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THE ROLE AND REALITY OF EMOTIONS IN LAW

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It is a great pleasure to participate in the celebration and exploration of Susan Bandes' *The Passions of Law* in this symposium on emotion and gender jurisprudence.¹ It may be worth reminding today's law students that when Professor Bandes and I were classmates at the University of Michigan Law School in the mid-1970s, there were no such conferences. Jurisprudence existed, but the concept of gender had not yet emerged; we were still too busy defining feminism. Emotions were something we dutifully suppressed as we tried to assimilate into the legal profession.

This is not to say we were wholly unaffected by the passions of law, or at least the passions of law school. Without question, law school had emotional content. I recall, for example, that Professor Bandes and I experienced *despair*, when, as first-year students, property grades were posted and ours were so low as to have fallen entirely off the graph the professor sketched on the board. In contrast, during our third year, we experienced *elation* when we learned we would be earning \$13,000 upon graduation: instantly wealthy, in our view, we were unable to imagine how we would even spend such a sum. But, our primary reaction during the three years of law school was one of profound puzzlement. The puzzlement grew out of the peculiar nature of our legal education — the subjects we studied, the methods of intimidation used by the professors, and the uniformity of those who taught — for whether our professors were venerable scions or newly hired boy-geniuses, no women ever stood before us.

I should be clear, however, that I do not characterize our puzzlement as an emotion at all, at least not if we take that term in its usual (if now properly criticized) sense of something like pure feeling. Our puzzlement was an entirely rational response to a world we entered as intelligent inquisitive women, but in which we felt a sudden and disorienting feeling of being out of place. It took a long time to figure out why this was so, and I suspect that the process of figuring it out explains why Professor Bandes and I both chose, after some years of practice, to return to the scene of the crime and teach law.

Let me leave my first impressions of the relation between law, emotion, and gender to offer instead more developed thoughts on the topic. As a framework for this undertaking, there are four ideas to

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1. *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999).

keep in mind as we hear from today's speakers about emotions in the workplace, in the family, and in the courts.

The first point is a question. What exactly are the properties of an "emotion?" When we decide whether the law should treat this or that emotion in a particular way, on what basis are we confident that the response or behavior under consideration really is an emotion and not something else? The response may be like a thought (commonly understood as more cerebral, more rational), an instinct (a response understood to be more physiological in origin), or a value (something to be respected and encouraged). For example, when the doctor whacks your knee with a mallet and your leg kicks straight, you are not having an emotional reaction. On the other hand, if you receive news of a certain kind and go "weak in the knees," you may well be responding emotionally, as well as physiologically, even though the origins of the response are not physical.

There are, of course, other examples of the relation between affective response and physical manifestation. One learns something and what follows may be a blush or a nosebleed, a smile or a heart attack. Emotions sit poised between, not distinct from, rational thought at the same time they are connected to the visceral. The physical component of emotion is important in law as a matter of proof. When law looks for evidence of emotion, outward manifestations signify. Consider a wife who calls the police and reports she was battered. Before the call triggers the police department protocol for battered women, the question may be whether the caller is acting as one expert has explained a battered woman would (or should) respond. Is she passive or is she angry? If the latter, well then, she may not have Battered Women's Syndrome because those women are supposed to be submissive, as the responding officer learned in domestic violence police training.² This "emotional profiling" may be particularly meaningful in contexts where the outcome of an inquiry depends on whether there is satisfactory proof that a particular emotion existed. Did the defendant show sufficient remorse? Did the husband act out of outrage? Was the complainant in fear for her life?

My second point adds a dynamic gloss to the first. Determining whether someone is having an emotional response, in contrast to a thought, value, or physical reaction has gotten much harder to discern in recent years. That is because we now live in an age in which

2. As Professors Schneider and Dalton explain, this requirement of a party actually being a battered woman can be problematic when the woman's behavior may be susceptible to a different characterization. See CLAIRE DALTON & ELIZABETH SCHNEIDER, BATTERED WOMEN AND THE LAW 224 n.3 (2001).

thinking and *feeling* routinely blur in everyday discourse. When I was in elementary school, lining up for recess on a fall day, our teacher told us to “put on your coats.” In the 1950s, we followed this instruction like the obedient little Mouseketeers we were. Today, teachers (and not only teachers in California) tell their students lining up for recess (or whatever recess is now called) that the teacher “needs for them to put on their coats.” Their compliance now is part of a more elaborate, quasi-therapeutic relation with their teacher. They are meeting her needs. Another example is also taken from close to home. When my son was in the third grade, his teacher asked him (yes, in California) to answer the following question: Do you feel that democracy is good? The hard part of the question for Michael was less his views on democracy (why didn't they just make him king and let it go at that?), than how to express his views in exact response to the question asked. Thus, he wrote, “I *feel* that I *think* that democracy is good.”

