
Volume 59

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

2010

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Recommended Citation

Clare Huntington, *The Emotional State and Localized Norms: Reply Piece*, 59 Emory L. J. 1183 (2010).
Available at: <https://scholarlycommons.law.emory.edu/elj/vol59/iss5/5>

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THE EMOTIONAL STATE AND LOCALIZED NORMS REPLY PIECE

Clare Huntington

I am grateful to Professor Fineman for her probing and engaged response to my Article.¹ I will take this opportunity to make explicit some of the implicit assumptions of the Article that Professor Fineman identifies as worthy of elaboration.

I. DEFINING THE STATE

A. *Embracing Fragmentation*

Professor Fineman contends that I portray the state as “rather monolithic and omnipotent.”² She argues that the state is fragmented in many respects, with multiple levels of government regulating the family, different entities within even a single level of government (legislative, judicial, executive, and administrative), and varied forces, both legal and extralegal, acting in tension with one another. Additionally, she contends, instead of regarding the state as a disembodied entity, we should work to identify the individuals who constitute the state, each with their own ambitions, ideologies, biases, and personalities. Professor Fineman questions whether the reality of this fragmentation “undermines the idea that the state can be conceptualized as acting to accomplish a singular goal or objective.”³

I agree with her vision of the state. An implicit assumption throughout my Article is that it is the very absence of a monolithic state that drives resort to emotion. Indeed, the fragmentation that she describes is what interests me. If the state were a unified entity capable of making decisions without friction, there would be little need for the kind of indirect regulation I describe. A monolithic state could act rationally using a single set of variables, and state regulation would be relatively straightforward. The state would not need to change the emotional context of who can marry, exercise reproductive choice,

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

² *Id.* at 1171 (response piece by Martha Albertson Fineman).

³ *Id.* at 1174 n.6.

and so on; the state would simply make calculations and implement decisions in a linear fashion.

Instead, the state is messy. It is messy both structurally and internally, in precisely the ways that Professor Fineman describes. And it is messy emotionally, with individuals acting on, and out of, emotion. Once we understand the state in this way, we can appreciate why indirect regulation often replaces direct regulation. The proxy battles described in my Article are the result of individuals governing in a federal context, within political constraints, and against a backdrop of deep emotions. The state cannot and does not make rational choices and implement them in a linear and transparent fashion, so it resorts to second-best alternatives. Individuals cannot ban abortion, so they enact indirect laws that can garner sufficient political support (such as the infant safe haven laws described in the Article) and still influence the calculus of whether to abort a fetus.

Once we recognize the state as this kind of actor, the choices for state regulation are more constrained. If we had a monolithic state, then state regulation through the emotional valence of social norms might well recede in importance. For these reasons, Professor Fineman's point is well taken and I am glad to have the opportunity to clarify my understanding of "the state."

B. The Emotional State

In her second point about the state as an actor or agent, Professor Fineman contends that how and why the state acts "complicate[s] the idea of a single-purpose state action."⁴ I agree. But in my Article, the filter is not the state but rather the people affected by the state. It is less relevant to the focus of my Article why any given set of individuals or institutions within government chooses to act as they do. My focus is on how this action affects the people it regulates.⁵

Although she does not frame it exactly this way, I understand Professor Fineman's argument to be about the emotional motivations of state actors. As she so rightly notes, this motivation can vary widely from institution to institution and individual to individual, complicating any understanding of

⁴ *Id.*

⁵ To be sure, when I speak of state norm entrepreneurship, Professor Fineman's points are deeply relevant. The discussion in Part III.C of my Article addressing how the state harnesses social norms for certain ends is a preliminary one. When I explore these issues more fully in future scholarship, I will address the nuances Professor Fineman identifies as inherent in any state action.

emotion *within* the state. Despite this uncertainty and complexity, or perhaps because of it, it is intriguing to think about an emotional “state.” Theories of state action typically do not account for emotion. For example, the public choice model entails a much colder calculation, positing that legislators acting out of self-interest will be more responsive to the needs of interest groups at the expense of society as a whole.⁶ Public choice theory may recognize motivations such as the desire for power, but it does not come close to articulating a complete theory of the role that emotion plays in the decisions of state actors. The relatively new field of law and emotion also has not articulated a theory of the emotional state.⁷

Missing from the current legal discourse is an understanding that state actors are individuals who draw upon their own emotions. As I elaborated in the Article,⁸ emotion is interwoven into human existence, informing our judgments and experiences. Therefore, the apparatus of the seemingly neutral state is really a collection of individuals who are the very embodiment of emotion. This fascinating topic of emotions *within* the state is not, however, the focus of my Article.

