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LAW'S EMOTIONS

*Robin West**

339

* Fredrick J. Haas Professor of Law and Philosophy, Georgetown University Law Center; B.A. University of Maryland; J.D. University of Maryland School of Law; J.S.M. Stanford Law School. Published by permission of Robin West and the International Association for the Philosophy of Law and Social Philosophy (I.V.R.). A more complete version of this paper will be published in M.N.S. Sellers, ed. "Law, Reason, and Emotion" (Cambridge, 2016).

The emerging interdisciplinary field of “Law and Emotions” brings together scholars from law, psychology, classics, economics, literature and philosophy all of whom have a defining interest in law’s various relations to our emotions and to emotional life: they share a passion for law’s passions.¹ They also share the critical premise, or assumption, that most legal scholars of at least the last half century, with a few exceptions, have mistakenly accorded too great of a role to reason, rationality, and the cool calculations of self interest, and have accorded too small a role to emotion, to the creation, the imagining, the generation, the interpretation, and the reception of law.² Their scholarship is in part offered as a collective corrective to what they perceive as the legal academy’s dominant and ill-conceived bias toward reason and rationalism, when explaining legal phenomena.

At least sometimes and to some degree, and sometimes for better while often for worse, according to this body of scholarship, all sorts of legal actors – legislators, judges, jurors, litigants, private contractors, city council members, drafters of constitutions, the authors of universal declarations of rights, and of course lawyers and legal scholars as well – are moved toward our legalistic decisions or our artful legal arguments by the force of our passions, rather than by the moral force of either shared or neutral principles, deductions from the natural law, inferences from past precedent, or a toting of societal costs and benefits.³

¹ For an excellent summary of the field, see Susan Bandes and Hila Keren, *Who’s Afraid of Law and the Emotions*, 94 MINN. L. REV. 1997 (2010). For good collections representing the state of the field, see THE PASSIONS OF LAW (Susan A. Bandes ed., 1999); Heidi Li Feldman, *Foreward: Law, Psychology, and the Emotions*, 74 CHI.-KENT L. REV. 1423 (2000); and *Passions and Emotions*, in NOMOS LIII - AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY (James Fleming ed., 2012). Early influences include the broad corpus of American legal realism, including Jerome Frank’s *LAW AND THE MODERN MIND* (1930) and more recently the scholarship of Martha Nussbaum on emotions and moral judgment, particularly Martha C. Nussbaum, *LOVE’S KNOWLEDGE* (1992). For a collection of essays exhibiting the influence of Nussbaum’s views on the impact of the emotions on moral decision making, see *Nussbaum and the Law*, in PHILOSOPHERS AND LAW (Robin West ed., 2015).

² For early and influential critiques, see Lynn Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); William J. Brennan, *Reason, Passion and the Progress of the Law*, 10 CARDOZO L. REV. (1988); Angela P. Harris and Marjorie Shultz, *A(nother) Critique of Pure Reason: Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773 (1993); Martha Minow and Elizabeth Spelman, *Passion For Justice*, 10 CARDOZO L. REV. 37 (1988); Robin West, *Jurisprudence and Gender*, 55 CHI. L. REV. 1 (1988); Robin West, *CARING FOR JUSTICE* (1997); Judith Resnik, *On the Boas: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877 (1988); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 63 (1984); PETER GABEL, *ANOTHER WAY OF SEEING: ESSAYS ON TRANSFORMING LAW, POLITICS AND CULTURE* (2013). For a discussion of the recent turn in scholarship and public opinion against empathic judicial decision-making, see Robin West, *The Anti-Empathic Turn*, in *PASSIONS AND EMOTIONS* (James Fleming ed., 2012).

³ For a wonderful example of this sort of claim in the context of a biographical treatment of Justice Cardozo, see JOHN NOONAN, *THE PERSONS AND MASKS OF THE LAW* (1975)

More fundamentally, some law and emotions scholars argue, legal theorists have likely accorded too great a role to rationality, and an insufficient role to emotion, when describing the origin of the rule of law itself, as well as our attachment to it and our ideals for it, as a product of self-interested games, metaphoric contracts, or highly rationalistic bargains.⁴ Legalism, they argue, more likely has its origin, as well as its appeal, in the primal fears and tremblings we occasion in each other, in our dread of our collective and individual fates, and at least on occasion, in our hopes for community and our love for each other, borne of our mutual attraction and need. Likewise, those paths of our law that spring from discretionary judgments – whether rendered by judges or administrators – might originate neither in logic nor experience, but rather, in any one of a number of decision-sparking emotions: perhaps by a broad judicial empathy that is in turn sparked by narratives, both those of the litigants and of the common law itself, or perhaps by an antipathic disdain for or disgust at human frailty, rooted in the alienation a deciding judge might harbor toward his deteriorating biological being, or perhaps by a judge's infantile craving for an authority figure that will exude both power and love.⁵

Judicial hunches that dictate judicial opinions may or may not have causal ties to sound moral intuitions, or be influenced by the judge's digestion of the breakfast he had that morning; we can save that brawl for another day. But it seems very likely that judicial hunches have ties to the judge's emotional coloring, which is itself informed by early life experiences of love, need, fear, and human connection.

Law and Emotions scholars share a very general orientation toward the study of all of this: of the irrationality, the passion, and the emotion in all of our legal expressions. The impact of this work, viewed collectively, is considerable, and its reach and ambition is admirable. The law and emotions scholars have correctly focused the academy's attention on the emotional root of law's legislative origins and its judicial interpretation, as well as on

⁴ See, e.g., Anne C. Dailey, *The Hidden Economy of the Unconscious*, 74 CHI.-KENT L. REV. 1599 (2000); Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986); JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

⁵ For early examples of skepticism regarding the rationality of judicial decision-making, see Joseph C. Hucheson, Jr., *The Judgment Initiative: The Function of the 'Hunch' in Judicial Decision*, 14 CORNELL LAW QUARTERLY 274-88 (1929); Karl Llewelyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); JEROME FRANK, *LAW AND THE MODERN MIND* (1930). For reconstructions of the nature of judging that incorporates affect, pragmatism and rationality, see Duncan M. Kennedy, *Toward a Critical Phenomenology of Judging*, in *THE RULE OF LAW: IDEA OR IDEOLOGY?* (S. Hutchinson & P. Monahan eds., 1987); Martha Minow, *The Supreme Court, 1986 Term, Foreword – Justice Engendered*, 101 HARV. L. REV. 10 (1987); Robin West, *CARING FOR JUSTICE* (1997); Shirley Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 1 (1984).

the emotional and impassioned human being – as opposed to the cost-benefit toting calculating subject, or the self-interested egoistic subject, or the politically driven subject hungry for his share of either earth or power – who is at least oftentimes at the center of law’s gaze, and certainly at the center of its might. This fundamental re-orientation of our scholarly attention, the handful of basic propositions that re-orientation generates, and the body of thought those propositions collectively ground, I believe, are tremendously important and generative; they collectively constitute a real breakthrough in our understanding of both the nature of law and of our ideals for it as well as our fears of it.

