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# Not Interaction but Melding—The “Russian Dressing” Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers

Peter Brandon Bayer\*

## I. INTRODUCTION

Even after centuries of contrary philosophy and psychology, many commentators, jurists, and law makers insist that emotions have no legitimate place in most legal decision making. This recalcitrance, of course, is misplaced in light of the powerful body of theory explaining that without emotions, decisions, including matters of law and policy, simply cannot be made.<sup>1</sup> Judges, along with all societal actors, must disabuse themselves of the fallacious belief that emotions obstruct or obscure reason in all endeavors, particularly morality, law, and justice.

The project of truly apprehending emotions, however, requires more than appreciating that they play a crucial role in decision making. Additionally, we must shun the heuristic and faulty premise that an individual's ascription of meaning regarding a particular situation involves the weighing or parsing of emotions and rational contemplation

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1. See *infra* Part II.

as though one was analyzing a financial statement by simultaneously contrasting two columns of data. Rather, the human capacity to discern meaning arises not simply from the consideration of emotions with reason nor even from their intertwining like vines of ivy around a pole. Emotions and rationality do not simply work together; they meld into a new, unique entity that we designate as "meaning." It is the systemic fusing of emotions and reason that comprises "meaning," thus underscoring the indispensability of emotions in projects such as law making and legal analysis.<sup>2</sup>

This Article first briefly recounts the psychology and philosophy of emotions within a framework of modern systems theory to explain the dynamic of how people and groups must use emotions to ascribe meaning and significance to their lives. Second, and more importantly, this Article explains that the most progressive theorists still heuristically separate emotions and rationality. That is, even some of the best minds writing on emotions have trouble conceptualizing a systemic thought process of coalescing emotion and reason yielding modes of behavior, a matrix of moral values and other indices of meaning.

The primary purpose, then, is to explicate that the process through which individuals interpret—ascibe significance to objects and events—actually melds emotions and reason to the point where, within the interpretive schema, the two cannot be separated but, rather, emerge as meaning upon which action is taken. This Article offers a construct, somewhat humorously denoted the "Russian Dressing" metaphor, to help enable judges and other social actors to envision the decision making process not as the layering of emotions and rationality, but as a systemic flow of emotions and reason that unite into a singular amalgam—something unique and new—of which neither the former nor the latter masters the other.<sup>3</sup>

Before describing the actuality of the emotional-rational melding, it is useful to ask: Does it really matter? Does it make a difference whether individuals in general, and legal decision makers such as judges in particular, truly understand that emotions are indispensable to the reasoning process and, equally essentially, that emotions inextricably merge with reason in order to produce decisions? The answer indisputably is "yes."

First, the quest for knowledge often involves attempting to understand how people act—why they do what they do. Any account that provides

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2. For the purposes of this Article, the concepts of "rationality" and "reason" will be used synonymously.

3. See *infra* Part II.H.2. The Article concludes with suggested maxims regarding the emotional-rational process and legal decision making.

a better—a more accurate or more lucid—description of a profound human enterprise such as ascribing meaning to objects, ideas, and events helps to explain the human condition. Investigations into ontology, epistemology, politics, morality, and other overarching constructs of existence must raise, *inter alia*, the question of how and when emotions have and should have a role in human life. To offer possible resolutions of these difficult questions we surely must try to understand what emotions are and how they work.

More particularly, our culture of law has promoted and continues to promote outrageous misconceptions regarding the connection between emotions and both the legal system and legal decision makers, particularly judges. “The aversion to granting emotion a legitimate place in the public policy process grows out of a long western moral tradition in which moralists have viewed emotions as dangerous or irrelevant.”<sup>4</sup> Plato, for instance, firmly believed that emotions obstruct or obscure each person’s “true self,” thus distorting deliberation and frustrating attainment of reason, which is how the true self is identified.<sup>5</sup> “Plato repudiated emotion and appetite as corrupting influences, insisting that correct practical judgments are reached only by encouraging the intellect to go off ‘itself by itself,’ free from their influences as far as possible.”<sup>6</sup> Indeed, the historical persistence of the debased position of emotions is due in large part to the Platonic argument that emotions “subvert rationality and distort truth” and the Stoics’ belief that “emotions [are] diseases of the soul, to be cured by proper thinking.”<sup>7</sup>

It is Immanuel Kant, of course, who exemplifies the philosopher’s quest to rid humanity of emotions in the belief that through pure

4. D. Don Welch, *Ruling With The Heart: Emotion-Based Public Policy*, 6 S. CAL. INTERDISCIPLINARY L.J. 55, 63 (1997).

5. See, e.g., MARTHA C. NUSSBAUM, *LOVE’S KNOWLEDGE* 76 (Oxford 1990). Similarly, as one scholar explained, the popular separation of reason and passion is traceable to Plato’s *Phaedo* in which Socrates taught that, “some of the elements of our inner life, namely, the passions and desires, are not truly parts of ourselves at all; what is to be identified with the true self is the reason that says yes or no to them.” TERRENCE PENELHUM, *Hume’s Moral Philosophy*, in *THE CAMBRIDGE COMPANION TO HUME*, at 122-23 (1993).

6. NUSSBAUM, *supra* note 5, at 76.

7. KEITH OATLEY, *BEST LAID SCHEMES—THE PSYCHOLOGY OF EMOTIONS* 131 (Cambridge Univ. Press 1992); *accord.*, e.g., MARTHA C. NUSSBAUM, *POETIC JUSTICE* 56-57 (Beacon Press 1995). Professor Nussbaum believes that Plato and the Stoics did not see emotions as detached from judgment. “The problem, however, is that the judgements are false. They are false because they ascribe a very high value to external persons and events that are not fully controlled by the person’s virtue or rational will. They are acknowledgments, then, of the person’s own incompleteness and vulnerability.” *Id.* at 56.

rationality comes moral perfection and autonomy.<sup>8</sup> As Professor Hill explained:

Kant argued that human action could only be truly autonomous when it was performed according to the dictates of reason unfettered by "heteronomous" influences such as desires and inclinations. According to Kant, reason must be free from the bondage of will in order for the person to attain genuine autonomy.<sup>9</sup>

The quest to expunge or to minimize the role of emotions in human affairs, particularly regarding law, is no artifact of bygone centuries. To the contrary, the crusade to embrace reason without emotion has excited many contemporary theorists of law and society. Indeed, one may look to three leading contemporary jurists who espouse theories of pristine rationality to inform law and legal decision making. In his work, *The Partial Constitution*, noted philosopher Cass Sunstein urged that constitutional issues have singularly correct answers and that reason, rather than emotions, sentiments, power, or coercion will lead to a collective, absolute understanding of the Constitution.<sup>10</sup> Likewise, Owen Fiss, another theorist of deservedly high regard, yearns for an "entirely rationalistic" judicial process eschewing emotions.<sup>11</sup>

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8. See generally IMMANUEL KANT, *CRITIQUE OF PURE REASON* 511-15 (F. Max Muller trans., 2d ed. 1907); IMMANUEL KANT, *Grounding for the Metaphysics of Morals*, in *ETHICAL PHILOSOPHY* 49-62 (James W. Ellington trans., 1983).

9. John L. Hill, *Exploitation*, 79 *CORNELL L. REV.* 631, 674-75 (1994). Similarly, Sabini and Silver synopsized Kant's philosophy thus: "The domain of the moral is the domain of the will expressed in action; it is the domain of that for which we are responsible. Emotions are beyond the will, and for this reason have no intrinsic moral value." John Sabini & Maury Silver, *Emotions, Responsibility and Character*, in *RESPONSIBILITY, CHARACTER AND THE EMOTIONS—NEW ESSAYS IN MORAL PSYCHOLOGY* 165 (Ferdinand Schoeman ed., 1987); see also, e.g., NUSSBAUM, *supra* note 5, at 76; Daniel J. Morrissey, *Moral Truth and the Law: A New Look at an Old Link*, 47 *SMU L. REV.* 61, 68-69 (1993) (contrasting Kant and Hume); Dan M. Kahan & Martha Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *COLUM. L. REV.* 269, 299 n.121 (1996).

Indeed, Kant authored his emphatic denouncement of emotions as impediments to ethical clarity directly in response to David Hume's *A Treatise of Human Nature* celebrating passions as the route to meaning in human life. In a notable tribute, Kant said Hume's work had "woken me from my dogmatic slumbers." Morrissey, *supra* note 9, at 68 n.42; ANTHONY FLEW, *PHILOSOPHY: AN INTRODUCTION* 49 (1980).

10. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 17-39, 93-122 (Harvard Univ. Press 1993); see also, e.g., Robin L. West, *The Constitution of Reasons*, 92 *MICH. L. REV.* 1409 (1994) (criticizing Sunstein's belief in constitutional reasoning absent emotions).

11. Owen M. Fiss, *Reason in All Its Splendor*, 56 *BROOK. L. REV.* 789, 789, 800-04 (1990). Professor Gewirtz authored a strong rebuke of Professor Fiss' disavowal of emotions, noting that Fiss misconceived the emotional-rational process. See Paul Gewirtz, *On "I Know It When I See It,"* 105 *YALE L.J.* 1023, 1035-36 nn.42-44 (1996).

Few modern minds have had the impact of John Rawls whose work, *A Theory of Justice*, ranks among the most important of twentieth century legal philosophy. In a much discussed section, Rawls proposed the "original position" in which disembodied entities with no knowledge of what their lives, conditions, or statuses will be on earth, must determine what is or is not just before commencing their earthly existence. Rawls imagined that within the original position, "[t]he principles of justice are chosen behind a veil of ignorance. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain."<sup>12</sup> According to Rawls, the hallmark of the original position is that all occupants therein are "rational and mutually disinterested."<sup>13</sup> Rawls, too, looks for a jurisprudence of rationality without emotion.<sup>14</sup>

The prejudice against emotions arises in large part because we feel emotions and we assess the appropriateness of our reasoning process by the emotions attendant to that process.<sup>15</sup> Because emotions comprise our feelings, we are apt to blame the emotions for our mistakes rather than understand that our errors are the results of an imperfect process in which reasoning too is at fault. The heuristic was well summarized by Professor Pillsbury as "the myth of dispassion":

The predominate culture of the law promotes formal, deliberative, and dispassionate decision making. Its modern ideal is a complete rationalistic rule structure which determines results in an objective, i.e., impersonal fashion . . . . The culture of modern law discourages informal, intuitive, personal or passionate decision making . . . .

Because courts view the law as fundamentally dispassionate . . . courts have often concluded that lack of emotion is an essential attribute of justice.<sup>16</sup>

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12. JOHN RAWLS, *A THEORY OF JUSTICE* 12 (1971).

13. *Id.* at 13.

14. Many commentators have challenged Rawls' position. Dean Welch, for example, offered a convincing reproach noting that, by Rawls' own admission, the "original position" model cannot handle the very type of "hard cases" that, Rawls says, "distract our moral perception by leading us to think of people distant from us whose fate arouses pity and anxiety." Welch, *supra* note 4, at 65 (quoting John Rawls, *A Kantian Concept of Equality*, 96 *CAMBRIDGE L.J.* 96 (1975)). However, as Dean Welch accented, these hard cases are precisely what law is designed to manage; if law resolves these disputes imperfectly, there is no more fair nor more perfect exemplar, although, certainly, discrete legal decisions, procedures, and instrumentalities may be unfair and subject to reformation. *Id.* at 65-66.

15. See *infra* Parts II.A, B, G, H, J.

16. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 *CORNELL L. REV.* 655, 665-66 (1989) (footnotes omitted).

The delusion of emotionless law is embodied in the idealized judge, as Professor Bandes noted in her powerful article on emotions:

Whereas the juror and the attorney receive constant reminders that their perspectives are partial, the judge is encouraged by every trapping of the judicial role to believe that his own perspective is truly universal—a grave danger indeed . . . .

[T]he judge's claim to speak in a universal voice goes hand-in-hand with his claim to have moved beyond individual emotions and morals into the emotionless realm of the rule of law . . . .

This mentality . . . privileges emotions that the judge doesn't think of as "emotional" (such as the zeal to prosecute and the desire for revenge).<sup>17</sup>

Indeed, while not without the occasional notable exception, judicial opinions habitually profess a Platonic-Kantian credo that emotions have no legitimate place in legal decision making. Sixty years ago the Court admonished that interpretation of due process must be performed by a judiciary "free of prejudice, passion, [and] excitement."<sup>18</sup> With regard to the more specific due process issue of capital punishment, Justice Sandra Day O'Connor urged that imposition of the death penalty must reflect a "reasoned *moral* response . . . and not an emotional response."<sup>19</sup> On the equally contentious issue of abortion, the Court rashly opined, "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."<sup>20</sup>

This mistaken antagonism towards emotions—"the myth of dispassion"—"rests on two fictions: (1) that emotion necessarily leads to

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17. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 377-78 (1996) (footnote omitted).

18. *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940).

19. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *accord Booth v. Maryland*, 482 U.S. 496, 508 (1987). Fifteen years earlier, the contemplative and often astute Justice Potter Stewart averred, "[A]ny decision to impose the death sentence [must] be, and appear to be, based on reason rather than caprice and emotion." *Furman v. Georgia*, 408 U.S. 238, 311 (1972) (Stewart, J., concurring).

20. *Roe v. Wade*, 410 U.S. 113, 116 (1973); *see also Saffle v. Parks*, 494 U.S. 484, 493, 495 (1990) (allowing juries to consider sympathy threatens fairness); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202-03 (1989) (holding government entity not liable for failing to take steps likely to have prevented abusive father from severely beating his four-year-old son).

However, courts have embraced emotions when it pleases them. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (noting death penalty may reflect community's "moral outrage"); *Barclay v. Florida*, 463 U.S. 939, 948-51 (1983) (holding judge may express outrage at defendant's conduct when imposing death sentence).

injustice, and (2) that a just decision maker is necessarily a dispassionate one."<sup>21</sup>

Because human beings are incapable of ascribing meaning and significance without recourse to emotions—thus legal decision making simply cannot be performed absent emotion—any theory allowing legal decision makers to imagine the contrary profoundly distorts the reality of the process, thereby defying the legitimacy of any decision rendered pursuant to that fallacy or, perhaps better put, fantasy. One may question whether a system such as the judiciary is tenable and legitimate if its dons are unable or unwilling to acknowledge forthrightly to themselves, much less to others, the actual dynamic of their deliberative process. If judges do not appreciate the verity of emotions as integral to their judgments, we cannot be sure that their decisions truly reflect what they intended to decide or, more importantly, what they would have decided had they been free of self-deception.<sup>22</sup>

Convincing judges that they do and must utilize emotions will strip them of the subterfuge—the untoward luxury—of ascribing their decisions exclusively to extra-human and, more significantly, extra-personal constructs such as precedent, text, purportedly neutral rationality, and generic common sense. This is not to imply, of course, that most judges are ignorant of or wholly insensitive to the decades of jurisprudence demonstrating the political nature of lawmaking and judging. Many judges consider themselves to be sophisticated “legal realists.” Still, there remains a uniquely stubborn reluctance to acknowledge, much less embrace, the actuality that judicial decisions—indeed all lawmaking—is possible only because of the emotions of the decision makers.

Judges who fully appreciate not only the purported interplay, but indeed the unavoidable blending of emotions and reason, will be better able to render the opinions they truly believe are appropriate under law. The fact that judges’ decisions trigger within them and within others certain emotional responses will no longer be understood as a warning that their rulings are illicit. Rather, they will willingly contemplate their emotional responses—they will embrace the emotional-rational melding as inherent to the discovery of thorough meaning and will

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21. Pillsbury, *supra* note 16, at 666.

22. Professor Gewirtz provided a useful example of how the “myth of dispassion” might foster consequences unforeseen and unwanted by the decision maker: “I believe legal regulators have not adequately appreciated that attempting to suppress pornography may enhance its allure, since pornography’s appeal probably rests in part on its being treated as taboo.” Gewirtz, *supra* note 11, at 1033 n.29.



pursue the range of emotions to help them devise their most appropriate meanings arising from the discrete legal controversies.