These small examples are meant to suggest an increasing socialization into having or at least displaying appropriate emotional responses in situations once unconnected to emotional involvement. The important question now is, “How do you feel?” We are all into “feeling one another's pain,” except typically in those cases where we caused it. Also, note that people can be socialized into not having the right emotional response, and here gender seems to matter a lot. Recall Senator Edmund S. Muskie who, in 1972, cried on the campaign trail when his family was slandered falsely. That was the end of him. Compare him with Governor Michael Dukakis, who some sixteen years later refused to display husbandry outrage when asked a hypothetical question about his wife as a rape victim. He did not turn on his feelings in response to a counterfactual. That was the end of him.

My examples have moved from behavior in primary school to behavior in politics (which some would say is not much of a jump). Points three and four move more specifically to law and how expectations about emotional responses complicate notions of justice. Back in the early days of the law recognizing, or being urged to recognize, that actual people — in contrast to named parties — were involved in the activities upon which law operates, all of us sensitive types thought this new awareness would surely advance the cause of fairness. Understanding that people experienced the effect of legal rules and that rules ought to be concerned with aspects of human experiences previously considered outside the legal realm was a foundational concern of the Law and Society movement and of Feminist Jurisprudence, to name two forms of the newer scholarship. To some extent, this has led to improvements. Sexual harassment

law is an example. Women's displeasure with unwanted sexual advances was re-characterized from uptight prissiness to a rational and appropriate response grounded in a demand for equal respect for all workers.

Now that law has discovered emotions, things are not brighter in every instance. Consider, however, victim impact statements, one of Professor Bandes' important and early subjects of inquiry.³ Is justice advanced when the families of victims are entitled to confront a defendant in the courtroom and damn him to hell and indignities of prison life as part of their achieving "closure?"⁴ The urge to find a place for emotion in a legal regime, suddenly takes on darker meaning, for as we see, much depends on which emotions the law chooses to recognize, dignify, and incorporate into its processes.

Outrage gets a workout not only in victim impact statements, but in other popularly enacted legislation, such as Megan's Law, Kelly's Law, and Polly's Law, each aimed at increasing the penalties or reducing the procedural protections for those who commit criminal acts against children.⁵ Grief, which seems to reside close to anger, has become a rallying principle, and the legislative response to organized grief has been a spate of laws, which are not only motivated by emotion, but include as part of their scheme some emotive component. This may be the right to confront the defendant personally, for whatever emotional relief that provides, or to publicize his name, in what we might understand as a modern form of branding in order to humiliate.

This last example focuses attention on the question regarding which of the emotions law chooses to recognize, dignify, and incorporate. Let us assume that emotions just discussed — vengeance and outrage — are authentic and in some contexts legitimate, even if we might disagree with their use in a particular statute. I want to suggest — and this is my fourth point — that the problem of incorporating emotions into law is not simply that the emotions legislators seem to find appealing may not be the ones that those of us seeking a kinder, gentler, legal system may have had in mind. My concern is when an emotional response is not only included in the legal process, but *required* by it, emotions may lose the very authenticity as a marker of human experience that caused scholars, courts, and legislatures to urge attention to them in the first place.

3. See, e.g., Susan Bandes, *Victim Standing*, 1999 UTAH L. REV. 331 (1999).

4. See, e.g., Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599 (2000).

5. See generally Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001).

We seem now to have refined an array of officially approved emotions, a list of responses deemed sufficiently worthy to be included in the new, hipper calculus of justice, but which have been so well advertised as to suggest some caution with regard to any issue we might make of their presence or absence.

