

Seeking Emotional Ends with Legal Means

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INTRODUCTION

Can we use legal institutions to cultivate forgiveness after mass violence, genocide, or pervasive group-based injustice? This is the question Dean Martha Minow asks in her provocative and pathbreaking Jorde Lecture.¹ Yet she also poses a question that is simpler and broader in its reach: Should we attempt to use law in a purposive way to shape or foster human feeling? Both questions, as Minow acknowledges, evoke skepticism from those who see law as a field of objectivity and reason, or those who view law as ineluctably and exclusively bound to norms such as consistency, predictability, and the resolution of discrete controversies. However, as I argue in this Essay, these questions also

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1. Martha Minow, *Forgiveness, Law, and Justice*, 103 CALIF. L. REV. 1615 (2015).

elicit doubts from a less probable group of critics: scholars who have come to view law and emotions as deeply intertwined. Although Minow is less focused on this group of critics, their concerns merit close attention; they frame an important set of questions facing this emerging field of scholarship. Most law and emotions scholars agree that we can use a rich, interdisciplinary understanding of human emotions to assess, critique, or revise legal rules and institutions. But there is more ambivalence about whether we can or should use the instrumentalities of the law to encourage or shape emotions in socially ameliorative ways. Although Minow's primary focus is on probing the instrumentalities of repair following mass violence, her essay provides a clear model of how we might pursue this second possibility as well, using the law's potential to support, foster, or cultivate pro-social emotions.

In Part I, I offer a brief outline of the scholarship on law and emotions, which distinguishes two facets of its effort. The predominant strand of analysis, described in Part I.A, examines *emotion's effects on law*, defined as legal doctrine or the work of legal actors. A second body of work, explored in Part I.B, investigates *law's effects on emotions*, contemplating purposeful efforts to probe, incentivize, or cultivate emotions through law. This second strand of analysis has proved more controversial among law and emotions scholars, particularly where it envisions using law to mobilize or promote moral or other pro-social emotions. To illuminate this controversy, I examine several works by law and emotions scholars that reflect such skepticism. Though the work is varied, and for the most part focuses only on specific efforts to encourage or cultivate particular emotions, it reflects several common concerns or assumptions. First, it views purposive efforts to cultivate specific emotions as a novel undertaking: a departure in the deployment of legal institutions, if not indeed a risky turn in law and emotions scholarship. Second, this work does not necessarily interrogate the term "law"; it focuses—as do most of the proposals it considers—on conventional legal settings like criminal trials, hearings, or appellate decision making. Third, this work evinces two distinctive concerns about the larger project of fostering emotion: that it may impinge in a coercive way on litigants or other affected parties, or that it may lead to the performance of "sham" emotions. Fourth, because this work frequently offers a critique without pursuing a normative alternative, it creates ambiguity about whether critics reject the larger project, or simply specific iterations of it, and how they view the larger ends of legal institutions.

In Part II, I examine Minow's treatment of law and forgiveness. Although Minow shares many of the concerns surveyed in Part I.B, her analysis departs in several ways from these efforts to analyze the legal cultivation of emotions, and provides a model for those who might embrace this goal. In contrast to scholars who view the use of law to foster emotion as a departure, she sees emotion as already subject to construction and influence by law, making purposeful cultivation not anomalous but self-aware and responsible. But

Minow also conceives of “law” more broadly as a plural set of institutions and processes that work in concert with efforts by private individuals and groups. Law, in this view, often works in a subtle or stagewise fashion to shape a variety of perceptions and attitudes that fuel forgiveness and contribute to repair. These varied and often indirect legal influences also impinge less dramatically on their participants. Finally, unlike many law and emotions scholars, who reflect uncertainty or ambivalence about whether their inquiry into emotions should affect the traditional goals of legal institutions, Minow frankly declares law to be a means, which can serve the ends of “harmony, compassion, and human growth.”² This loosening of the tether between legal instrumentalities and traditional “rule of law” objectives frees efforts to engender emotions from presumptions of illegitimacy. It also makes room for institutional experimentation and empirical appraisal, two features of Minow’s approach that reduce the risk of taking law beyond its traditional domain.

I.

TWO APPROACHES TO LAW AND THE EMOTIONS

A. *Emotions Shaping Law: A Field Emerges*

Law and emotions scholarship emerged from critiques of legal objectivity that were first offered by realists, feminists, and critical race scholars. Led by scholars such as Minow³ herself, and jurists such as Justice Brennan⁴ and then-Judge Sotomayor,⁵ this analysis challenged the assumption that emotion threatened the rationality of law. It argued, instead, that emotion in judges was both inevitable and salutary. Emotions, such as empathy and compassion, could illuminate judges’ engagement with the lives before them, while denying or submerging affective response could lead to detachment and a failure to take responsibility for the consequences of judicial action.

Acknowledging a place for emotion in legal decision making gave rise to several strands of scholarship, each of which explored the role of emotion in shaping the law.⁶ One strand illuminated the role of emotions in various bodies

2. *Id.* at 1623.

3. Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 45 (1988); Martha Minow, *The Supreme Court, 1986 Term, Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); see also Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1882–84 (1988) (identifying empathy and engagement with the humanity of claimants as aspirations for judges).

4. William J. Brennan, Jr., *Reason, Passions, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3 (1988) (arguing that emotion helped him apprehend the circumstances of the plaintiffs in a way that informed his decision in *Goldberg v. Kelly*).

5. Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002) (identifying empathy and experience as attributes that do and should guide adjudication).

6. A pivotal event at this time was the publication of *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999), which gathered works by scholars interested in the topic and inaugurated or recognized several lines of inquiry.

of doctrine: both in criminal law, where emotions had been an explicit focus of doctrine, and in fields such as family law, constitutional law, or contract law, where they had not.⁷ A parallel body of scholarship sought to investigate—with the aid of disciplines ranging from philosophy to psychology to neuroscience—emotions that were most likely to bear on the operation of law. This subset of scholarship centered on the emotions of the criminal justice system: vengeance, anger, and indignation, the classical foci of adjudication;⁸ disgust and shame,⁹ whose role in criminal justice was being reconsidered; and mercy, a staple of sentencing.¹⁰ A smaller body of work, sometimes connected to feminism, explored the operation of empathy or compassion in doctrinal contexts.¹¹ Some works simply highlighted the operation of emotions in doctrine; others argued that understanding them more fully led to different doctrinal resolutions. Yet another strand of scholarship extended the investigation of emotion to the work of legal actors, examining specific judicial emotions, such as anger,¹² and exploring the emotions of lawyers¹³ and hearing officers.¹⁴

These explorations were not immune from controversy. Some scholars continued to see the particularity or partiality of emotion as a threat to the rationality or public value inherent in law.¹⁵ Justice Sotomayor's Supreme Court nomination prompted heated debate on her views that empathy and experience played, and should play, a role in judging.¹⁶ Moreover, the field developed unevenly: some emotions garnered greater attention while others faced neglect or even disparagement. Emotions of empathy or compassion,

7. See, e.g., Robert Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in *THE PASSIONS OF LAW*, *supra* note 6, at 123 (criminal law); Clare Huntington, *Repairing Family Law*, 57 *DUKE L.J.* 1245 (2008) (family law); Hila Keren, *Textual Harassment: A New Historicist Appraisal of the Parol Evidence Rule with Gender in Mind*, 13 *AM. U. J. GENDER SOC. POL'Y & L.* 251 (2005) (contract law).