No longer apprehensive, embarrassed, and confounded by emotions, judges should judge more perfectly, more thoroughly, and engage in the very difficult project of challenging their own predispositions more successfully. They will appreciate more fully that the dominant or prevailing standards are not necessarily correct because they render the triumph of reason over passion. Rather, judges will know that just below the seemingly emotionless facade are the accepted, often unspoken, and, because of their familiarity, unacknowledged emotions of status quo arguments. These judges will understand that challenges to the status quo must come from the introduction of new arguments, and thus, the introduction of different, perhaps unfamiliar and, therefore, uncomfortable emotions. As a result, the formation of legal arguments will be viewed, as they should be, as a clash of emotional reasoning. The status quo perhaps no longer will carry so easily the pretense of transcendence.<sup>23</sup>

## II. THE EMOTIONAL PROCESS—A GENERAL DEFINITION OF EMOTIONS, THEIR PURPOSES, AND THEIR MELDING WITH RATIONALITY

### A. *The Definition of Emotions*

When first considered, any discussion of emotions, their causes and effects, seems vexed, for, as one scholar sighed, "Even a cursory foray in the writings of philosophers, psychologists and neurobiologists reveals

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23. See Bandes, *supra* note 17, at 370, 385, 409; Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 666-67 (1993); Peter Margulies, *Inclusive and Exclusive Virtues: Approaches to Identity, Merit, and Responsibility in Recent Legal Thought*, 46 CATH. U. L. REV. 1109, 1126 (1997); Kahan & Nussbaum, *supra* note 9, at 296-97.

Ironically, the political and social consequences are not clear. We cannot fully predict what will transpire if judges truly accept the emotional aspect of decision making as essential and not obstructive. We may wish that it will encourage judges to be more open-minded and humble, leading to fairer decisions. See Martha C. Nussbaum, *Aristotle, Feminism and Needs for Functioning*, 70 TEX. L. REV. 1019 (1992). Many commentators believe that the more a judge understands the truth of how and why she renders her decisions, the more likely it is that she can and will be just. See, e.g., Peter J. Riga, *The Nature of Truth and Dissent*, 40 AM. J. JURIS. 71 (1995). However, a judge who belatedly recognizes the role of emotions may still determine that her pre-existing prejudices and beliefs are appropriate. Understanding the dynamics of emotions and reason does not guarantee a particular result. See, e.g., Bandes, *supra* note 17, at 366-71. At the very least, nevertheless, both the decision maker and interested observers will more fully know what given decisions mean and how they were made when the "myth of dispassion" finally is dispelled.

the daunting complexity of the study of emotions. There is widespread agreement on the impossibility of finding a definition for the term 'emotion.'<sup>24</sup> The purported impossibility of agreeing on a complete and irrevocable definition of emotion, like the impossibility of fully defining most terms, should not and, indeed, has not prevented the unfolding of a rich and meaningful literature traversing over two thousand years. Actually, remarkable accord exists among social scientists and philosophers establishing a functional, albeit unavoidably broad, definition.

Profoundly disagreeing with his tutor Plato, Aristotle recognized the importance of emotions to human intercourse. Aristotle believed that one cannot understand how to conduct oneself appropriately without the warnings and triggers attendant to emotions.<sup>25</sup> The battle between the Aristotelean and Platonic positions still rages.<sup>26</sup>

While Aristotle's steadfast rejection of Plato's critique of emotions set the timbre that would resonate across centuries, a thorough appreciation of emotions is impossible without crossing two millennia to David Hume, whose highly regarded and obligingly readable discourse, *A Treatise of Human Nature*, originally published in 1739, explored in compelling depth both the nature of emotions—"passions" as Hume denoted them—and the interconnections between emotions, rationality, human nature, and morality. Anticipating modern psychology and physiology, Hume recognized that the essential function of emotions is to disturb us, often in pleasant ways, but to agitate nonetheless, requiring us to ascribe meaning or significance to our own acts and to the acts of others. Judgments, particularly about our own worth, character, and value, "are always attended with passions, . . . which diffuses itself over the imagination, and gives an additional force to every related idea."<sup>27</sup>

Hume presaged and, with Aristotle, provides rapport with contemporary psychology's precept that emotions are those "mental disturbance[s]" that let us know something noteworthy or significant is taking place.<sup>28</sup> As explained by psychologist Richard S. Lazarus, a pre-eminent scholar on the theory of emotions, "[t]he emotion system is in place in our species to ensure that the truly important things in life,

24. Bandes, *supra* note 17, at 366 (footnote omitted).

25. See generally ARISTOTLE, *THE NICOMACHEAN ETHICS* (J.A.K. Thomson trans., 1976); Nussbaum, *supra* note 23, at 1022; see also Martha Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 23, 25 (1996); RONALD DE SOUSA, *THE RATIONALITY OF EMOTION* 183 (MIT 1987); Sabini & Silver, *supra* note 9, at 171.

26. See *supra* notes 4-21 and accompanying text.

27. DAVID HUME, *A TREATISE OF HUMAN NATURE*, BOOK II 75-76 (Pall S. Ardal ed., Fontana/Collins 1972). See generally *id.* at BOOKS II and BOOKS III.

28. OATLEY, *supra* note 7, at 46.

adaptation and survival, get taken care of."<sup>29</sup> Emotions, then, are integral to the "adaptational wholeness" of the person; they are the psychosocio-biological construct that, joined with rationality, convey the personal meaning of what is happening in our lives, particularly our social lives.<sup>30</sup>

The quintessence of emotions is that they provide the cues that we must stop what we are doing, pay attention, consider what is happening around us, and adopt a course of response.<sup>31</sup> Emotions provide their cues and warning signs when "a psychological tendency is arrested or when smoothly flowing action is interrupted. *The mental disturbance* of this interruption is experienced as an emotion."<sup>32</sup> We recognize these mental disturbances by the feelings and sensations they generate; that is, we perceive emotions or clusters of emotions by their accompanying physical and psychological manifestations.<sup>33</sup>

Given the abstractness of the definition of emotions, we might fruitfully attempt to recognize and understand emotional phenomena by what Lazarus calls their "core relational themes"—the essential manifestations commonly associated with the given emotion.<sup>34</sup> For instance, Lazarus identified "Anger" through the core relational theme of "A demeaning offense against me and mine."<sup>35</sup> Anxiety is "Facing uncertain, existential threat."<sup>36</sup> Hope is "Fearing the worst but

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29. RICHARD S. LAZARUS, *EMOTION AND ADAPTATION* 208 (Oxford Univ. Press 1991).

30. *Id.* at 6-7.

31. As Lazarus noted, "Emotions are organized psychophysiological reactions to news about ongoing relationships with the environment. 'News' is colloquial for knowledge or beliefs about the significance for personal well-being of the person-environment relationship." *Id.* at 38.

32. OATLEY, *supra* note 7, at 46 (emphasis added).

33. To illustrate with one very familiar example, we identify the emotion "fear" by a combination of manifestations such as sudden, excessive perspiring, an empty feeling in the "pit" of the belly, tense pain in the chest, heavy breathing, and similar sensations that, in toto, depict the theme that there is something to dread. Aware of this feeling of dread—this fear—we are prompted to discern its source and to formulate apt responsive behavior.

34.

A core relational theme is simply the central (hence core) relational harm or benefit in adaptational encounters that underlies each specific kind of emotion . . . . When its implications for well-being are appraised by the person, each thematic relationship produces an action impulse consistent with the core relational theme and the emotion that flows from it. [Thus,] . . . each emotion has its own particular core relational theme, appraisal pattern, and action tendency [unique to each human actor.]

LAZARUS, *supra* note 29, at 121.

35. *Id.* at 122, Table 3.4.

36. *Id.*

yearning for better."<sup>37</sup> Various commentators disagree regarding lists of diverse emotions.<sup>38</sup>

No commentator boldly claims to draw up a chart of immutable core relational themes the way one can plot a reliable genetic map. At best, even an accurate list of core relational themes describes anticipatory reactions of sufficient frequency to define generally the emotion and the system in which the emotion plays. Each individual actor comprises a unique amalgam of physiological and socially learned responses to combinations of emotions; thus, in that sense, any given actor's response to emotional stimuli essentially is original.<sup>39</sup> Still, investigation and experience confirm that responses may be sufficiently similar overall to permit predictions of acceptable reliability, at least insofar as estimating how a significant number of people likely will react under specific conditions.<sup>40</sup> Similarly, with specific enough knowledge, we may reliably estimate how a particular actor will respond in a particular situation. Certainly, neither complex social science nor philosophy of language and meaning are necessary to confirm what daily living instructs: We do not live on the cusp of interpretive hopelessness.<sup>41</sup>

Nonetheless, explication of core relational themes is particularly complex because emotions do not usually travel alone. Experience informs that emotions manifest in clusters although, at any given moment, one emotion may predominate over others. Multiple emotions are inevitable because "there are many agendas and thematic facets to a complex encounter."<sup>42</sup> Hume recognized that not only multiple corresponding emotions, but also seemingly contradictory emotions, regularly arise from a given set of events. Using an example he called "pity reversed," Hume noted that the observer may feel pity and

37. *Id.* Additional identified emotions include, but certainly are not limited to, fright, guilt, shame, sadness, envy, jealousy, disgust, happiness, pride, relief, love, and compassion.

38. Oatley, for example, posited five basic emotions: happiness, anger, disgust, fear, and sadness. OATLEY, *supra* note 7, at 55, 103.

39. *See, e.g.*, FREDERICK L. BATES, *SOCIOPOLITICAL ECOLOGY—HUMAN SYSTEMS AND ECOLOGICAL FIELDS* 6-19 (Plenum Press 1997).

40. LAZARUS, *supra* note 29, at 121.

41. *See, e.g.*, BATES, *supra* note 39, at 7 (stating the test of any actor's perception of reality is its success as a predictor of how others will respond to the behavior or the actor); *see also* Robin L. West, *The Literary Lawyer*, 27 PAC. L. REV. 1187, 1197 (1996); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 43 (G.E.M. Anscombe trans., 3d ed. 1958); Bruce A. Markell, *Truth?*, 72 IND. L.J. 1115, 1127 (1997); DENNIS PATTERSON, *LAW AND TRUTH* 170 (1996).

42. LAZARUS, *supra* note 29, at 62; *see also* HUME, *supra* note 27, at 43-44 (explaining one emotion may result in another resulting in another in a pattern or even a circle such as grief resulting in anger resulting in envy resulting in malice returning to grief).

compassion for the destitute stranger while simultaneously feeling happiness that it is the stranger, not the observer, who is poor.<sup>43</sup> Indeed, these conflicting emotions generate numerous, often contradictory core relational themes along with numerous, often contrary, estimations of meaning.<sup>44</sup>

*B. The Societal Functions of Emotions*

As just described, the amalgam of feelings and sensations that we classify as one or more discrete emotions help us manage in a world that we cannot fully understand by enabling us to plan, to understand, and to react.<sup>45</sup> Consequently, one knows that something is meaningful to one's life by identifying and pondering attendant emotions. The informative function was well understood by Hume, who aptly perceived the passions as integral to self-reflection and meaning.<sup>46</sup> In this way, emotions and their particular congruence with given individuals allow us both to understand ourselves and to generate "sympathy"—a socially shared understanding of "the inclinations and sentiments" of other people—with reasoning, "which makes us regard [others'] judgment."<sup>47</sup>

43. HUME, *supra* note 27, at 122.

44. Hume deftly summarized,

Now as we seldom judge of objects from their intrinsic value, but from our notion of them from a comparison with other objects; it follows, that accordingly as we observe a greater or less share of happiness or misery in others, we must take an estimate of our own, and feel a consequent pain or pleasure. The misery of another gives us a more lively idea of our happiness, and his happiness of our misery . . . . A small object makes a great one appear still greater. A great object makes a little one appear less.

*Id.*

45. OATLEY, *supra* note 7, at 24-25. Psychologists have tried to hone the definition by distinguishing emotions from other states that seem emotion-like because, like emotions, they are known to us by physical responses. For instance, "moods" are overdispositions usually lasting long periods of time, emanating from at first unknown reasons. *See, e.g.*, LAZARUS, *supra* note 29, at 47-49. Similarly, investigators differentiate "states" from "emotions." Hunger, for instance, is a "state" which drives us to eat.

The singular difference between emotions and emotion-like or emotion-saturated conditions such as "states," "moods," and "capacities" is that emotions inspire the individual to reflect deeply, on a conscious or unconscious level, to ascribe meaning and significance to the mixture of sensations identified as one or more emotions. By contrast, a person may abide under the influence of a mood, a state, or a capacity either without reflection or by engaging in what fairly might be called shallow reflection, that is, noting nothing more than the nature and persistence of the mood, state, or capacity.

46. "We seldom reflect on what is beautiful or ugly, agreeable or disagreeable, without an emotion of pleasure or uneasiness . . ." HUME, *supra* note 27, at 107.

47. *Id.* at 72, 76. "Sympathy" requires some workable comprehension of the perceptions, goals, and motivations of other individuals. "Sympathy," Hume was quick to accent, is not synonymous with "compassion," which is valuing the feelings of others. The

Thus, emotions are necessary to understand others. Indeed, emotions become even more than the means through which individuals initiate and contemplate interpersonal interactions, as pivotal as that function of emotions is. Emotions are the tools with which to define, perceive, and evaluate morals.<sup>48</sup>

The Humian-Aristotelian understanding of emotions and morality as it relates to law has been embraced by modern jurisprudence.<sup>49</sup> Given their manifest importance for human interaction, the extensive legal commentaries concerning emotions are hardly surprising. It is appropriate to accent the passions' indispensability to law by quoting Professor Martha Nussbaum, perhaps the leading contemporary jurist on emotions, meaning, and morality:

To remove the beliefs about worth on which love, fear, grief, and so on are based is indeed to remove many sources of pain, but the resulting life may seem flat and lacking in wonder. And it may also be lacking in a type of information that is crucial to good ethical and also legal reasoning; to respond with the pain of compassion at the sight of another person's suffering is to understand the importance of that suffering in a way no uncommitted person could possibly do. Without the information given by such emotions few difficult issues concerning poverty, or damages, or privacy, or mitigation, could be well addressed.<sup>50</sup>

### C. *The Concept of the Actor*

Involving as it does morals, the creation of meaning, and human interactions, a theory of emotions must posit a concept of the actor. As a general matter, the philosophy and psychology of emotions propounds rational, choice-making actors who can be self-reflective, who are goal oriented, and who attempt to understand their environments.<sup>51</sup>

The rationality of a given actor may be viewed either objectively or subjectively. One expression of the objective view is that something is irrational if it is contrary to empirical fact.<sup>52</sup> A similar but consider-

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latter certainly may arise but is not an inevitable consequence of the congruence of sympathy and reason. *Id.* at 76.

48. See *infra* Part II.F.

49. See generally Kahan & Nussbaum, *supra* note 9, at 285-97; Welch, *supra* note 4, at 68.

50. Martha C. Nussbaum, *Skepticism, About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 737-38 (1994) (footnote omitted).

51. See, e.g., LAZARUS, *supra* note 29, at 90-91, 134-35.

52. This objective rationality is typified by symbolic logic, a process with rules that allow testing for internal consistency without moral, political, or value judgments. If, for instance,  $A > B$  and  $B > C$ , then  $A > C$ .  $A$  cannot be  $< C$  under the rules of logic. To assert

ably broader and more popular formulation holds that “[r]eason alone will wrinkle out inconsistencies in our convictions, and the critical use of reason will expose inconsistency in the views of others.”<sup>53</sup> We might call this formulation the “rules of the game” concept: Certain set rules are triggered by certain ensuing criteria leading to one or more acceptable behavioral responses consistent with the philosophy of the rules of the scenario. This concept clearly is broader than defining irrationality simply as defiance of empirical reality because the rules or scenarios may be based in either empiricism or political-moral ideology defined in the broadest possible sense.<sup>54</sup>

Turning from objectivity to subjectivity, rationality may be defined subjectively, which, as Hume understood, is an iteration in summary form of the emotional-rational process:

[W]hen we have the prospect of pain or pleasure from any object, we feel a consequent emotion of aversion or propensity, and are carried to avoid or embrace what will give us this uneasiness or satisfaction. It is also obvious, that this emotion rests not here, but making us cast our view on every side, comprehends whatever objects are connected with its original one by the relation of cause and effect. *Here then reasoning takes place to discover this relation;* and according as our reasoning varies, our actions receive a subsequent variation. But it is evident in this case, that the impulse arises not from reason, but is only directed by it. It is from the prospect of pain or pleasure that the aversion or propensity arises towards any object; and these emotions extend themselves to the causes and effects of that object, as they are pointed out to us by reason and experience.<sup>55</sup>

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that  $A > B$  and  $B > C$ , yet  $A < C$  is irrational because it irrevocably confounds the rules. Similarly, under an objective definition of rationality we may presume that, with sufficient knowledge, an observer could explain in a positive, non-normative fashion whether a given actor selected goals that actually conform with her authentic desires and whether she chose the most appropriate means either to attain a specific goal or to accommodate a host of conflicting goals. The actor may have believed that her actions were rational in that they conformed to the rules of her own game, but the facts reveal to the observer that her behavior was irrational. A clear example is an actor who shoots herself in the head in order to promote good health. Assuming that the actor's sole or overarching goal is good health, shooting herself is irrational because it breaks the rules—as a physical reality a bullet in the brain is contrary to remaining healthy.

