



Volume 59

Issue 5 *Colloquium – Celebrating the 25th Anniversary of Feminism and Legal Theory Project*

Article 4

2010

States of Being: Response Piece

Martha Fineman

Emory University School of Law

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj>

Recommended Citation

Martha Fineman, *States of Being: Response Piece*, 59 Emory L. Rev. 1171 (2010).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol59/iss5/4>

This Colloquium is brought to you for free and open access by Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

STATES OF BEING Response Piece

Martha Albertson Fineman*

I thoroughly enjoyed the opportunity to engage with the important ideas presented in Professor Huntington's Article "Familial Norms and Normality."¹ I hope that my comments accurately capture her major points and reflect the importance of the topics she addresses. My comments are made in the spirit of engaged academic exchange and seek not only to take her Article seriously, but also to encourage her to expand and develop further the significant concepts with which she is working.

INTRODUCTION

Professor Huntington grounds her Article on the assertion that emotion generally plays a critical role in shaping both formal law and social norms. She asserts that the impact of emotion on social norms—a relationship that is both under-explored and under-theorized in legal scholarship—is most significant when it comes to regulation of the family. She presents the centrality of social norms to the family as “indirect” regulation, in contrast to formal, legal arrangements. While many commentators recognize that social norms are part of the regulatory mechanism for the family, Professor Huntington observes that few have addressed the significant role of the state in both the manipulation and the generation of the emotions that comprise, inform, and shape those norms. That is, the state not only creates law, but it also generates and harnesses emotion to construct social norms. In particular, Professor Huntington concludes that two contemporary approaches to social norms—rational-choice theory and law-and-society scholarship—have failed to adequately take into account the role of emotion in the formulation of social norms. This is the task that she sets for herself in the Article, with the objective of showing how understanding and employing the relationship between emotion and social norms may lead to more positive and pluralistic regulation of the family by the state. To that end, she urges that in addition to

* Robert W. Woodruff Professor of Law, Director of Feminism and Legal Theory Project, Emory University School of Law.

¹ Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103 (2010) (Article).

laws, social norms should be explicitly and transparently cultivated and promoted by the state through subtle “norm entrepreneurship.”²

Professor Huntington’s exploration of the potentially positive role for emotion and social norms in rethinking the place of the state in family regulation is an important contribution to the field. In calling for a more realistic approach to the variety and range of family emotions, she persuasively argues there is a need for widespread reexamination of the assumptions and beliefs (and emotions) informing social norms governing the family. In positing an active role for the state beyond formal law, she correctly positions the state as involved in the actual construction and imposition of informal, extra-legal modes of regulation, thus making the case for state responsibility in both the reexamination and reformulation of social norms.

However, in order to accomplish the ambitious tasks she sets out for herself, I suggest that she should give more attention to clarifying the meaning of key concepts. Elaboration of certain assertions and terms would strengthen her observations and arguments, making both more persuasive. In the following Parts, I raise some key issues and questions regarding the concepts and terms that warrant further development and articulation.

I. THE STATE

At a basic and very preliminary level, Professor Huntington should supply the reader with her vision of “the state.” As envisioned in her Article, the state seems rather monolithic and omnipotent. Its capabilities and processes are described in anthropomorphic terms in that the state is seen as acting as the result of some unitary motive or to achieve a well-defined objective.³

A. *The Fragmented State*

Whatever else it may be, the state is not a monolithic entity; nor is there only one state with which to be concerned. When it comes to family and intimacy issues in particular, the state should be seen as fragmented and multiple in form, with various components that are often duplicative and frequently in contention with one another. On the most obvious level, there are multiple states involved with families and family laws. In governance or law making, we have a federalist system—a national government coexistent with

² *Id.* at Part III.A (examining emotion and state norm entrepreneurship).

³ *Id.* at 1105.

multiple state entities. These overlapping sources of potential family regulation are complimented and complicated by local and regional authorities that also can adopt policy and rules (and certainly can influence understandings of social norms and emotions).

But even considered independently and individually, these multiple manifestations of the state are not free to act unencumbered. They are composed of various bodies that are supposed to “check” and “balance” the process of governance.⁴ Legislatures, courts, and executives are governed (or regulated) by myriad rules, conventions, constitutional mandates, and geographical and ideological constraints. Some of these are externally imposed, but many are processed internally—interpreted and implemented by the various departments, agencies, officials, bureaucracies, and other entities that may make up any individual state. This is the “separation of powers” point, but it also reflects the reality that any individual state is really a variety of complementary, overlapping, dynamic, contingent, and interactive segments.