8. See, e.g., Solomon, *supra* note 7, at 123.

9. See, e.g., Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *THE PASSIONS OF LAW*, *supra* note 6, at 63; Toni M. Massaro, *Show (Some) Emotions*, in *THE PASSIONS OF LAW*, *supra* note 6, at 80; Martha C. Nussbaum, "Secret Sewers of Vice": *Disgust, Bodies and the Law*, in *THE PASSIONS OF LAW*, *supra* note 6, at 19.

10. See, e.g., Stephen P. Garvey, *Questions of Mercy*, 4 *OHIO ST. J. CRIM. L.* 321 (2007).

11. See, e.g., Lynne N. Henderson, *Legality and Empathy*, 85 *MICH. L. REV.* 1574 (1987).

12. Terry A. Maroney, *Angry Judges*, 65 *VAND. L. REV.* 1207 (2012).

13. Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 *BUFF. CRIM. L. REV.* 339 (2006).

14. See Lin Piwowarczyk et al., *Secondary Trauma in Asylum Lawyers*, 14 *BENDER'S IMMIGR. BULL.* 263 (2009); Chalen Westaby, "Feeling Like a Sponge": *The Emotional Labour Produced by Solicitors in Their Interactions with Clients Seeking Asylum*, 17 *INT'L J. LEGAL PROF.* 153 (2010).

15. See Owen M. Fiss, *Reason in All Its Splendor*, 56 *BROOK. L. REV.* 789 (1990) (arguing that the particularity and partiality of emotion militate against the shared conceptual rationales or public reasons that law aims to provide).

16. See Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 *OHIO N.U. L. REV.* 263 (2010) (examining and interrogating Senate critiques of Justice Sotomayor's position on the role of empathy and experience in judging); Susan Bandes, *Empathic Judging and the Rule of Law*, 2009 *CARDOZO L. REV. DE NOVO* 133 (same).

which tended to be feminized,¹⁷ drew less attention from law and emotions scholars and more skepticism from the legal mainstream. “Positive” emotions, such as joy or interest, sometimes suffered from their connection to positive psychology and its popularized self-help counterpart.¹⁸ But the descriptive premise that the law and its primary actors might embody certain kinds of emotions, and that understanding these emotions might contribute to possible revisions in doctrine or judicial behavior, has garnered growing acceptance from the legal mainstream.

B. Law Shaping Emotions: Sources of Skepticism

A second body of work has considered not simply how emotions shape law but whether and how law might shape or cultivate emotions to achieve certain social goals. Some thought in this vein has proved less controversial: it is almost commonplace to observe that adjudication, legislation, and regulation produce powerful, incidental effects on the emotions of those they govern. Contracting the social safety net produces feelings of insecurity in the lives of poorer Americans; *Bowers v. Hardwick* provoked despair or indignation in LGBT individuals and couples. There have been isolated, unpredictable moments when the incidental emotional effects of the law triggered controversy. One such moment occurred in *Gonzales v. Carhart*, when the Court voiced a concern that the greater availability of abortions, or of intact dilation and evacuation (partial birth) abortions, might increase the prevalence of women’s post-abortion regret.¹⁹ But the incidental effect of law on emotion,

17. Angela Harris has argued, for example, that the emotion of love is gendered feminine through its association with the ostensibly discredited, but still-influential, ideology of domesticity. Angela P. Harris, *Lawyering as Peacemaking*, 56 VILL. L. REV. 819, 822 (2012). Harris contends further that the feminization of emotions such as love and empathy has led legal observers to see them as less consistent with the norms and practices of adjudication or lawyering than emotions such as anger or vengeance. *Id.*

18. William Miller, whose riveting interdisciplinary work ignited widespread interest in disgust, WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997), and who has written evocatively on fear, William Ian Miller, *Fear, Weak Legs, and Running Away: A Soldier’s Story*, in *THE PASSIONS OF LAW*, *supra* note 6, at 241, has inveighed against the positive emotions. See WILLIAM IAN MILLER, *LOSING IT* 3 (2011) (“I will not quite be able to repress all my irritation with and contempt for so-called positive psychology and the related field of positive emotions, with their fatuous takes on old age, wisdom, happiness, and well being—not to mince words, these fields are either culpably moronic or a swindle, one in which its purveyors, it seems, believe their own con.”). See generally BARBARA EHRENREICH, *BRIGHT-SIDED: HOW POSITIVE THINKING IS UNDERMINING AMERICA* (2009) (critiquing positive psychology, positive thinking, and their effects on American culture). Happiness, however, has enjoyed a happier fate, in part because it has become the object of attention by behavioral economists. For a discussion of the ways in which behavioral law and economics is confluent with, yet has been received differently from, law and emotions scholarship, see Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010).

19. *Gonzales v. Carhart*, 550 U.S. 124 (2007). Chris Guthrie has argued that this controversial moment was precipitated in part by the Court’s failure to understand the emotion of regret and its psychological dynamics. See Chris Guthrie, *Carhart, Constitutional Rights and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008).

perhaps because of its very ubiquity, has generated only modest discussion and debate.

Other works, however, have contemplated more purposeful legal efforts to engage, or shape, the emotions of litigants or the public. Varying versions of this project have ranged from the subtler to the more ambitious or explicitly proactive. Some, though by no means all, of these efforts have concerned criminal law, one of the few areas in which the emotions of the parties have traditionally been acknowledged and engaged by law. Some work in this vein has analyzed features of doctrine or procedure by which courts *validate or incentivize particular emotions* by creating openings for, or conditioning particular outcomes on, their expression. In the penalty phase of criminal trials, for example, judges may assess the remorse of the defendant to determine an appropriate penalty; they may also invite victim impact statements, which recognize the grief and anguish of survivors of crime and enable them to share it with triers of fact.²⁰

Other scholarship has focused on more direct efforts *to mobilize, direct, or cultivate* emotions. Dan Kahan, for example, has asked how legal actors might mobilize disgust or shame to give force to criminal prohibitions or shift public opinion against particular acts.²¹ Other scholars have proposed cultivating moral emotions,²² such as guilt, remorse, or forgiveness, to achieve particular pro-social goals. Hila Keren has proposed that courts activate guilt through the unconscionability doctrine to ameliorate predatory bargaining in the market.²³ John Braithwaite, among others,²⁴ has proposed to cultivate

20. These efforts may not themselves be the innovations of law and emotions scholars, but they have come under the scrutiny of such scholars as they recognize or invite the expression of emotion in the courtroom. For a thoughtful discussion of the role of victim and other emotions in the criminal courtroom, see Susan A. Bandes, *Share Your Grief but Not Your Anger: Victims and the Expression of Emotion in Criminal Justice*, in EMOTIONAL EXPRESSION: PHILOSOPHICAL, PSYCHOLOGICAL, AND LEGAL PERSPECTIVES 6–14 (Joel Smith and Catherine Abell eds.) (forthcoming 2016). Works by law and emotions scholars that respond to these features of the criminal trial will be discussed *infra* note 58 and accompanying text.

21. Kahan, *supra* note 9, at 63 (arguing for the mobilization of disgust by legal actors in response to heinous crimes); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (supporting a role for shame in criminal sanctions).

