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Fear: A Story in Three Parts

Rachel F. Moran*

*"[F]or the last few years I have been highly conscious that from now on I am preparing to die, and must think about it, and try to do it well. When I was young death was a romantic dream, longed for at times of great emotional stress as one longs for sleep. Who could fear it? one asked at nineteen. We fear what we cannot imagine. There is simply no way of imagining what has not yet happened nor been described. We live toward it, not knowing"*¹

May Sarton wrote these lines when she was 61, but today many men and women serving in America's armed forces are contemplating the prospect of death at an early age. They must imagine the unimaginable and find ways to cope. Army Pfc. Jesse A. Givens of Springfield, Missouri, coped by writing a letter to his family to be opened in the event of his death. In addition to his wife Melissa, he wrote to his six-year-old stepson Dakota and his son Carson (nicknamed Bean) who was born while he was stationed in Iraq. Here are excerpts from that letter:

My family,

I never thought that I would be writing a letter like this. I really don't know where to start. I've been getting bad feelings, though and, well, if you are reading this. . . .

The happiest moments in my life all deal with my little family. I will always have with me the small moments we all shared. The moments when you quit taking life so serious and smiled. The sounds of a beautiful boy's laughter or the simple nudge of a baby unborn. You will never know how complete you have made me. You saved me from loneliness and taught me how to think beyond myself. You taught me how to live and to love. You opened my eyes to a world I never dreamed existed.

* Robert D. and Leslie-Kay Raven Professor of Law, University of California School of Law (Boalt Hall). I would like to thank Jennifer K. Robbennolt and Christina E. Wells for inviting me to participate in this symposium on "Fear and Risk in Times of Democratic Crisis" at the University of Missouri-Columbia School of Law. Their efforts as well as the support provided by the law school made this an extremely memorable and worthwhile event.

1. MAY SARTON, *THE HOUSE BY THE SEA: A JOURNAL* 53 (1977) (emphasis added).

I am sorry. I did not want to have to write this letter. There is so much more I need to say, so much more I need to share. A life-time's worth. I married you for a million lifetimes. That's how long I will be with you. Please keep my babies safe. Please find it in your heart to forgive me for leaving you alone. . . . Teach our babies to live life to the fullest, tell yourself to do the same.

I will always be there with you, Melissa. I will always want you, need you and love you, in my heart, my mind and my soul. Do me a favor, after you tuck the children in. Give them hugs and kisses from me. Go outside and look at the stars and count them. Don't forget to smile.

Love Always,

Your husband,

Jess

On May 1, 2003, Pfc. Givens died at the age of 34 when his tank fell into the Euphrates after a riverbank gave way. On November 11, 2003, this letter to his family was published in the *New York Times*.²

Pfc. Givens' letter is a story about fear in three parts. The first is when only he knows about the letter, as it remains tucked away among his belongings unopened and unsent. If Givens lives, he can destroy the letter or share it with his family as he chooses. If he dies, it is a kind of emotional insurance policy, should he not have the chance to say what he felt during long distance calls in which perhaps he could not find the right words. The second is when Givens' family reads the letter after he is killed. This is a communication seemingly from beyond the grave, a way of preserving emotional connections even as relationships among husband, wife, and children are irrevocably ruptured by an untimely death. The third is when the letter is published in the *New York Times* for perfect strangers to read. Though they do not know Jesse, Melissa, Dakota, or Carson Givens, many of these readers will be moved by this letter for reasons even they themselves do not fully understand.

