

NEBRASKA SYMPOSIUM ON MOTIVATION

VOLUME 56

Emotion and the Law

Psychological Perspectives

Brian H. Bornstein

Richard L. Wiener

Editors

Nebraska Symposium on Motivation

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Editors

Emotion and the Law

Psychological Perspectives



Springer

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Acknowledgments

The seed for this book was planted several years ago, when our own research interests in the emotional aspects of legal decision making led us to edit a special issue of *Law and Human Behavior* on the topic (Wiener and Bornstein 2006). In the course of reading the submissions and writing our own papers for the special issue, we came to realize just how many people were doing excellent work in the area and were addressing a broad array of interrelated topics under the “law-and-emotion” umbrella. This realization, in turn, had three salutary consequences. First, it made us excited and energized to know that our fellow researchers were doing so much good stuff. Second, it inspired us to undertake several new research projects, both together and with our individual research groups. And third, the awareness that there was so much more out there led us to propose organizing the symposium that produced this book.

There are a number of people whose contributions to this endeavor we wish to acknowledge. We are grateful to the UNL Psychology Department’s Motivation Symposium Committee, which provided us helpful feedback as we developed the proposal. We are especially indebted to Deb Hope, Chair of the Committee and Series Editor, for her encouragement and support throughout both the symposium and book editing process; and to Dave Hansen, Psychology Department Chair, for providing the departmental infrastructure that made our job so much easier. A number of departmental staff helped with the symposium, and we are grateful for their efforts. We particularly want to single out Claudia Price-Decker, whose attention to the myriad logistical details of hosting the symposium (travel, food, lodging, program, etc.) freed us to concentrate on the speakers and their presentations. This was the 25th Nebraska Symposium on Motivation that Claudia has worked on, and her institutional memory, efficiency, and good humor were invaluable.

A number of law-psychology graduate students assisted in chauffeuring and entertaining speakers, and we thank them for their efforts, especially Jessica Snowden, who “ran point” and coordinated the airport and restaurant arrangements. We have benefited from the efforts and expertise of several individuals at Springer, especially Sharon Panulla and Anna Tobias, and we thank them for their contributions and patience. It goes without saying (but we’ll say it anyway) that we thank all of our speakers/authors, who took time from their busy schedules to participate in the symposium and to write chapters for this volume. We were fortunate to have

such an incredibly accomplished group of scholars, who also turned out to be a joy to work with. We thank them for making our job as editors so easy.

Finally, we thank the women in our lives: Christie, Lillian, and Melissa; and Audrey, Samantha, and Elissa. You put up with our absences and our anxieties, and your steady support enables us to do the work that we do, while making our time away from work so enjoyable. Thank you for all that and more.

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Preface

The volume editors for this 56th volume of the Nebraska Symposium on Motivation are Richard L. Wiener and Brian H. Bornstein. The volume editors coordinated the symposium that led to this volume, including selecting and inviting the contributors. My thanks go to Brian and Rich and to our contributors for their outstanding presentations and chapters. This interdisciplinary work on emotion and the law takes its rightful place in the finest scholarly traditions of this historic series.

This Symposium series is supported by funds provided by the Chancellor of the University of Nebraska-Lincoln, Harvey Perlman, and by funds given in memory of Professor Harry K. Wolfe to the University of Nebraska Foundation by the late Professor Cora L. Friedline. We are extremely grateful for the Chancellor's generous support of the Symposium series and for the University of Nebraska Foundation's support via the Friedline bequest. This symposium volume, like those in the recent past, is dedicated to the memory of Professor Wolfe, who brought psychology to the University of Nebraska. After studying with Professor Wilhelm Wundt, Professor Wolfe returned to this, his native state, to establish the first undergraduate laboratory in psychology in the nation. As a student at Nebraska, Professor Friedline studied psychology under Professor Wolfe.