22. While no scholarly consensus exists on precisely which emotions qualify as “moral,” Jonathan Haidt, in his oft-cited article *The Moral Emotions*, has defined them as “those emotions that are linked to the interests or welfare either of society as a whole or at least of persons other than the judge or agent.” Jonathan Haidt, *The Moral Emotions*, in HANDBOOK OF AFFECTIVE SCIENCES 853 (Richard J. Davidson et al. eds., 2003). The broader literature, as Hila Keren notes, tends to include “self-blaming emotions such as guilt and shame and other-condemning emotions such as anger and resentment. It also mentions self-praising emotions such as pride and other-praising emotions such as gratitude, while compassion and empathy are discussed as other-suffering emotions.” Hila Keren, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, B.Y.U. L. REV. (forthcoming 2016) (manuscript at 31–32), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566468. The moral emotions are often understood to incentivize pro-social behavior through affective pleasure (compassion and gratitude) and sanction anti-social behavior through affective pain (guilt and shame).

23. Keren, *supra* note 22.

remorse and forgiveness through face-to-face engagement to achieve repair among victims, offenders, and communities.

These efforts to support, incentivize, mobilize, or promote emotions have proved controversial among law and emotions scholars. Even scholars who acknowledge and investigate the role of emotion in legal doctrine have qualms about these more purposive undertakings. The articulated reservations vary widely; yet, as I argue below, they point to certain assumptions, from which Minow's work departs.

1. *Critiques of Purposeful Efforts to Cultivate Emotions Through Law*

At times, these objections to efforts to promote emotions are limited and contextual. Scholars have argued, for example, that some of these efforts foreground, activate, or foster the wrong emotions, or the wrong emotions for a specific legal context. Martha Nussbaum, for example, critiques Dan Kahan's effort to mobilize disgust in relation to hate crimes, arguing that disgust is based on a denial of our animal natures and connected with a self-deluding tendency to project that animality onto others.²⁵ Susan Bandes argues against the use of victim impact statements, noting that they amplify rather than correct the feelings of empathy for the victim and anger at the defendant instilled in jurors by the criminal trial. These emotions can make it difficult for the defendant to secure a fair trial:

Victim impact statements evoke not merely sympathy, pity, and compassion for the victim, but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger. These emotional reactions have a crucial common thread: they all deflect the jury from its duty to consider the individual defendant and his moral culpability.²⁶

Other objections go beyond specific emotions to raise broader doubts about the purposeful engagement of emotion. Jeffrie Murphy argues that using

24. See John Braithwaite, *The Fall and Rise of Restorative Justice*, in RESTORATIVE JUSTICE AND RESPONSIVE LEGISLATION 3, 19 (2001); see also HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE (1990).

25. Nussbaum, *supra* note 9, at 19. Nussbaum's critique is distinct from some of the others reviewed here in that she combines a critique of disgust with a proposal to mobilize a different emotion, indignation, in response to hate-based or heinous crimes. She argues that it may be politically productive, and not injurious, to mobilize indignation, *id.* at 26–29, because indignation, unlike disgust, rests on reasons that can be “publicly articulated and publicly shaped.” *Id.* at 26. Nussbaum is also the author of an ambitious work on the cultivation of the political emotions necessary to support liberal, egalitarian democracies. See MARTHA C. NUSSBAUM, POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE (2013).

26. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 395 (1996). Similarly, Toni Massaro argues that “hot” or volatile emotions such as hatred and disgust may be difficult to contain, or limit by frameworks based on proportionality, especially when aroused by judges or other legal actors against criminal defendants. See Massaro, *supra* note 9, at 98–99.

the law to incentivize particular emotions risks invading the dignity and autonomy of those subject to it.²⁷ While it may be acceptable, indeed uncontroversial, for the law to require us to conform our *behavior* to certain rules, encouraging the experience and expression of particular emotions is coercive and damaging: it is comparable to intervening in our desires, thoughts, or souls.²⁸ Carol Sanger argues that doctrines requiring judges to identify, or condition outcomes, on particular emotions can incentivize the performance of “sham” emotions.²⁹ Describing the condition that minors manifest “maturity” to obtain a judicial bypass from the parental notification requirement for abortion, Sanger observes:

The court is supposed to be making a maturity determination, but . . . it is evident that something more than a display of maturity is sought. Some indication or display of contrition or remorse is also valued, and rewarded. *Pregnant girls, and their advocates, are not stupid, and some are able to think through and script the presentation of self that will best accomplish the desired goal of demonstrating whatever it takes in order to get judicial permission.*³⁰

Murphy makes a similar point in the criminal context about the practice of basing decisions on punishment on the remorse manifested by the defendant:

[A] practical problem with giving credit for remorse and repentance is that they are so easy to fake; and our grounds for suspecting fakery only increase when a reward (e.g., a reduction in sentence, clemency, pardon, amnesty, etc.) is known to be more likely to be granted to those who can persuade the relevant authority that they manifest these attributes of character.³¹

27. For example, Murphy argues that resentment of an injury may reflect one’s “respect for himself and for his rights and status as a free and equal moral agent.” Jeffrie G. Murphy, *Forgiveness, Reconciliation and Responding to Evil: A Philosophical Overview*, 27 *FORDHAM URB. L.J.* 1353, 1359 (2000). A legal demand that one forgo such resentment may infringe the dignity of the subject who harbors it.

28. See Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 *OHIO ST. J. CRIM. L.* 423, 437 (2007) (discussing the belief that “repentance and remorse are conditions of one’s very soul and that the state acts wrongly . . . in presuming to inquire into such private matters and to make secular punishment depend on secular guesses about when these states of character or soul are present”).

29. Carol Sanger, *The Role and Reality of Emotions in Law*, 8 *WM. & MARY J. WOMEN & L.* 107, 112 (2001). For a varied and thoughtful critique of the use of legislation, in particular, to cultivate emotions, see Carol Sanger, *Legislating with Affect: Emotion and Legislative Lawmaking*, in *PASSION AND EMOTIONS: NOMOS LIII* 38 (James Fleming ed., 2013).

30. *Id.* (citations omitted) (emphasis added).

31. Murphy, *supra* note 28, at 440. Murphy notes that the risk of encouraging fakery may have been one reason that the South African Truth and Reconciliation Commission (TRC) did not require defendants to apologize in order to receive amnesty, but simply to testify as to what had occurred and take responsibility for their role. *Id.* Ultimately, however, Murphy concludes that remorse may be more appropriately considered in the context of clemency than in the context of initial sentencing because there is a greater and more varied body of evidence from which to assess the sincerity of the defendant’s claim of remorse. *Id.* at 444–45.

Other critiques suggest that emotions are too complex, or too firmly tethered to conventional social meanings, to be cultivated by law for ameliorative purposes. Toni Massaro has argued that emotions like shame and disgust, among others, are so complex in their operation and so contradictorily explained by theoretical work that it is difficult to know how they might be elicited from perpetrators of crime, particularly through legal institutions.³² Susan Bandes contends that efforts to foster empathy for victims through the use of victim impact statements are likely to be structured by cultural expectations and valuations based on gender,³³ as well as race, ethnicity, and other stratifying characteristics.³⁴

Finally, some scholars raise arguments about the motivation for such projects and their effects on participants. Writing about restorative justice, for example, Annalise Acorn has voiced concerns that the practice places uncomfortable and unproductive pressures on participants, and that it is more likely animated by unrealistic or sentimentalist assumptions than by careful empiricism. These claims bear closer analysis because of the parallels between restorative justice and Minow's focus on forgiveness after mass violence.