II. DEFINING SOCIAL NORMS

Professor Fineman identifies two kinds of norms—hard and soft—and states that for analytic purposes she prefers to refer only to hard norms. Drawing upon the work of Richard Morris, she argues that hard norms are “more universal, specific, heavily sanctioned, or absolute.”⁹ Professor Fineman argues that I use the term social norms to mean both these hard norms and soft norms—where sanctions are sporadic, enforcement is limited, and applicability is more narrow. She understands these as constraints or expectations, not social norms. She contends that using soft norms means my analysis is less cogent because I cannot theorize about the relationship between norm and sanction—that is, I cannot say anything about the predictive power of norms.

⁶ See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 14–15 (1991).

⁷ One scholar, Terry Maroney, has begun a project of exploring the role of emotion in the judiciary. See Terry A. Maroney, *The Myth of the Dispassionate Judge* (manuscript on file with author). However, to my knowledge, there has not been a similar exploration of the role of emotion in either the executive or legislative branches.

⁸ Huntington, *supra* note 1, at 1104.

⁹ *Id.* at 1179 (response piece by Martha Albertson Fineman).

Although I agree that there is a distinction between norms and expectations, I disagree that much of what I describe in my Article falls into the category of “soft” norms. The Article defines social norms only briefly, but my definition largely follows the one set forth by Professor Richard McAdams, who explains that norms (1) differ from legal rules in that they are enforced through non-legal sanctions; (2) are obligations that individuals feel compelled to follow, as distinguished from a “tendency of behavior”; and (3) can flow in both formal and informal contexts.¹⁰

Addressing each element of Professor Fineman’s definition of a norm—universal, specific, heavily sanctioned, and absolute—I question whether these requirements are really necessary for a social norm to exist. Beginning with universality, familial social norms can be highly localized and contextual, but this lack of universality does not render them any less powerful. Of course, in a country as vast and complex as the United States, norms will differ from one community to the next, but the absence of ubiquity does not diminish the norm’s power within the relevant context. Returning to the examples I highlight in my Article, the reality that a breastfeeding imperative in Park Slope may not be present in the South Bronx does not render the imperative any less salient in Park Slope. And in light of the local nature of family life, the immediate community is often what is most relevant to the family. A woman is far more likely to be breastfeeding (or bottle feeding, to the glares of other mothers) in a local coffee shop or park in Park Slope than she is to be doing so across town. We live locally and we experience most of our familial norms locally. Of course we also are a highly mobile society, especially upper-income families; thus families often choose their community, in effect opting into a set of social norms. But this does not mean that once in that community, those norms are any less dominant. This plurality of norms is a challenge for regulation, but it does not mean that the norms are less salient because they are diverse across contexts.

Turning to specificity, even abstract norms can have a strong pull. Professor McAdams explains that norms can be effective and obligate compliance:

if those norms give substantive meaning to abstract, internalized obligations. One social role many in our society internalize is that of “parent”; many feel guilt if they believe they fail to be a “good”

¹⁰ See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350–51 (1997).

mother or father. Like most abstract norms, the vagueness of these obligations makes them easily internalized but provides little concrete behavioral guidance. Yet concrete esteem norms give many meanings to this obligation: in some communities, the consensus dictates that a “good parent” reads to his or her children, teaches them table manners, takes them to church, and provides them with a “safe environment.”

If this account is correct, then the expressive function of law can work to define further the roles that are enforced by guilt. A law obligating the use of child safety devices expresses a new consensus that the absence of such devices exposes a child to unacceptably high risks contrary to minimally acceptable parental behavior. The vagueness of the internalized obligation generally allows parents great flexibility to rationalize their behavior as consistent with their obligations. But when society announces its belief that a concrete behavior is required of parents, rationalization becomes more difficult. If one accepts that being a good parent requires something, then it is difficult to resist the (apparently) informed judgment of others about what child safety requires, at least when one is not independently knowledgeable of the precise risks involved. Thus, the law expresses a consensus and creates an esteem-based norm defining good parental behavior. For some parents, complying with the law is then necessary to avoid guilt. Even absent external, informal enforcement, the law can elicit internal enforcement.¹¹

I explored precisely this dynamic in my Article, and this is where I see the entry point for the law. Again, the abstractness of a norm does not make it inherently less salient; it simply means that other processes are necessary to give the norm content.

I similarly disagree with Professor Fineman’s contention that norms must be heavily sanctioned. To be sure, some sanction must exist for the norm to be operative, but it need not rise to the level Professor Fineman envisions, such as the excommunication from a cherished faith community.¹² Sensitivity to sanctions will vary among individuals, with one person devastated by a judgmental look and another oblivious, but so long as a sanction is felt by most people, the norm will be relevant to familial behavior. As I note in the Article,

¹¹ *Id.* at 407–08.