Debra A. Hope
Series Editor

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Chapter 1

Emotion and the Law: A Field Whose Time Has Come

Brian H. Bornstein and Richard L. Wiener

Psychological research on emotion has a rich and varied history. A number of protopsychologists (e.g., Aristotle, Aquinas, Descartes, Hume) wrote about the effect of the passions on human thought and behavior, and empirical work on emotion dates back over 100 years (e.g., James 1890/1950). Emotion research has long been a central component of social, personality, and clinical psychology, and it is increasingly being integrated into other psychological subdisciplines, such as cognitive and physiological psychology. In fact, the contributions of neuroscience to understanding the role of emotion in thought and decision making has recently “taken off,” as cataloged in recent reviews of this burgeoning field of research (e.g., Winkielman and Cacioppo 2006). In contrast to the neuroscientific approach, the work collected in the present volume focuses on the role of emotion in *molar* judgments and behavior (Forgas et al. 2006), the conduct that is characteristic of the many actors in the legal system. As such, this work focuses on social cognitive models of behavior and judgment in the real-world context of law and policy making.

Much of this work distinguishes among various types of affective responses, such as emotion, mood, and affect (e.g., Davidson 1994; Forgas 2003; Schwarz and Clore 2007). These distinctions are important, as the nomenclature one uses (e.g., specific emotions such as fear or anger, versus a more diffuse positive or negative affective state) has both theoretical and methodological implications. Researchers typically speak about *affect* as a broad generic term to include all types of affective states but reserve the term *mood* for an undirected, unconscious, low intensity but enduring state, which has no clearly identifiable or specific cause (Forgas et al. 2006). Usually, the term *emotion* refers to affect tied to a particular conscious event, high in intensity but short-lived and easily labeled and recalled. Indeed, the contributors to the present volume go to great lengths to be precise in exactly what sort of affective response they are describing. However, because the contributors, like many others in the field, show considerable variation in exactly what they define as different emotional states,

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in setting the stage for the following chapters, the present introduction refers to “emotion” as an overarching rubric for all kinds of affective responses.

Given the centrality of emotion to several subfields within psychology, it is not surprising that the earliest work in psychology and law also dealt with emotion. For example, both of the earliest known books devoted to the topic – Hugo Münsterberg’s *On the Witness Stand* (1908) and G.F. Arnold’s *Psychology Applied to Legal Evidence and Other Constructions of Law* (1906) – had chapters on feeling or emotion (see generally, Bornstein and Penrod 2008). Burt’s (1931) early text on *Legal Psychology* considered emotion’s contribution to multiple legally relevant behaviors, such as memory and deception. Thus, the conjunction of law and emotion is hardly new (indeed, as Jeremy Blumenthal argues, it dates back 3,400 years; see Chap.7). Nonetheless, the exact nature of the relationship is intricate and not yet fully explored.

Law and Emotion: When, Why, How, Where, and Who

As Skovran et al. (2009) point out, emotion has both crept into law through the back door and entered directly through the front door. Indeed, some would still try to argue along with Aristotle that law is reason free from emotion. Under such an approach, jurors and other legal decision makers are rational actors attempting to conduct cost-benefit analyses for each potential verdict by simply adopting the verdict that maximizes the likelihood of a positive change in the state of the environment (Korobkin and Ulen 2000). Simply put, jurors as rational legal decision makers select the verdict that best applies the law of the case to the facts of the case, as they understand both to be. However, there are many examples of legal decision making that show how policy intentionally incorporates emotion into its process. For example, as Maroney (2006) points out, judges frequently admit gory evidence or photos as evidence in a trial, civil juries compensate plaintiffs for emotional suffering, and criminal juries consider defendant remorse and victim impact statements in determining sentences for brutal crimes. Furthermore, some legal commentators argue that one of the defining parameters of punishment in criminal trials is the fact that the jurors condemn the perpetrators for the criminal acts that they commit and that the condemnation is a function of the criminal conduct proportional to the heinousness of the perpetrator’s actions (Feinberg 1995; Pearce 2007; Schopp 1993). Some of the emotional features of that condemnation are very likely the anger, disgust, and contempt that people feel toward wrongdoers who have committed heinous crimes against society. This same sense of condemnation or outrage applies to the awarding of punitive damages in civil trials (Kahneman et al. 1998).