Here, I want to reflect on this story of fear in three parts as a way to understand emotion as part of a private experience, an interpersonal communication, and a public event. As this story will show, fear can be defined in purely cognitive terms. In fact, efforts to equate fear with information processing, that is, risk assessment, have been especially prominent in recent years. Alternatively, fear can be defined as "cognition plus." That is, cogni-

2. *The Things They Wrote*, N.Y. TIMES, Nov. 11, 2003, at A23.

tion is relevant but something more is required to understand fear fully.³ These competing approaches are in conflict only to the extent that cognitivists assert that their analysis is a comprehensive one. The cognitive approach is perhaps most appealing when fear remains an interior experience, yet even here an exclusive focus on beliefs and propositions can be challenged. As the focus shifts to interpersonal settings, doubts about a purely cognitive approach become more salient, though cognitivists continue to defend their position. In the public domain, there is a push to return to a highly abstract account of fear as pure risk assessment, but here too there are powerful calls to complicate the analysis of emotion's role in collective decision making.

I. A LETTER UNOPENED: THE MEANING OF EMOTION

If any of us were asked to explain what motivated Jesse Givens' letter, we would likely rely on his fear of death. In anticipation of being killed, Givens prepared a message that covers a range of emotional terrain, including not just fear but love, empathy, remorse, and regret. The word "emotion" is itself based on the idea of a "moving out,"⁴ and here our commonsense surmise is that fear is the prime mover, prompting Givens to engage in introspection and to put his sentiments into writing. Yet, what precisely do we mean by fear? As S.J. Rachman points out, "The word *fear* is used without difficulty in everyday language to mean the experience of apprehension, but problems arise when it is used as a scientific term."⁵ In sifting through these problems to tell the story of fear in three parts, I will not attempt to resolve how emotion should be defined in all contexts and for all purposes. Instead, I will limit myself to analyzing how competing definitions of fear might relate to the law. Here, what seems critical is that proponents of both pure cognition and cognition plus move beyond definitions of emotion that focus on biological and reflexive processes. Each school of thought allows room for conscious awareness and control, conditions that make the imposition of social values and legal judgments plausible.⁶

3. NOËL CARROLL, *THE PHILOSOPHY OF HORROR OR PARADOXES OF THE HEART* 25-27 (1990); PETER GOLDIE, *THE EMOTIONS: A PHILOSOPHICAL EXPLORATION* 18-19 (2000); DAVID PUGMIRE, *REDISCOVERING EMOTION* 7-16 (1998). In addition, there has been disagreement about whether to include action within the definition of emotion. For a sense of this debate, see ROBERT C. ROBERTS, *EMOTIONS: AN ESSAY IN AID OF MORAL PSYCHOLOGY* 157-76 (2003).

4. CARROLL, *supra* note 3, at 24; PUGMIRE, *supra* note 3, at 1-3.

5. S.J. RACHMAN, *FEAR AND COURAGE* 2 (2d ed. 1990).

6. Cass Sunstein adopts a similar approach when he treats fear as a cognitive error in analyzing its role in regulation but refuses to resolve "vigorous debates about whether an emotion is a form of thought, whether thoughts are necessary and sufficient conditions for emotions, and whether emotions in a sense precede or outrun cognition." Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1140 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)).

Debates about the role of cognition build on a general agreement that biological processes play a foundational role in emotional life. Fear is a particularly good example. Neuroscientists have identified the amygdala, a small almond-shaped mass of nerves in the brain, as the seat of fear.⁷ There are two pathways to exciting the amygdala, one via the sensory cortex and the other via the sensory thalamus.⁸ The sensory cortex relies on fairly detailed perceptions to trigger a reaction; as a result, it takes a while for information to be processed and prompt the response of fear.⁹ The sensory thalamus is a “quick and dirty reaction mechanism” that activates fear based on only a crude perception of danger.¹⁰ This potentially lifesaving system enables you to be frightened of a snake before fully realizing that it is a snake.¹¹ Once you fear the snake, you are apt to react by jumping away, the product of complex interactions between the amygdala and the corticostriatal motor system that remain something of a mystery in the neuroscientific world.¹²

