental exercises in order to suppress fear that interferes with public speaking. In short, an emotion can be experienced as an end in itself or as a means toward other things.

In both cases, people have preferences over their emotion states, and thus these preferences can be absorbed into normative economic analysis. If the government seeks to enhance social welfare, and people have intrinsic or instrumental preferences over emotion states, then the law should be used to help people satisfy their preferences at least cost. It is this view that has guided the earlier discussions of criminal law and other areas of the law. If people manipulate their emotions in order to overcome scruples and commit crimes, then the law should punish this behavior. If emotions interfere with bargaining that can enhance welfare, then the law should reallocate property rights so that parties can depend less on bargaining.

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89. Peter Huang analyzes emotions and bargaining in Peter H. Huang, *Reasons Within Passion: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV 435, 465-71. (2000). Our articles were written independently, but come to some similar conclusions about the relevance of emotions to bargaining about property rights. Also note Huang's earlier paper on the effect of emotional reactions on litigation incentives. Peter H. Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 INT'L REV. LAW & ECON. 31 (1992).

90. This is a simplification of a complex topic, toward which economists have taken diverse approaches. *See* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 177 (1999).

91. *See* Nico H. Frijda, *Emotions and Hedonic Experience*, *in* WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 190, 205 (Daniel Kahneman et al. eds., 1999).

The difficulty with this simple view is that many preferences are registered under the influence of the emotion or are inextricably tied up with an emotion state. The problem for the government is evaluating these kinds of preferences—as opposed to calm-state preferences about the desirability of being in an emotion state. This problem arises when government agencies engage in cost-benefit analysis and must decide whether valuations, reflected in surveys or derived from market behavior, ought to be taken seriously. A person who is angered by a government request for a valuation of a mountain view might retaliate by providing an implausible valuation. Similarly, a person who panics over a report about a nearby toxic waste dump might sell his house at a price that does not reflect his real need for shelter.

It is typical of an angry or fearful person to ignore relevant information when making choices. Nussbaum argues that disgust is a form of magical thinking, and many judgments based on disgust (like not wanting to drink from a sterilized cup that earlier contained urine) do not reflect a person's well-being.[92] If this argument is correct, then choices made while angry, fearful, or disgusted might not reflect the person's "real" well-being, which is just a way of saying that the economic assumption that unadjusted subjective preferences have fundamental normative value must be rejected. Preferences should not be used as the basis for regulation if they are "distorted" in some way. It is commonly argued that preferences are distorted if they are uninformed, or adaptive in some sense (sour grapes), or morally objectionable. Many welfarists, for example, do not include sadistic preferences in the social welfare function because they are morally wrong.[93] One might argue that certain preferences that manifest themselves in emotion states should not be counted for similar reasons. An angry, disgusted, or fearful person focuses on one aspect of the world to the exclusion of others. He has a distorted perspective on the relationship between the world and his own (calm-state) well-being. His temporary preferences can be likened, therefore, to uninformed preferences, which are commonly ignored in real-world regulation as well.

Yet there is another view: Choices made under the influence of emotion reflect a person's well-being more accurately than choices made in the calm state.

The psychology literature insists that certain emotions spring into existence because the environment poses a threat to the agent's well-being and that emotional reactions register threats that escape cognition. For example, one might feel anxiety or anger without knowing why because noncognitive areas of the brain have detected a threat and are preparing the individual to react. That person's emotion-state behavior might be more consistent with his well-being

92. Nussbaum, *supra* note 48, at 22-25.

93. *See* AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 84-106 (1982); John C. Harsanyi, *Game and Decision Theoretic Models in Ethics*, *in* 1 HANDBOOK OF GAME THEORY WITH ECONOMIC APPLICATIONS 669, 703-04 (Robert J. Aumann & Sergiu Hart eds., 1992). *See generally* Adler & Posner, *supra* note 90.

than the behavior in which he would engage if he were calm. Disgust often reveals that a substance poses dangers of which the disgusted person has no conscious knowledge. In general, a person in an emotion state may be more, rather than less, perceptive about moral realities and physical threats.[94] Thus, people often describe themselves as roused to action on the basis of photographs or stories that stimulate their indignation or horror.

Similar comments apply to emotional dispositions—and here the problem remains even if people were always in calm states when filling out contingent-valuation questionnaires or engaging in market behavior. A person with an emotional disposition to feel disgust will take this into account when (calmly) engaging in market behavior or when answering surveys that elicit valuations for the purpose of cost-benefit analysis. Suppose he feels disgusted whenever he sees adults of the same sex holding hands. This person might be willing to pay for laws that discourage such behavior because he wishes to avoid the sensation of disgust. The question is whether this person's preference should count, just as it would surely count if he were objecting to a noxious odor caused by pollution. To answer this question, one must resolve a methodological issue, namely, whether we should look through the lens of emotion or of morality. The lens of emotion suggests that whether the preferences should count in this case depends on whether they are based on magical thinking rather than a correct assessment of the impact of the behavior on the person's well-being.[95] An alternative view is that whether the valuation should be taken into account depends on whether the agent can supply a moral justification for it.

The point I want to make is that both emotion-state preferences and calm-state preferences that reflect emotional disposition cannot automatically be either ignored as defective because "emotional," or counted as "just preferences." Both kinds of preferences must be evaluated, and included in or excluded from the social welfare function, in accordance with the degree to which satisfaction of them contributes to the individual's well-being.

94. *See* RONALD DE SOUSA, THE RATIONALITY OF EMOTION (1987); MILLER, *supra* note 48, at 179-205; Greenspan, *supra* note 11, at 471-75. Many of the essays in THE PASSIONS OF LAW, *supra* note 1, discuss this as well.

95. Compare this with Nussbaum's discussion of magical thinking. *See supra* note 92 and accompanying text.