Consider the matter of remorse in a defendant's presentation during the allocution that follows the verdict but precedes sentencing. There is no question about what the convicted defendant is supposed to feel, or at least is supposed to express. Now that the jury has returned a verdict, the strategic defendant should give up any pretense of innocence. If he does not, things are not likely to go well at sentencing or during parole board hearings. Of course, Innocence Projects around the country have begun to reveal unacceptable rates of convictions in capital cases that were not only improperly obtained, but factually wrong. The "hardened criminal" who will not demonstrate remorse may, in some cases, simply have immense integrity. On the other hand, a convicted and guilty defendant can put on a great show of remorse and be rewarded for the display. All of the players now understand the "proper" emotional response and each can act accordingly.

To illustrate the law's potential for tyranny in requiring a particular emotional response as part of a legal process, I offer two final examples from recent work of my own. The first example, judicial bypass hearings for pregnant teenagers, illustrates how the law's recognition of the emotions may, in certain circumstances, provide only the illusion of legal responsiveness. Judicial bypass hearings are the mandatory hearings required in about thirty states for pregnant teenagers who want an abortion but are unwilling to notify or obtain the consent of one or both of their parents, as required under state law. The minors may instead petition for permission from a local judge who, at a bypass hearing, is supposed to make a determination about the petitioner's maturity. If she is determined to be a mature minor, the judge is supposed to grant her request and authorize the abortion. His decision substitutes parental consent, and ensures that at least one adult will be involved in the minor's decision-making process. To determine if she is mature enough, a number of judges ask what they consider to be relevant questions about her circumstances. These often include such questions as why she got pregnant, whether she knows about birth control now so that this will not happen again,⁶ and why she will not involve her parents

6. In one case, the trial judge declared the minor immature because this was her second pregnancy.

in the process. In short, these pregnant teenagers must testify before strangers about the most intimate facts of their lives. I develop this argument in greater detail elsewhere⁷ but briefly, I suspect that the purpose of these hearings is less an attempt to assure a sound decision regarding the abortion than it is an attempt to humiliate young women — in old socio-legal terms, it is an attempt to use the process itself as punishment.⁸ The court is supposed to be making a maturity determination, but in looking through cases where petitions have been denied, it is evident that something more than a display of maturity is sought. Some indication or display of contrition or remorse is also valued, and rewarded. Pregnant girls, and their advocates, are not stupid, and some are able to think through and script the presentation of self that will best accomplish the desired goal of demonstrating whatever it takes in order to get judicial permission. This, I argue, is a terrible misuse of emotions in law.

My second example is taken from the law and practice of open adoption, where some contact between birth mother and the adoptive family is central to the adoption arrangement. Open adoption grew out of the desire for birth mothers to avoid the stark and abrupt termination of all contact with their child, as required under traditional (or closed) adoption, where the birth family and the adoptive family remained complete strangers. Responding to the laws of supply and demand, adoption agencies now routinely offer open adoption services to their customers, partly out of concern to remain competitive in the market. Indeed, adoptive parents are commonly told that unless they will agree to an open adoption, they are unlikely to be chosen by a birth mother. To be sure, there are a few agencies that arrange only traditional closed adoptions, but they are now the minority. In consequence, it is likely that adoptive parents may commit to this intense involvement with their child's birth family, and possibly to an involvement between the birth family and the child. They do this not because it is the arrangement they prefer, but because it is necessary to commit and exhibit the commitment in order to get a child.⁹ This circumstance is somewhat different from the use of emotions in the judicial bypass cases, although both cases require

7. See Carol Sanger, *Compelling Narrative: Judicial Bypass Hearings and the Misuse of Law* (unpublished manuscript, on file with author).

8. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN LOWER COURTS* (1979).

9. In one sense, the law is simply shifting which party in the adoption bears the emotional burden. Until open adoption became both accepted and legal, the birth mother more often bore the brunt of the burden. Now, to the extent that the arrangement is not entirely to their liking, adoptive parents must put up contact they might not prefer, just as birth mothers had to endure with the lack of contact or information in a closed adoption.

an avowal, or perhaps only a display, of particular emotions to accomplish a particular end. In the case of adoption, however, the avowal is not just for show: the adoptive parents may be in a complex relationship with the birth mother for some time. There is much to learn about open adoption and its consequences for all the parties. My point here is simply that the subject provides another example where the outcome of a legal procedure is explicitly hinged to a scripted emotion; here the desire to be part of a new form of blended family and where subsequent research may show that the requirement results in commitments to attachment that are less than authentic.