In my comments this morning, however, I want to pose a question that I believe has been neglected by law and emotions scholars, and I will urge that we center it. To summarize my criticism: Law and Emotions scholars have looked at emotion’s impact on law and on our understanding of justice, and at law’s impact on emotional life, and have done so to great effect. What they, or we, haven’t much to date investigated, however, are the emotions law *produces*, or authors, or sires, or births, or fathers – the emotions that law itself generates, rather than the emotions that affect law or the emotions that law affects. To echo William James, we have not generated an understanding of the “varieties of legal experience.”⁶ To echo Foucault, we don’t look much at the emotions that both law and legalism produce, *rather than* the emotions that impact law, or that are censured, denigrated, or regulated by it.⁷

Law and emotions scholarship seems somewhat oddly predicated on a conception of law as produced by the sovereign, while emotions, meanwhile, come from somewhere else: they come from the heart, or the hearth, or the family, or the intimate or private sphere, or early childhood, or from the mother’s breast, but at any rate, they have their genesis somewhere other than law or politics. Law and emotions scholars, unlike the more traditional rationalists, pragmatists, natural lawyers, and legal economists they challenge, do *see* emotions’ influence on law,⁸ and they see law’s influence on emotion,⁹ but both L and E scholars and legal rationalists share a picture

⁶ WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* (1902).

⁷ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (1976).

⁸ For examples drawn from criminal law, see Susan A. Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361-412 (1996);

Dan M. Kahan and Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269-374 (1996); Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 Harv. J. Law & GENDER 447-466 (2005); David Gray, *Justice and Mercy in the Face of Excessive Suffering: Some Preliminary Thoughts*, in NUSSBAUM AND LAW, (Robin West ed. 2015).

⁹ Clare Huntington’s recent work on family law is an excellent example. Huntington shows how family law structures and impact both family relations and the emotions that family produces in various ways, often destructive. CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY*

of the fundamentally different points of origin of the two: emotion comes from heart and hearth and domesticity and social and intimate interaction, while law emanates from sovereignty.

This seems wrong. Obviously, it is not across the board wrong – clearly, some of our emotions originate in the private and intimate sphere, and much of law does indeed come from the public will of the public sovereign – but nevertheless it is wrong enough of the time to misdirect, somewhat, this entire field of scholarship. It is not only the heart, hearth, intimacy and family that produce emotion. And law does not only produce rules and judicial opinions. My claim is just that law also produces emotions: some of our emotions are a function of law more than a function of family. If this is true, I think it is important both for the study of emotions and for the study of law.

Here I want to make this claim a little more plausible and much more concrete by suggesting that U.S. law produces at least four distinct and largely unhealthy emotions in its subjects – that would be us – that merit study, and that should be cause for concern. The four particular legal emotions I will identify and discuss, which I call collectively “law’s emotions,” I believe, are harmful in these ways: they alternately undercut our critical capacities, alienate us from our own understanding of both our subjective hedonic selves and our objective interests, truncate our political and moral imagination, and frustrate rather than further important aspects of human flourishing. I don’t by any means intend to deny however that the emotions I identify and discuss are the only emotions law produces, nor do I mean to imply that law doesn’t also produce healthy emotions. My discussion and the examples I’ve chosen are suggestive only.

So, I will list them here, and then I will take them up sequentially below: First, American constitutional law, I will argue, produces outsized authoritarian feelings, varying, of submission, reverence, respect, and obedience. This should be a cause for concern, not the celebration it typically triggers, and across the political and legal spectrum. Second, America’s emergent “culture of contract,” I will argue, with its promise of liberty, its ethic of consent, and mostly its adamant denial of even the existence much less the machinations of private power, produces an alienation from our own subjective desires and pleasures, and from any objective sense of our own expansive human capacities. The residue is what I will call “consensual dysphoria.” Third, the “equal opportunity society” interpretation of our various civil rights revolutions has delivered a dollop of much needed fairness and

RELATIONSHIPS (2014). *See also* JANA SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* (2015).

basic justice to public and private institutions that are in sore need of both, but it has also produced stark feelings of frustration and anxiety, and a stunted capacity for empathy, as we now are taught to assess our own and each others' shortcomings against a presumptively fair and just meritocracy. And fourth, legalism's embrace of a perhaps rugged but often violent individualism, coupled with its contemptuous dismissal of the profundity of the demands placed on those who care for the very young and the aged, produces fear, and a lot of it – a degree of real and felt material and physical insecurity – and places it right smack at the heart of family life. That familial fear has in turn engendered severe emotional disabilities and pathologies. Law and Emotions scholarship, to date, has not focused attention on these (or other) dysfunctional or unhealthy emotions that might owe their origins to law rather than family. I want to look at each of these sequentially. Again, my most modest claim is that these emotions are the product rather than the subject of law. They emanate from the legal face of our political order, rather than from anything that can be located either in our politics or in our private lives.

A. IN AMERICA THE RULE OF LAW IS KING

There is much we don't understand, in U.S. legal culture, regarding our outsized American attachment to the U.S. federal Constitution. For some substantial percentage of American legal scholars, devotion and fidelity to the United States Constitution and its institutional trappings is a fully justified faith: scholars pronounce their belief in the moral virtue of the United States Constitution as readily as officials are required to take an oath to uphold it. The meaning of the Constitution is of course hotly debated across the scholarly rainbow, as is the means by which we determine it, and by virtually all who study it. But for a surprisingly high number of American Constitutional scholars, and an even broader swath of constitutional lawyers, its *virtue* is not. We neither love, revere, nor swear allegiance to any King. But we do all of that and more to the Constitution.¹⁰

This is odd, somewhat, for a citizenry that prides itself on its antiauthoritarian rambunctiousness, but its very odd for a legal academy that prides it-

¹⁰ There is a fair amount of scholarship noting the profundity and sometimes the irrationality of constitutional faith, but very little that attempts to understand it. See SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988) and OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (INALIENABLE RIGHTS) (2013); Robin West, *Constitutional Skepticism*, 72 B.U. L. REV. 765 (1992); Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983); MARK TUSHNET, RED WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (CONSTITUTIONAL THINKING) (1988); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 673 (1983).

self on its embrace of enlightenment values, including a critical stance toward legal authority. Legal scholars of virtually all philosophical persuasions, political dispositions, and disciplinary fields pride themselves on their skeptical stance toward the value of particular areas of law; indeed, for many this skepticism toward the justice of positive law is the very hallmark of their jurisprudence, and the defining feature of a professional and scholarly legal stance. No commercial law scholar would declare an undying faith in the virtue of the Holder In Due Course doctrine; no contracts scholar would claim that the value of the consideration doctrine is simply off limits from critical normative inquiry, no one that I know wants to assert that the negligence doctrine in tort law should be loved, no matter its consequences or justice, no family law scholar suggests even in this era of high sentimentality that the moral or social or political value of state run legal marriage is simply a taboo topic for legal discourse.