At the same time, emotion may be either incidental (independent of the judgment to be made) or integral (a reaction to the evidence or to a required judgment), and under each path it may have unintended consequences for the final judgment (Feigenson and Park 2006). For example, Skovran et al. (2009) showed that increases in anger across a capital murder trial predisposed jurors to be more certain in a death sentence, and Ask and Granhag (2007) demonstrated that sad criminal

investigators were more likely to consider disconfirming evidence than were angry investigators. The relationship between law and emotion is complex because of the lack of specificity regarding when, why, how, where, and for whom emotion should influence legal judgments. Emotions might have an effect at any stage of legal proceedings: prior to legal judgments, as when an eyewitness's depression leads her to encode an event poorly; during legal judgments, as when a judge's outrage at a convicted defendant's conduct leads to a harsh sentence; or afterwards, as when a juror regrets having allowed himself to be persuaded by the majority during deliberation. Indeed, Wiener and colleagues (Wiener et al. 2005a, b, 2006b, 2007), in their studies of consumer use of credit, have demonstrated that law itself (here bankruptcy law) makes assumptions, sometimes unfounded, about the role of emotion (or in this case, lack of emotion) in judgment and behavior. For example, Wiener et al. (2007) showed that enhanced credit card disclosure rules that are part of the Bankruptcy Abuse and Prevention Reform Act of 2005 have only limited influence in persuading people to use their credit cards wisely. They found that consumers' forecasted emotions after buying or not buying products moderated the impact of disclosure enhancements. Additional research showed that experienced emotion at the time of purchase also limited the effectiveness of enhanced disclosure (Wiener et al. 2006b). Our field needs more work on the pervasiveness of emotion in all aspects of law as it attempts to regulate human conduct.

The questions of why and how emotions influence legal judgments are closely related, and theories of emotion and social judgment (e.g., Forgas 1995) address both. "How" is likely easier to answer than "why," and a number of plausible explanations have been proposed in which one's emotional response somehow alters the decision-making process itself or provides information that is relevant to the decision (see Feigenson and Park 2006; Wiener et al. 2006a; also the chapters by Forgas and Feigenson, this volume). Of course, the explanations differ in their description of the precise mechanism or mechanisms by which this occurs. The most common answer to *why* emotion influences judgment is that it is somehow adaptive, but again, the particularities (e.g., How is it adaptive? Are some emotional states more adaptive than others?) are complicated (see, e.g., Forgas et al. 2008).

The questions about "where" and "for whom" emotions influence legal judgment are likewise related. If one were to go simply by the weight of the research, the answer to "where" would be "in the jury box/deliberation room" and "at crime scenes/lineups," and the answer to "for whom" would be "jurors" and "eyewitnesses." However, emotions can and do influence the decision making of numerous other legal actors, such as judges, victims, attorneys, and police (Maroney 2006). For example, just as gruesome, emotion-arousing evidence can influence jurors' decision making by making them more likely to convict (Bornstein and Nemeth 1999; Bright and Goodman-Delahunty 2006), it might also make judges less sympathetic to defendants, victims more likely to report the crime, prosecutors more likely to file charges and seek a severe penalty, and police more zealous in their investigation. Emotion will not affect all of these legal actors in similar fashion; for example, Wessel et al. (2006) found that judges were less susceptible than jurors to witnesses' emotional displays.

This overview of the myriad ways in which law and emotion intersect reflects the fact that emotion plays a central role in many legal questions. Emotional considerations often precede, surround, and follow legal judgments and decisions (Wiener et al. 2006a). As noted above, legal actors' emotional states are legitimate considerations in many contexts. As Maroney (2006, p. 120) observes, "The point [that law takes account of emotion] is so obvious as to make its articulation almost banal." Yet the exact manner in which emotion should and does influence these judgments is far from clear. For example, emotion can be elicited by a source integral or incidental to the judgment task, and it can affect judgments either directly or indirectly (Feigenson and Park 2006).