2. *A Critique of Restorative Justice*

Once an advocate of restorative justice, Acorn now critiques what she calls its "seductive" promise.³⁵ Its benefits of justice-in-relation, achieved through a face-to-face encounter between victim, offender, and members of the community, depend on a series of optimistic assumptions—the "transformability of the wrongdoer's character,"³⁶ for example, or the "transcendability of the victim's loss"³⁷—that may not bear out in practice.³⁸ Victims may be unable to release their trauma or resentments; the parties may

32. Massaro, *supra* note 9, at 83–93.

33. Bandes, *supra* note 20, at 32–36. Jeffrie Murphy makes a similar point that expressions of remorse or apology are inevitably shaped by the social, historical, and cultural context that surrounds them. He observes:

[A]pologies . . . can sometimes have many virtues—both individual and social. In a different social and historical context I might have wanted more to stress those virtues and discuss them in more detail. Our present intellectual culture, however, strikes me as one in which apology and other expressions of remorse are often located (and often over praised) in the context of a sentimental ideology of therapy and healing rather than, say, an ideology of truth and justice.

Murphy, *supra* note 28, at 452. In associating valuation of apology and remorse with culturally specific forms of sentimentality, Murphy previews Annalise Acorn's argument, which I discuss, *infra* at note 35.

34. Bandes, *supra* note 20, at 31–32.

35. In the introduction to her first chapter, Acorn describes her progression from supporter to critic of restorative justice. ANNALISE ACORN, COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE 1–18 (2004).

36. *Id.* at 60.

37. *Id.* at 69.

38. *Id.* at 46–77.

be so experientially distant that they cannot respond empathically to each other's pain. Perhaps most importantly, the transition to remorse and accountability demands an offender with a particular kind of character, "someone who has committed a grievous act but who remains . . . a fully human being capable of compassion, integrity, and, most importantly, good-faith action,"³⁹ who may be vanishingly rare. The victim may confront instead an offender

whose inner life is truly inaccessible to us, whose conscience is beyond our reach, who is either smugly self-excusing and self-justifying or, more likely, smugly (if secretly) aware that his self-interest is promoted by performances of contrition. . . . Restorative justice provides no protection against the offender who has us pegged as suckers for performances of contrition and remorse. To promise relational healing with such an offender seems to be culpably naïve and unconcerned with the interests of the victim.⁴⁰

Also naïve, Acorn argues, are advocates' expectations for the "encounter" between victim and offender.⁴¹ The victim's narration of pain prompts a spontaneous show of remorse from the offender, which is followed in turn by weeping, embraces, or prayer; forgiveness; and a path toward re-integration for the offender. This scenario not only places pressure on the offender, who may respond with a curated performance of contrition. But it also puts pressure on the victim—who has already suffered an injury and may feel vulnerable facing the offender—to feel and manifest an emotion that she may not (indeed, may never) experience.⁴²

In Acorn's view, restorative justice is so ill-suited to the emotions of its participants because it is grounded in sentimentality rather than in empirically based predictions about what legal interventions may create.⁴³ The prospect of remorse and forgiveness, Acorn argues, activates a set of culturally instilled tropes that lure us toward an unwarranted faith in restorative processes:

Sentimentality is about perfectly harmonious connection But it is also about indulgence in woe, despair, despondency, sadness, grief, lamentation. The most potent strain of sentimentality is, therefore, found in the quick flip between these two sets of sentimental emotions. It is typified by the facile movement from lugubrious to joyful, from unrestrained woe to complete fulfilment and happiness. Sentimentality teaches us to overlook the inadequacy of the mechanism of its shift from misery to bliss. . . . It habituates us to falling for the quick fix,

39. *Id.* at 89.

40. *Id.* at 76.

41. *Id.* at 89.

42. *Id.* at 150–58.

43. *Id.* at 86–91. Acorn says, initially, that sentimentality "seeks in a simplistic way, to evoke feelings of harmony, wholeness, and connection, and it portrays the means of arriving at those feelings as magical and/or easy." *Id.* at 86. She then elaborates in the passage quoted below, *infra* note 44 and accompanying text.

the shallow and ephemeral hit of joy. . . . It seduces us toward a simplistic account of the way from A to B.⁴⁴

We may be drawn to restorative justice, in Acorn's view, not by its elaboration of a process that fosters accountability, remorse, and forgiveness, but by our own culturally instilled desire to believe that adversaries can be reconciled and harmony can be restored.

3. *Common Premises and Questions*

Although these critiques have different objects and take different tacks, it is possible to distill from them, and from this later law and emotions literature more broadly, certain assumptions about the risks of inviting, encouraging, or fostering particular emotions through law.⁴⁵ First, most of the scholars discussed above view this purposive project as something new—an effort whose intentionality distinguishes it from the pervasive, unplanned effects of the law on emotions. While these scholars acknowledge the pervasive, unplanned effects of the law on emotions, and some argue that we should recognize and actively manage these effects,⁴⁶ at least some see the purposive promotion of particular emotions as a distinguishable effort that raises distinctive risks. Though they write from a posture of knowledge about, rather than suspicion of, emotions, this knowledge amplifies their sense of the risk involved in purposeful promotion. For example, their research makes clear that emotions are multi-faceted, elusive phenomena that are variously, if not indeed contradictorily, explained by the plural literatures that comprise “emotion theory.”⁴⁷ These literatures, moreover, provide little guidance about how to

44. *Id.* at 86–87.

45. Although I highlight these assumptions as a way of distilling certain premises which characterize many examples of this body of work and from which Minow's essay tends to diverge, not all examples of law and emotions work, which reflect skepticism about the legal cultivation of particular emotions, reflect all of these assumptions. Nor has the question whether legal actors should purposefully cultivate emotions created a polarizing divide among law and emotions scholars. Indeed, I have written on both sides of this ostensible divide, although I am, as a general matter, deeply interested in the project of using law to cultivate specific emotions. Compare Kathryn Abrams, “*Fighting Fire with Fire*”: *Rethinking the Role of Disgust in Hate Crimes*, 90 CALIF. L. REV. 1423 (2002) (critiquing Dan Kahan's effort to use law to cultivate disgust as a response to hate crimes), with Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319 (2007) (arguing for the use of law to cultivate hope among disenfranchised groups through such expedients, for example, as Project Head Start). Particularly where critics' skepticism arises from concern about the legal cultivation of a particular emotion or a particular expedient used for that cultivation, critics may be more amenable to the general project of cultivating emotions through law or to other examples, though they may not share all of the following premises.

46. Susan Bandes, in particular, has argued that legal institutions “both reflect and shape our emotional commitments,” and that we can and should make choices about how to direct this influence for the better. Susan Bandes, *Victims, “Closure,” and the Sociology of Emotions*, 72 L. & CONTEMP. PROB. 1, 9 (2009).

47. Toni Massaro, for example, makes this point explicitly, in Massaro, *supra* note 9, at 84–87 (describing disagreements among emotion theorists in understanding shame).

activate, channel, or cultivate emotions through institutional means.⁴⁸ In the face of such uncertainty, adjusting or mitigating the extant effects of law on emotion may be one thing; but purposefully aiming to foster new affective responses may seem more perilous.