The instinct to jump away may be an automatic response, one that does not depend on a deliberative decision.¹³ Indeed, according to leading neuroscientists, implicit emotional memory operates without conscious awareness and is critical in the learning process that leads to conditioned fear.¹⁴ Yet, explicit memories of emotional experiences also play a significant role in shaping our emotional lives. These memories are a product of “the co-representation in awareness of the conscious memory [of an event] and the current emotional arousal [due to implicit memory that] give an emotional flavoring to the conscious memory.”¹⁵ This conscious awareness makes it

7. JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 157-59 (1996) [hereinafter LEDOUX, *THE EMOTIONAL BRAIN*]; Joseph LeDoux, *Fear and the Brain: Where Have We Been, and Where Are We Going?*, 44 *BIOLOGICAL PSYCHIATRY* 1229, 1229-32 (1998) [hereinafter LeDoux, *Fear and the Brain*].

8. LEDOUX, *THE EMOTIONAL BRAIN*, *supra* note 7, at 163-65.

9. *Id.*

10. Joseph LeDoux, *Emotion, Memory and the Brain*, *SCI. AM.*, June 1994, at 50, 55-56.

11. LEDOUX, *THE EMOTIONAL BRAIN*, *supra* note 7, at 161-65; LeDoux, *supra* note 10, at 52-54.

12. LEDOUX, *THE EMOTIONAL BRAIN*, *supra* note 7, at 174-76; LeDoux, *Fear and the Brain*, *supra* note 7, at 1234.

13. LEDOUX, *THE EMOTIONAL BRAIN*, *supra* note 7, at 175-76. Debate persists about whether emotional automaticity is a genuine phenomenon. This debate need not be resolved to undertake an analysis of the relevance of fear to the law. Because law is concerned with emotions that involve at least some elements of cognitive awareness, the rare instance of an automatic response is not particularly germane to the discussion.

14. *Id.* at 181-82, 196-97; see also Daniel L. Schacter & Peter Graf, *Effects of Elaborative Processing on Implicit and Explicit Memory for New Associations*, 12 *J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION* 432, 442-43 (1986).

15. LEDOUX, *THE EMOTIONAL BRAIN*, *supra* note 7, at 201.

possible to supplement emotional automaticity, that is, unconscious reactions, with emotional plans, which are a product of thought and deliberation.¹⁶ As Joseph LeDoux explains:

Emotional plans are a wonderful addition to emotional automaticity. They allow us to be emotional actors, rather than just reactors. But the capacity to make this switch has a price. Once you start thinking, not only do you try to figure the best thing to do in the face of several possible next moves that a predator (including a social predator) is likely to make, you also think about what will happen if the plan fails. Bigger brains allow bigger plans, but for these you pay in the currency of anxiety¹⁷

It is clear from Givens' letter that he acted thoughtfully and deliberately as an emotional actor, not simply as a reactor to an immediate threat. It is also plain that he paid the price that LeDoux describes, as he contemplated dangers yet to be encountered and harms yet to be realized. For, by moving beyond the realm of the implicit and unconscious, Givens clearly relied on cognition, including the power of imagination, to grasp the possibility of his own death.

Sentiments rooted in conscious thought implicate legal concerns because individuals can be held accountable for the emotional plans that they make. In evaluating these complex emotional experiences, some theorists focus exclusively on cognition. For example, in analyzing the impact of popular anxieties on the regulatory process, Cass R. Sunstein concludes that fear results from laypeople's reliance on cognitive heuristics, mental shortcuts that lead to distorted risk estimates.¹⁸ Although people may rationally choose to use rules of thumb to save time and resources, their inaccurate perceptions lead to misguided decision making.¹⁹ Based on Sunstein's account, fear becomes nothing more than "a fertile field for cognitive mistakes."²⁰

Consider the case of Givens' letter. To conclude that Givens was motivated by fear, Sunstein must find that the soldier misperceived the danger of death. The fact that Givens actually died after writing the letter is no guarantee that he properly apprehended the risk beforehand. For instance, Sunstein might worry that Givens was influenced by "'the social amplification of risk,'"²¹ that is, the tendency of people with little independent knowledge to rely heavily on others' beliefs. These beliefs can be especially powerful when they are aided by "reputational cascades" that lead individuals to agree lest

16. *Id.* at 201, 203.