Many commentators seriously question whether any observer may describe human behavior absent interpretation based in some part on the observer's personal biases attendant to the meaning of actions and rules. *E.g.*, BATES, *supra* note 39, at 6.

53. West, *supra* note 10, at 1434.

54. For example, racism, with rare exceptions, is morally wrong. See Hill, *supra* note 9, at 689.

55. HUME, *supra* note 27, at 155-56 (emphasis added).

Subjective rationality, then, is the process through which we evaluate the impulses to action generated by our emotions and decide which impulses to indulge and, of those, to what extent.<sup>56</sup> We act rationally by seeking to maximize our pleasure and minimize our pain. Similarly, subjective rationality is the process through which observers ascribe meaning or significance to their observations of others. Although, arguably, an observer may objectively describe an actor's emotional-rational episode and measure whether the actor's resultant behavior is consistent with the actor's goals, thus rational, the observer must plumb her own subjective rationality if she cares to ascribe meaning, particularly moral or other value-laden conclusions. Thus, from the perspective of subjective rationality, all behavior is rational once the observer fully understands the emotional-rational process of the given actor.<sup>57</sup>

Rational actors, thus, have developed a sense of themselves, a sense of others, and a sense of how they are perceived by others,<sup>58</sup> although their senses and perceptions may be skewed or inaccurate.<sup>59</sup> Actors, therefore, are rational in that they consciously consider and adopt specific, sometimes conflicting, goals and they aspire, with varying degrees of success, to prioritize, to harmonize, and to attain their goals. Arguably, the concept of subjective rationality in essence takes the "rationality" out of "subjective rationality" because the actor, even if deluded, will act in the manner she thinks will maximize pleasure and minimize pain. Thus, she will always act rationally; she will always be

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56. See *supra* Part II.H.

57. The explanation for this was set forth cogently by De Sousa:

No event is an action unless it has a teleological structure. Actions are determined by wants and beliefs. The wants determine the goals of the act (even if the act is done "for its own sake"). The beliefs pertain to the circumstances and to ways of attaining the goal. And if the description of the act is sufficiently circumscribed, no distinction can be made between the act's teleological structure and its rationality. It is only when we enlarge the context to include other beliefs and wants, as well as the arguments that have served to bring them into existence, that the charge of irrationality may be made to stick.

DE SOUSA, *supra* note 25, at 159-60; see also Hill, *supra* note 9, at 688 ("Virtually any decision may be 'rational' from a *subjective* standpoint—that is, from the standpoint of the actor's own beliefs, values, and goals.") (emphasis added).

58. See generally GEORGE HERBERT MEADE, MIND, SELF AND SOCIETY (1934).

59. The notion of a conscious, goal-oriented, cognitive, and choice-making actor animates the modern theory of emotions. This Article will join those commentators who augment that definition of the actor by positing, in a somewhat post-modern fashion, that although existing in a real world, actors essentially construct their own definitions and perceptions of reality. Subjective perceptions may be deemed reliable if they are accurate predictors of the consequences of the actors' behavior. See, e.g., BATES, *supra* note 39, at 6-19.



playing by some set of internal rules, conscious or unconscious, which, when known, will reveal the rationality of her behavior. Some may respond that a definition of rationality eschewing objective rationality or defining all behavior as rational is not particularly useful. This Article avers that it does have at least one significant use: If beliefs and goals are subjective, then we need to remember as we assess the rationality of how others behave that what we may perceive as irrational likely is perfectly reasonable to the actor. If we can convince the actor to agree with our assessment, then we might convince the actor to change her concept of rationality and, thus, modify her behavior. The notion of subjective rationality reminds us that we must always try to understand the actor's perspective as well as our own.<sup>60</sup>

Some social scientists dispute rational choice theory, insofar as the concept of rationality presumes that "persons . . . seek to maximize their own self-interest."<sup>61</sup> The response is: both experience and a strong body of research confirm that while people are goal oriented in their significant endeavors, they nonetheless may act purportedly irrationally by making errors. As systems theorist Frederick L. Bates explained, "The mind of any thinker can be compared to a kind of cognitive *garbage can* or *trash bin* into which many ideas have been dumped after they have been formed and used for the great variety of particular cognitive purposes pursued by all human actors."<sup>62</sup> While actors may be goal oriented and truly interested in attaining their aspirations with minimum struggle, their minds are full of irrelevant, inconsistent, or contradictory flotsam that comprises, according to Bates, cognitive "garbage," inhibiting completely rational behavior.<sup>63</sup> Thus, social science hardly has abandoned what S.E. Taylor styled the "motivated tactician," who "is viewed as having multiple information processing strategies available, selecting among them on the basis of goals, motives, needs, and forces in the environment."<sup>64</sup> It is just that a particular "motivated tactician" may not be very adept.

The myriad natural and societal influences impressed upon a given rational actor coupled with the fact that emotional responses are a

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60. Cf. DE SOUSA, *supra* note 25, at 186.

61. Hill, *supra* note 9, at 675 n.261.

62. BATES, *supra* note 39, at 24.

63. *Id.* "The idea called *social behavior*, when it is retrieved from memory, is therefore apt to carry with it many inconsistent connotations and many irrelevancies as far as the cognitive task faced by the user at a particular time is concerned." *Id.*

64. S.E. TAYLOR, THE SOCIAL BEING IN SOCIAL PSYCHOLOGY, HANDBOOK OF SOCIAL PSYCHOLOGY 75 (D. Gilbert, S.T. Fiske, G. Lindzey, eds., 4th ed. 1998); see also Norbert Schwarz, *Warmer and More Social: Recent Developments in Cognitive Social Psychology*, 1998 ANNU. REV. SOC. 239, 242 (1998).

product of unconscious as well as conscious factors support Bates' concept of cognitive garbage.<sup>65</sup> An observer may not be able to understand fully and appreciate both her own emotions and the emotional responses of someone she observes. In other words, understanding emotions requires piercing two screens, the observer's and the actor's. The observer ("O") observes and attempts to interpret the emotions of the actor ("A") by correlating O's observations of A with the meanings O has experienced or been taught. Although A's actions and their meanings are unique, they likely bear sufficient similarity to actions and meanings that O understands.<sup>66</sup> Using imagination and analogy, O attempts a four step analysis: (1) classifying A's acts; (2) unwrapping the emotions reflected by A's acts; (3) determining what A's acts mean to A; and (4) deciding what A's acts mean to the observer herself.<sup>67</sup>

The process often is imperfect because A may not fully understand and thus may not accurately report her actions and O may be unaware of how her own matrix of experience, perceptions, and beliefs may distort her analysis of A's emotional state.<sup>68</sup> The interpretive task is all the more complex when O seeks to ascribe meaning, significance, or value to A's emotions such as "A has no right to be angry with me" or "A should be depressed; I would be under the same conditions." Social scientists identify the difficulty as the lonely actor seeking a connection

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65. See, e.g., LAZARUS, *supra* note 29, at 7, 18-19; see also MICHAEL LEWIS, SHAME, THE EXPOSED SELF 32-34 (The Free Press 1992). "People's responses to events and situations are, obviously, specific to their unique histories of experiences, expectations, desires, and needs." *Id.* at 34.

66. Bates, for instance, believes that no observer can be objective because every perception is filtered through the observer's subjective assessments of what she sees and what it means. Nonetheless, as Bates acknowledged, observers are able to make reasonably accurate assessments of how observed actors interpret both their own behavior and the behavior of others. BATES, *supra* note 39, at 6-8.

67. See, e.g., LEWIS, *supra* note 65, at 32-34; OATLEY, *supra* note 7, at 107-08. Hume likewise accented the importance of the human ability to imagine what another person is feeling and to analogize from one situation to another. As Hume explained, we seldom judge for intrinsic value; rather we judge by comparing one object with another. Hume, *supra* note 27, at 122, 160-61. See generally Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 86-98 (Harvard Univ. Press 1990).

68. For example, O may misconstrue the facts as when she interprets A's facial expressions, gestures, and actions as anger when, in reality, A is depressed. Similarly, both A and O may misconstrue the facts as when A says to O, "I am angry at you" and both O and A believe that A is angry with O when actually A is depressed, that is, A is angry at herself. Moreover, it is possible that A does not misinterpret herself, but O does. For instance, A accurately relates to O, "I am not angry at you; I am depressed," but O mistakenly decides that A has misjudged herself and actually is angry with O.

with other individuals and groups. There is a world of reality—"raw reality" some call it<sup>69</sup>—and actors learn about that reality in a social setting.<sup>70</sup> Thus, each actor constructs his or her own "cognitive reality" or sets of realities comprised of received, "culturally derived elements, for example, a symbolic code or language, a belief system, values, and so on."<sup>71</sup> The interesting and ironic question is how well a given actor's cognitive apparatus is able to:

predict the behavior of its environment and furnish useful responses to the "empirical environment" it creates through its own cognitive action. A cognitive system literally creates its own "facts" or "data" by selecting, interpreting, codifying, and processing "sense impressions" arising out of interaction between the cognitive apparatus itself and the phenomenological environment to which it relates or with which it interacts through observation.<sup>72</sup>

In this fundamental regard, each of us truly is alone within our adopted, singular perspectives.<sup>73</sup> That the project of observation and interpretation is not hopeless, of course, is born out by human experience; if we were not correct much of the time, we would simply be incapable of any social interactions. The assessments of the observer may be imperfect. However, often they are good enough in that they satisfactorily describe the actions of the actor, they adequately identify the cluster of emotions underlying the actions, and they allow the observer to devise and perform responsive actions.<sup>74</sup> We may learn, evaluate, amend, and adjust our "cognitive apparatus" based on the

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69. See BATES, *supra* note 39, at 6.

70. *Id.* at 98-99; see also *infra* Parts II.D. and II.E. As Bates summarized the familiar process, actors learn and perform patterns of behavior "in social units whereby a population of individuals acting in relation to each other, and jointly in relation to [a social] environment, establish stable, normalized patterns of interactions that allow the population to survive and reproduce itself." BATES, *supra* note 39, at 98.

71. *Id.* at 7. Bates explicated the dynamic and ever shifting phenomenology of thought: The mind, in contrast to the brain, is artificial in the sense that it is formed from experience that itself is constructed out of previous experience as information accumulates in the organism . . . The mind is a self-generating, self-constructing system or set of systems that is based on the organic capacity and predisposition of the organism to construct an information file organized according to a biologically based plan, and through which it constructs and continually reconstructs itself and its environment.

*Id.* at 114.

72. *Id.* at 7.

73. "The cognitive apparatus . . . is designed to deal *only with the reality it itself creates and not with other realities* brought to it by the reader or the critic on the basis of a belief in the ultimate correctness of other theoretical formulations." *Id.*

74. *Id.* at 6-8.

responses of others. Nonetheless, our interpretations are our own, shared in large part while unique in all the world. Thus, absent emotions, there can be no contact, no communication, and no interaction.<sup>75</sup> Granted, actors may affect others without recourse to assessing each other's emotions, but that interaction is not the same as communication and social interaction. One may carelessly drive one's car into another person's vehicle and cause some sort of negative effect through the accident, but that interaction is not social intercourse.<sup>76</sup>

#### D. *The Effects of Genes and Socialization*

The aspect of the lonely actor leads to the recurring questions of whether persons are genetically disposed to certain emotions and the degree to which such dispositions preordain behavior. Emotions, after all, are at their core physiological responses to stimuli.<sup>77</sup> As noted above, we feel emotions because of changes in our bodies that we have learned to associate with the onset of emotions. Moreover, we notice emotions in others through physical manifestations such as facial expressions and other forms of body language.<sup>78</sup> Thus, fully consistent with the thesis of this Article, thought and emotion are physically linked and interdependent.<sup>79</sup> An injection of the right substance at the right time will cause the actor to have a decidedly different emotional reaction to given stimuli than had there been no injection at all.

Nonetheless, a preponderance of commentators compellingly insists that biology alone is not enough to explain either the generation of emotions or, more importantly, how actors interpret and respond to their emotions.<sup>80</sup> While certainly not denying that biology affects behavior and thus influences passionate reactions, "[m]any philosophers and psychologists have argued for the primacy of cultural aspects of emotion."<sup>81</sup> De Sousa, for instance, posited that the influence of biology and evolution produces emotional inclinations that he called "tempera-

75. See, e.g., Robin West, *Love, Rage and Legal Theory*, 1 YALE J.L. & FEMINISM 101, 102 (1989); Nussbaum, *supra* note 25, at 24-25; *infra* Parts II.D. and II.E.

76. See, e.g., Bates, *supra* note 39, at 93.

77. See, e.g., LAZARUS, *supra* note 29, at 26-29; OATLEY, *supra* note 7, at 14.

78. LAZARUS, *supra* note 29, at 69-75; LEWIS, *supra* 65, at 20-21.

79. See ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* (Harcourt Brace & Co. 1999); ANTONIO R. DAMASIO, *DESCARTES' ERROR* (Avon Books 1994) (arguing that cognitive analytical process is physically impossible without emotions).

80. See, e.g., LEWIS, *supra* note 65, at 20-21; LAZARUS, *supra* note 29, at 75-78; Kahan & Nussbaum, *supra* note 9, at 296.

81. Pillsbury, *supra* note 16, at 683 n.91.

ments.<sup>82</sup> Undoubtedly, societal influences modify the acting out of discrete temperaments and, in certain instances, to some degree, may modify the temperaments themselves. Nonetheless, the eminence of given temperaments may allow the actor to resist social influences in certain cases or may strongly affect which among conflicting influences will prevail.<sup>83</sup> As De Sousa clarified:

We need to allow for the idea that . . . a certain degree of self-assertion by rebellion [] is essential to ego development. And I suspect the biological factors I have bundled under the name of "temperament" may be responsible for a great many differences between individual natures in respect of the style, strength, and direction of the rebellion.<sup>84</sup>

Approaching the issue from a different tack, Lazarus reasoned through example that a smile may be a biological-physiological response to any number of emotions: joy, love, compassion, vengeance, anger, even fear.<sup>85</sup> The study of biology alone, therefore, cannot provide sufficient analytical tools to decipher what the smile means.<sup>86</sup>

Most commentators, then, eschew the idea that individuals are helpless pawns of their biology.<sup>87</sup>

In recent years cognitive theories . . . have dominated both the philosophical and the psychological literature on the subject. Cognitive theories come in many varieties, but all share the idea that cognition is central to emotion. By cognition I mean a perception which we can determine to be correct or incorrect according to rational principles. A cognitive approach holds that emotion is a cognitive assessment of a person or situation, which assessment is associated with a physiological sensation, normally accompanied by a desire to undertake a particular kind of action.<sup>88</sup>

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82. DE SOUSA, *supra* note 25, at 252.

83. *Id.* at 251.

84. *Id.* at 252.

85. LAZARUS, *supra* note 29, at 69-75.

86. *Id.* at 75-78.

87. "Were emotions disturbances of the gut (or sympathetic nervous system or whatever), the difference would be nothing but a difference in the tweaks, twinges, and pangs . . . people feel—and what about *that* would lead us to select one over the other as a friend?" Sabini & Silver, *supra* note 9, at 168 (emphasis added).