Jurisprudentially, the possibility of criticizing positive law and positive legal institutions is a central tenet of legal positivism and natural law both: for positivists, the possibility of critical legal thought shows the vital difference between legal rules and moral ideals,¹¹ and for natural lawyers that same possibility shows the objective existence of a realm of moral ideals dictated by justice rather than by sovereign power – our critical impulses toward law evidence the existence of the natural law.¹² Yet, as scholars and citizens, we hold constitutional law, and for the most part the institutions that created it and perpetuate it, in some sort of critical no-man's land. To be sure, we criticize a particular case as wrongly decided, a particular court as misguided, and an entire area or time period as a constitutional abomination. We aim plenty of critical fire on constitutional pariahs – *Dred Scott*,¹³ *Plessey v Ferguson*,¹⁴ *Citizens United*,¹⁵ the *Lochner*¹⁶ era, *Roe v Wade*¹⁷ and its progeny. Some of us criticize particular interpretive approaches as wrongheaded or untrue to the spirit of constitutionalism. But for the most part we simply assume the justness of our constitutional baselines – that a law might be unconstitutional weighs in our assessment of whether it is unjust or immoral or unwise, and that a law is just, moral or wise, weighs

¹¹ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); H.L.A. HART, *THE CONCEPT OF LAW* (1961); H.L.A. HART, *ESSAYS ON BENTHAM* (1982).

¹² JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); LON L. FULLER, *THE MORALITY OF LAW* (1964).

¹³ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

¹⁴ *Plessey v. Ferguson*, 163 U.S. 537 (1896).

¹⁵ *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010).

¹⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

heavily as well in our assessment of its constitutionality.¹⁸ For almost all of us, just as the King's edicts were once rendered fair and virtuous by force of the sun's sweet rays, so too for our Constitution¹⁹: it gets off pretty much scot free, critically speaking.

Why is this? Why is constitutional skepticism in such short supply? Why isn't skepticism in fact the default, the order of the day, the stance toward the Constitution expected of any decent constitutional scholar? Here are some possible explanations: maybe the reverence is justified. The Constitution may just be that perfect. Or, the Constitution's meaning may be so indeterminate that skepticism toward the Constitution itself, rather than toward any particular interpretation of it, is simply not warranted.²⁰ If the Constitution can mean whatever the speaker with power wants it to mean, Humpty Dumpty style, then critical fire should sensibly be focused on interpretations and those who generate them rather than on the Constitution.

A third possible explanation is that the Warren Court's great victories – victories for human rights, for civil rights and for fundamental justice – set the dye of our current constitutional reverence, just as surely as that same era set the dye regarding the Republican party's electoral hold on the voters from southern ex slaveholding states.

Since *Brown v Board of Education*, three generations of constitutional scholars and lawyers have been steeped in a defining education that stresses the virtue not only of a group of wise decisions by particular historical figures, but in the essential goodness and wisdom of all that facilitated those decisions, including the essence of constitutionalism itself: judicial review, anti-majoritarianism, the idea of restricting rather than freeing politics through foundational law, deep skepticism regarding not the constitution itself but rather representative government. We have been steeped, in other words, in a love of reasoned legal principle and a fear of political passion, not noticing, perhaps, that love of constitutional reason is itself a passion toward which a bit of inspection and skepticism might be warranted.²¹ These explanations for our constitution-lust are each unsatisfying in different

¹⁸ For a full defense and celebration of the role of constitutionalism in our moral assessments of political choices, see RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977).

¹⁹ I discuss this comparison between Shakespeare's metaphor for the King's necessary virtue, and our own love of constitutionalism, in Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U.L. REV. 145, 167 (1985).

²⁰ This is the account given by the Critical Legal Studies movement for Constitutional Faith. See MARK TUSHNET, *RED WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

²¹ The influential writings of Owen Fiss often sounded this note. See Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

ways, which I won't enumerate; I have addressed them elsewhere.²² My point here is that there are other explanations, and other modes of explanation of this peculiar and indeed exceptional American passion that might shed light, and that, I believe, law and emotions scholarship might unveil, particularly if we focus on our emotional attitude toward constitutionalism, rather than our beliefs regarding it.

We might, for example, infer a plausible explanation for our Constitution-lust from Freud's reflections on the nature of legalism, sketched out in his classic essays *Totem and Taboo*²³ and *Civilization and its Discontents*.²⁴ Freud famously described both legal and religious impulses – and the emotions those impulses produce – as the result of a mythical contract: *not*, though, the familiar Hobbesian contract, in which a band of otherwise warring brothers turns power over to a political sovereign, so as to better the chances of their own survival and to better protect their wealth from the aggression of each other. Rather, in Freud's depiction, the brothers band together, not so as to construct a paternal powerful sovereign who will protect them from each other, but rather, so as jointly to kill that paternal powerful sovereign who has protected and maybe loved them but who has also terrorized them. In the aftermath of the shock, fear, shame, and guilt that follow their patricide, and knowing their own need for authority as well as for nurturance, but also knowing their desire for an authority that is not embodied in mortal, paternal flesh, they then construct a *totem* – religious authority, or, perhaps, Freud suggests, a Rule of Law. Both yield totemic rather than personal or embodied authority: authority that stems from a non-human source, but which can nevertheless render both binding edicts and loving care. They then abide by taboos – one of which is criticism of the totem. Totemic law thus serves a core infantile need: the need for an authority that is loving but not threatening, because not human, and to whom an absolute fidelity might be granted, without risking one's own annihilation.²⁵

My point here is simply that this Freudian story of totems, taboos, and authorities, both religious and legal, bears an uncanny resemblance to our

²² On the imperfections of the constitution, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE (INALIENABLE RIGHTS)* (2013). For an early economic and political critique, see CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913). For an argument that the perceived indeterminacy of the constitution has truncated critique of it, see ROBIN WEST, *NORMATIVE JURISPRUDENCE: AN INTRODUCTION* (2011). See generally Robin West, *Constitutional Skepticism*, 72 B.U. L. REV. 765 (1992).