Second, their deeper inquiry into emotions has made critics particularly sensitive to two potential risks that they glimpse in early efforts in this vein⁴⁹: the risk that legal efforts to foster particular emotions will exert a coercive torque on participants in legal processes, and the risk that legal actors seeking to identify or elicit particular affective responses will be taken in by “sham” emotional performances. Concerns about these kinds of effects are acute; they appear to be far greater, for example, than concerns about coercing or being fooled by false versions of more cognitive-based disclosures. A curated emotional performance is counted as a greater risk, for example, than a strategic or “scripted” presentation of life history or events—a phenomenon that is pervasive in the legal system.⁵⁰ Similarly, institutional pressures on parties to feel remorse or forgiveness seem more problematic than institutional pressures to enter into plea bargains or civil settlements, which also pervade litigation. These heightened concerns may rest on the notion that emotions are the ultimate seat of human authenticity,⁵¹ or that moral emotions are properly a

48. See, e.g., *id.* at 92 (arguing that emotion theory does not describe the triggers that elicit particular emotions or explain when state interventions are likely to be a helpful expedient); Bandes, *supra* note 20, at 14–22 (acknowledging that though victim impact statements may provide catharsis, closure, or healing to victims, it is not clear whether and how in-court statements contribute to this set of goals).

49. These two assumptions might seem in tension with each other, as one assumes that participants are susceptible, indeed vulnerable, to these kinds of legal efforts, and the other assumes that they have sufficient autonomy in relation to legal institutions—that they are not only unfazed by these ostensible pressures, but can outsmart legal actors with contrived emotional performances. In fact, both can be true of different participants in the same proceeding, or even of the same participant: for example, a defendant might feel pressured to respond with a display of remorse and consequently decide to simulate it because he does not feel it.

50. For a particularly illuminating discussion of this process and one client’s resistance to it, see Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (describing choice faced by lawyer and client, a recipient of public assistance, about embracing a script which would portray a client as needy and disempowered, but which would be more likely to result in a positive outcome). Susan Bandes, in particular, grasps this choice as confronted by victim-witnesses in criminal trials; yet, she focuses on it as a problem associated with introducing freighted victim statements in the criminal context, rather than as a more pervasive feature of adjudication. See Bandes, *supra* note 20, at 32–36.

51. Not all scholars who have expressed reservations about efforts to cultivate emotions through law share this view. See *infra* note 52. However, Carol Sanger, for example, argues that “when an emotional response is not only included in the legal process, but *required* by it, emotions may lose *the very authenticity as a marker of human experience* that caused scholars, courts, and legislatures to call attention to them in the first place.” Sanger, *supra* note 29, at 110 (emphasis added). This view is, however, subject to critique by research demonstrating that emotions may be scripted by culture or subject to management in specific environments. For a classic sociological account of emotion management, which demonstrates the long pedigree of this view, see ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: THE COMMERCIALIZATION OF HUMAN FEELING* (1983). The argument that emotions, and our assessment of emotions, are scripted by cultural norms is made by

matter of conscience, more suitable to religious than to secular legal cultivation.⁵² These concerns may also rest on an uneasy sense that an aspiration to social change through the cultivation of emotions creates a kind of susceptibility in the legal actor or advocate—a vulnerability to being taken in.⁵³

Third, despite the concern that the law is inadequately nimble or responsive to a set of human responses as complex, labile, and elusive as emotions, “the law” itself remains a fairly narrow category in many of these accounts. Most critics have focused their analysis on the most familiar, formal legal contexts, including criminal trials and appellate decision making. Even critiques of more innovative or informal processes, such as restorative justice, have focused on the restorative “encounter” to the exclusion of case selection, mediation, and informal conferencing⁵⁴—all processes that experts describe as integral to the emotional preparation of the parties.⁵⁵ While “the law” may be critiqued for its heavy-handedness, inflexibility, credulousness, or cultural conservatism, few of the formal and informal processes that might be activated under the rubric of “the law” actually become the focus of analysis.

Finally, many of these works offer a critique without proposing a normative alternative. This may be reasonable, as many of these critiques concern particular contexts⁵⁶ and are offered to induce scholars to take a sober second look at efforts to foster specific emotions through law. Massaro, for example, focuses on the activation of disgust within criminal law, Bandes on reliance on victim impact statements, Sanger on the search for remorse or emotional maturity, and Acorn on restorative justice. Moreover, the field they

some of the scholars discussed above. *See, e.g.*, Bandes, *supra* note 20, at 10–11 (social and institutional norms shape feeling and display of emotion); Massaro, *supra* note 9, at 88 (describing shame as shaped by familial and other social environments); *id.* at 92 (noting that emotions are “highly adaptable to context”).

52. *See* Murphy, *supra* note 28, at 437 (discussing the view that “repentance and remorse are conditions of one’s very soul and that the secular state acts wrongly . . . in presuming to inquire into such private matters and to make secular punishment depend on secular guesses about when these states of character or soul are present”).

53. Some legal scholars who see a degree of skepticism as necessary to maintain an appropriately critical intellectual posture may associate the aspiration implicit in proposals for social change, including those which work through the instrumentality of law’s effects on emotions, with undue optimism and even credulousness. In Acorn’s case, this intuition appears to have been shaped by what she describes as her experience of having been taken in by the “seductive” claims of restorative justice. *See* ACORN, *supra* note 35, at 1–18.

54. *See id.* at 87–91, 142–58 (discussions of restorative encounters focus almost entirely on face-to-face meeting and offer little mention of the extended processes of case selection, mediation, and preparation of all parties that precede and structure that encounter).

55. *See, e.g.*, Bruce Archibald, *Why Restorative Justice Is Not Compulsory Compassion: Annalise Acorn’s Labour of Love Lost*, 42 ALTA L. REV. 941, 945 (2005) (review of ANNALISE ACORN, COMPULSORY COMPASSION) (“[S]ophisticated facilitators of the restorative justice process no longer put their faith in a one-off encounter involving victims, offenders, their supporters and community representatives, although those may still happen.”).

56. Of the works examined above, only Sanger’s is offered as a general commentary on efforts within the field of law and emotions (it responds to the publication of Bandes’s *The Passions of Law*), and even this work has a specific doctrinal and emotional focus.

help to define is still relatively new, which can make exposition and critique essential building blocks.⁵⁷ But because these critiques do not have a clear normative trajectory, it can be difficult to know whether they are simply meant to induce caution about particular proposals or whether they reflect reservations about the larger project of promoting pro-social change through purposive legal engagement.⁵⁸ This uncertainty may also be reinforced by the fact that advocacy for the purposeful cultivation of emotions remains comparatively rare in the law and emotions literature. This may be attributable to the pragmatic bent of legal scholarship, including law and emotions work; it may seem more fruitful to engage critically with extant legal expedients that affect the emotions, than to undertake new efforts to foster affective response. Yet this choice at least raises the question whether certain aspects of intentional cultivation may strike law and emotions scholars as more anomalous or problematic.

These ambiguities raise some important questions that scholars in the law and emotions field are now beginning to confront. Should we feel comfortable embracing emotion-based goals that depart from or create tension with “rule of law” values such as consistency or predictability? How should we weigh the potential cost of emotional distortions—coercive pressures on participants, sham performances of emotion, or culturally hegemonic emotional scripting—against the benefits that might flow from the purposeful cultivation of

57. Hila Keren and I have argued, however, that for law and emotions scholarship to achieve its full potential, scholars should embrace the normative orientation that is characteristic of legal scholarship, and that will help mainstream scholars understand the directions in which this seemingly novel form of analysis points. *See* Abrams & Keren, *supra* note 18, at 2049–74.