88. Pillsbury, *supra* note 16, at 675 (footnotes omitted); *see also* Gewirtz, *supra* note 11, at 1030 ("More recently, a chorus of scholars from fields as diverse as philosophy, psychology, and neurobiology has demonstrated that emotions have a cognitive dimension, are connected to beliefs, and can promote, illuminate, and convey understanding in many ways.") (footnote omitted).

Thus, when one experiences an emotion, as personal as that experience is, it is likewise a sociological event.<sup>89</sup> Surely biology alone, for example, cannot explain why one judge believes that substantive due process should prohibit the criminalization of privately performed acts of homosexual sodomy between consenting adults while a different judge would not accord this protection.<sup>90</sup> The pervasive influence of social forces is so well known its mention herein is mandated simply to provide a complete analytical framework. As Hume, among many others, observed with his characteristic verve, "We can form no wish, which has not a reference to society."<sup>91</sup> If Hume's statement is hyperbolic, it is so only by a small degree. Because passions are essential to derive meaning from a particular situation, and because society, in its myriad forms, imparts contexts within which to ascribe meaning, emotions are essential to comprehending social experience, and social forces influence the generation and understanding of emotions.<sup>92</sup>

### *E. The Learning Process*

Professor Pillsbury deftly summarized the social learning process: "By cultural influence and direct education we learn which emotions are appropriate in particular situations and which are not. We learn to regulate their degree and the manner of their expression."<sup>93</sup> This learning process begins at birth. As Professor Nussbaum noted, we all

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Feelings have powerful effects on cognitive processes: serving as a selective filter that admits some material and excludes others, determining what gets stored in memory, giving greater salience to some information, affecting what records can be retrieved from memory, influencing thinking and judgment as people evaluate themselves and their environment.

Welch, *supra* note 4, at 67 (footnote omitted).

89. See Kahan & Nussbaum, *supra* note 9, at 296-97; Pillsbury, *supra* note 16, at 681; Welch, *supra* note 4, at 77.

90. See, e.g., POSNER, *supra* note 67, at 130-53 (discussing generally how political factors and social visions affect judges).

91. HUME, *supra* note 27, at 112.

92. See, e.g., ROBERT C. SOLOMON, A PASSION FOR JUSTICE—EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT (Addison-Wesley Pub. Inc. 1990) (explaining how emotions are integral to the formation of a theory and system of societal justice).

93. Pillsbury, *supra* note 16, at 681. As with most of the theory of emotions, the antecedents go back millennia. Aristotle, it will be recalled, accented the need for individuals to be educated in the emotions in order to lead good lives in society. See, e.g., DE SOUSA, *supra* note 25, at 183; Sabini & Silver, *supra* note 9, at 171; HUME, *supra* note 27, at 154-59.

learn from infancy that emotions are not limited to one situation but are essential to developing a more comprehensive world view.<sup>94</sup>

De Sousa coined a most useful and expressive term explaining that from early childhood we are inculcated with "paradigm scenarios" drawn from, "stories, art, and culture," and, later on, through literature.<sup>95</sup> De Sousa's construct of paradigm scenarios provides three necessary components for any particular emotional episode. First, paradigm scenarios designate an "object," that is, the person, thing, or event giving rise to the emotion and about which the actor evaluates and adopts an invented response.<sup>96</sup> Classically, for instance, the object of the emotion romantic love is one's paramour. Second, the paradigm scenario furnishes the one or more acceptable or "normal" responses to the situation, "where normality is first a biological matter and then very quickly becomes a cultural one."<sup>97</sup> Lastly, in addition to providing means to identify clusters of emotions and to formulate responses, paradigm scenarios culturally indoctrinate individuals, providing not simply responses but also motivations and goals. In this sometimes overlooked or underestimated manner, emotions become more than the individual's physically felt siren that something has occurred important enough to require a response. Emotions are integral to the process of creating and perpetuating goals and desires.<sup>98</sup> This function, of course, brings us back to our initial definition of emotions as motivators of

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94. NUSSBAUM, *supra* note 5, at 68. Learning emotional responses, of course, is part of the greater project of social learning, that is, socially created elements including language, belief systems, and values. BATES, *supra* note 39, at 7, 98-99. As Bates explained, each individual draws, "the resources necessary to sustain the life of the individual" from socio-behavioral systems. The "adaptive behavior" of individuals, "is usually performed in social units whereby a population of individuals acting in relation to each other, and jointly in relation to an environment, establish stable, normalized patterns of interaction that allow the population to survive and reproduce itself." We see all this moving in time through "repeated episodes of action and interaction." *Id.* at 98-99.

95. DE SOUSA, *supra* note 25, at 182. Certainly, De Sousa's concept of "literature" is broad enough to encompass more than fiction including texts of history, law, philosophy, and theory.

96. *Id.*

97. *Id.*

98. Oatley offered an apt summary applicable to what De Sousa designated as the three functions of paradigm scenarios:

Each goal and plan has a monitoring mechanism that evaluates events relevant to it. When a substantial change of probability occurs of achieving an important goal or subgoal, the monitoring mechanism broadcasts to the whole cognitive system a signal that can set it into readiness to respond to this change. *Humans experience these signals and the states of readiness they induce as emotions.*

OATLEY, *supra* note 7, at 50 (emphasis added).

behavior. Thus, emotions are essential to all personal and social projects, including law.<sup>99</sup>

The educative process continues through adulthood but in ever more complex ways as early, simple paradigm scenarios are modified, expanded, supplemented, and, occasionally, discarded through the experience of living. "Learning these scenarios continues indefinitely . . . as the emotional repertoire becomes more complicated."<sup>100</sup> Of course, the task of emotional interpretation immediately is complicated further because society is not monolithic. An individual's emotional responses and her interpretations of her responses are affected by diverse and possibly conflicting societal structures such as family, friends, schools, organizations, government, and the like.<sup>101</sup>

The learning process becomes additionally complicated because paradigm scenarios are not necessarily clear, absolute, and certain. A particular scenario may be vague even with regard to the criteria that inspired the scenario. For instance, a given culture may be ambivalent about love—when to make sacrifices for the sake of the loved one and when to act selfishly.<sup>102</sup> No single paradigm scenario likely will be applicable to all facts; thus, the culture may construct a host of highly specific scenarios, some calling for sacrifice and some calling for rapacity. There may be no clear way to reconcile those scenarios in the face of a new situation with attributes of scenarios calling for selflessness and attributes of scenarios calling for selfishness.

Thus, the difficulty of understanding emotions arises in part because, within a given culture, the lessons of paradigm scenarios will be subject to several reasonable interpretations, especially with regard to analogy, that is, applying scenarios to a situation similar to but different in significant regards from the familiar contexts defining the scenarios.<sup>103</sup> Even if a given paradigm scenario is so artfully drawn and masterfully taught that its application is unambiguous within the factual context from which that scenario sprung, great and reasonable doubt may exist with regard to applying the scenario to similar but factually distinct cases. This uncertainty led De Sousa to surmise, "Like scientific paradigms, . . . emotions are better at stimulating research in certain

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99. See, e.g., Gewirtz, *supra* note 11, at 1029-30 & n.14; West, *supra* note 10, at 1434-36; Margulies, *supra* note 23, at 1129-35; Pillsbury, *supra* note 16, at 656-57, 677.

100. DE SOUSA, *supra* note 25, at 183; accord OATLEY, *supra* note 7, at 24-28.

101. See, e.g., Kahan & Nussbaum, *supra* note 9, at 296-97.

102. See, e.g., Kahan & Nussbaum, *supra* note 9, at 296.

103. See, e.g., DE SOUSA, *supra* note 25, at 188; Lewis, *supra* note 65, at 32-34; OATLEY, *supra* note 7, at 107-08; POSNER, *supra* note 67, at 86-98 (discussing the use and limits of analogy).



directions than at finding compelling and fair reasons for their own adoption. They are too 'deep' for that, too unlike specific beliefs."<sup>104</sup>

#### F. Coercion, Emotions, and Morality

Of course, the fact that commentators refer to it as a "learning process" cannot negate the actuality that individuals and groups use coercion as well as persuasion in their attempts to influence others to adopt their paradigm scenarios.<sup>105</sup> As Professor Bandes observed, "The characterization of some emotional variables, stances, or mechanisms as 'emotional' and others as 'reasonable' is an assertion of power—a camouflaged decision to marginalize the former and privilege the latter."<sup>106</sup> Individuals and groups habitually use various forms of compulsion and constraint to promote their own paradigm scenarios and attendant behavior patterns.<sup>107</sup> Undeniably, the process through which individuals accept and imbue paradigm scenarios is partisan.

The reality that, in substantial degree, meanings and responses to emotions are socially learned, has led philosophers and psychologists to agree, as they must, that the meanings and responses ascribed to emotions in given contexts are moral judgments. Thus, emotions are integral to the creation and perpetuation of personal moral principles.<sup>108</sup>

At this point, the reader can hardly be surprised that the linkage of emotions and morality goes back to Aristotle, as De Sousa accented:

A child is genetically programmed to respond in specific ways to the situational components of some paradigm scenarios. But what situational components can be identified depends on the child's stage of development. An essential part of education consists in identifying these responses, giving the child a name for them in the context of the

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104. DE SOUSA, *supra* note 25, at 198; *cf.*, Michael C. Dorf, *Truth, Justice and the American Constitution*, 97 COLUM. L. REV. 133, 151 (1997) (positing methodological similarities between arguably conflicting genres of jurisprudence, such as postmodernism and Dworkinian concepts of law as "integrity," "illustrate the irrelevancy of a theory of law to the resolution of legal questions—even quite abstract legal questions such as 'How does a judge discern the law?'").

105. See Kahan & Nussbaum, *supra* note 9, at 296-97 (explaining groups and societies often attempt to suppress and to control emotional responses in discrete situations).

106. Bandes, *supra* note 17, at 370, 385, 409; Delgado, *supra* note 23, at 666-67; Margulies, *supra* note 23, at 1126.

107. See, e.g., West, *supra* note 75, at 107.

108. See, e.g., LAZARUS, *supra* note 29, at 194; Kahan & Nussbaum, *supra* note 9, at 297-301; Pillsbury, *supra* note 16, at 681. As Dean Welsh concluded, "Appropriate emotional responses are not only possible ingredients in moral decision-making but are essential elements in the process." Welsh, *supra* note 4, at 77.

scenario, and thus teaching it that it is experiencing a particular emotion. That is, in part, what is involved in learning to feel the right emotions, which, as Aristotle knew, is the central part of moral education.<sup>109</sup>

Hume went so far to aver that “[m]orality has no foundation in nature.”<sup>110</sup> Morality, Hume argued, is founded upon the expectation of pleasure from attaining an “advantage” that generates the emotion or passion of “pride,” a sense of self-worth and satisfaction. Conversely, morality likewise is founded on the fear of pain arising from a disadvantage manifested as “humility,” that is, a loss of personal worth. For Hume, the meaning of morality arises not from natural law but from the personal-social context of emotions generally categorized into “pride”—an “agreeable impression” of the self—and “humility”—a disagreeable self-impression.<sup>111</sup>

Given the nature of emotions as substantially socially mastered, many contemporary theorists shun the value-laden inquiries that intrigued investigators during the last two hundred years, specifically, whether certain emotions inherently are good and others are bad.<sup>112</sup> These investigators rejected the project of devising a meta-theory linking discrete emotions to discrete notions of good and evil.<sup>113</sup> Rather, the

109. DE SOUSA, *supra* note 25, at 183 (citing Nicomachean Ethics, II.2); *see also* Sabini & Silver, *supra* note 9, at 171 “[Aristotle] argues that the practice of moderation in action acts back on the passions to produce a balance, or harmony, of the passions themselves.”; Martha Nussbaum, *Aristotle, Feminism and Needs for Functioning*, 70 TEXAS L. REV. 1019, 1022 (1992).

110. HUME, *supra* note 27, at 54.

111. *Id.* at 54-56. Hume recognized, naturally enough, that humility does not necessarily lead to moral conduct nor does pride necessarily result in immoral behavior. This is not to imply that Hume was a relativist who felt that nothing is intrinsically good or corrupt. Hume believed that people may choose benevolent passions over selfish ones in discrete situations. Often individuals select duty over personal gain and, indeed, society depends on individuals embracing a sense of responsibility. But, Hume disagreed fully with the rationalistic, or what would later be denoted the Kantian, ideal that such duty and devotion are the triumph of reason through the suppression of emotion. Rather, they are the mastery of unselfish emotions over self-centered ones. *See, e.g.*, PENELHUM, *supra* note 5, at 125.

112. Not all commentators, however, have abandoned the enterprise of attempting to prove that certain emotions are worthier than others in civil society. *See, e.g.*, JUSTIN OAKLEY, MORALITY AND EMOTIONS 75-78 (1992); W. GEORGE TURSKI, TOWARD A RATIONALITY OF EMOTIONS: AN ESSAY IN THE PHILOSOPHY OF MIND 146 (1994).

113. *See, e.g.*, West, *supra* note 10, at 1432 (“After forty years of formulating, reformulating, and rejecting principles with which to resolve issues of racial justice, it is becoming harder . . . to see precisely what any of these principles—whether the principle of colorblindness, or anticaste, or antisubordination, or antidiscrimination—are doing, beyond providing fancy rhetorical garb for slogans.”); *see also* Dorf, *supra* note 104, at 151.

good or bad resulting from an emotion and responses thereto are contextual, with meanings arising from the given situation based on the value judgments of the actor and those observing the actor, all of whom may disagree.<sup>114</sup>

*G. Emotions and Reason—An Inextricable Collaboration*

The foregoing demonstrates that emotions are not solely, nor even predominately, a matter of instinctive response or genetically predisposed reflex. Rather, the recognition of meanings ascribed to and choice of responses regarding experienced emotions is a matter of indoctrination. If, as prevailing theory posits, emotions are learned, then any individual's emotional response in any given situation must be, in substantial part, an intellectual effort. Thus, a pivotal aspect of emotions now may be introduced. Theorists, particularly Hume, correctly and profoundly described the systemic, inevitable collaboration between reason and emotion and, in so doing, explained why both are essential to human behavior. Hume expressed the verity with stunning brevity: "Reason alone can never produce any action."<sup>115</sup> Emotions and reason might be separated conceptually but not pragmatically, for they are the integral elements of the cognitive-phenomenological system that gives rise to action.<sup>116</sup>

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114. A typical and illustrative example question is whether "vengeance" is a "bad" emotion because vengeance inspires an actor to harm someone as retribution for a perceived injury. Doubtless, vengeance is personal, selfish, and often crude, although some forms of vengeance, as history and literature show, may be elegantly complex and subtle. Even according to a propensity for subtlety, some commentators aver that although the urge for vengeance under certain situations is understandable, it should be suppressed in favor of "kinder" emotions such as compassion and love, particularly the love of justice. Ironically perhaps, without a sense of vengeance, an individual may not understand that she has been wronged and thus may not consider appropriate steps to ameliorate her injury. See, e.g., SOLOMON, *supra* note 92, at 40-43. Vengeance then is not antithetical to justice. To the contrary, a theory of justice must include a reasonable sense of vengeance—the recognition both that one has been harmed and that one is entitled to see the wrongdoer punished. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (noting that the desire for retribution in the form of capital punishment for certain crimes "is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."); *Barclay v. Florida*, 463 U.S. 939, 948-51 (1983) (holding judge may express outrage at defendant's conduct when imposing death sentence).