²³ SIGMUND FREUD, *TOTEM AND TABOO* (1913).

²⁴ SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1930).

²⁵ For a full elaboration of this argument, see Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986).

own constitutional founding: we slayed a monarchic paternal authority, and replaced him with a totemic constitution – an authority of laws, not men, a Constitution to worship rather than a King, and most important, a limit on the perceived dangers of the highly personalized authority of legislators and presidents.

Freud's hypothesis may be wildly off the mark. Our loving embrace of our constitution may have nothing at all to do with a deeply wished for but deeply denied violent oedipal act followed by the erection of an authority that distinctively lacks those embodied human attributes we find so threatening – such as physical power or phallic political will. But it is suggestive, I believe, of an approach to the puzzle of constitutional reverence that deserves pursuit. It explains the emotional dimension of our constitutional faith. It explains why it is that our attitude to our own constitution *is* so emotional, why deep criticism is so taboo, why we insist against the evidence of our senses that its authority transcends its human origins or the humanity of its interpreters. It explains why we insist that it embodies political virtue while lacking political potency – why we perceive it as both the least dangerous branch – as having no fangs – *and* the most transcendently nonhuman, non-positivist, moral, principled, passionless, rational, and virtuous of all our institutions. It explains, in other words, why our constitutional traditions are both so totemic and so taboo. The Freudian story provides an account of the genesis of this particular, and particularly deep, legal emotion: an oedipal emotion seemingly rooted in law's mythic origins, but utterly unrooted from anything attributable to home, to hearth, or to a mother's breast.

B. CONSENSUAL DYSPHORIA

The act of consenting to something, like the formality of contracting, is oftentimes a legal act. It has legal consequences. When we consent to an exchange, we create a contract that otherwise might be a theft.²⁶ When we consent to a sexual transaction, likewise we transform a legal encounter from what would otherwise possibly be criminal – a rape, or some other form of sexual assault – into a legal exchange.²⁷ When we consent to a labor contract, the relationship that might otherwise be an act of enslavement is not. As is often enough remarked, consent, not status, now marks the line between lawful and unlawful in physical intimacy, in employment, and in

²⁶ See Randall E. Barnett, *Contract is Not Promise; Contract is Consent*, 45 SUFFOLK U. L. REV. 647, 656-59 (2011).

²⁷ For consent-based theories of rape, see Deborah Turkheimer, *Sex Without Consent*, 123 YALE L. REV. (2013) for a seminal treatment of rape as non-consensual sex, see SUSAN ESTRICH, *REAL RAPE* (1988).

exchange.²⁸ I will call this type of consent, “legal consent” – acts of consent that have the legal consequence of transforming that which is the subject of consent into a lawful transaction, rather than the crime or tort it might be without the consent.

Legal consent plays an outsized role in contemporary jurisprudence. An “ethic of consent” polices large swaths of law: contract law is governed by it, and increasingly much of criminal law as well. Rape law reformers urge that rape law be reformed so as to better conform to the norm of consent that increasingly informs common or lay understandings of the meaning of rape (thus, drop the force requirement, and define rape instead as non-consensual intercourse).²⁹ Even aside from the legality it confers, however, lawful consent is also becoming the line, culturally, between that which is good or perceived as good, and that which is not.³⁰ Thus, we presumptively believe that the world that follows a lawful consent is a better world than the one before it. Lawful Consent, in other words, makes the post consent world a good place, rather than simply a lawful place. Acts of legal consent are presumed to produce worlds that are better than their pre-consensual predecessors. The more consensual our world, then, the better.

Why is this? What is it that legal-consensual transactions produce that is of such indisputable value? Two answers dominate scholarship and consciousness both. First, when we proffer lawful consent to some change in our world we are acting freely, we believe, and that freedom is itself of great intrinsic value.³¹ Thus, lawful consent is productive of liberty. And second, when we consent to some change in our world, we are also exchanging something we have – sex, money or labor – for something on which we place an even higher value – intimacy, a consumer good, or a wage. When we make that exchange, we are enriched; if we get something in a free trade, we enjoy the additional surplus value, as will the partner to

²⁸ See Randall E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* (2003). See generally THE ETHICS OF CONSENT: THEORY AND PRACTICE (Franklin Miller and Alan Wertheimer eds., 2010)

²⁹ STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998); Deborah Turkheimer, *Sex Without Consent*, 123 YALE L.J. (2013). For critiques of the reform position that rape should be defined as nonconsensual sex, see Michelle Anderson, *Negotiating Sex*, 41 SO. CAL. L. REV. 101 (2005); Jeb Rubinfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013); CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1988); Katharine K. Baker, *Why Rape Should not Always be a Crime*, MINN L. REV. (forthcoming); Ian Ayres and Katharine Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599 (2005).

³⁰ For a classic defense, see Richard Posner, *Ethical Basis of Wealth Maximization*, in THE ECONOMICS OF JUSTICE (1981).

³¹ Randall E. Barnett, *Contract is Not Promise; Contract is Consent*, 45 SUFFOLK U. L. REV. 647 (2011).

the exchange.³² Thus, lawful consent produces wealth. A post-consent world, then, is both richer and freer— consent alone and by definition creates value. Consensual transactions therefore make for a wealthier and freer society, whether it be a society of two, of an industry, of a nation, or of an international regime. Consensual exchanges are good by definition. They're pareto optimal. As a formal matter there's no downside. Everyone gains.

The question I want to pose regarding legal consent is just this: do these acts of consent – legal acts that produce wealth and liberty axiomatically – produce anything else? I think they do: lawful consent at least sometimes produces an emotionally toxic undercurrent. A contract for labor, sex, or consumption – our agreed-to exchanges in the workplace, in intimate spheres, and in consumer markets – might axiomatically produce wealth and liberty, but precisely by virtue of that fact – that we have defined them in such a way as to assume they produce wealth and liberty, and that they are axiomatically good because of both – they might also, at the same time, shut down our capacity to imagine more meaningful forms intimacy or work or social intercourse, blind us to unseen alternative ways of being in the world, mask the powers and the cruelties within the spheres of liberty these legal acts of consent sometimes unwittingly but usually quite wittingly create, and reduce our instincts and desire for social, sexual, and commercial connection with others, to a series of permissions borne of precious little but shrunken visions, sour grapes, and material necessity. Thus, our commitment to the value of “consensual sex” – no matter how consent is defined – might mask or mute or render irrelevant or even psychically disturbing a deeper desire for a less mediated, and vastly more pleasurable form of physical and sexual human intimacy than that to be gained through bargains trading sexual access for whatever we think we're getting in return. Our steadfast assurance that consensual acts of consumption should axiomatically leave us better off might truncate our near-instinctual urge for more meaningful human intercourse with the strangers with whom we engage commerce.