The question of the processes underlying emotion's role in legal judgment is closely tied to the question of emotion's role in social judgments and decisions more generally (e.g., Forgas 1995, 2003; Lerner and Keltner 2000; Loewenstein and Lerner 2003; Pham 2007; Schwarz 1990). A review of the many ways in which emotion can and does influence legal judgment is well beyond the scope of this introductory chapter (see Wiener et al. 2006a; Feigenson and Park 2006). However, a recent and important model that Baumeister and colleagues (2006, 2007) introduced into the literature offers a theory that has great potential for understanding how experienced emotion – both consciously appraised and unconsciously triggered (Smith et al. 2006) – might influence judgments and behaviors in the law. The strength of the approach is that it also specifies the individual influence of anticipated and forecasted emotions, the relationship between anticipated and forecasted emotions, and finally, the combined influence that both factors exert on both judgments and behavior. Accordingly, people experience emotion in a variety of contexts, including legal situations, and the emotions that they experience serve as a feedback mechanism that assists them in learning the social (and maybe legal) rules that govern those situations. Later, when these emotions arise as moods triggered in new situations similar to the older ones, they indeed help to activate the original rules. For example, angry jurors learn to lower the standard of proof that constitutes a guilty verdict (Skovran et al. 2009), and angry criminal investigators learn to avoid disconfirming evidence in initial encounters (Ask and Granhag 2007). These emotions later trigger activation of these rules when the context is a match. Here, experienced emotion influences judgments and decisions directly but influences behavior only indirectly.

On the other hand, people come to anticipate the positive and negative feelings associated with contextual situations so that legal decision makers' forecasts of future affect help shape their judgments, decisions, and behavior. As Meller and colleagues (Mellers 2000; Mellers et al. 1997, 1999) have shown, people act to avoid negative feelings and to secure positive feelings independent of cost-benefit analyses of the inputs and outputs in their environments. While the interaction of anticipated and experienced emotion will never tell the whole story of legal decision making, it does go a long way to help us understand how emotion has the power to influence the outcomes of those processes. The chapters in this volume highlight in detail how these emotional events take place in the world of legal decisions and how they can influence the judgments and choices that legal actors make.

Despite the legitimacy of emotion in many legal situations, the law has a double standard with respect to emotion (Bornstein and Wiener 2006). In many situations, the law presumes that legal decision makers can set their emotions aside and behave as cool, dispassionate, rational actors (Maroney 2006; Wiener et al. 2006a). Examples include the expectation that jurors not be unduly influenced by graphic evidence (Bornstein and Nemeth 1999) and adhere to the letter of the law even when it violates their moral intuitions of fairness (Finkel 1995; Horowitz et al. 2002). Despite the complex nature of the intersection of law and emotion, in the last couple of decades a number of legal and psychological scholars have begun to tease apart the relationship (e.g., Bandes 1999; Feigenson 1997; Feigenson and Park 2006; Kahan and Nussbaum 1996; Maroney 2006; Nussbaum 2004; Wiener et al. 2006a). The present volume continues those efforts. In particular, it emphasizes how interdisciplinary research can contribute to the dialogue over the proper role of emotion in legal settings.

Emotion and Law: Multi-, Inter-, and Intradisciplinary Approaches

Psychology and law, by its very nature, is ideally situated to benefit from the current scientific trend toward diverse research teams rather than solitary investigators (Wuchty et al. 2007). Yet despite the longstanding interest in emotion in both psychological and legal circles, the efforts have been more parallel than intersecting. Thus, although law and emotion scholarship is clearly *multidisciplinary* – drawing on psychology, law, and related social scientific (and even biological) disciplines – it is rarely *interdisciplinary*. Multidisciplinary research is additive, aggregating the work of experts in different fields (Cacioppo 2007). This approach is certainly beneficial, but after solving specific problems the experts typically “return[] to their own disciplines, largely unchanged by the collaboration” (Cacioppo 2007, p. 3). This reflects the natural tendency for scholars to speak and write in their own disciplinary idioms, to attend discipline-specific conferences, and to publish in discipline-specific journals. Though perfectly understandable, and doubtless advantageous in some respects, this isolationism inevitably leads to parochialism and an absence of cross-fertilization.

Interdisciplinary research, in contrast, is not merely additive but should instead be interactive, thereby making the whole more than the sum of its parts (Cacioppo 2007). Although, like multidisciplinary research, it often involves the efforts of multiple individuals from diverse disciplines, it does not have to; a single researcher can be trained and well-versed in more than one discipline. Because it has the potential to be transformative, interdisciplinary work requires innovation, and it is therefore riskier and, in many respects, harder. It takes individuals out of their disciplinary comfort zones. Yet along with the greater risk comes the potential for greater reward. At its best, law-psychology scholarship is not merely multidisciplinary, but fully interdisciplinary as well.