115. HUME, *supra* note 27, at 156.

116. It may be true that an emotion alone may arouse an instinctive or unconscious response. One may freeze or run at the sight of something deadly without conscious reflection. In that sense, it may be argued that some emotional responses can arise without a rational process of reflection, at least on the conscious level. Often though the unconscious response to emotions is the first step—the "trigger"—in a given emotional-

Of course, in a positive fashion, emotions may be conceived of as conceptually distinct from reason, but understanding human motivation and behavior requires the ability to visualize emotions and reasoning working together and at once.<sup>117</sup> Identically, conceptually an actor can engage in a process of pure reason such as solving a math problem, rationally but without passion. To illustrate, Hume disagreed not with the notion that the math problem could be solved rationally, but with the idea that either the act of solving or the solution itself could be meaningful to the actor without appeal to passion.<sup>118</sup> Conceptual reasoning such as mathematics might be performed according to its logic, Hume concluded, but it carries no intrinsic significance, or motivational force, until it is used as a tool, as when a merchant balances her books. Thus, one may struggle over a math problem but only ascribe consequence by way of passion and reflection combined such as pride in success, frustration in failure, or satisfaction in balancing the books.<sup>119</sup> As Professor Nussbaum discerned through a profound illustration, "Intellect without emotion is, we might say, value-blind: it lacks the sense of the meaning and worth of a person's death that the judgements internal to emotions would have supplied."<sup>120</sup> That the death occurred by accident as opposed to murder, suicide, or natural causes has meaning only insofar as instructed by the paradigm scenarios adopted by social actors—the emotional-rational processes associated with assessing the pertinence of death.<sup>121</sup>

rational episode in which conscious reflection plays an integral role. For the projects of legal decision-making, certainly the emotional process will require some conscious rational reflection. See *infra* Part II.H.

117. See, e.g., HUME, *supra* note 27, at 154-59.

118. "Abstract or demonstrative reasoning . . . never influences any of our actions, but only as it directs our judgment concerning causes and effects." *Id.* at 155.

119. The math problem for a merchant then is only meaningful "[b]ut that he may learn what sum will have the same *effects* in paying his debt, and going to market, as all the particular articles taken together." *Id.* (emphasis in original).

120. NUSSBAUM, *supra* note 7, at 68.

121. Indeed, the earliest philosophers on legal advocacy understood that the meaning of a fact comes not simply by its happening but by the significance imparted to the fact by actors and observers. Quintilian, for example, boldly admonished,

"[T]he purpose of the statement of the facts is not merely to instruct, but rather to persuade the judge . . . I am . . . surprised at those who hold that there should be no appeal to the emotions in the statement of the facts . . . [W]hy, while I am instructing the judge, should I refuse to move him as well?"

Michael Frost, *Ethos, Pathos and Legal Audience*, 99 DICK. L. REV. 85, 95-96 (1994) (quoting QUINTILIAN, 2 INSTITUTIO ORATORIA 155, at 61, 111 (H.E. Butler trans. 1954)).

Presaging Hume, Quintilian correspondingly cautioned that withholding an emotional interpretation of facts until the closing argument is defeating, for when facts initially are presented, the judge will experience some emotional reactions with which to interpret those

Of equal profundity, modern research tells us that the psychology of thinking and the physiology of thinking are intertwined and mutually dependent:

feelings are a powerful influence on reason, [and] the brain systems required by the former are enmeshed in those needed by the latter, and [] such specific systems are interwoven with those which regulate the body . . . . It is as if we are possessed by a passion for reason, a drive that originates in the brain core, permeates other levels of the nervous system, and emerges as either feelings or nonconscious biases to guide decision making. Reason, from the practical to the theoretical, is probably constructed on this inherent drive . . . .<sup>122</sup>

Dean Welch deftly summarized the point: "A style of thinking that is totally disinterested, without affective connection, is simply not a possibility for flesh and blood human beings."<sup>123</sup>

Accordingly, a life void of emotions, if possible, would be empty of meaning and all that flows from meaning. Once this fact is understood, the nay-sayers to the integral affiliation of reason and emotion must be proved wrong. The projects rather are understanding and judging the emotional-rational interplay of given actors.

#### *H. The Mechanics of the Emotional-Rational Melding*

We are ready now to move to the mechanics of the process. Although different theorists provide somewhat differing descriptions, most agree that the two fundamental elements of the emotional-rational process are the trigger and the evaluation. These commentators, however, make a significant error: They see emotion and reason working together yet as separate agents when the creation of meaning, in fact, is the coalescing—the melding—of the two.

**1. The Trigger.** Philosophers and psychologists concur that the initial trigger of the emotional process is a sense of harm or benefit to

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data. Having expended the energy in this emotional-rational process to form an initial impression of the facts, the judge is prone to adopt that impression as the correct one—what is known as a "calm passion" (see Part II.i.)—that will be difficult to excite, much less amend, at a later moment during the trial. The initial factual presentation, then, is the advocate's opportunity to instruct the judge as to the preferred emotional-rational understanding of the facts. Quintilian wisely admonished, "Once the habit of mind is formed, it is hard to change it." *Id.* at 99 (quoting QUINTILIAN, *supra*, at 111).

122. DEMASIO, DESCARTES' ERROR, *supra* note 79, at 245; see also DEMASIO, THE FEELING OF WHAT HAPPENS, *supra* note 79.

123. Welch, *supra* note 4, at 66-68 (footnotes omitted).

further pleasure and to avoid pain.<sup>124</sup> The pleasure or pain may be purely physical or, more likely, simultaneously physical and psychological.<sup>125</sup>

Something occurs; some trigger inspires an emotion that the actor experiences as the set of physical-psychological symptoms she has learned to associate with the given emotion. The trigger diverts the actor from other immediate projects, requiring the actor to engage in some conscious reflection upon the new emotion. The trigger arises unbidden and from outside the actor, what Professor Pillsbury referred to as "[t]he suddenness of the experience."<sup>126</sup> We do not choose initially to experience an emotion, nor do we choose what will activate that initial emotion.

**2. The Evaluation Process.** As a result of the trigger, the actor begins to reason, that is, to contemplate, to reflect on what has caused the sudden emotion or cluster of emotions. Reviewing the information available, the actor selects a "target," that is, an object or event that the actor believes triggered the emotions. This step leads to the next level of reasoning, the selection of a "motive" about the target, meaning the attributes of, or beliefs about, the target that stimulated the emotions.<sup>127</sup> This identification of a target and the ascribing of motives may occur in a matter of moments or over a longer time period if the situation is more complex or obscure. In addition, the motives may be unconscious or partially unconscious as might well occur in the case of

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124. See, e.g., LAZARUS, *supra* note 29, at 18-19, 57, 92-104; OATLEY, *supra* note 7, at 19; HUME, *supra* note 27, at 54-56. Indeed, Hume noted a commonly recognized link between pain-pleasure and the law. Human law of all types is founded on the granting of rewards and the threat of punishments. Identifying what will work as a reward or a punishment, of course, is based on observations of what triggers certain responses in many, perhaps most, members of a given society. HUME, *supra* note 27, at 152.

125. It may be argued that the pain-pleasure framework is meaningless because it proves too much. If all human endeavor is based on avoiding pain and maximizing pleasure, then we really know nothing except that when an actor performs some act, even one that seems to hurt her, she chose to perform the act because she guessed that, of all available options, the chosen act was the least painful or the most pleasurable. Of course, the interesting question is why the actor decided to perform a given act over all other alternatives. The pain-pleasure approach simply provides the opening concept inevitably leading to the more important inquiries such as what were the actor's options, what did she think her options were, and why did she select the chosen option?

126. Pillsbury, *supra* note 16, at 679.

127. DE SOUSA, *supra* note 25, at 115-16, 335-36.

a phobia when the affected individual may be unaware of the reasons why she is phobic.<sup>128</sup>

Next, the actor contemplates paradigm scenarios to assess what seems to be at stake, what are the benefits or detriments that may be generated in this situation. The actor gauges the perceived benefits and detriments from a matrix of personal long-term and short-term goals, or a "goal hierarchy," resulting from years of education and indoctrination, cumulative personal experience, and perhaps some genetic predisposition.<sup>129</sup> Thus, the process of the cognition of emotions—of rational thought—continues. The assessment, understandably, includes choosing one or more goals from a hierarchy of personal goals and forecasting the probable personal costs engendered by alternative possible responses designed to attain, in whole or part, one or more goals. The actor will choose the behavior pattern resulting in the greatest pleasure and least displeasure and will distinguish potential behavior patterns by the emotions attendant to each.

In sum, as Oatley described,

emotions derive from *cognitive processes* for integrating multiple and sometimes vague goals and for managing the associated plans that are enacted with limited resources in an uncertain environment, often in conjunction with other people. Happy emotions occur when coordination between plans is being achieved and unanticipated events are assimilated. Distressing emotions occur when coordination fails, or when some plan goes badly, when a problem emerges that cannot be solved from current resources or when an important background goal is violated. *Emotions function to allow otherwise disparate aspects of a complex system to be coordinated.*<sup>130</sup>

It is worth accenting that the evaluative process is fraught with complicating factors including the following: (1) the actor works under time constraints; (2) the actor must sort numerous, possibly conflicting

128. The mingling of an unconscious goal or mode of interpretation with conscious goals and conscious reflection may mean that

conscious intentions may not cause the action, although rationalization may be offered later. In other words, plans may be scheduled by processes that are not fully integrated with any consciously assessable representation . . . . Correspondence between the cognitive-theoretical idea of goals that direct plans and the reasons people give for actions therefore becomes problematic . . . .

OATLEY, *supra* note 7, at 34 (citations omitted).

129. See, e.g., DE SOUSA, *supra* note 25, at 118-21; LAZARUS, *supra* note 29, at 33, 94-99; OATLEY, *supra* note 7, at 24-50.

130. OATLEY, *supra* note 7, at 43-44 (emphasis added). It is worth recalling that whether an emotion is pleasant or unpleasant to a given actor does not necessarily mean that the attendant results are good or bad.

emotions, which the actor herself likely does not fully understand; (3) the actor exists in a context of incomplete and incorrect information, affecting her ability to reflect comprehensively on the given emotions; (4) the actor must choose among possibly vague and conflicting goals and contrast the probability of goal attainment with each possible response to the emotional stimuli; and (5) the reflection process occurs consciously, unconsciously or both.

The foregoing becomes extraordinarily complex and exquisitely intricate because it is a systemic process and is, therefore, repeated, often numerous times, as the actor assesses and reassesses the meaning of an initial emotion or set of emotions and the meanings of emotions resulting therefrom. The interplay of emotion and reason is phenomenological; therefore, we must tweak our concept to envision emotions and reason not simply interacting but actually merging, generating new or revised emotions and assessments, and merging again to create meaning which, in turn, inspires other emotional-rational meanings. Modern "systems theory" supplies a paradigm requiring observers to visualize events flowing through time. Sociologist Frederick L. Bates explained the point:

[A] defining characteristic of a system is the idea that systems are always viewed as objects that operate, behave, or function. They are never static in the sense of being motionless, inert, dead, or in a state of functional entropy. In systems, things are happening; energy or pseudoenergy is being expended.<sup>131</sup>

Thus, to engage in systemic analysis is to see things always moving, unlike a static, pure structural analysis. Through systemic inputs and feedbacks, we sort and reflect on a myriad of scenarios, weighing their meaning, evaluating their applicability, choosing among conflicting scenarios, and, through imagination and analogy, constructing new ones. Possible meanings causing the most discomfort to the decision maker are rejected; the one that causes the most comfort or least discomfort is accepted. The degree of comfort or discomfort is felt by emotions; reason informs what these emotions mean. However, emotions inform whether our reasoning is apt (comfortable) or inapt (uncomfortable), which meaning, in turn, is informed by reason. The process swirls in a system of inputs and feedback culminating in one or more decisions that are the product of emotion and reason uniting as meaning. The systemic whirl and interplay merges emotion and reason—where one ends and one begins becomes indistinguishable. What is important is that the melding of emotion and reason is understood as meaning. That system

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131. BATES, *supra* note 39, at 80.



is inborn in the biology of human beings. Without emotions we cannot apply reason; without reason we cannot understand our variety of emotional impulses; and the construction of meaning is the product of the coalescing of emotions and reason.<sup>132</sup>

How then can we visualize the systemic, processional blending of emotion and reason? At the risk of skirting the edge of flippancy, I propose the "Russian Dressing" theory. That is, if we can conceptualize how that particular condiment is made, we can imagine how emotions and reason interact.

Although subject to culinary embellishments not germane to this inquiry, the basic recipe for Russian Dressing is roughly equal parts of mayonnaise and ketchup. Mayonnaise and ketchup are each uniquely describable relishes, packaged separately and conceptually distinct with regard to composition, taste, texture, and other characteristics. If one wants Russian Dressing, one must combine these two ingredients, producing something distinctly different from the two ingredients separately. It might be protested that all recipes render something unique from a combination of ingredients. To a degree that is true, but often the distinctive flavor of one or more items predominates. When you pour milk over cereal, usually you get soggy cereal that tastes like cereal plus milk, rather than resembling something new. Similarly, buttered toast tastes like toast plus butter, a combination if you will, where both tastes merge slightly but essentially seem to layer upon the taste buds as toast and butter.

Not so blending mayonnaise and ketchup. Although the resultant Russian Dressing bears some similarities to the predecessor ingredients, it does not look like ketchup—red—nor mayonnaise—white—nor is it striped. Rather, it is pink, a true blending of the two ingredients. Similarly, Russian Dressing tastes distinctly different from either ketchup or mayonnaise. Though the discerning pallet could identify the ingredients, the resultant flavor is unique.

Admittedly, the cultural habit of separating emotion and rationality makes it more difficult to imagine them as one than to appreciate Russian Dressing as distinct from ketchup and mayonnaise. However, to understand how people in fact evaluate and accord value and significance to ideas and events, we must envision the systemic process in which emotion and reason coalesce and render a new product: an actor's expression of what something means. Granted, we will understand the meanings we ascribe, and we will attempt to grasp the meanings ascribed by others through the feelings engendered by the

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132. See, e.g., DAMASIO, DESCARTES' ERROR, *supra* note 79, at 245.

emotional-rational process. We call those feelings emotions. Those feelings are like the taste of Russian Dressing; they tell us what the new product is, pleasing or unpleasant under the given circumstances.

Of course, to test and to alter the result of a given emotional-rational episode, the actor or observer will explore the process, discerning and evaluating both the emotions and modes of reasoning. The Russian Dressing metaphor reminds the actor and the observer that the critiqued behavior or event is the result of a systemic process, moving through time, in which the necessary ingredients (emotion and reason) must intermingle or no behavior will result to critique.

Perhaps the most effective extant jurisprudence to approach a Russian Dressing/systemic philosophy of emotion with reason is "narrative theory." Put too simply to capture fully the richness of this school of legal thought, narrative theory recognizes that individuals and groups relate and interpret experiences through the use of stories and the process of narrative,<sup>133</sup> that is, communicating clusters of stories that, taken as an entirety, impart lessons, define ethics, and instruct modes of conduct.<sup>134</sup> Correspondingly, narrative jurisprudence argues that the processes of law building and legal decision making, no less than any other human enterprise, involves reviewing and choosing among separate stories brought together in a lattice of narrative. Societal actors tell stories and receive the stories of others through any number of informal and formal social structures, including courts of law.<sup>135</sup>

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133. "Narrative" is

a broader enterprise that encompasses the recounting (production) and receiving (reception) of stories. This enterprise functions to organize certain kinds of problems into a form that renders culturally meaningful both the problems and their possible resolutions . . . . The narrative consists of the cumulative effects of these separate stories as their aggregate meaning comes to light. By organizing discrete stories and constructing their "point," narrative is interactive and social; it represents one collective way of knowing things, one communal mechanism for grasping the world.

Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141, 147-48 (1997).

134. See, e.g., Bandes, *supra* note 17, at 383-85.

135. "The transformative insight of narrative scholarship is that narrative structure and conventions shape all legal discourse." Bandes, *supra* note 17, at 382-83 (footnote omitted). Even critics of the narrative school of jurisprudence soundly recognize that law is made and perpetuated by imparting stories such as accounts of events at trial and testimony of personal experiences before legislative committees. See, e.g., Barron & Epstein, *supra* note 133, at 149 ("[N]arrative in law can be helpful as a way of elucidating how meaning is made in legal contexts. This is not to say that all meaning, in or outside of law, is somehow ineluctably narrative in character.") (footnote omitted). Understanding and interpreting stories and the process of telling stories "can improve our understanding of law." Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections On Scholarship And Truth*, 46 *STAN. L. REV.* 647, 647 (1994).

From given stories or lines of narrative, actors employ imagination and metaphors to expand the narrative web into scenarios related, albeit different, from those giving rise to the original stories. Narrative and the lessons of narrative become the basis for rule making and social control including law and legal process.<sup>136</sup> Clearly, as with emotions and reason, the process of narrative is socially learned. The form and structure of stories are socially imparted, as are modes of interpretation.