Most poignantly, the legitimacy to which we lend the work we do in labor markets solely by virtue of its consensuality might blind us to our shared desires for meaningful and rewarding ways of blending our energies with the earth's natural bounty. When we have these desires for pleasurable

³² Richard Posner, *Ethical Basis of Wealth Maximization*, in *THE ECONOMICS OF JUSTICE* (1981). For critiques of the economic defense of efficiency as ethically grounded in the value of wealth, see Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769 (1979); Robin West, *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 388-91 (1985); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

intimacy, for a joyous commerce, or for creative work, and then tap them down, or trample them, or let them be trumped by our acquired legalist knowledge that the work, sex and commerce to which we've consented *invariably* create liberty and wealth – so they just must make us happy – we alienate our desirous selves and disown our horizons of hope. The result of this may be a disconnection from both our hedonic and our aspirational selves. If so, then law – in this case our legalist valorization of legally binding acts of consent – produces dysphoria.

Listen, for example, to Marx's justly famous and poignant description of the consent of a worker to an employment contract with a capitalist:

On leaving this sphere (of liberal ideology)... which furnishes the "Free-trader Vulgaris" with his views and ideas, and with the standard by which he judges a society based on capital and wages, we think we can perceive a change in the physiognomy of our [primary actors]. He who was previously the money owner now strides in front as capitalist; the possessor of labour-power follows as his labourer. The one with an air of importance, smirking, intent on business; the other timid, and holding back, like one who is bringing his own hide to market and has nothing to expect—but a hiding.³³

This doesn't sound like a contractual arrangement between two free people that leads them both to an increase in their respective quotas of liberty and wealth. It sounds like lawful consent producing a free contract in the sphere of work and labor that truncates the worker's human potential – a truncation of which the worker himself is well aware – for meaningful engagement with the world through work and meaningful and rewarding engagement with the community through social interactions more weighty than a contractual weighing of bad options – starvation on the one hand, giving his hide for a hiding on the other – followed by a checking the box sign-off. The bad options and their promise of liberty and wealth leave the worker "timid and holding back." The ethic of consent leads to emotional dysphoria.

Marx's example of the free labor contract that truncates the human potential for meaningful work, can be expanded beyond his focus on alienated labor. A sex worker in a traditional marriage – say, a wife – who feels bound by duty and dependency likewise may consent to sex during marriage, but she too may be timid and holding back, bringing to her marital market nothing but her hide and with no expectations but a hiding. A consumer buying a good motivated by a commercially created desire might likewise be timid and holding back, the appearances of consumer sovereignty notwithstanding – doing little but satiating an ephemeral and false lust, that will in turn prompt not satisfaction, but a cycle of continued frus-

³³ KARL MARX, *DAS KAPITAL* 354 (1867).

tration. The general point is that contractual consent that is marked by unacknowledged disempowerment in the private sphere in which the contract is consummated, along with a relinquishment of desire for meaningful engagement – either in the sexual, commercial or labor sphere – may reflect nothing but the rhetorical sway of a powerful advertiser, or the machinations of centuries of patriarchy that prime women and girls to consent to unwanted intimacy, or in the labor market nothing but bondage to circumstances only marginally better than the threat of starvation. Satiation of artificially created desires may feel better than frustration of those desires at the moment, submission to unwanted and unpleasurable and undesired sex may be better than the various fears of isolation, abandonment, hunger, violence or death, that may be the alternative in traditional patriarchal regimes and to some degree in liberal regimes as well, and bondage to an employer at monotonous work and humiliating wages may of course beat starvation. If the freely contracting buyer, wife, sex worker, girlfriend or worker has the freedom to enter a contract – which may well offer better terms than the felt alternative – and she or he does so, then no question, his or her liberty is enhanced and wealth is created. The feeling such contracts produce, however, might be far from a feeling of liberation or enrichment. The consummated contract – whether for labor, market goods, or sex – might squelch the piercing pain of fear or hunger or desperation. But it might also be accompanied by a feeling of resignation and an awareness that the alternative is some sort of unacknowledged pending doom – the wolf is being kept from the door only by virtue of the whimsy of some contractual partner's strength, whose sole virtue lies in the fact that he is not the wolf. If so, then the consent might likewise be accompanied by self alienation – a denial of one's own desires for more meaningful intimacy than that negotiated through consent, more meaningful work than that agreed to by a labor contract for wages under conditions of necessity, a more creative engagement with the natural world than that envisioned by the marketer of a consumer good, the purchase of which is motivated by the imperative to satiate a trumped up urge.³⁴

Acts of legal consent – now such a constant and potent aspect of our legal lives – that are themselves motivated by need, private disempowerment, desperation, and fear, might increase a superficial and fleeting contractual liberty and might trigger a formal increase in a circularly defined conception of wealth. They do so, however, at a cost, a part of which is emotional, as Marx reminds us. Far from satiating desire, some of these consensual transactions might squelch it. Or, more accurately, while they satisfy sur-

³⁴ I elaborate on this argument in *Authority Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 395-400 (1985).

face desires, they trample deeper ones: desires for a more human and humane community, for mutuality in human relation, for a sexual connection between human bodily borders that requires no affirmation of consent, for something more, that is, than the pact of the withdrawn selves.

If there's any truth to this, we'll know that truth only within a small and denied part of a fragile self, the more we convince ourselves, and the more we convince others, that consent is a proxy for our wellbeing, that the consensuality of a transaction is the best guide to that which nurtures and sustains. The consensual transaction may well be a sound marker for the distinction between the legal and illegal, between bargain and theft, rape and sex, enslavement and labor; I think it is. Recognizing it as such is a huge and liberalizing advance for the societies that embrace it. But that does not make our present consensual bargains, sexual relations, and employment lives the fulfillment of our potential for flourishing lives. We cut off our emotional self-knowledge – our knowledge of the content of our desires, and of our capacity for less alienated lives – when we convince ourselves that our choices on open markets neatly reflect our preferences, which in turn neatly reflect our desire. That pretense, and the effort to maintain it – the sheer effort it takes to pull back, to remain timid, to bring one's hide to market expecting nothing more than a hiding – triggers emotional dysphoria – a timid pulling back. That dysphoria, in turn, is the canary in the mine. Our emotional distress at our shrunken consensual world, if nothing else, tells us that something is very wrong, when we delegate to sometimes desperate acts of consent the work of delineating the capacity for full human engagement.