Further, it seems obvious to me that it is the individuals within these sets of institutional arrangements who act as or for the state. This raises additional questions about how one determines which actions and motivations can be attributed to “the state” and which actions or motivations are more properly attributed to those who populate (however temporarily) its law-making structures. When acting in their capacity as state officials, individuals are constrained by various factors, including laws and processes as noted above, but individual characteristics and contexts also influence individual behavior. In understanding how and why these individuals act within their official governmental positions, we might have to also consider their political position, ambition, and prospects for reelection or reappointment. We could also factor in an individual’s ideology, personal relationships, native ability, biases, and so on.⁵ My question is whether the individuality and particularity of beliefs, politics, and contexts influencing those individuals who act for the state

⁴ A modern state is made up of various components, typically including a legislative body, an executive, a judiciary, and various agencies and commissions.

⁵ Another way to make this point is to ask if social norms actually inform and constrain how individuals acting in a state capacity behave. Might social (and professional) norms independently affect how these actors participate in the construction and manipulation of social norms in attempts to regulate the family?

undermines the idea that the state can be conceptualized as acting to accomplish a singular goal or objective.⁶

B. *The State as Actor and Agent*

Professor Huntington's analysis would also benefit greatly from specific articulation of her understanding of the process by which the state as an actor or agent uses emotions for the creation and maintenance of social norms. This raises more than simply the "who" question identified in the preceding section; it also raises very important "how" and "why" questions—that is, how exactly does the state act and how can we determine state purpose or motivation with any specificity. I think these types of inquiry fatally complicate the idea of single-purpose state action.

Professor Huntington seems to view the state as acting as an entity. For example, she posits that the state can through its actions, by sending particular messages, change the "emotional context of intimate and personal decision making."⁷ This seems to view the state as capable of acting (successfully and forcefully) as a single unified unit. One page of the Article presents the state as regulating, influencing, affecting, using, creating, and manipulating either emotions and social norms or families themselves.⁸ In the section discussing the state as a norm entrepreneur, we are told that there is a possibility of the state "actively shaping ground-level social norms by changing the emotional content of decision making."⁹ In the sections on "What the State Does" and "How the State Does It," the ability to choose to further a value, to act in a covert manner potentially subverting the democratic process, to send hidden messages, and to use emotion as a tool are all attributed to the state.¹⁰

⁶ When we think of states and the authority of law or norms, we also should include many of the quasi-public institutions that intersect with formal states and act under the authority of law. In other words, the state can also be manifested through complex institutional arrangements that don't have the imprimatur of formal government but can powerfully affect norms. Such entities also are state actors in that state acts brought them into legally recognized existence, and they often operate under particular state mandates or regulatory regimes. In fact, Nancy Cott has argued that the state actually constitutes itself through the legal recognition and subsequent regulation of societal institutions like the family. See Nancy F. Cott, *Giving Character to Our Whole Civil Polity: Marriage and the Public Order in Late Nineteenth Century*, in U.S. HISTORY AS WOMEN'S HISTORY 107 (L.K. Kerber, A. Kessler-Harris & K.K. Sklar eds., 1995) (giving a historian's perspective on the family as an institution). Professor Cott states that "one might go so far as to say the institution of marriage and the modern state have been mutually constitutive" and further that "one of the principal means that the state can use to prove its existence . . . is its authority over marriage." *Id.* at 109.

⁷ Huntington, *supra* note 1, at 1103.

⁸ *Id.* at 1107.

⁹ *Id.* at 1154.

¹⁰ *Id.* at 1154–56.

One example from Professor Huntington's Article is illustrative of why I find it problematic to talk about actions such as manipulation of emotions or construction of social norms as undertaken by "the state." She asserts that there are some political actors who use "proxy fights" in seeking to influence women considering an abortion.¹¹ The fights she discusses are those creating "indirect barriers to abortion," such as requiring a woman to view a sonogram of the fetus before being given access to an abortion.¹² "The goal is to create a norm that stigmatizes abortion . . . seeking to impose, cultivate, or evoke the emotions of motherhood in all pregnant women."¹³ According to Professor Huntington, a further example of measures that "play a particular role in the 'culture of life'"¹⁴ are the infant safe haven laws that, while "facially unobjectionable," have as their "deeper meaning . . . pro-life social norm entrepreneurship . . . seek[ing] to change the emotional resonance of the abortion decision."¹⁵ Recognizing that abortion is an event that may have emotional resonance without state contribution, Professor Huntington concludes nonetheless that "the state is privileging and emphasizing one set of emotions[,] . . . manipulating the emotional context of decision making."¹⁶ We are not told who or what acts as the state in this context or how in so acting state's purpose is revealed in this analysis, perhaps because the answers are supposed to be obvious.