The touchstone of narrative theory holds that knowledge of the emotional content of stories is essential to understanding the motivations and meanings underlying the behavior of individuals and their constituent groups.<sup>137</sup> Narrative theory intrepidly espouses what other schools of theory either deny or heuristically minimize—that to understand fully and to practice law, one must appreciate that all legal events—trials, judicial decision making, legislation, administrative procedures, and the like—are the products of the emotional-rational process of the constituent actors. Thus, to comprehend law, one must know a great deal about the culture from which law springs and over which law holds influence. Culture, in turn, is appreciated not simply by its political economy, but also by the narrative of its groups and subgroups. To comprehend narrative, or the composite stories of the given narrative, the actor must grasp the imparted meanings. As we know, meaning and significance are generated, shared, and interpreted not rationally, but through an emotional-rational process. Therefore, to understand the narratives that comprise law, one must perceive the constituent combined emotions and reason.<sup>138</sup>

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136. See, e.g., Bandes, *supra* note 17, at 383-85.

137. *Id.* at 382-90; see also Margulies, *supra* note 23, at 1113, 1126. Indeed, critics of narrative theory see its embracing of emotion as evidence that the paradigm lacks intellectual standards and intellectual rigor. See, e.g., Gewirtz, *supra* note 11, at 1045 ("Much of this work, I think, puts too much emphasis on emotions, particularity, and subjectivity, and too little on reasoned analysis or general rules."). That a narrative approach to law is extremely useful for both description and interpretation, however, is well established in the literature. See, e.g., Margulies, *supra* note 23, at 1126-44 (discussing, inter alia, how major theorists from Machiavelli to Hannah Arendt have recognized that law, morality, culture, and attendant modes of behavior are taught and honed through stories as exemplars).

138. In this regard, it is vital to emphasize that despite the reproach of some concerned critics, the narrative paradigm does not and ought not be taken as an abandonment of such sound principles of investigation as reasoned analysis and empiricism. Some commentators say that narrative theory eschews reason and encourages "abandoning the expectation that legal scholarship contain reason and analysis as well as narrative." Farber & Sherry, *supra* note 135, at 648. Narrative theorists rightly bristle at the accusation of pervasive intellectual laziness. As Professor Delgado responded, "[Farber and Sherry's] point is that stories in themselves teach little unless supplemented with analysis and commentary that

Thus, narrative theory instructs us to be aware of emotions—to employ the emotional-rational process gladly, unashamedly and without apology. To do so, we must seek to understand the stories and the overall narrative by experience and analogy, thereby cultivating imagination “capable of perceiving the individual humanity of the people involved.”<sup>139</sup> Narrative theory, then, provides a strong dynamic framework for the emotional-rational process.<sup>140</sup>

*I. “Calm Passions”—Why Most of Us Are Not in a Continual State of Emotional Riot Over Every Event*

A reasonably skeptical person might ask, “Are *all* decisions really emotional ones, the result of some blending, Russian Dressing-like, of emotions and reason?” Is it really an emotional process to select an item from a menu or to decide which movie to rent from the video store? Does a judge who, from all appearances could not be more bored, actually decide a dispute over the alleged six-inch encroachment of a driveway by weighing emotions?

The answer, of course, must be “yes” because each of those projects, routine as they may be, require the ascribing of meaning. The actor must choose which item on the menu sounds most appetizing and which video seems likely to be most entertaining. Even the judge must sift through a panoply of emotions when ruling on her banal driveway-

will enable the reader to connect the story with a more general rule or principle. True, but irrelevant—most of us already follow this counsel.” Delgado, *supra* note 23, at 670 (footnotes omitted); see also West, *supra* note 75, at 108-09; Margulies, *supra* note 23, at 1110, 1138 (noting that stories lead to critical thinking). Indeed, Baron and Epstein’s work on narrative theory remind us of the major point of this Article: to ask whether narrative jurisprudence—or any legal theory—wrongly employs recourse to emotion or forsakes rationality confounds the actuality of the emotional-rational process. Barron & Epstein, *supra* note 133, at 145-46.

139. Nussbaum, *supra* note 25, at 24; see also DE SOUSA, *supra* note 25, at 157 (using roleplaying in psychotherapy to illustrate that one can believe but cannot experience the emotional-rational process of others without attempting to feel, or “role play,” the perspective of the observed party).

140. In light of political reality, a role many narrative theorists have appointed for their theory is to provide effective voices for “outsiders,” that is, to introduce counter-narratives to offset the dominating narratives that inform law. See, e.g., Delgado, *supra* note 23, at 670-71; Margulies, *supra* note 23, at 1112. Much narrative jurisprudence attacks the status quo, arguing the familiar but critical point that the prevailing law is not based on proven transcendent truths, but politics and power. Thus, the political agenda of many theorists is to change hearts and minds in the hope of replacing one power structure—one set of narrative and paradigm scenarios—with another. See, e.g., Richard Delgado, *Rodrigo’s Book Of Manners: How To Conduct A Conversation On Race—Standing, Imperial Scholarship, And Beyond*, 86 GEO. L.J. 1051, 1056 (1998); West, *supra* note 75, at 107-08; Bandes, *supra* note 17, at 375-78, 409.

boundary case to discern which party's claim best conforms with the law. She must overcome boredom and try to determine the facts, if any are in dispute, or if there is a question of witness veracity. The driveway-encroachment case may not carry the same drama as a multiple homicide, but even the application of a set of laws to simple facts requires the judge to ascribe meaning, or significance, to some facts over others and to reaffirm, albeit very briefly, that her understanding of the applicable law, in her estimation, is correct. To do so, she must engage the emotional-rational process although probably in low gear.

While the emotional process is dynamic, it cannot be maintained full-blast every waking moment. People are not in a constant state of emotional turmoil when responding to every possible stimulus. Hume understood that once we adopt emotional-rational responses, we apply them routinely, often unconsciously, generating little emotional energy. These responses Hume called "calm passions." To apply some modern terminology, calm passions are those paradigm scenarios we have embraced and with which we are so comfortable that, when the situation arises, we apply the scenario's mandate with little or no conscious agitation nor troubling reflection. We have turned something that once was problematic into something no longer troubling.<sup>141</sup>

The importance of calm passions cannot be overstated because, as Hume understood, most of our habits, beliefs, and patterns of action are ensconced as calm passions. In this regard, calm passions ought not be confused with weak passions. Calm passions may be weak, but in many instances they are quite strong, that is, passions of great consequence to the particular actor.<sup>142</sup> Indeed, by adulthood the majority of our most deeply cherished opinions and prejudices often drowse as calm passions,

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141. Hume described the calm passions as follows:

Now it is certain, there are certain calm desires and tendencies, which, though they be real passions, produce little emotion in the mind, and are more known by their effects than by the immediate feeling or sensation . . . . [W]hen a passion has once become a settled principle of action, and is the predominant inclination of the soul, it commonly produces no longer any sensible agitation. As repeated custom and its own force have made everything yield to it, it directs the actions and conduct without that opposition and emotion, which so naturally attend every momentary gust of passion.

HUME, *supra* note 27, at 158, 159. Oatley reaffirmed Hume's observations two-and-one-half centuries later: "Consciousness is a small part of mental processing, and may be primarily concerned with new adaptations, as, for instance, when we construct new plans to deal with problematic events . . . . When there is nothing problematic, behavior runs off automatically." OATLEY, *supra* note 7, at 34; see also BATES, *supra* note 39, at 49-50 (concerning the concept of "structural models" adopted by individuals to represent ideas or other things upon which the individual reflects).

142. See PENELHUM, *supra* note 5, at 125-26.

which is why it is so difficult to change long-held convictions; before convincing the listener that your position is correct, you may have to irritate the listener by agitating calm passions.<sup>143</sup> Persuading a reluctant listener often involves arousing calm passions, for we must overcome recalcitrance by making the listener reconsider familiar, comfortable, and likely cherished, judgments, opinions, or beliefs. Awakening someone's calm passions is apt to induce anger because the awakening forces the actor to reconsider matters that she had deemed concluded. Thus, the very process of animating reconsideration is rage-inducing because the listener must now spend time and effort rethinking something she thought required no re-examination.

More than that, if the calm passion is precious, as usually is the case in political, moral, and legal arguments, the listener likely adopted the underlying paradigm scenario as part of her self-definition, that is, as integral to her individuality and sense of self. The process of learning emotions often requires expending considerable effort and costs in terms of time, intellectual energy, and, of course, emotions. The reasons why emotional patterns are difficult to change, then, are no mystery. After indulging the delay and trouble to choose among competing paradigm scenarios, actors do not wish to reinvent themselves substantially on a routine basis by revisiting and re-evaluating learned emotions and attendant patterns of behavior. This incessant relearning of integral comportment would be too much trouble and too disruptive because we rely on paradigm scenarios to provide deft and reliable instructions for how to react in given situations. Each actor's repertoire of paradigm scenarios renders a convenient and tested bundle of behaviors or behavior choices in response to particular conditions. They become essential to each actor's conception of self, defining the given actor as an individual apart and distinct from others.

Indeed, often the resolve of a calm passion becomes even more unrelenting because the given actor may be so satisfied with and reliant upon a calm passion that she misconstrues it for objective verity rather than personal truth. "When any of these passions are calm, and cause no disorder in the soul, they are very readily taken for the determination

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143. See, e.g., NUSSBAUM, *supra* note 7, at 61 (explaining that emotions are concerned not only with feelings but with "certain beliefs about their objects . . . . Some of the beliefs in question, especially those concerned with value or importance, may be very deeply rooted in one's psychology; getting rid of them cannot be expected to be the job of a one-shot argument. But without these beliefs, no emotion can take root.").

of reason, and are supposed to proceed from the same faculty, with that, which judges truth and falsehood."<sup>144</sup>

To reconsider paradigm scenarios on a constant basis, therefore, is not simply inefficient; it would challenge the ability of actors to retain senses of themselves—identities to distinguish themselves from a world of others.<sup>145</sup> The excitation of the calm passion challenges their judgment and thus their identities. The act of convincing a reluctant listener, therefore, is doubly hard, for not only must one overcome the opposing paradigm scenario, but one must also appease the attendant exasperation of the listener whose calm passion is now irritated.<sup>146</sup>

#### *J. The Rationality of the Emotional-Rational Process*

It is appropriate to conclude this discussion of the emotional-rational process by noting that, despite the inextricable fusing of emotions and rationality to attain meaning, some still argue that humanity would be better off by limiting the role of emotions because emotions purportedly are the well-spring of irrationality.<sup>147</sup> Regarding the interplay of reason and emotions, commentators seem fascinated by the question whether emotions themselves *are* rational as though an affirmative answer would better justify the role of emotions in human relations. In fact, emotions are neither rational nor irrational. Emotions simply *are*; they arise from triggers and are modified, augmented, or substituted by conscious or unconscious reflection of paradigm scenarios. Hume recognized as much:

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144. HUME, *supra* note 27, at 158; *see supra* note 141 and *infra* notes 146, 182-83 (discussing how the legal status quo is misconstrued as inherently rational while challenges to the prevailing standards often are deemed overtly emotional).

145. *See, e.g.*, NUSSBAUM, *supra* note 7, at 61-62; HUME, *supra* note 27, at 158-59.

146. For example, a judge may harbor as a calm passion the belief that gay and lesbian relationships are wrong. The adoption of the belief might have been accompanied with a number of very strong emotions, yet because he has made this paradigm scenario into a calm passion, the judge may be unaware of the emotions initially involved. The judge, therefore, may wholly misinterpret his extant nonagitated belief in the wrongfulness of homosexuality as a position adopted exclusively through rational thought without "tainting" emotions. Understandably, it will be extremely difficult to change this judge's opinion to embrace a right of privacy covering privately performed acts of homosexual conduct between consenting adults. To do so, the advocate must challenge, and thereby excite, the judge's cherished calm passion that homosexuality is immoral. The very act of agitating that or any calm passion immediately irritates the judge, thus disposing her against the advocate's plea. Substantially compounding the judge's exasperation are the negative emotions attendant to changing her position and thus having to admit she was wrong on an issue of profound importance. An admission like this would be a serious self-reproach that most people, understandably, are reluctant to make.

147. *See, e.g.*, *supra* notes 4-21 and accompanying text.

A passion is an original existence, or, if you will, modification of existence, and contains not any representative quality, which renders it a copy of any other existence or modification . . . . It is impossible, therefore, that . . . passion[s] can be opposed by, or be contradictory to truth and reason; since this contradiction consists in the disagreement of ideas, considered as copies, with those objects, which they represent.<sup>148</sup>

Emotions cannot be right or wrong, good or bad, appropriate or inappropriate, worthy or corrupt, valuable or worthless; they can neither be blamed nor congratulated for happening. Emotions cannot be branded objectively rational or irrational because emotions are not a reasoning process. Therefore, to say that an emotion experienced by a given individual is irrational is as fallacious as asserting that any fact—any empirically certain thing—is irrational. If John suffers from an ulcer, we do not say that the ulcer is irrational although, of course, we might criticize or condone the cause of the ulcer. That John experiences love likewise does not make the emotion of love irrational. The love, like the ulcer, exists, and its existence is neither rational nor irrational; it simply is.<sup>149</sup>

Although emotions themselves cannot be assessed for rational content, they are an essential component of a process that fuses emotions and reason to divine meaning. The ascription of meaning may be judged to be appropriate or inappropriate. As noted earlier, the prejudice against emotions doubtless is due in large part because we feel emotions and we assess the appropriateness of our reasoning process by the emotions attendant to that process. Because emotions constitute our feelings, we

148. HUME, *supra* note 27, at 156-57. As De Sousa similarly explained 250 years later:

Since emotions are learned in terms of paradigm scenarios, they cannot, at least within a given social context, be criticized for inappropriateness if they occur in response to a relevantly similar situation. Here we must carefully distinguish the emotion itself from the behavioral response that the scenario might involve: it does not follow from the rationality of the emotion evoked that the stock response will continue to be seen as rational. Where the response is an action or strategy, it needs to be assessed in its own terms. It may be that a further narrowing of the context is needed before the minimal rationality of the behavior is guaranteed.

DE SOUSA, *supra* note 25, at 185.

149. Thus, emotions are not irrational insofar as the statement "John is experiencing emotion X" is true. If verified, the statement corresponds with the state of things: John is experiencing emotion X. Cf. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 312 (1985) (discussing the realist approach to the ontology of truth and the epistemology of correspondence, that is, we know some statement of affairs is truthful if it corresponds with the way things are); Michael S. Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1109 (1982).



are apt to blame the emotions for our mistakes rather than understanding that our errors are the results of a poorly operating process in which reasoning too is at fault.<sup>150</sup>

Moreover, even if the claim that emotions rather than reason foster irrationality was actual, there is no better alternative for human existence. A life without emotions would rob human beings of their very humanity. De Sousa, among many others, has posited the grotesque aspect of an actor who acts on rationality alone. Emotions, after all, are not designed simply for existing in a living state, for "basic survival functions have no need of emotions at all."<sup>151</sup> Rather, emotions are integral to our humanity; we cannot be good or bad, strong or weak, worthy or ignoble without emotions: "A truly emotionless being would be either some kind of Kantian monster with a computer brain and a pure rational will, or else a Cartesian animal-machine, an ant, perhaps, in which every 'want' is preprogrammed and every 'belief' simply a releasing cue for a specific response."<sup>152</sup> Both the ant and the Kantian monster have in common "complete determinacy: in the first by mechanism, in the second by reason."<sup>153</sup> A life of rationality without emotion would render human beings ambulating ledger pages—living lists of logical formulae, absent personality, existing for no apparent reason, and unable to derive significance from either themselves or others. Thus, even if emotions could be irrational, it is better to cope with and attempt to correct discrete instances of emotional irrationality than to limit the role of emotions in the emotional-rational process.

Much of the criticism of emotions stems from the belief that emotions are not manageable or are very difficult to self-govern while reason is the triumph of calculation and self-control. One core of this argument is that emotions arise unbidden, perhaps unwanted. Professor Pillsbury opined:

[T]he rationality of emotions operates at a different level than ordinary deliberative thought processes. Emotions are normally prereflective. Their cognitive assessment is normally made without conscious,

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150. In the context of a social situation concerning moral judgments, if John respects a selfish, evil hypocrite who cares nothing for humanity, it is not the respect that is objectively irrational; rather, if irrationality exists, it is the emotional-reasoning process that led John to break the rules of a paradigm scenario, which directs that, to earn respect, people should do good acts and be honest. As an unfortunate shorthand, we are apt to say, "John's respect for that selfish, evil hypocrite is irrational," thus blaming the emotion when the fault lies with the emotional-rational process. Rather, we should say, "John's analysis leading to embracing the emotion of respect was irrational."