We sought to address this issue in the *Law and Human Behavior* Special Issue (Wiener and Bornstein 2006), and the present volume continues that effort.

As with any psycholegal research, to be informed and relevant, psycholegal research on emotion should draw on appropriate social scientific theories and methodology and be well grounded in applicable law and policy (Blumenthal 2002; Wiener 2007). The contributors to the present volume do just that. They have training in both disciplines, incorporate both in their teaching and research, and stand at the interface of psychology and law. Much of the research that they describe in the following chapters has been conducted in an interdisciplinary fashion.

In addition to these *interdisciplinary* concerns, there are *intradisciplinary* stress points as well, which take two manifestations. The first reflects the occasional tension among various psychological subdisciplines. Researchers within every psychological subfield – social, cognitive, developmental, personality, clinical, physiological, industrial-organizational, etc. – address the topic of emotion. This dispersion is generally a good thing, as it highlights the topic’s richness and complexity; but, as with multidisciplinary scholarship, it can lead to parochialism and to difficulty formulating a comprehensive theory of emotion’s role in human thought and behavior. We hold out hope that interactive models that look at both experienced and anticipated affect have the potential to tie together the many threads that comprise the literature in this area.

The second manifestation of intradisciplinary conflict is the tension between basic and applied research. This tension has characterized experimental psychology since its very origins (Benjamin 1997) and particularly bedevils those psychological fields, like psychology and law, that seek to apply their research findings directly to practical matters and public policy (Bornstein and Meissner 2008). Not insignificantly, the individual whom many regard as the founder of psychology and law, Hugo Münsterberg, himself was ambivalent about the proper place of applied psychology (Benjamin 2006). Although it is not impossible to integrate basic and applied approaches in psycholegal research, it certainly is challenging (Lane and Meissner 2008). If done successfully, however, the simultaneous benefits to psychological theory and to legal policy are both enormous and obvious (Wells 2008; Wiener 2007). The editors of this volume are committed to “critical multiplism” (Shadish 1993) as an approach to science that looks for knowledge in the intersection of different methods, theoretical constructions, disciplinary approaches, and problem definitions. We get most excited when applied and basic research together inform problem solving efforts across methods, theories, and disciplines; and we believe that under these conditions researchers, policy makers, and the public gain the most from our scientific enterprise. We hope that this volume shows the beginning of a convergence about the role that emotion does and should play in legal decision making.

Chapter Overview

To varying degrees, all of the book’s chapters wrestle with the normative, descriptive, and prescriptive questions concerning law and emotion. That is, what role *should* emotion play in legal judgment (the normative question); what role *does* it play

(the descriptive question); and what steps can we take to ensure that it functions as it should, or should not, depending on whether it is an appropriate factor to consider (the prescriptive question). This simultaneous concern with normative, descriptive, and prescriptive perspectives is one of the things that makes the present volume a unique contribution to law-and-emotion scholarship, and it adds to a “multiplistic” understanding of scholarship in this area.

The body of the book starts with two chapters that provide an overview, simultaneously broad and deep, of the law-and-emotion field. Both chapters apply general theories of emotion to the particular kinds of decisions that legal actors make. Both chapters are excellent examples of interdisciplinary scholarship, but they complement each other in that the chapter by Joseph Forgas is written from more of a psychological perspective, whereas the chapter by Neal Feigenson is written from more of a legal perspective. In Chap. 2, Forgas extends his pioneering work on emotion in social judgment (e.g., Forgas 1995) to legal contexts. This is not Forgas’ first foray into the world of law-and-emotion (e.g., Forgas et al. 2005), and to judge from the chapter, it will not be his last. The chapter compares the effects on judgment and decision making of positive versus negative affect, and it relates these states to forensic contexts. One conclusion that we draw from Forgas’s work is that one cannot simply say that good moods, bad moods, or neutral moods are best for legal decision makers; rather, policy makers and researchers alike ought to consider the valence of the emotion and its other dimensions, along with the specific nature of the legal judgment at hand. The work in this chapter points out much of the unfinished basic research that social psychologists need to conduct to learn more about the specific ways in which affect is infused into legal judgments.