But when the state acts, it does so through a complex set of institutional relationships and actions; it is hardly a monolithic entity moving forward with one mind or urged on by one motivation. Passing a law or explicitly stating policy in a legislative debate is a more transparent and public activity than norm creation or the manipulation of emotion, and therefore these activities are more open to analysis and critique. However, the legislative process requires a variety of actions on the part of the state: study, investigation, fact finding, and

¹¹ *Id.* at 1133.

¹² *Id.* at 1134. She also includes "extra-legal efforts," such as claims that women later regret abortions, as an example of the creation of a culture of life. *Id.* at 1134. These are viewed as attempts to "shape an anti-abortion social norm by changing the individual and cultural dimension of the emotions associated with abortion." *Id.* at 1134.

¹³ *Id.* at 1134. A page later, Huntington's Article reveals that a woman may sign a waiver and decline to view the ultrasound. *Id.* at 1135. Such a legislative escape route suggests that the state may have been of at least two minds on the sonogram issue. Rather than "choos[ing] this method because it is so effective at conveying the state's preferred narrative," *id.* at 1135, perhaps the norm of individual choice just bumped the norm of fully informed decision making, confusing the state.

¹⁴ *Id.* at 1134 (quoting Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 753 (2006)).

¹⁵ *Id.*

¹⁶ *Id.* at 1136.

negotiation involving legislators and, their staffs, as well as others such as experts and interest groups who are brought into the process. Legislating also involves agencies and other mechanisms of executive power with implementation authority, as well as the judiciary, which has a key role in resolving disputes. Which acts count as state acts, particularly when there is some inconsistency or disagreement among these actors? Do we only look at the last act (assuming there is one)? Or do we perhaps look just at final legislation, leaving aside negotiation, compromise, and reconciliation within the legislature as well as subsequent executive enforcement or judicial review?

It seems to me that the idea of a monolithic state is even more incoherent when we consider attributing attitudes, objectives, or motivation to a single thing called “the state.” Professor Huntington should address how a complex entity like the state arrives at a single objective, or even a set of objectives, on an issue like abortion or other similarly highly contested policy matters. In addition, I am unsure of how we can determine with any certainty the definitive motivations for specific legislation. Further, what is the significance of inconsistent or contested positions in determining state objectives or motivation? An advocate of infant safe haven laws might genuinely want to save newborns from abandonment, quite independent of his or her position on the right of a woman’s choice when it comes to abortion. Is it correct to ignore that motivation or to consider it trumped for purposes of academic criticism just because another (devious pro-life) legislator really wants to stigmatize abortion in any way possible? Which desires, objectives, and motivations of which state actors should count?

II. SOCIAL NORMS AND EMOTION

A second welcome set of clarifications and amplifications would center on Professor Huntington’s use of the terms “social norms” and “emotions.” Both are employed in various, sometimes confusing, way that incorporate both “hard” and “soft” meanings for each term.¹⁷ From a theoretical perspective, I prefer to work with the harder versions, but I recognize that perhaps only the softer manifestations allow Professor Huntington to make her boldest claims.

¹⁷ I use “hard” to denote concise, clear, defined terms or categories. “Soft,” by contrast, indicates blurred, ambiguous, or shifting categories.

A. *Social Norms*

Professor Huntington sets out the very broad proposition that social norms are “the rules of behavior that individuals follow despite the absence of legal obligation or formal penalty for noncompliance.”¹⁸ In talking about non-legal systems of behavioral regulation, the interesting question arises as to why individuals would comply with social norms, particularly if compliance is against their preferences or values or even merely inconvenient. Law carries with it the prospect of formal sanction and coercion or incorporates incentives and subsidies, but what equivalent enticements are inherent in social norms?

Professor Huntington observes that the idea underlying social norms theory is that such norms influence people because individuals are social beings who are attentive to others’ views, seek approval, and alter their behavior to avoid disapproval. However, she does not seem to sufficiently contemplate this question of the relationship between social norms and sanctions. Certainly there must be some relationship. If the sanction is slight, incidental, or insignificant, an individual may well ignore the norm. Absent some significant, clearly evident sanction, perceived self-interest may trump any specific social norm. In fact, if the sanction is uncommunicated, minimal, or insignificant, there may even be a question as to whether something should be labeled a social norm at all.