151. DE SOUSA, *supra* note 25, at 190.

152. *Id.* at 190-91.

153. Pillsbury, *supra* note 16, at 680.

deliberate effort. They may depend on cognitive sources of which the conscious mind is not otherwise aware. The suddenness of the [emotional] experience, its strength, and the lack of a deliberative trigger lead to the assumption that the emotion is a nonrational force that happens to us.<sup>154</sup>

Professor Pillsbury is correct, as we have seen, that the first felt emotion in a given emotional-rational episode arises unexpectedly from some triggering event,<sup>155</sup> however, he incorrectly concluded that the process of considering emotions is different from other rational processes. If emotions often spring abruptly, no less do concepts, ideas, and thoughts. If I walk down the street and chance upon my friend Jane, I no more consciously choose to reason that I unexpectedly am seeing Jane than I consciously choose to experience whatever emotions are attendant to seeing Jane. The ideas "That is Jane I am seeing" and "Jane is my friend" come to my consciousness as spontaneously as emotions such as joy ("I am happy to see her"). I did not elect to recognize Jane, nor did I choose to be happy to see her. The process that allowed me to recognize Jane from the world of all other persons and to recognize the emotion of joy were both "prereflective."

It is true that even when embedded in our consciousness, undeniably it is very difficult in many cases to control, modify, and manage emotions. It is difficult but surely not impossible. Experience confirms what the earlier discussion of philosophy and psychology grasped—people learn to control and even to choose emotional responses.<sup>156</sup> Moreover, if we do not always master emotions, neither do we master reason.<sup>157</sup> Through innate intelligence, experience, and education, we learn logic and the art of analogy just as we learn to recognize, interpret, and act in response to our emotions;<sup>158</sup> most importantly, we combine this knowledge into the emotional-rational

154. *Id.* at 679 (footnotes omitted); see also Sabini & Silver, *supra* note 9, at 169 ("A central notion of our moral lives is responsibility, and responsibility presupposes choice; emotion is unchosen . . . . To be sure, we sometimes are responsible for controlling *the expression* of these mental states, but we are not typically seen as responsible for having them in the first place.")

155. See *supra* Part II.H.1.

156. See *supra* Parts II.E, F.

157. "Some emotions can be unreliable, just as reason can be . . . . Emotions, like reasons, can lead in multiple directions and create problems of indeterminacy . . . . All of this means that emotional responses must be openly tested by deliberation and reasoned examination, and vice-verse." Gewirtz, *supra* note 11, at 1036 (footnotes omitted). In other words, the unreliable or inadequate response, conclusion, or mode of behavior results from the emotional-rational process, not from reason or emotions suspended from the process.

158. See, e.g., DE SOUSA, *supra* note 25, at 188.

melding. In any societal grouping, some people reason better than others, just as some seem more adept at controlling and balancing their passions.<sup>159</sup>

Some commentators insist that emotions are irrational or that they act as obstacles to reason because emotions can distort facts. A hypothetical situation by Professor Pillsbury illustrates why the claim that emotions distort facts is itself irrational:

Emotive cognitions may make sense in terms of the world view they presuppose, but not necessarily in terms of reflective rationality. A person may live in terror of ants, believing that even a single one may devour him. This belief does not comport with reality; it is irrational. But given this belief, fear provoked by the sight of an ant is entirely rational. It is the cognitive assessment which is mistaken.<sup>160</sup>

Asserting that emotions distort facts, therefore, is prattle. What is called a factual distortion by emotion is a matter of conflicting interpretations of an actor and her observers. It may be that the observers are able to compel upon the actor a behavior change. The influence of the observers upon the actor evinces either the observers' ability to convince the actor to re-enter the emotional-rational process and to adopt a new interpretation, or reveals the observers' coercive power, or both.

If emotions cannot be said to distort facts, often they stand accused of distorting reason itself.<sup>161</sup> Professor Hill presents the exemplar of this position by asserting that emotions can influence beliefs,<sup>162</sup> affect values,<sup>163</sup> and "may disorganize the very process of reasoning it-

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159. Commenting on how reason is as subject to abuse and mistake as are so-called emotional appeals through narrative, Professors Baron and Epstein noted, "We do not dismiss statistics as evidence because they are sometimes unreliable or inaccessible, and we need not dismiss stories on those grounds either. Reliability, accessibility, relevance, persuasiveness all go to the quality of the evidence, not to whether something can be evidence." Baron & Epstein, *supra* note 133, at 180.

160. Pillsbury, *supra* note 16, at 680.

161. Generally explaining the position that emotions distort reasoning, Professor Frost recounted:

Even though classical rhetoricians preferred appeals to reason, they recognized the powerful persuasive effect of appeals to emotion. Even so, they disapproved of appeals to emotion because emotion impairs the audience's ability to reach a well-reasoned decision. While modern experts also recognize that emotion may impair the audience's ability to reason logically, they are more tolerant of nonrational "reasoning" than their predecessors.

Frost, *supra* note 121, at 111.

162. "[I]ntense desires may have easily discernible influences upon an individual's beliefs which, in turn, will affect the *capacity* for rational judgment." Hill, *supra* note 9, at 675 (emphasis added).

163. *Id.* at 677.

self.”<sup>164</sup> The response is to reiterate that (1) it is the emotional-rational process that is infirm, not the emotion itself, and (2) even if emotions can distort the emotional-rational process, so too can reasoning itself.

The emotional-rational process invariably is subjectively rational.<sup>165</sup> Furthermore, the emotional-rational process is always objectively rational except when the actor chooses a course of action despite an empirically verifiable fact<sup>166</sup> that the actor knows will frustrate the attainment of the relevant goal. Again, Hume put it best, explaining why passions cannot be irrational:

[A]s nothing can be contrary to truth or reason, except what has a reference to it, and as the judgements of our understanding only have this reference, it must follow, that passions can be contrary to reason only so far as they are *accompanied* with some judgement or opinion. According to this principle, which is so obvious and natural, it is only in two senses, that any affection can be called unreasonable. First, when a passion, such as hope or fear, grief or joy, despair or security, is founded on the supposition of the existence of objects, which really do not exist. Secondly, when in exerting any passion in action, we choose means insufficient for the design'd end, and deceive ourselves in our judgement of causes and effects. Where a passion is neither founded on false suppositions, nor chooses means insufficient for the end, the understanding can neither justify nor condemn it.<sup>167</sup>

This Article avers that there are only two reasons an emotional-rational episode is objectively irrational: (1) the actor is incapacitated, or (2) she cheated.

Incapacity is a physiological or psychological inability to perform minimally logical analysis in a given instance; therefore, even when

164. *Id.* at 678 (citing KEITH OATLEY, *Do Emotional States Produce Irrational Thinking?*, in *LINES OF THINKING: REFLECTIONS ON THE PSYCHOLOGY OF THOUGHT* (K.J. Gilhooly et al. eds. 1990)); *see also* Hill, *supra* note 9, at 688-89 (“Emotional disturbances may affect the capacity to reason practically in several ways, including intrapsychic coercion and compulsion, and social conditioning. Their influence skews the deliberative process.”).

Professor Hill opined that “exploitation is the knowing manipulation of these processes,” that is, exploiting and affecting “strong emotional and affective states [to] impede sound reasoning.” This exploitation leads to full or partial exculpation for the affected actor because “the obviously debilitating effects of these processes should excuse certain behavior, at least when another takes advantage of these all-too-human frailties in the deliberative process.” Hill, *supra* note 9, at 678-79 (footnote omitted).

165. *See supra* Part II.C.

166. For the purposes of this Article, “empirically verifiable” will encompass logically verifiable, such as mathematics.

167. HUME, *supra* note 27, at 157 (emphasis added).

made aware of a salient fact, the actor is unable to change his emotional response.<sup>168</sup> For instance, a judge is incapacitated if she grants judgment to a defendant even though she believes the plaintiff fully proved his case. As a reality, she should not have granted judgment for the defendant, but for some reason, the judge cannot comprehend that what she is doing is contrary to her true wishes. Her incapacity makes her do something that is antithetical to what she really wants.

The second mode of objective irrationality is cheating. When actors lie or cheat, we might say that they choose to act objectively irrationally although certainly not subjectively irrationally. A judge may falsely claim to find a given witness not credible and thus render a verdict that fits the judge's fancy but that the judge knows is contrary to the evidence. Cheating, however, requires a functioning emotional-rational process wherein reasoning and emotion are co-conspirators. Emotions alone cannot lead to such objective irrationality.<sup>169</sup>

### III. THE USEFULNESS OF THE "RUSSIAN DRESSING" THEORY

#### A. *The Difficult Conception of an Emotional-Rational Process*

This Article has demonstrated that emotions cannot be separated from human intercourse and that we ought not try to do so, especially in projects of great meaning and significance such as legal decision making. More particularly, to generate meaning, the human intellect does not simply utilize reason and emotion—the two do not remain separate entities although intertwined. Rather, intellect can only devise meaning by a systemic fusing of emotion and reason. We have seen, as well, that a legal, political, or ethical stance purported to be the product of detached, unemotional reason is nothing of the sort. Rather, any stance, position, or standard of this sort reflects the emotional-rational fusing employed by the given law or policy makers.

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168. DE SOUSA, *supra* note 25, at 122. Interestingly, and completely plausibly, De Sousa believes that incapacity is not irrational. For De Sousa, "rationality applies only to intentional states. . . . [T]here are responses before there are intentional states, but there are no scenarios, and therefore no emotions, until those responses can be integrated into an intentional structure, enabling the [actor] to understand the meaning of different possible roles." *Id.* at 186.

169. Thus, contrary to Hume's implication, mistake is not necessarily irrational. For example, if Jane mistakenly thinks she sees her beau embracing Jane's rival, she may be jealous and angry, a reasonable emotional-rational response. When she learns her beau was giving a fraternal hug to his sister, Jane should no longer be jealous. The mistake lead to "rational" emotions but, arguably, it would be "irrational" for Jane to be angry once the mistake is corrected. If she does not change her emotions, Jane either is incapacitated (unable to understand the facts) or she is cheating.

Remarkably, even the most ardent adherents to the importance of emotions have trouble conceptualizing a true melding process. Like the commentators they criticize, emotion theorists are apt to neglect the dynamic of the emotional-rational process, denoting policies and positions with which they disagree as too emotional or lacking in reason while lauding their favored stances as reason incarnate.

Consider, for example, an earlier quoted proposition from Professor Pillsbury's article on emotions:

In recent years cognitive theories of emotion have dominated both the philosophical and the psychological literature on the subject. Cognitive theories come in many varieties, but all share the idea that cognition is central to emotion. By cognition I mean a perception which we can determine to be correct or incorrect according to rational principles. A cognitive approach holds that emotion is a cognitive assessment of a person or situation, which assessment is associated with a physiological sensation, normally accompanied by a desire to undertake a particular kind of action.<sup>170</sup>

At first blush the quote above seems to express the emotional-rational process; however, closer inspection reveals that if "cognitive" means "a perception which [is] correct or incorrect according to rational principles," then, in fact, Professor Pillsbury's formulation is as follows: "A cognitive approach holds that emotion is a [rationally correct or incorrect perception] assess[ed] of a person or situation, which assessment is associated with a physiological sensation, normally accompanied by a desire to undertake a particular kind of action." But an emotion is not a "rationally correct or incorrect perception" any more than rationality is an emotionally correct or incorrect perception. Decision making is the melding of emotion and reason, the outcome of which will be rational or irrational due to the process of melding, not due to the component emotions. Perhaps unintentionally, Professor Pillsbury's formulation subordinates emotions to reason; indeed, it seems to make emotions a specie of reason. By so doing, the formulation implies that reason is better than emotion and hints that emotion, although not to be eliminated, is merely a functionary of reason. The advancement of reason over emotion confuses the reality of the emotional-rational process, exalts reason as superior, and thus threatens to impair decision making.

Professor Pillsbury's misapprehension is exemplified in his discussion of sentencing in capital crimes: "Because of the magnitude of the capital decision, its complexity, and the degree of discretion enjoyed by

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170. Pillsbury, *supra* note 16, at 675 (footnotes omitted).

sentencers, sentencing decisions are likely to be emotional as well as rational."<sup>171</sup> No, the sentencers' decisions are the result of the emotional-rational process. They are not "emotional as well as rational." Rather, the decisions are the confluence of emotions and reason.

Another example is found in Professor Susan Bandes' powerful work, *Empathy, Narrative And Victim Impact Statements*,<sup>172</sup> which makes a compelling case against the use of victim-impact statements at the sentencing of convicted felons. Bandes commenced her work by carefully outlining the dynamics of the emotional-rational process<sup>173</sup> with an emphasis on the emotions related to empathy.<sup>174</sup> With the foregoing prelude, Professor Bandes urged that victims' impact statements should be barred as evidence at criminal sentencing because (1) they diminish rather than enhance the dignity of the victim and (2) they unduly obstruct the jury from appropriate empathy, if not compassion, for the perpetrator.<sup>175</sup>

Her argument is powerful, but to cement her point, Professor Bandes attempted to separate emotions from reasoning. That approach simply will not do, even in the realm of criminal sentencing where, to borrow Hume's phrase, emotions are "lively." Specifically, Professor Bandes capped her rationale with the following:

[T]he problem with victim impact statements is not that they evoke emotion rather than reason. Rather, it is that they evoke *unreasoned, unreflective emotion* that cannot be placed in any useable perspective.

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171. *Id.* at 697 (footnote omitted).

172. Bandes, *supra* note 17.

173. *Id.* at 366-72.

174. *Id.* at 373-82.

175. *Id.* at 392-410. According to Bandes, jurors are more likely to identify with and feel sympathy for the victim and the victim's survivors than to empathize with the perpetrator, especially when the victim is a member of the community from which the jury is drawn. Jurors' paradigm scenarios thus incline them towards the victim. *Id.* at 399-400. Victim impact statements are apt to dissuade consideration of both the defendant's actual moral culpability and any mitigating circumstances by distracting the jury with impassioned testimony about the pain and suffering endured by the crime victims for whom the jury already harbors imbalanced favor.

Moreover, impact statements "cheapen" the lives of some victims in favor of others. For instance, the victim who leaves a grieving family behind is deemed more worthy and a greater loss to society than a victim without survivors. Thus, a felon is more likely to suffer maximum punishment because, by chance, her victim was married or had children than if her victim was a misanthrope. Bandes believes that this sort of standard devalues human life by allowing a criminal to procure a lighter penalty by selecting, deliberately or fortuitously, a less socially valuable victim. For these and similar reasons, Bandes argued that victims' impact statements should be prohibited from use at trial as too prejudicial. *Id.* at 395-410.

In evidentiary terms, victim impact statements are prejudicial and inflammatory. They overwhelm the [jury's] ability to process other relevant evidence, such as evidence of mitigation . . . . [A victim impact statement] interferes with—and indeed may completely block—the jury's ability to empathize with the defendant or comprehend his humanity.<sup>176</sup>

Professor Bandes blames emotions—the bad emotions from the victim-impact statement that block reason, that is, reason as formulated in an empathic response towards the defendant. Professor Bandes may be right that victim-impact statements are “prejudicial and inflammatory” to the point that they should not be admissible in court; however, the fault of impact statements, if fault exists, arises not from emotions, but from the emotional-rational process—the paradigm scenarios—attendant to the statements.

It is true that a victim-impact statement may incite feelings such as sympathy for the victim, rage, and a wish for vengeance against the perpetrator. Doubtless, those may trump other feelings that might moderate fury with the defendant. However, such physio-psychological feelings, which we identify as emotions, did not spring full-blown from some genetic or biological determinism. The feelings are part of received paradigm scenarios—an amalgam of emotions and reason—which, rightly or wrongly, instruct us to be angry with and seek to punish severely perpetrators of certain crimes because of the pain they cause. Perhaps victim-impact statements may reflect unworthy paradigm scenarios favoring victims over violators, especially when the defendant comes from outside the community of the victim and jury. Conceivably, these statements promote arguably unethical prejudices based on cultural stereotypes. To say, however, that the problem with victim-impact statements is their emotional content is as wrong as asserting that appreciating the perpetrator's account is a matter of emotionless rationality.<sup>177</sup>

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176. *Id.* at 401-02 (footnotes omitted) (emphasis added).