C. THE EQUAL OPPORTUNITY SOCIETY

My third example comes from the broad field of civil rights law. We have accepted, both in legal practice and in the worlds of legal scholarship and legal ideals, the ideal of an “equal opportunity society” as those laws’ best interpretation, and more broadly, as an ambitious conception of social justice – a conception of justice tailored specifically for the workplace and schoolhouse, but also somewhat for society at large. So, we often say, when referencing our civil rights ideal, that the competitive worlds of opportunities – in employment, in education, in political office, and in social and civic life – must be available to all, without restriction on the basis of race, gender, sexual orientation, disability, ethnicity, religion or age. All should have an equal opportunity to achieve whatever is within his or her ability, and consistent with her will, her ambition, and her desire, to achieve. Jobs must be open to all without regard, etc., but the ideal of equal

opportunity clearly goes beyond barebones equal employment law or the antidiscrimination norm: in a world of equal opportunity, all must have the same opportunity to succeed. Neither poverty nor circumstance, any less than race or gender, should limit success in life. Sometimes, luck might play a role in determining who succeeds or fails, even in a fully fair society, but those scenarios should be minimal and diminishing: for the most part, the dream goes, we should be judged by our character, and not by inbred traits, the vagaries of fate, or the wheels of luck, over all of which we lack control. We disagree of course, and mightily, over how to get to such a world. Most of us think, and I believe rightly, that it is clearly not enough to simply target intentional acts of racism, ageism, abilitism, sexism and so on – centuries of marginalization and subordination leave scars that require compensation; substantive equality for subordinated groups is not so readily achieved. Many of us believe that the greatest impediment to such a world of equal opportunity is no longer race, gender or any other suspect class defined by immutable characteristics, but rather, inherited wealth on the one hand and inherited poverty on the other. Some believe that targeted affirmative actions of any sort on any basis other than perhaps class, will be counterproductive and unjust because it is a step backward in the march toward an equal opportunity society, even though it purports to be a step forward. I want to put these debates over means and particularly over affirmative action aside, and address instead the goal. Is the ideal of an equal opportunity society one that we should so quickly embrace?

Again, I think our emotional intelligence provides some reason to put on the brakes. What emotions might the equal opportunity ideal produce, both in theory and, to the limited degree we have achieved it, in practice? The ideal of the fair opportunity society is almost invariably expressed as a large but fair game, or race: In the equal opportunity world, we will all play this game of life on an equal field. Once we rid the world of prejudice and the injustice to which prejudice leads, we will all start the race with our foot on the same line; we all will respond to the same pop of the starting gun, we will all play by the same rules, the game won't be rigged, as Elizabeth Warren says.³⁵ No tilts allowed. Now a fair world of opportunity is no doubt better than a world in which many start life with a hand tied behind their back. The world of equal opportunity, were we to ever achieve it, would produce a sorely needed dollop of fairness where none or little has existed before. But is it the ideal to which we should aspire? Does it exhaust our moral imaginations, with regard to hard won civil rights? What else might

³⁵ See e.g., Elizabeth Warren, Speech at Netroots Nation (July 2015), http://www.huffingtonpost.com/entry/elizabeth-to-speak-at-netroots-nation-rally_55a938f8e4b03f76c5ee2be2.

such a world produce, besides a measure of justice?

I have argued elsewhere that our civil rights traditions if not the laws themselves are better understood as expressive of ideals of communitarian inclusion rather than as ideals of fair play: they counsel or mandate inclusion of groups once excluded into the public space, into politics, into employment, into the worlds of education, and into civic life generally.³⁶ Civil rights understood as rights of inclusion, I think, better captures the history of those laws, and is also a better because more moral interpretation than civil rights understood as rights of equal opportunity. Here, I don't want to argue that point, I want instead to point to the emotional residue which the reduction of civil rights to equal opportunity leaves in its wake.

What emotions are produced by the conflation of the ideals of civil rights with the ideals of metaphorically fair games? There are two that should give us pause. First, in a fair game the winning side both on the field and in the bleachers can and does dismiss both the need for and the experience of empathy for the pain experienced by a game's losers. The risk of loss is precisely the risk one assumes when playing a game. The winners, then, in an equal opportunity world, then, to the extent the metaphor holds, are as justified in turning their back and averting their eye from society's losers, as the fans on the winning side of the bleachers can turn their back on and avert their eye from a losing team's palpable misery. The losers in the equal opportunity world after all have fully consented to the loss and to the fairness of it, just as have the losers on the playing field in a fair game.

So, is the fair game a good metaphor for civil rights? A refusal of empathy for a game of skill is an emotion that may be commonplace in sports, but in life, we should recognize a refusal of empathy, and the willed absence of its experience, as a terrible and even terrifying limitation on the reach of our moral sensibilities across class, ethnicity, race, sex and national border likewise, in the rest of life. That limitation of empathy across groups and particularly across class – the failure of people of good will but also the failure of people of means to empathize or even understand the struggle and pain of people who lack the necessities of a decent life, is hugely worrisome; it blocks a decent progressive politics, but it also blocks a decent society.³⁷ That our dominant understanding of the meaning of our civil rights

³⁶ Robin West, *Toward a Jurisprudence of the Civil Rights Act*, in *A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50* (Samuel Bagenstos and Ellen Katz, eds., 2014). See also Robin West, *Freedom of the Church and our Endangered Civil Rights: Exiting the Social Contract*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Zoe Robinson, Chad Flanders, and Micah Schwartzman, eds., 2015).

³⁷ For related critiques of the civil rights ideal of equal opportunity, see some of the seminal writings of the Critical Race Theory movement, including Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049

revolutions leaves us with a sense of fairness that comes with such an emotional cost – the denial of empathy on the grounds that losers have lost in what is now, courtesy of the civil rights laws, a fair game purified of the residues of racism and other pernicious inclinations – should count as a red flag. That just cannot be what those laws mean.