58. Some of the scholars examined above seem unlikely to harbor these broader reservations. Martha Nussbaum has offered a lengthy and systematic proposal for fostering in citizens those “public emotions” that conduce to a just and egalitarian liberal democracy. NUSSBAUM, *supra* note 25, at 1–18. This project involves cultivating a love of country that is consistent with a broad scope of critical freedom, fostering compassion toward one’s fellow citizens and beyond, and mitigating disgust that may arise from perceptions of difference. Nussbaum’s effort is comparable to Minow’s in its scope and ambition, although it engages different emotions and focuses on political rather than legal vehicles for realizing its goals.

Susan Bandes also seems unlikely to hold these broader reservations. She has frequently argued that law’s effects on emotions are ubiquitous, and legal actors must think about how to shape or manage those effects. *See, e.g.*, Bandes, *supra* note 46, at 9. Bandes’s reluctance to propose normative alternatives in the area of victim impact statements may stem from a view that they are irredeemably wrongheaded; they fuel negative emotions toward the defendant that distort the process of criminal adjudication. In other contexts, Bandes has suggested means of mitigating the negative consequences of law’s engagement with emotions. *See* Susan A. Bandes, *Remorse, Demeanor, and the Consequences of Misinterpretation: The Limits of Law as a Window into the Soul*, 3 J.L. RELIGION & ST. 170, 194–98 (2014) (discussing ways of moderating problems arising from the search for remorse in criminal defendants).

As to the remaining scholars discussed above, I make conjecture because my understanding of their work makes it more difficult to reach a conclusion. However, the larger issue is not whether any of these particular scholars harbor a broader reservation about the legal cultivation of emotion; it is that the trajectory of this body of work, for the reasons I have suggested, frames some provocative questions about the larger enterprise, which I outline below and to which Martha Minow’s essay explicitly responds.

particular emotions? Should we take a precautionary stance toward this seemingly novel task, favoring circumspection in the face of any potential danger or in the absence of empirical proof that legal institutions could serve these unconventional affective purposes? Or are there other means of moderating risk that allow for more institutional experimentation?

II.

MINOW ON LAW, FORGIVENESS, AND REPAIR

These are the questions that Martha Minow's article can help us address.⁵⁹ Foregrounding a vital set of emotions—forgiveness and related emotions that facilitate social repair⁶⁰—Minow takes up an inquiry that is ambitious and unapologetically normative: whether and how law should support the emergence of these emotions in settings where mass violence and related social schisms have made repair an essential goal. She aims to answer this question by examining the cultivation of forgiveness in a number of contexts in which it has been attempted and identifying choices that may point in promising directions.

Minow is keenly aware of the risks highlighted by law and emotions scholars. She acknowledges that her paper contemplates forgiveness by those who have suffered state-sponsored violence, torture, enmity, and the death of loved ones. “Private or public pressure on a victim to forgive can be a new victimization,” she notes, “denying the victim her own choice”;⁶¹ sham confessions, apologies, or proceedings may also be distinctly injurious where suffering has been so acute. Moreover, as Minow observes, cultivating emotions takes law away from its “heartland” of “pursuing rights[] [and] correcting wrongs” into the less familiar territory of producing “shift[s] in

59. One of the signal features of this piece is that it intervenes in multiple debates, including: the character of forgiveness as an emotion; the state of research on South Africa's TRC; the role of legal institutions, including the ICC, in nations or communities that have suffered genocidal or state-supported violence; the legal status of child soldiers; the prospect of relief from international debt; and more. I have chosen to focus on a specific dimension of her work, which may escape the attention of other audiences, because it makes a particularly valuable contribution to a specific line of law and emotions research. I have also chosen to focus primarily on individual rather than institutional forgiveness, although Minow considers both, because the former seems to me more directly related to the questions that are being debated in the law and emotions literature.

60. The specific emotion that is her normative object may render Minow's effort a more promising context in which to explore these broader questions. Forgiveness is less hierarchical, and its mobilization less quixotic and potentially inflammatory, than the disgust analyzed by Kahan, *supra* note 9; Nussbaum, *supra* note 9; and Massaro, *supra* note 9; it is also less apparently partial than the ventilation or satisfaction of victims' emotions considered by Bandes, *supra* note 26. Forgiveness, as Minow defines it, may relieve victims of the burden of resentment, easing the hold of past violations on their present lives; it may permit the re-entry of offenders into the broader community and enable the kind of coexistence that is the basis of repair. In these respects, it is more comparable to the restorative justice projects critiqued by Acorn, yet it is undertaken in circumstances that are arguably even more exigent. It is, however, still susceptible to concerns about coercion, sham performances, and deviations from rule of law goals, as Minow acknowledges.

61. Minow, *supra* note 1, at 1617.

attitudes and relationships.”⁶² These new goals may produce tension with rule of law values, such as predictability, regularity, and treatment of like cases in a like way.⁶³ However, while Minow is alert to these risks—these reservations recur throughout her essay, and she devotes a final section to their explicit consideration—they do not ultimately deter her. Using law to cultivate forgiveness in communities emerging from mass violence may be an uncertain task, hedged with pitfalls; yet Minow sees means that can be used to manage its risks and judges the repair as worth the effort. Several assumptions or features of her work make this measured optimism possible.

First, Minow assumes a different baseline in describing law’s relation to emotions. Where mainstream legal actors see a domain structured by rationality, in which judges perpetuate rule of law doctrine, and where scholars see a sphere where emotions color perceptions, and in which processes have rarely been the focus of purposive cultivation, Minow sees that legal institutions and choices already shape emotions. These unplanned effects are not intermittent or incidental; they are predictable and may be systematic, forming a backdrop, or comparator, for the innovations Minow considers. She explains:

[L]egal institutions inevitably affect human relationships. Participating in a lawsuit . . . can be emotionally draining, push the parties even farther apart, and magnify negative emotions that exist because of the underlying conflict. In divorce and child custody matters, the adversarial process often increases bitterness and blame as each side tries to win the all-or-nothing contest. Litigation can enlarge the distance between disputing parties.

It is wise to be cautious and humble about using law in order to shape—or manipulate—the feelings of individuals. But it is no less important to admit that law does affect its participants. If the legal framework inevitably affects emotions, pushing toward forgiveness may be no worse than pushing toward revenge, adversariness, or bitterness.⁶⁴

With this, Minow bridges the distance between law’s “incidental” effects on emotions, treated as commonplace by law and emotions scholars, and law’s purposeful cultivation of emotions, a source of greater discussion and discomfort. She suggests that the apparent distinction may largely be a function of our awareness. Recognizing that law engenders emotions all the time—and, in this context, may foster adversariness or vengeance—makes the cultivation of moral emotions such as forgiveness a less anomalous task. It not only normalizes this ambitious undertaking, but also points toward a striking reversal. Persisting in the unreflective perpetuation of emotional effects may

62. *Id.* at 1618–19.

63. *Id.* at 1619.

64. *Id.* at 1626–27.

now appear as the greater of two evils, while purposive efforts to cultivate valuable effects can be seen as a way of taking responsibility for the inevitable emotional effects of the law.