17. *Id.* at 177.

18. Sunstein, *supra* note 6, at 1127-28.

19. *Id.* at 1123-24.

20. Rachel F. Moran, *Fear Unbound: A Reply to Professor Sunstein*, 42 WASHBURN L.J. 1, 4 (2002).

21. Sunstein, *supra* note 6, at 1130 (quoting PAUL SLOVIC, PERCEPTION OF RISK 232-45 (2000)).

they be labeled out of touch or unreasonable.²² In fact, psychologists have documented fear by contagion on the battlefield. That is, “[f]rightened people, especially leaders, can trigger widespread fear.”²³ So, it is quite possible, though by no means certain, that Givens’ fears were exaggerated. Yet, if Givens correctly assessed the risk of being killed, Sunstein is unable to say that Givens was afraid despite a letter stating that he had been “getting bad feelings.” Such a conclusion seems to be at odds with Givens’ interior experience, at least as expressed in the message to his family. This is an anomaly rooted in the equation of fear with mistaken beliefs. As Eric Posner notes, this approach is dubious precisely because fear rooted in heuristics and “cascades would occur even in a hypothetical world in which people had no emotions.”²⁴

To address the limitations of this type of approach, Robert C. Roberts defines an emotion as predicated on not only a proposition but also a concern-based construal of its significance. While the propositional element remains cognitive, the construal is not. As Roberts explains, “Construals have an immediacy reminiscent of sense perception. They are impressions, ways things appear to the subject; they are experiences and not just judgments or thoughts or beliefs.”²⁵ The construals can be voluntary or involuntary, conscious or unconscious, but they are always subjective and involve grasping one thing in terms of something else.²⁶ Roberts therefore refers to a construal as “seeing-as” because it is “an ‘in-terms-of’ experience based in a concern.”²⁷

Applying this framework, Roberts defines fear as “*X presents an aversive possibility of a significant degree of probability; may X or its aversive consequences be avoided.*”²⁸ Roberts’ definition begins with the proposition that an aversive event is possible. The presence of fear does not turn on the accuracy of the statistical estimation. Nor is it necessary that the object of fear be dangerous; instead, it can simply be undesirable. So, Roberts chooses the word “aversive” rather than “harmful.” Finally, the propositional element requires that the aversive condition be significantly and not just remotely possible.²⁹ The proposition that an aversive event is possible triggers a concern-based construal. This concern is “a desire to avoid the thing feared or a desire to avoid the consequences that figure in the subject’s reasons for his fear.”³⁰ This wish to avoid the feared object “sometimes, but not always, [will lead to] a desire to act so as to avoid either the object or its consequences.”³¹

22. *Id.* at 1133-34.

23. RACHMAN, *supra* note 5, at 62.

24. Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 2002 (2001).

25. ROBERTS, *supra* note 3, at 75.

26. *Id.* at 76.

27. *Id.* at 68, 73.

28. *Id.* at 195.

29. *Id.* at 193-94.

30. *Id.* at 195.

31. *Id.*

This framework can be readily applied to Givens' letter. When he describes "getting bad feelings," he believes that there is a substantial possibility that he will lose his life in Iraq. He wants to avoid not only the danger of his death but its aversive consequences for his family. This leads to a desire to act, and though he ultimately is not able to avoid being killed, he writes a letter that mitigates at least some of the hardships for his wife and children.