Debates about how social norms should be understood and classified have persisted for over a century.¹⁹ Social proscriptions and prescriptions grouped under the category of social norms clearly exist along a variety of spectrums. They can be classified according to characteristics like formality or severity of sanction, specificity or explicitness in the statement of the norm, source[s] of authority, socialization process whereby the norm is transmitted (family, school, or media), or patterns of deviance from the norm, to name just a few. Particularly relevant to the notion that norms can influence behavior (and thus have the predictive possibilities Professor Huntington desires) would seem to

¹⁸ Huntington, *supra* note **Error! Bookmark not defined.**, at 1105.

¹⁹ See WILLIAM GRAHAM SUMMER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES AND MORALS* 34–43 (1906) (proposing classification of norms into folkways and mores); see also PITIRIM A. SOROKIN, *SOCIETY, CULTURE, AND PERSONALITY: THEIR STRUCTURE AND DYNAMICS* 87 (1969) (criticizing Summer and developing a more focused classification scheme including law norms, technical norms, and norms of etiquette and fashion along with more amorphous norms).

be the longstanding distinction between what have historically been labeled “absolute” and “conditional” norms.²⁰

More than fifty years ago, Richard Morris explained the differences between these poles of norm classification by characterizing an absolute norm as one “which is known and supported by everyone, which applies to everybody under all conditions, which is rigorously enforced by heavy sanctions.”²¹ By contrast, conditional norms are of limited application and sporadic enforcement.²² Examining this distinction suggests points of inquiry that further complicate the notion of a predictable causal line between social norms and human behavior.

Is a social norm clearly universally applicable, or is it merely one of several acceptable or contested alternatives? And if it is an alternative, is there a hierarchy of norms? Is there any interpretive flexibility in the articulation of the social norm, or is it specific and detailed? Ultimately, what is the context for enforcement, particularly, what extent and degree of power does the enforcement community exert over the individual? In regard to this last inquiry, it would seem to make a significant difference if the non-legal sanction were nothing more than a shake of the head with a “tsk-tsk”—especially when compared to excommunication from a religious body with which the individual shares a fundamental belief about the terms of salvation. I wonder how each of the situations set forth in the Introduction to Professor Huntington’s Article should be sorted using such classification possibilities²³:

A young boy hits his brother in a crowded subway.

A young woman and man are trying to decide whether to marry, move in together, or remain in separate homes.

A thirty-nine-year-old single woman considers using donated sperm to become pregnant and raise a child on her own.

A gay couple puzzles through who should attend the Mother’s Day celebration at their children’s school.

A mother contemplates breastfeeding her baby in a crowded public park.

²⁰ Or, in my terms, hard and soft norms.

²¹ Richard T. Morris, *A Typology of Norms*, 21 AM. SOC. REV. 610, 612 (1956). Under this definition, there are at least three stages: generation and acceptance, universal application, and implementation through sanctions. Norms that complement or supplement legal rules may also be deemed absolute, and the law or legal institutions may play a role in assisting the transmission and acceptance of norms and non-legal sanctions.

²² *Id.*

²³ The following list of situations is set forth in paragraph format in Huntington, *supra* note 1.

A teenager considers having sex with his girlfriend.
A closeted lesbian ponders bringing her partner to the annual holiday party.
A visibly pregnant woman decides whether to order a glass of wine in a restaurant.
A woman considers terminating her pregnancy.
A family thinks seriously about homeschooling their young children.

Is a young couple's decision to marry, cohabit, or remain in separate homes—with all of the concrete benefits that may flow from that decision (tax incentives, health and welfare benefits, and formal legal entitlements)—really motivated by the same type of norm processing as a parent's reaction to a young boy's choice to hit his brother in a subway? Is a single, thirty-nine-year-old woman's decision to become pregnant using donated sperm really governed by the same social norm calculus as an individual teenager's decision to have sex with his girlfriend? Professor Huntington's assertion that all these situations fall under the broad classification of "social norms" seems in need of further refinement.