¹² Huntington, *supra* note 1, at 1179 n.24 (response piece by Martha Albertson Fineman).

the sanction need not be external. To the extent a person has internalized a particular norm, she will feel guilty for not complying. Guilt is the sanction.¹³

Finally, the requirement that a norm be absolute appears to be a reiteration of the earlier requirements. As Professor Fineman notes, Richard Morris defines 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.”¹⁴ These requirements do not constitute the irreducible minimum of a social norm, although I fully acknowledge that these criteria form one end of the relevant continuum.

Professor Fineman further argues that only hard norms will yield predictable behavior. I agree that the clearer the social norm, the easier it may be to shape that norm toward a desired end. But my point about emotion is that we cannot even begin to understand the predictive power of norms without an appreciation of the role of emotion. Emotion can skew norm formation and enforcement, but it does not render incoherent the calculus of input and output. I agree that in my discussion of the state I rely on an implicit understanding of the relationship between the structure of sanctions and the resulting social norms. But to insist upon a dichotomy of hard and soft norms ignores the reality that the relationship between sanctions and norms is complicated by emotions. There is a relationship, but it is simply never going to be a linear, rational calculation. There may be less emotional overlay and interplay in other contexts, but when talking about whom to marry, whether to have children, and how to parent, it is not possible to ignore the role of emotion in these intimate choices. To do so would yield a formula that does not make sense.

III. DEFINING EMOTION

Professor Fineman contends that my understanding of emotion is overly inclusive and that I fail to define emotion. Her point is well taken and, to

¹³ Returning to the subject of breastfeeding, the writer Ayelet Waldman describes an experience she had bottle feeding her infant while standing in a Berkeley bakery. A stranger turned to her, saying “you know, breast is best.” AYELET WALDMAN, *BAD MOTHER: A CHRONICLE OF MATERNAL CRIMES, MINOR CALAMITIES, AND OCCASIONAL MOMENTS OF GRACE* 58 (2009). Rather than simply telling the woman to mind her own business, Waldman launched into a long explanation about how the milk in the bottle was expressed breast milk and described all the ways she was trying to breastfeed her child, despite considerable challenges. *Id.* Guilt, both external and internal, is the dominant emotion.

¹⁴ Fineman, *supra* note **Error! Bookmark not defined.**, at 1178 (quoting Richard T. Morris, *A Typology of Norms*, 21 AM. SOC. REV. 610, 612 (1956) (internal quotation marks omitted)).

clarify my understanding of emotion, I begin by noting that emotion scholarship has yet to settle on a single definition of emotion, nor has it reached a consensus on the role of cognition in emotion.¹⁵ Antonio Damasio, a leading neuroscientist, has outlined a useful approach to these questions. Professor Damasio contends that an emotion is a “patterned collection of chemical and neural responses that is produced by the brain when it detects the presence of an emotionally competent stimulus—an object or situation, for example. The processing of the stimulus may be conscious but it need not be, as the responses are engendered automatically.”¹⁶ He further argues that “[m]ost emotional responses are directly observable either with the naked eye or with scientific probes Thus, emotions are not subjective, private, elusive or undefinable.”¹⁷ To draw upon the work of psychologist Robert Emery, emotion is no longer understood as simply an internal state, but rather as “a part of broader systems of motivation, behavior, and brain circuitry.”¹⁸ As Professor Emery explains, emotions “are the internal, motivating part of several different brain-behavior systems, for example, responding to pain, forming social attachments, grieving, and the fight or flight response.”¹⁹

Finally, Professor Fineman notes that in discussing emotion, I seem to overplay its role, making it the content, catalyst, regulator, and complicater of social norms.²⁰ My intention is not to elevate emotion to the exclusion of other relevant factors, but rather to focus my inquiry on this underappreciated and understudied factor.

* * *

I appreciate Professor Fineman’s engagement with my work. It has been helpful for my own thinking, to clarify some implicit assumptions, and to

¹⁵ See Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974, 983–84 (2001) (reviewing *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999) and describing the debate among emotion theorists about how to construct a taxonomy of emotions and how to distinguish emotions from moods and desires); see *id.* at 987–92 (describing a similar debate about the definition of cognition and how to distinguish it from emotion).

¹⁶ Antonio Damasio, *Fundamental Feelings*, 413 NATURE 781, 781 (2001).

¹⁷ *Id.* By contrast, “[f]eelings are the mental representation of the physiological changes that characterize emotions. Unlike emotions . . . feelings are indeed private, although no more subjective than any other aspect of the mind.” *Id.*

¹⁸ Robert E. Emery, *Anger Is Not Anger: Different Motivations Behind Anger and Why They Matter for Family Law*, 16 VA. J. SOC. POL’Y & L. 346, 346–47 (2009).

¹⁹ *Id.* at 347.

²⁰ Huntington, *supra* note 1, at 1181 (response piece by Martha Albertson Fineman).

elaborate on other points. As she notes, we share the ambition of imagining a more responsive state, and I look forward to traveling that path together.