The chapter by Feigenson (Chap. 3) takes something of the opposite approach. Grounding his questions solidly in legal decision making, he explores what theories of emotion and cognition have to say about how emotion influences legal judgment, and whether it should. The chapter extends his previous work on the topic (e.g., Feigenson 1997; Feigenson and Park 2006) by applying his framework to two recent test cases, the Jena Six criminal trial and the Securities and Exchange Commission’s civil fraud case against James Koenig. Feigenson concludes his chapter with some very practical recommendations on what to do about unwanted effects of emotion on legal judgment.

The next three chapters address the role of emotion in specific kinds of legal judgments. In Chap. 4, Norbert Kerr addresses the role of emotion in juror decision making, specifically, what determines the emotions experienced by jurors, and how those emotions might affect their judgments. Kerr has been one of the most prolific and insightful commentators on these questions, addressing, for example, the emotional components of jury nullification (e.g., Horowitz et al. 2006) and pretrial publicity (Kramer et al. 1990). In the present chapter, he reviews these bodies of work and presents new data on yet another situation in which emotion might affect jurors’ verdicts – namely, trials containing heinous evidence. These different contexts are instructive because they illustrate the different legal approaches to emotional influence: Sometimes it is expressly barred (pretrial publicity), sometimes it is allowed but discouraged (jury nullification), and sometimes it is allowed for

some judgments (effect of heinousness on sentencing) but not others (effect of heinousness on guilt). Exploring the effects of emotion on different kinds of judgments allows researchers and policy-makers to disentangle emotion's legitimate and inappropriate consequences in the legal domain. There is a unique opportunity here for legal commentators who focus on comparing condemnation (e.g., anger, disgust, outrage, contempt) in criminal and civil proceedings (Feinberg 1995; Pearce 2007; Schopp 1993) and empirical researchers who study the role in court of specific dimensions (e.g., valence, certainty, and responsibility) of a variety of negative (anger, disgust, and contempt) and positive emotions (hope, excitement, happiness) (e.g., Skovran et al. 2009) to forge an interdisciplinary effort. The result could be an understanding of how the various emotions that are triggered by heinous evidence do and should influence legal decision makers, and Kerr has led the way for us in his important and interesting chapter.

The emotional effects described by Kerr are often subtle, but those described in the next chapter, by Joel Lieberman, as he takes on the complex issue of hate crimes, would seem to be less so. Indeed, there is a burgeoning literature on hate crimes in psychology (Boeckman and Liew 2002; Cowan et al. 2002; Herek et al. 2002; Wiener and Richter 2008), but researchers have largely tackled the problem from a cognitive and not an emotional point of view. Indeed, our own work in this area has tried to measure the tension that research participants perceive between the free speech and equal protection principles in the Bill of Rights in the United States Constitution (Wiener and Richter 2008). Wiener and Richter found that people attached greater importance to equality principles than free speech principles when evaluating symbolic speech that was alleged to produce discrimination (e.g., displaying burning crosses and confederate flags).

One might wonder whether emotion's effects could ever be any more transparent than in the case of *hate* crimes. On closer inspection, however, the role of emotion is complex even here. For example, hate crimes have a variety of motivations, including, of course, prejudice, but the perpetrators do not necessarily experience intense negative affect during commission of the crime. Lieberman applies *terror management theory* to illustrate how hate crimes can be, in part, a defense against a threatened worldview. Most intriguingly, threats to one's worldview might lead not only to the commission of certain crimes, but also to differing attitudes by others toward hate crimes and to differing perceptions of specific offenses (Arndt et al. 2005; Lieberman et al. 2001). Others' reactions to hate crimes are relevant to the decisions of judges, jurors, and policy-makers. Although people's reaction to a threatened worldview is difficult to modify, Lieberman proposes means to increase tolerance of worldview threats. His arguments make it clear that although hate crimes are, in a sense, emotional by definition, the emotion may not consciously arise from the actual conduct.

A book on emotion and the law would be incomplete without a chapter on emotion's role in eyewitness memory. Cara Laney and Elizabeth Loftus fill this need admirably in Chap. 6 on truth in emotional memories. Loftus was one of the developers of the now widely used "rich false memory" research paradigm, in which researchers employ false feedback to convince adult participants that certain (untrue) events