Both Sunstein's cognitivist view and Roberts' effort to go beyond pure cognition offer ways to understand Givens' fear. Still, whatever the approach, law may seem to have little relevance to this emotional experience. As Givens writes the letter and tucks it away among his belongings, he appears to inhabit a purely private epistemological universe. Yet, nothing could be further from the truth. Even when Givens is not sure whether anyone else will read his words, his emotional plan is the product of social experiences, and law is implicated in the cognitive universe that defines his fear. As I have explained elsewhere:

[F]eelings are learned reactions, not just biological states of arousal. Emotional sensations like fear result from socialization that links physiological responses to acceptable cognitive understandings and courses of action. Through this process, emotions become not simply individual conditions but products of collective normative judgments. After all, there are relatively few states of arousal, but there are many ways of labeling them as fear, love, anger, joy, envy, sympathy, or hate. Far from being captives of a "felt perturbation," people are active participants in "the ordering, selecting, and interpreting work upon which . . . acts of management of fragments of life depend." Emotional scripts educate individuals about what they feel, when they act, and when they restrain themselves. These scripts in turn reflect a sociopolitical economy of emotion that assigns people a place in the status hierarchy by directing them to adopt the emotional deference of subordinates or to enjoy the privilege of expressing their feelings freely.³²

Returning to Givens' letter, it seems likely that he is constrained by battlefield etiquette from expressing his fear freely. S.J. Rachman has noted that "[a]dmissions of fear are discouraged in wartime,"³³ and it is undoubtedly no accident that Givens confides his fear in a letter that no one may ever read. Even then, he describes this emotion only briefly at the beginning as a "bad feeling" before moving on to more socially acceptable expressions of love and concern for his family. The need to hide his fear marks Givens as an emotional subordinate, someone who must manage his emotions for the benefit of others. These others presumably include not just the family he is seek-

32. Moran, *supra* note 20, at 11-12 (footnotes omitted).

33. RACHMAN, *supra* note 5, at 2.

ing to protect but also his fellow soldiers who are spared his anxiety when it is expressed privately in a letter. Givens has followed the emotional script of the “good soldier” who stoically faces danger largely without complaint. Though law does not directly regulate his thoughts, emotions, or expression in the letter, it indirectly shapes what he is capable of imagining, feeling, and saying. He defines his emotional connections through the legal institution of marriage and family, and he feels regret because he must do his legal duty as an enlisted man and therefore write a letter that he “did not want to have to write.” Even in what seems like a purely interior moment, Givens’ emotions are shaped by social, political, and cultural assumptions. These assumptions in turn are reflected in and reinforced by the law.

II. A LETTER OPENED: THE INTERPERSONAL SIGNIFICANCE OF EMOTION

After Pfc. Jesse Givens died, his letter was delivered to his grieving family. When his wife read the message and shared it with their children, the significance of his expression of sentiment changed. No longer was Givens writing just to satisfy himself that he had an emotional insurance plan in the event of his death. Instead, that event had materialized, and his fear and longing were communicated to his loved ones. Emotion had moved from the realm of a primarily private experience to the sphere of intimate relationships.

In small-scale, interpersonal settings, the debate over emotion takes on a somewhat different character. Here, social psychology emerges as a significant source of insight, for sentiment plays a role not just in structuring an individual’s subjective understanding of the world but in shaping the texture of relationships that signal status, power, and social distance, among other things.³⁴ People experience emotions in groups in ways that they would not were they alone. As mentioned previously, studies of soldiers in combat show that they often demonstrate their solidarity and sense of shared fate by suppressing expressions of fear. Moreover, a soldier’s subjective experience of fear can be altered by the behavior of others, particularly leaders, as they cope with physical danger.³⁵ Just as fear by contagion can operate, “[t]here is consistent evidence that membership in a small, cohesive group can play an important part in controlling fear” and “most people appear to be more susceptible to fear when they are alone.”³⁶ On the battlefield, even experienced com-

34. CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE 226-51 (1997); Theodore D. Kemper, *Predicting Emotions from Social Relations*, 54 SOC. PSYCHOL. Q. 330, 333-34 (1991); Rachel F. Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 749 (2001).