Second, in considering the legal expedients that might produce these effects, Minow takes a more plural view of “law” than many scholars who have addressed these issues. Eschewing the predominantly adjudicative focus that has characterized law and emotions work, Minow investigates a variety of legal instrumentalities. She looks at non-traditional “legal” actors and processes, including private groups that work in conjunction with legal institutions and informal interactions that occur in the shadow of legal processes. She also looks at less frequently analyzed acts of more conventional legal institutions. Political leadership, for example, is a resource that is rarely discussed under the rubric of “law,” yet Minow treats it as one piece of the puzzle. Leaders can provide inspiration or they can metaphorize; they can offer their own tangible, public examples.⁶⁵ They can also give visibility and endorsement, either to formal processes, such as truth and reconciliation commissions, or to the efforts of non-governmental groups—such as Forgiving Mothers or the parents of the Gugleti Seven—who have worked toward forgiveness.⁶⁶ Although truth commissions are a more familiar expedient, Minow considers less conventional aspects of their work. For example, the experience of testifying before South Africa’s Truth and Reconciliation Commission (TRC) did not elicit feelings of forgiveness in many of its witnesses.⁶⁷ Yet, the TRC, Minow observes, created an atmosphere of engagement and a process inviting proximity between individuals “that permitted informal conversations, including some offers of apologies and forgiveness.”⁶⁸ On the periphery of the formal legal process, victims formed bonds that enabled them to support each other in their recovery from trauma; and exchanges between erstwhile adversaries enabled greater understanding or an opportunity to glimpse the humanity of the other. These subtle moments of emotional connection may not bring participants all the way to forgiveness, but, as Minow suggests, they provide emotional building blocks that may be useful as a society struggles toward repair.

Although Minow declines to focus predominantly on courts, she sees a role for them, particularly in supporting extra-judicial efforts to achieve forgiveness or repair.⁶⁹ The judicial treatment of apologies reflects this role⁷⁰: excluding evidence of apology or expressions of regret can shape the willingness of private actors to take responsibility for their errors and seek

65. *Id.* at 1623 (referring to examples of Nelson Mandela and Desmond Tutu).

66. *Id.* at 1625.

67. *Id.* at 1622–23.

68. *Id.* at 1623.

69. Minow also references the role that established alternatives to adjudication, such as mediation, can play by highlighting particularized practices—such as asking each party to articulate the position of the other—that foster empathy and compassion. *Id.* at 1620.

70. *Id.* at 1620–21.

more human connections with those they have injured. A court's suspension of its own jurisdiction may support processes aimed at forgiveness: Minow asks, for example, whether the International Criminal Court (ICC) should stay its hand when domestic authorities choose truth commissions over conventional prosecutions.⁷¹ The Rome Statute, which authorizes the ICC, deprives it of jurisdiction when domestic authorities conduct criminal prosecutions; yet the Rome Statute is ambiguous about the effect of domestic truth commissions. Were the ICC to treat the activity of robust truth commissions as also supplanting its jurisdiction, Minow argues, it would provide both a transnational imprimatur to such proceedings and an incentive to undertake them.

As these examples make clear, the "law" envisioned by Minow cultivates forgiveness in plural institutional settings and through varied forms of experimentation, leadership, and deference to informal efforts. This heterogeneity may mitigate concerns that legal interventions will be heavy-handed mandates that risk coercing their participants. On the contrary, Minow's interventions work through small, building steps that may not immediately yield forgiveness, but foster the kinds of feelings or perceptions that make it more likely. Minow makes this point about the South African TRC, noting that while the TRC did not engender feelings of forgiveness in large numbers of its participants,⁷² it "coincided with South Africa's relatively peaceful political transition to democracy and high levels of people reported willingness to engage with politics and to respect the legal system."⁷³ Minow is willing to consider that the path to forgiveness may run through a cluster of different emotions and attitudes, which emerge at different times and with the help of different institutional expedients. The more varied, modest scale of legal intervention contemplated by Minow seems likely to impinge less on the sensibilities of those who take part.

Reinforcing this suggestion, Minow also describes variation in the perceptions and responses of participants. Though Minow acknowledges that there is little rigorous empirical information about the survivors of mass atrocities and how they may be affected by legal procedures,⁷⁴ she profiles individuals who are tracing their own distinctive paths toward repair. These participants are not routinely overborne by legal interventions aimed at the emotions; on the contrary, they occupy many places on the spectrum between

71. *Id.* at 1630–33. Her conclusion that the ICC should in some cases treat truth commissions as alternatives to prosecution that divest it of jurisdiction is carefully qualified by a discussion of those criteria that mark a commission as robust and likely to support processes of repair. *Id.* at 1635–37.

72. *Id.* at 1622–23 (citing a study indicating that "of 429 participants in South Africa's process, only seventy-two discussed forgiveness; only 10 percent were willing to forgive if the wrongdoers took responsibility for their deeds, and only seven people surveyed were willing to forgive without conditions").

73. *Id.* at 1622.

74. *Id.* at 1618 n.15.

resentment and its release, and many struggle audibly as they make or contemplate the transition. There is the woman who told the South African TRC that “*I am not ready to forgive.*”⁷⁵ Or the Sierra Leonean teacher, saved from death by the chance intervention of a former student, who declared that repair does not come from courts, but from “*a purposeful, daily decision to forgive and forge a common future.*”⁷⁶ These individuals approach legal processes and encounters with their former oppressors with responses ranging from resignation to resilience. These processes themselves may be daunting, illuminating, or acutely uncomfortable; but in the contexts explored by Minow, they neither impose the footprint of the law on their subjects’ interiority nor deliver the false sense of transcendence that scholars such as Acorn envision.

Yet, if this range of expedients and responses renders Minow hopeful about the human effects of legal interventions, it does not render her credulous. She sees as clearly as Sanger or Acorn that some offenders may be unready or unwilling to take responsibility for their acts, or that legal initiatives can be marred by fraud and exploitation. For example, she considers the prospect that the ICC might be asked to defer to a “sham” truth commission, a process in which “[l]ocal authorities . . . bend to the demands of despots who seek to negotiate terms of their own amnesty.”⁷⁷ But the possibility that a deceptive purpose might infuse a truth commission does not, in Minow’s view, disqualify the legal innovation. Instead, it gives rise to a third distinctive feature of her analysis: a search for procedural safeguards that can mitigate risks while allowing the exploration of new strategies for fostering emotion. The ICC, for example, requires standards to assess the integrity of those proceedings to which it might defer. She lays out several criteria—such as naming wrongdoers, permitting victims and perpetrators to be heard, and conditioning amnesty on acts by perpetrators such as providing testimony or reparations⁷⁸—that could establish the *bona fides* of a truth commission. She explains why the ICC, the United Nations Security Council (which has the power to refer matters to the court), and the member nations (which govern the ICC) have the competence to make these fact-based determinations.⁷⁹ Minow’s concern about manipulation leads to the pragmatic design of safeguards rather than to thoroughgoing skepticism or institutional stasis.

The promise of ongoing empirical assessment also enables Minow to pursue institutional innovation, rather than embrace a strict precautionary stance. She takes inspiration from the South African example. The TRC was introduced in a context of great exigency and imperfect information; however, researchers and policy makers have responded to the uncertain grounds of its

75. *Id.* at 1628.

76. *Id.* at 1624.

77. *Id.* at 1631.

78. *Id.* at 1633.