As I indicated earlier, I prefer a harder version (meaning more universal, specific, heavily sanctioned, or absolute) of the concept of social norms. If the concept is too loosely theorized, it loses all analytic and predictive force. This is not to say that there may be some social conventions or customs with normative implications (but lacking strong sanctions) or personal values²⁴ that come into play in these situations. However, I question whether in twenty-first-century America most, if any, of the above situations are governed by anything that could be considered close to an absolute norm—in the sense that it is coherent, clearly dominant, and works to predict individual behavior on a wide scale. This point is more than a quibble with the situations selected; it is the assertion that if the enforcement community is too small or localized and unique, the concept is trivialized by labeling it as a social norm.²⁵ A more acceptable characterization would be to say that within these given contexts (such as the workplace of the closeted lesbian or the family of the woman

²⁴ Professor Huntington does not address the relationship between values and norms in her Article. One distinction is that norms require a community and consensus, while values are held individually and may overlap, or be coexistent with, or reflective of, social norms. Since they are internalized on an individual level, values can even be in opposition to social norms and may be a more potent influence on and predictor of individual behavior.

²⁵ The smaller and more unique the community of enforcement, the more successfully the individual can escape to the moral security of other normative orders or hide their "deviation" from surveillance and response.

considering abortion) there might be constraints or expectations (norms and sanctions associated with those specific communities) that could structure individual decision making.

B. Emotions

I also have some difficulty understanding of what is encompassed within Professor Huntington's concept of "emotion." The category seems very elastic and over-inclusive. This over-inclusiveness is evident in Professor Huntington's description of emotions²⁶ and in her analysis of the roles of emotion.²⁷ Descriptively, emotion is articulated through a series of examples, rather than a conceptual definition. As a human phenomenon, Professor Huntington asserts that "emotion" may be the *individual* disgust felt by an opponent of gay marriage toward a lesbian couple or the *collective* opinion of groups mobilized to promote child welfare.²⁸ In the first example, emotion is a feeling, but in the second it is an opinion or belief. In the former, emotion is individual, but in the latter it is collective. Describing emotion using such divergent examples makes it very difficult for the reader to deduce a cogent theory or definition.

Professor Huntington repeatedly describes emotion as "integral to family life,"²⁹ "interwoven into every aspect of our lives,"³⁰ "at the center of the [same sex marriage] debate,"³¹ "the currency that enforces parenting social norms,"³² and a "key component of reason."³³ Each of these characterizations emphasizes the *significance* of emotion without actually defining it. By virtue of its ubiquity, emotion seems not only to permeate nearly everything but to include it as well. Is it really emotion that serves as both the content of, and a compliance factor for, a norm? Are there other factors beyond emotion, such as formal legal structures, individual behavior, institutional arrangements, or material circumstances, that further affect the viability of a norm? A narrower definition of emotion would provide for a more precise analytical framework equipped to confront such questions.

²⁶ Huntington, *supra* note 1, at 1105.

²⁷ *Id.* at 1147.

²⁸ *Id.* at 1106.

²⁹ *Id.* at 1168.

³⁰ *Id.* at 1106.

³¹ *Id.* at 1124.

³² *Id.* at 1142.

³³ *Id.* at 1120.

Professor Huntington falls into a similar pattern of unduly elastic boundaries in her analysis of the roles of emotion. She presents four categories for the roles of emotion vis-à-vis social norms: “emotion as the content of a norm,” “emotion as the instigator of a norm,” “emotion as a compliance factor,” and “emotion as a complicating factor.”³⁴ By rendering emotion the content, the catalyst, the regulator, and the complicater of norms, she equates emotion with a series of different psycho-social phenomena. Does Professor Huntington really mean that emotion is all of these things? If so, what is the purpose of addressing social norms if emotion essentially eclipses them? A more precise definition of emotion would better clarify the real value of this theory to the law and the state.

III. IN SEARCH OF THE SAVANNAH

Professor Huntington has presented us with a forceful account of why understanding emotion is essential to understanding how social norms—and thus family law regulation—work. The important and ultimate purpose of this project is to facilitate the development of more creative and effective state interventions in family life. I share with Professor Huntington the ambition of imagining a more effective and responsive state when it comes to family policy. There is a need for the state, however conceived, to be more responsive to the realities of individuals and families. By engaging with the concepts of emotion and social norms, as well as interrogating the role of the state in regulation of the family through informal means, Professor Huntington has raised some intriguing avenues for further exploration.

In concluding her Article, Professor Huntington concedes that her efforts to examine the role of emotion in family law (and family norms) have not presented an exact theory that finds “a savannah between the desert of rational-choice accounts and the swamp of law-and-society accounts.”³⁵ I hope my comments will provide some small footholds or guideposts as she pushes toward further development of such a theory.

³⁴ *Id.* at 1147–48.

³⁵ *Id.* at 1150.