177. Accordingly, if a jury considers the victim-impact statement and, through deliberation, rejects the defendant's story, the rejection of the defendant may be morally suspect but not the product of passion alone. Rather, the jury employed an emotional-rational process that placed a higher value on the paradigm scenarios of the victim than of her victimizer. Indeed, even if a hypothetical jury was totally maddened by the victim-impact statement and gave not the slightest consideration to the defendant's pleas, the jury would not be driven by unaccompanied emotion, but by the paradigm scenario adopted by the jurors preferring the victim and disavowing the defendant. The adoption of that paradigm scenario was a product of social learning, and its adoption required reason and reflection. Perhaps the paradigm scenario now is a calm passion; that is, although offered the defendant's testimony and instructed by the judge to consider that testimony, the jury



Similarly, other theorists cannot resist separating emotion from reason within the decision making process. Professor Nussbaum proposed in *Love's Knowledge*, "Frequently, it will be [an actor's] passionate response, rather than detached thinking, that will guide her to the appropriate recognitions. Intellect will *often* want to consult these feelings to get information about the true nature of the situation."<sup>178</sup> Granted, the beginning of any emotional-rational episode is a triggering event, but that trigger promotes unbidden ideas as well as emotions. Intellect, we have learned, does not "want" to consult emotions any more than emotions "want" to consult intellect. Rather, intellect and emotions must interact in a systemic process through which meaning and significance are adduced by the given actor. Once again, it must be emphasized the understandable, accustomed habit of separating emotion and reason confuses how people reflect.

Even Hume, the fountainhead of modern emotions theory, misconceived the interplay of emotions and reason. Based on his conclusion that abstract rationality always lacks meaning in human lives, Hume wrote one of the most controversial supposition regarding emotions and rationality in the history of ideas: "We speak not strictly and philosophically when we talk of the combat of passion and reason. Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them."<sup>179</sup>

This supposition has led to a prevalent shorthand for Hume's position: Emotions tell you what you want; reason tells you how to get what you want.<sup>180</sup> Penelhum offered the following summary:

Reason shows us how to satisfy our desires, and in enabling us to recognize that which we then come to want, it can even prompt them, although [Hume] does not concede this explicitly. What reason cannot do is motivate us of itself. It is the *slave* of the passions. But there are many things we can do with the help of a slave that we could not do if we did not have one, and for all the air of paradox with which Hume pronounces his theories, he does not deny this.<sup>181</sup>

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is unwilling to reconsider the paradigm scenario favoring the victim. In that case, while embracing a victim impact statement is an exercise of a calm passion, the underlying paradigm scenario is no less the product of reason with emotion.

178. NUSSBAUM, *supra* note 5, at 79 (emphasis added).

179. HUME, *supra* note 27, at 156.

180. As Professor Hill explained, "[A]ccording to Hume, reason can never give us knowledge of ultimate ends but has only an instrumental role in telling us how to achieve what we already value." Hill, *supra* note 9, at 673 n.248.

181. PENELHUM, *supra* note 5, at 129; *see also* RACHEL M. KIDD, REASON AND CONDUCT IN HUME'S TREATISE ch. 5 (Oxford 1964).

Whether Hume was purposefully exaggerating or not, clearly emotions and reason are essential parts of the same project, selecting goals and modes of behavior in given situations. Ascribing a metaphorical supremacy of one over the other within the process itself, is evocative but, as we now know, deceiving.<sup>182</sup>

This is no small point. Inability or unwillingness to understand the systemic merging of emotions and reason means that a decision maker can never be certain that she has made what she truly should feel is the correct decision in a specific situation. By attempting to exclude or diminish the flow of emotions, the decision maker distorts her ability to perceive, thereby substantially limiting both her choice of possible meanings and the depth of those meanings she decides to weigh. With her perception thus impaired, her comprehension of the given problem and her sagacity are debilitated. The moment she thinks to herself, "I am getting emotional. I am not being rational. Thus, the meaning I am contemplating must be wrong," she has rebuffed what might be the best meaning or what, upon reflection, might have led to some other, better meaning upon which to resolve the given problem.

A second related and more insidious fallacy attends the misconceived distinction between emotions and rationality. It is easy, tempting, and incorrect to state, "The position *I* adopt is rational; the position *you* espouse is emotional." It appeals to the prevailing prejudice that things rational are transcendent and correct but things emotional are fleeting and problematic. Thus, one singularly serious danger of failing to appreciate the actuality of the emotional-rational process is that decision makers and commentators misperceive how decisions, legal and

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182. See, e.g., DAMASIO, *DESCARTES' ERROR*, *supra* note 79, at 246 ("Knowing about the relevance of feelings in the processes of reason does *not* suggest that reason is less important than feelings, that it should take a backseat to them or that it should be less cultivated.") (emphasis added). As Bates explicated regarding thought and action,

[I]t is important to be clear in pointing out that it is *not assumed* that cognitive action is being thought of as the master and behavior the slave. To do so would impose a "rationalistic" orientation, because such an assumption would lead to the conclusion that thought or cognition always precedes and controls action, as the orders of a master precede the actions of the slave. Thought, as a behavioral process, is regarded here as one that may as easily be provoked by overt action as to think of overt action as being provoked by thought. Without such an assumption, perception as a process could not operate to allow an organism to adapt to an environment outside itself. The process of perception must be conceived of in such a way that although ending in a cognitive process of meaning attribution, it begins with the events and objects outside the organism that elicit cognition through evoking neural stimulation.

Bates, *supra* note 39, at 30.

otherwise, actually are made. Based on their grievous misconception, decision makers and commentators may fallaciously castigate an actual or proposed decision as "emotional" rather than "rational." In this way, the status quo wrongfully is deemed unemotional once in place; that is, a given meaning or set of meanings formalized as a legal standard or policy becomes the usual, accustomed norm—a calm passion.<sup>183</sup> Proponents may declare that the standard's predominance evinces its rationality, untarnished by emotions, ignorant or defiant of two realities: (1) the adoption and enforcement of any policy results from the emotional-rational process, and (2) delineating a standard or policy as rational rather than emotional is a partisan classification.

One vital project of emotion theory, therefore, is to shake the law makers from their lethargy that emotion and reason are separable in decision making endeavors by showing their inextricable interconnectedness—their process nature or phenomenology. Judges need both to understand and to embrace that they must be emotional to render judgments, to interpret law, indeed, to fulfill their roles as judges. To accomplish this goal, we must free ourselves from the vocabulary that promotes intellectual laziness about emotions and reason. Judges in particular must believe, perhaps as a calm passion, that for any human project involving the assessment and imparting of meaning, especially for projects involving law, one never acts emotionally or rationally; one acts according to a process in which emotions and reason twist, blend, and meld.<sup>184</sup>

#### *B. Maxims For Law Makers To Evoke Based on the Melding of Emotions and Reason*

The point of the foregoing extensive foray into the philosophy and psychology of emotions has been to augment earlier jurisprudence applying emotions theory to judicial decision making. It is hoped that the thorough explication herein, particularly the Russian Dressing metaphor, will induce legal decision makers, especially reluctant judges, to recognize that emotions no less than reason must inform their decision making processes. Once free from the fiction of unimpassioned decision rendering, judges may be more knowledgeable of their decision-making operations and, therefore, be as forthright and self-aware as

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183. See, e.g., Bandes, *supra* note 17, at 370, 385, 409; see also Delgado, *supra* note 23, at 666-67; Margulies, *supra* note 23, at 1126; Kahan & Nussbaum, *supra* note 9, at 296-97; HUME, *supra* note 27, at 158.

184. As Professor Gewirtz noted, "The answer is to insist upon the dialectic of emotion and reason, feeling and deliberation, story and theory, rhetoric and argument." Gewirtz, *supra* note 11, at 1035.

possible. I join the myriad of commentators who hope that, with increased self-knowledge, judges will become more broad-minded, empathetic, and compassionate.

Given the importance of emotions in the reflective process and in light of the persistent hostility towards emotions from the bench and bar, this Article ends with proposed maxims that, I think, would go well in any judges bench-book.

**Maxim 1—Each Of Us Is Alone:** We have seen that, although we share ideas via communication, each of our emotional-rational responses, to some degree, is unique. In this fashion, each of us is alone, attempting to create meaning in our lives by contacting others. The question becomes, how should actors respond to their lonely existence? Certainly, one response is that the very isolation of existence justifies whatever action the lonely actor takes towards any other societal actor. The solitude of the actor, one might assert, means that no one but the actor can understand what the actor feels, what she needs, what causes harm, and what brings pleasure. Morality, then, is purely relative to the actor. If a second societal actor stops the first actor from completing a given act or punishes the first actor for acting, it was power, not morality, that allowed the second actor to prevail.

An altogether different and better lesson is offered by the theorists discussed in this Article. From the isolation of personal existence, as noted above, comes a desire to interact, to adopt a consciousness by our association with others. Our desperate struggle to interact through sharing emotional-rational scenarios, that is, our hope to pierce our isolation, should humble us. I join the many commentators who admonish that the humility of loneliness must tend our thinking towards empathy, tolerance, understanding, and compassion.

[E]mpathic understanding of and sensitivity to the context in which differently situated others find themselves is but one aspect of a truly caring relationship with those others, even if the relationship is as fleeting and bureaucratized as judge-litigant. Empathic understanding is *therefore* essential to any moral response to that person's situation, including responses prompted by legalism. When we care about the "differences" of others . . . we do so because we are moved to lessen their burden, not just understand it.<sup>185</sup>

This Article embraces the growing voices exhorting legal decision makers, particularly judges, to understand that the inherent solitude of each individual means that, before passing judgment, the judge must

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185. West, *supra* note 75, at 106 (footnote omitted).

recognize and evaluate prejudices, must re-evaluate her calm passions, and must be not simply willing, but desirous, to hear outsider voices.<sup>186</sup>

In light of the foregoing, Maxim 1 for judges proposes the following: I understand that, to a substantial degree, I create the reality through which I interpret and judge. I understand that all other individuals do the same. We communicate as best we can and try to see the world as others see it. We form groups and structures that comprise systems in order to share and to communicate perceptions, and often our communications are reasonably accurate. However, I must never forget that each of us constructs our own reality.

*Corollary 1:* I must try to understand and appreciate the reality of others, particularly those whose reality is unusual to me. I must remember that they are melancholy, that is, in great measure alone, as am I.

*Corollary 2:* I cannot presume that my reality is transcendent or ontologically correct. I can never be sure I have found the truth.<sup>187</sup>

**Maxim 2—Emotions Are Integral To Meaning And Significance:** I understand and accept that the route to meaning—how I evaluate and judge myself and others—is a reflective, systemic process that requires not only canons of rationality but also emotion. I know that the emotional-rational process is like Russian Dressing, a merging and blending of emotion and reason. This process is how I, along with all others, make decisions, and I will not resist it or pretend otherwise. I fully accept that without emotions I cannot make decisions. I must be aware of the emotions I want to use to make decisions, and I must be open to the emotions that others would have me consider.

**Maxim 3—Paradigm Scenarios and Narrative:** I have learned to organize the fruits of emotional-rational episodes as paradigm scenarios. These scenarios were taught to me by various societal groups and individuals such as family, schools, friends, religious and secular organizations, government, and the like. In large part, these scenarios

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[G]ood legal judgment is increasingly being seen as Aristotle sees it—as the wise supplementing of the generalities of written law by a judge who imagines what a person of practical wisdom *would* say in the situation, bringing to the business of judging the resources of a rich and responsive personality . . . a vigorous sense of concrete human reality and . . . [a] passionate engagement with life.

NUSSBAUM, *supra* note 5, at 100-01 (footnote omitted) (emphasis added). Presumably, although not necessarily, the judge will be more empathic, compassionate, and wise than a judge who deceives herself that dispassionate rationalism is obtainable and desirable.

187. See, e.g., Riga, *supra* note 23, at 71, 73-74.

were imparted as stories or collections of stories called narratives, and evaluating facts and legal principles in each case, I use narratives and reflection to (1) adopt new scenarios; (2) modify, amend, or expand old scenarios; (3) attempt to harmonize conflicting scenarios; (4) reject formerly held scenarios when appropriate; and (5) apply the scenarios to discrete situations.

*Corollary 1:* The scenarios I have been taught reflect the political and moral dispositions of those who taught me the scenarios. I can never be sure those scenarios reflect ontological truth.

*Corollary 2:* My teachers may have used coercive tactics to induce me to accept given scenarios. How certain am I that I chose to embrace any scenario I am inclined to apply?

**Maxim 4—Question The Status Quo:** The status quo does not represent reason predominating over emotion, nor does an appeal for change reflect an attempt to overpower rationality with emotion. No less than any others, the paradigm scenarios constituting the status quo comprise the Russian Dressing of numerous emotional-rational episodes. The status quo is the prevailing distribution of power, and its predominance does not necessarily mean that it is just.

**Maxim 5—Calm Passions:** What I take to be a fact or what I take to be the truth is a calm passion. I have adopted numerous paradigm scenarios, including their underlying moral precepts, and have made them calm passions. These positions are not exemplars of rationality but, rather, are “calm” because I am so comfortable with the given scenarios that thinking about them does not agitate me. I must remember that underlying each calm passion is the Russian Dressing of an emotional-rational process.

Similarly, the status quo reflects the predominating calm passions of those able to impose their will. These calm passions may be worthy of enforcement, but not simply because they are calm passions.

*Corollary 1:* I understand that I likely will become irritated if my calm passions are challenged, prompting me to re-evaluate them. Thus, to test the integrity of any decision I make, I must put aside any anger I may experience if a party seeks to arouse my calm passions. Indeed, if a party does not do it for me, I should seek to awaken applicable calm passions to be sure that, should I use them to make my decision, I do so because I believe in them, not simply because it is comfortable.

**Maxim 6—Opinions Are Opinions:** My published decisions are called “opinions” because that is what they are.<sup>188</sup> They have the force of law because somebody must make an enforceable decision. An honest search for truth, then, mandates that the investigator—such as the judge—“see other than what we see, . . . know other than what we know, . . . hear other than what we hear, . . . live other than what we live, . . . understand other than what we understand.”<sup>189</sup>

**Maxim 7—Outsider Voice Must Be Heard And Regarded Seriously Considered:** In light of the foregoing maxims, I must be particularly willing to hear, to understand, and to judge fairly the positions of those who come from the “outside,” that is, outside of my calm passions. To do so, I should act as though the burden of persuasion always rests with the party consistent with the status quo, consistent with my calm passions, or both.

*Corollary 1:* Before making any decision, I should presume I am wrong and re-evaluate my decision.

*Corollary 2:* I must be humble,<sup>190</sup> generous, compassionate, receptive, and worthy of the responsibility of judging others.

**Maxim 8—All Who Come Before Me Come In Equal Dignity:** As a judge who understands the integral truth that I cannot escape my emotions into a realm of transcendent reason, I recognize that:

Therefore, there is a radical equality between persons when they speak or seek the truth. The standard that measures their relationship is not stature or power or wealth or education or social work or religion or creed or race or sex, but truth alone. It is here that we encounter the very heart of what any authentic and legitimate judicial and legal system is all about. That is why we can say as the U.S. Supreme Court says on the entrance to its building, “Equality before the law.” We are not equal in talent or intelligence or personality—only in human dignity in together seeking the truth.<sup>191</sup>

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188. I should follow Professor Gewirtz’s advice: “We should encourage judges to believe and say: This is the best I can do now; it doesn’t solve all the problems, but it’s a start, and I’ll keep thinking.” Gewirtz, *supra* note 11, at 1027.

189. Riga, *supra* note 23, at 75.

190. I adopt the judicial stance that I “[am] not the sole repository of . . . truth.” Gewirtz, *supra* note 11, at 1034.

191. Riga, *supra* note 23, at 76.