The second emotional residue of the “fair game” understanding of civil rights is a state of profound, life-long, adult anxiety. Risks of failure are individualized, not only materially, but psychically. We are not in this foot race together, we are each running our own race, and we are running against each other. That degree of competitiveness is poisonous not only for fellow feeling, but also for a decent conception of self: the good person, according to this most moral and most moralizing of all of our fields of law, is the person who wins the race. What does that make the rest of us? What is the emotional remainder? What does it mean, for one’s emotional health, to be the last to finish the marathon, in an equal opportunity society, what does it mean to fail in a fully just society?

Well, failure, in the equal opportunity society, is entirely one’s own. It can’t be blamed, but it also can’t be shared. To be judged by the content of one’s character, so vastly better than being judged by the color of one’s skin, is nevertheless to be judged, taken the measure of, evaluated. In an equal opportunity society, that is a fair game, but also, increasingly, a game with winner-take-all stakes, that judgment is relentless, individualized and harsh.

Almost a hundred years ago, Karl Llewellyn put a similar point thusly:

No man will ever understand the age-old problem of "justice" as a going concern who does not keep in mind that one of the vital desires of human beings—which social institutions must provide for—is not even-handedness, but understanding treatment of individual idiocy or weakness. The boss is great because he helps out those in trouble. He helps you out first, and helps without regard to whether you have been at fault. If you have, he bawls you out—as is his function. It does not stop this help. You have no use for what reformers keep calling "justice," even-handed, and the law. You need the undeserved aid reformers will denounce as favoritism, influence, corruption...The something that you do not need to deserve, the wherewithal to bear up against an ill-understood and

(1977); DERRICK BELL, AND WE ARE NOT SAVED (1987); Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). For thematically related claims that norms of formal justice in any sphere can retard rather than promote full social justice see Mark Kelman, *Market Discrimination and Groups*, 53 Stan. L. Rev. 833 (2000); RICHARD FORD, RACIAL CULTURE: A CRITIQUE (2005).

arbitrary, bitter world. In a word, then, the satisfaction of a nameless assortment of spiritual needs...³⁸

To sum: If fairness is indeed justice, and justice is a pure meritocracy, then justice is assuredly not enough. Pure meritocratic justice may be like procedural justice unjust this way: there will be an abundance of both in hell. A pure meritocracy is just not a decent interpretation of what either justice or our civil rights laws require. It is a truncation of our dream – it is certainly a truncation of Dr. King's dream – for a blessed community.³⁹ We should aspire to much more, societally, than a fair competition that yields a few winners and many losers who must be satisfied with their lot in life, because their loss was the result of a fair game to which they gave full consent. We should aspire to kindness, generosity, and a spirit of shared mission and communal life, both in our workplaces and our neighborhoods. We're not, after all, in a footrace. Our successes belong to all of us, as President Obama once made clear in an impolitic moment,⁴⁰ but so are our many failures, which he has yet to say. We share a common purpose and a common lot; the equal opportunity society denies or forgets that. Excessive fears for our own futures, and a flattened empathy for those who for whatever reason fall off or choose to take themselves out of the footrace, are toxic emotions that are part of the legacy of that truncated ideal, which, for fully understandable and even honorable reasons, is nevertheless much loved.

D. INDIVIDUALISM, FEAR, AND FAILURES TO THRIVE

Lastly and much more quickly, our laws and legal institutions rest on a baseline ideal of individual self sufficiency and independence that are at odds with any reasonable understanding of the needs of caregivers of newborns, infants, toddlers, young children, the profoundly disabled and the elderly. Unlike virtually all other mammals, human newborns, infants, and toddlers are completely physically dependent upon caregivers for a sustained period of their early lives, and for a much longer period, their emotional health as well is a function of the quality of care they receive while dependent. Children are not plants that thrive on sunshine and water alone. They need the physical presence of caregivers if they are to survive the early years, and thrive throughout. The care of an infant, baby, toddler or child requires near constant attention – to diaper, clothe, bathe, feed and soothe

³⁸ Karl Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1293-94 (1932).

³⁹ See e.g., *The King Philosophy: The Beloved Community*, THE KING CENTER, <http://www.thekingcenter.org/king-philosophy#sub4>

⁴⁰ President Barack Obama, Election Campaign Speech in Roanoke, Virginia (July 13, 2012). "You did not build that" (referring to the roads on which entrepreneurs depend...).

infants, to talk with and read to and stimulate and interact with babies and toddlers, to shepherd older children through the stages of childhood and adolescence – all of this takes years, not moments stolen here and there between two full time jobs. Without the minimal care required in infancy, children will die. Without devoted and focused care in babyhood they fail to thrive. Without the committed attention of caregivers through childhood and adolescence they will fail to develop emotionally. The entirely predictable result of a lack of sustained care in infancy, babyhood and early childhood is pathologically unhealthy adolescents: not only educational deficits but also massive failures of the heart that are now widely recognized as being at the root of moral maturation and societal competencies. The consequence of our collective failure, in this culture, to take care seriously, and particularly to take maternal care seriously – our self indulgent propensity to privatize it, trivialize it, feminize it, animalize it, and vilify it – is an all too familiar array of social pathologies.⁴¹

As is also now well known, caregiving of the sort requisite to the physical and emotional wellbeing of newborns, infants, toddlers and children is inconsistent with the remunerative market-placed labor that is the centerpiece of our love affair in the United States with individualism and self sufficiency. A woman giving birth is obviously incapacitated from otherwise remunerative market-based labor; birthing displaces wage or salaried labor. Breastfeeding also displaces a good bit of it. The constant care required by babies is inconsistent with hours spent away from them, as is the attentiveness required of the caregivers of young children. Even adolescence requires a degree of focused care and attention that is inconsistent with long hours on wage jobs or excessive careerism. Caregivers, therefore, are in turn dependent upon others for material support during particularly the early years, but in the subsequent years somewhat. Caregivers therefore are not fully autonomous, independent, self sufficient beings, pretty much by definition. Caregiving as a human act embeds one in a web of dependencies. As the child (or elder) – the cared for – depends upon the caregiver – the caregiver is in turn dependent upon others. A society that overvalues individualism will undervalue care. The damage will be wrought society-wide.