79. *Id.* at 1631–33.

foundation by subjecting the TRC and its effects to ongoing examination.⁸⁰ That information is incomplete, or that a particular effort does not achieve all of its intended results, does not make the legal cultivation of emotion a mistake or provide a reason to refrain from making further efforts. She notes that the South African example, however equivocal in its outcomes, has stimulated dozens of other efforts to design and implement processes of transitional justice.⁸¹ Minow also uses features of the TRC in forming her own response to issues of ICC deference and the prosecution of child soldiers.⁸² Ongoing investigation can highlight both beneficial features that can be more broadly applied and problematic features that can be ameliorated in future iterations, mitigating the risk of unsatisfying results or painful emotional effects.

Finally, Minow's view is distinct in that she envisions law as a means to a variety of ends, including affective ends, rather than an autonomous process that exists solely to vindicate "rule of law" values. This view bears directly on the tension that Minow and other law and emotions scholars see between using law to foster forgiveness and using it to promote values such as regularity, predictability, or equal treatment of similar cases. Concern about compromising such values, Minow declares, "should not halt the inquiry; it should frame it. Legal tools are just that: tools. The purposes they serve should be ours. Law can be a tool for harmony, for compassion, and for human growth—for converting suffering into opportunity."⁸³ This understanding of law as a means to a range of ends reflects an enabling departure in Minow's stance. Law and emotions scholars have offered non-traditional *descriptions of legal decision making*. But they have neither agreed on nor, in most cases, explicitly considered whether a focus on emotions should affect their *view of legal goals*—specifically, whether an appreciation of the socially ameliorative role of specific emotions means that we should seek to engender them, including through the law.

Minow answers this question boldly in the affirmative; in so doing, she helps law and emotions scholars envision a world in which the legal cultivation of emotions does not suffer the taint of presumptive illegitimacy. Departures from conventional expectations about legal autonomy and rule of law norms are inevitably a cost that has to be weighed when contemplating less conventional legal efforts; yet legal actors may also consider the benefits of bringing pro-social emotions into being. A more plural, socially integrated

80. Minow observes that after twenty years, "[a]nalyzes of what did and did not work with the TRC are beginning to move beyond the anecdotal to more rigorous research," gesturing toward the large span of time that will be necessary fully to understand and assess the legal inventions she contemplates. *Id.* at 1622.

81. *Id.* at 1623 (describing four nations and a city that have embraced transitional justice regimes and a study of some forty truth commissions).

82. *Id.* at 1633, 1637.

83. *Id.* at 1619.

view of law, which affects its subjects through a range of subtle, varied, stagewise influences, opens new vistas for investigation and experimentation.

CONCLUSION

Minow's innovations inaugurate or advance, rather than conclude, a path of inquiry. Readers engaged by her argument may want to know about limiting cases or contexts in which the law should forgo projects of emotional cultivation. Several questions suggest the contours of this further terrain. First, how should legal actors respond to perpetrators who are seemingly beyond forgiveness? Minow references the unrepentant genocidaires of Indonesia, who willingly re-enact their atrocities in Joshua Oppenheimer's *The Act of Killing*.⁸⁴ Is legal support for forgiveness appropriate under such circumstances, or should legal actors return to the more traditional goals of punishment? Second, how might law approach individuals or communities that are not ready or able to forgive? While many were moved by the statements of family members forgiving Dylann Roof, the perpetrator of the Charleston massacre, commentator Roxane Gay argued that there "ha[d] not been enough time . . . for anyone to forgive."⁸⁵ In Srebrenica or Kigali, on the other hand, some argue that the passage of twenty years and the active governmental promotion of repair have not made forgiveness possible for many survivors.⁸⁶ What should law do at the two ends of this temporal spectrum? Should legal actors work to foster feelings of safety and security, rather than moving directly to forgiveness, when violence may be too proximate and feelings too raw for cultivation of forgiveness?⁸⁷ And should the law aim to foster toleration, or to

84. *Id.* at 1617; see THE ACT OF KILLING (Final Cut for Real 2012) (a film by Joshua Oppenheimer).

85. Roxane Gay, Opinion, *Why I Can't Forgive Dylann Roof*, N.Y. TIMES (June 23, 2015), <http://www.nytimes.com/2015/06/24/opinion/why-i-cant-forgive-dylann-roof.html>.

86. Josh Kron, *For Rwandan Students, Ethnic Tensions Lurk*, N.Y. TIMES (May 16, 2010), <http://www.nytimes.com/2010/05/17/world/africa/17rwanda.html>; Alex Lockie & Armin Rosen, *It's Been 20 Years Since Europe's Worst Atrocity Since World War II*, BUS. INSIDER (July 12, 2015), <http://www.businessinsider.com/20-years-ago-today-europe-saw-its-worst-atrocity-since-wwii-2015-7>; Chris MacGreal, *Rwandan Genocide 20 Years On: 'We Live with Those Who Killed Our Families. We Are Told They're Sorry, but Are They?'*, GUARDIAN (May 12, 2013), <http://www.theguardian.com/world/2013/may/12/rwanda-genocide-20-years-on>; Scott Newman, *20 Years After Srebrenica, Anger Over Genocide Still Runs Hot*, NPR (July 11, 2015), <http://www.npr.org/sections/thetwo-way/2015/07/11/422010098/20-years-after-srebrenica-anger-over-genocide-still-runs-hot>.

87. Chris Kutz argues that cultivating feelings of safety and security may allow for the emergence of "found" forgiveness (a slow-growing intuitive form of forgiveness) rather than "chosen" forgiveness (a more intentional, willed variety). See Christopher Kutz, *Forgiveness, Forgetting, and Resentment*, 103 CALIF. L. REV. 1647, 1650–51 (2015). Yet it is not clear to me that the paths to these two forms of forgiveness are always disparate. It may be that some of the indirect legal expedients Minow explores, such as supporting and publicizing the work of family members who choose to forgive, may expose individuals to the possibility of forgiveness, without imposing any kind of demand, thus facilitating both instances of chosen forgiveness and (perhaps over a greater span of time) found forgiveness.

moderate aversion or resentment, where forgiveness has proven elusive? Should the law cease to foster emotions in such contexts?

Finally, what kinds of examples or expedients might qualify as *unsuccessful* efforts at legal cultivation of forgiveness? Although Minow offers many different views of “success” in fostering the emotions of repair, she is more circumspect about examples of failure, excessive risk-taking, or other dubious choices. State action that unilaterally “forgives” on behalf of those injured, such as removing child soldiers from the purview of legal responsibility, seems to qualify as one example of flawed policy.⁸⁸ Yet this policy fails by displacing the appropriate individual agents of forgiveness, or by short-circuiting the process of self-forgiveness among child-soldiers, rather than by cultivating forgiveness in an unsuccessful or injurious manner. A careful examination of failed or damaging cultivation could answer many questions and might provide ground for engaging with more skeptical law and emotions scholars.

Ultimately, however, these questions may frame the goals of the next phase of this inquiry. The project of using law to stimulate pro-social emotions has thus far proceeded slowly. Not only has it confronted broader currents in legal thought: a persistent suspicion of emotions and Neoliberal premises that have made legal intervention in the market problematic, and intervention in the interior states of individuals all but unthinkable. But even legal scholars knowledgeable about emotions have voiced concerns: about the effects of legal cultivation on the agency and authenticity of legal subjects, or about whether and how legal institutions can depart from traditional rule of law ends. Martha Minow offers a distinct way of conceiving law, as a varied, socially integrated means, that can serve affective ends in subtle ways by allowing room for experimentation and ongoing empirical assessment. This challenging reconceptualization, with its vivid and tangible illustrations, should spur a new and necessary inquiry.

88. Minow, *supra* note 1, at 1628–29.