The quality of care – whether it is sufficient in kind and amount to ensure healthy emotional development – is in part – in very large part – a function of the felt security and wellbeing of the caregiver. A caregiver who is herself or himself fearful of an insecure environment or who lives within a violent or impoverished atmosphere, or who is working two or three jobs or otherwise, simply will not provide the devoted attention, or the interaction,

⁴¹ See generally EVA F. KITTAY, *LOVE'S LABOR* (1998); ROBIN WEST, *CARING FOR JUSTICE* (1997); Robin West, *Do We Have a Right to Care*, in *LOVE'S LABOR* (1998).

or even the educative vocalizing discourse essential for a child's health, emotional wellbeing and maturation. If she is fearful for her own or her children's safety, then her instincts will run toward preservation not nurturance. If she is fearful of losing her home or shortfalls in food, she will likewise be focused on survival rather than the mental stimulation or verbal interplay or interactive games necessary to emotional health. Thus, the new-born, infant, toddler, child or adolescent's capacity for emotional health, are all, in part, a function of the material security of his environment. Her freedom from fear and hunger, as well as his need for loving care, depends entirely on others, whose capacities are themselves constrained by material circumstances. The impoverished caregiver or the caregiver living under the threat of violence is largely incapacitated from providing the quality of care that is essential for physical survival and health, but almost invariably from the quality of care essential for the emotional wellbeing of her dependents. The result is a massive mental health crisis, with attendant pathologies.

We know all of this, with no less certainty than we know the earth is warming. Yet like our environmental political will-lessness, here too we are will-less. We don't make the political choices necessary to address the challenges of caregiving under the stresses of poverty.

We also, though, don't challenge or even much examine the legal structures – as opposed to the political choices – that produce the care deficit. It is not only the failure of Congress to pass a better because more generous Family and Medical Leave Act, or more generous AFDC provisions, although both would obviously help. And it is not only the bad or ignorant mothering of poor women or the absence of fathers – parents know it is essential to read to and play with young children, that babies need constant care, and that two parents should ideally be present. It is not, in other words, solely poor politics or poor culture – absent fathers, uneducated mothers, a lack of reading material in the home.⁴² Rather, the lack of aid to needy parents is a part of a broad set of policies deeply embedded in broad swaths of our existing law – not just the law that constitutes our inadequate welfare net – which taken jointly express a contempt for caregiving, and a willful blindness to the incompatibility of caregiving with the ethics we most valorize: an individualistic ethic that rewards the market labor that sustains self-sufficiency; a competitive work culture that punishes those dragged down by dependents, a communal life that holds life giving in dis-

⁴² See James Heckman, *Promoting Social Mobility*, BOSTON REVIEW (Sep. 1. 2012), <http://www.bostonreview.net/forum/promoting-social-mobility-james-heckman>.

repute while glorifying and permitting heavy doses of both individualistic and state violence. Employers fire employees at will, by virtue of contract law. Individuals lawfully bear arms – a right that has caused domestic violence lethality to soar – by virtue of constitutional law. Workplaces are still structurally hostile to parents, by virtue of the sad limits of equal employment law. States incarcerate young parents blithely for insignificant crimes and with no regard for those parents' caregiving obligations. The communal support we begrudgingly grant poor caregivers is sometimes not enough to meet basic needs of survival, and never enough to provide quality care that ensures mental health. And so on and on and on, again, through large swaths of our public and private legal codes.

Of the questions neglected by law and emotions scholars, this one is the elephant in the room – it is so obvious it has become white noise. Law creates the material and psychic conditions of our lives within which healthy and life sustaining emotions will take root, will develop, or will die. Sometimes, though, it creates conditions within which those emotions fail to develop at all – it creates the conditions within which healthy emotions are in effect still-borne. The capacity of loving caregivers to provide the attentive loving care that is necessary for mental and emotional health of dependents is largely dependent on the caregivers' own freedom from fear and overpowering anxiety. And *that* freedom is a function of law. The law, therefore, and not only a father's presence or a mother's good will or level of education or intelligence or linguistic facility, determines, in part, and indeed in large part, whether a caregiver's love is poisoned by her own fear and anxiety, and hence whether a newborn or a baby will suffer from a failure to thrive, or whether a child will suffer from insecure attachment, or whether an adolescent is burdened by psychopathologies born of isolation.

Put differently it is not only bad economic conditions, or poverty, or culture, or the breakdown of family, or the absence of fathers, creating the emotional ill health behind social pathologies. Our substantive law – family law, of course, but also contract law and property law and constitutional law, and antidiscrimination law and administrative law and so on – is complicit. We need to hold the law and the bodies of law that produce emotional toxicity accountable, and to do so we need to examine the multiple connections, causal, circumstantial, intended, or not, between not only law and the emotions it consciously seeks to regulate or suppress or honor, but also between our socially widespread emotional ill-health and our various legal cruelties.

CONCLUSION

Law produces emotions; emotions originate not only at a mother's breast or a father's hand or a functional or dysfunctional family dynamic. US Constitutional law produces a reverence for constitutionalism that smells unpleasantly of authoritarian emotionalism. US private law produces consensual dysphoria: the feeling of agitation and doubt that results, when the work of delineating the conditions for human flourishing are reduced to the task of tallying up acts of consent. Anti-discrimination law produces a conception of justice overly invested in fair play, that in turn relegates most citizens to the role of the also-rans in athletic events, with its attendant emotional overhang: a lack of societal solidarity and communitarian purpose, and a constant fear of falling short, of losing a race set up entirely so as to reward only the fleetest of foot. And finally our threadbare poverty law produces familial fear, and hence emotional ill health: babies, children and adolescents who fail to thrive, who too often then become adults who fail to empathize, or socialize. These are emotions, and they are produced, not just regulated by or informed by law. They are fathered by it.

The law's production of emotions deserves study. To date it has received it only sporadically: Peter Gabel, in the eighties, looked at what I'm calling consensual dysphoria; Clare Huntington, today, is looking carefully at family law's production of emotional ill health. There are other examples as well. But these efforts are exceptional; there is no sustained inquiry along these lines. That there isn't, says something about the youth of the movement. It also, though, says something about our contemporary self-understandings: we tend to overly privatize emotions, and we tend to hold law harmless. Law might reflect emotion, might be influenced by emotion, might regulate emotion, and might precipitate emotional outbursts. But law just can't be the sort of thing that actually produces emotion, so it can hardly be held accountable for doing so in a way that is damaging.

This set of assumptions is wrong-headed from top to bottom: Law produces emotions, some of which are destructive. It can also produce emotions, of course, which are essential to human flourishing. But I suggest a critical stance, rather a celebratory mode should motivate this work: right now, we live and work within a legalistic order that worships constitutional authority, celebrates consensual ethics, has settled for equal opportunity, and trumpets the value of individual self sufficiency. Each of these individually, and certainly all jointly, produce toxic legal emotions. They should be in the cross hairs of all of our critical impulses.