35. See *supra* notes 23 and 33 and accompanying text.

36. RACHMAN, *supra* note 5, at 59.

bat veterans perform worse and surrender more readily when they are isolated than when they are part of a team.³⁷

As noted earlier, some cognitive theorists explain these group effects by arguing that other people provide cues about danger. The result is the social amplification of risk as informational and reputational cascades generate widely shared perceptions of a hazard.³⁸ Yet, soldiers themselves offer a somewhat different account, one that depends heavily on shared social norms and obligations in a sociopolitical economy of emotion. A World War I veteran, describing how he became confused and panicked when he found himself alone and wounded, reflected:

I suppose that courage is mainly, if not wholly, the result of vanity or pride. When one is in action—especially when one is responsible for men under one's command—proper behaviour, even acts of gallantry, are part of the show. One moves and behaves almost automatically as a member of a team or an actor on the stage. But now it was all over; I was alone and nobody could see me. There was no need to keep up appearances, and I was very frightened.³⁹

Social psychologists readily acknowledge that cognitive factors play a significant role in explaining fear.⁴⁰ Yet, their views depart from those of information processing theorists. When rational risk assessment is the ideal, heuristics are merely a concession to the complexity of everyday life and the need for mental shortcuts. Because the information processing approach equates fear with distorted risk perceptions, this emotion becomes nothing but lapsed thinking.⁴¹ Once emotion moves from the realm of information processing to interpersonal relations, however, a narrowly individualistic, rational approach can be criticized precisely because it fails to account for reciprocal obligations and shared responsibilities. In his battlefield story, the World War I veteran describes his sense of duty to his fellow soldiers, a duty that requires him to perform “acts of gallantry.” Givens, in his letter to his wife and children, feels compelled to advise them of his “bad feelings” and send a letter posthumously because he has assumed a special responsibility to them through marriage and parenthood. As a result, he actually feels that he must apologize for his own death: “I am sorry. I did not want to have to write this letter.” He even goes on to beg his wife’s forgiveness: “Please find it in your heart to forgive me for leaving you alone. . . .” These feelings surely reflect a

37. *Id.*

38. *See supra* notes 21-22 and accompanying text.

39. HAROLD MACMILLAN, *WINDS OF CHANGE 1914-1939*, at 89-90 (1966). *See also* WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE 180-81* (2000) (describing examples of courage and cowardice on the battlefield and the group dynamics that sometimes play a role).

40. *See, e.g.*, RACHMAN, *supra* note 5, at 321-22.

41. *See supra* notes 19-20 and accompanying text.

sense of obligation that has little to do with an unadorned rational processing of information. Indeed, Givens' expression of remorse might well seem irrational, for he seems to have had little control over his fate.

Even so, Givens' mixed feelings of fear, love, and remorse probably do not strike most readers as surprising or strange. The widespread understanding of his letter suggests that in interpersonal settings, people do not judge emotions like fear by applying the metric of rationality, here defined as accurate risk assessment. These small social circles make the emphasis on strict rationality in estimating physical risk seem especially inapt. Instead, people evaluate the propriety of a particular sentiment based on the social and cultural context in which it is expressed.⁴² The shift from the interior to the interpersonal domain creates new challenges. People must move beyond their own emotional experience to make sense of the sentiments of others. Rationality alone will not suffice to make these intersubjective judgments. David Pugmire argues that individuals must rely not just on strict propositional logic but on metaphorical thinking to bridge this experiential divide.⁴³ As he explains, "[m]etaphors for feelings contrive to be expressive without being confessional. Metaphors can give voice to feelings without trying to describe them as private objects. For, the *objects* alluded to are neither undisclosable nor situated in some private space."⁴⁴ As a result, metaphors are judged not for their truth but for their aptness.⁴⁵

The work of philosopher Peter Goldie is particularly instructive in evaluating the aptness of sentiment.⁴⁶ He takes to task "propositional emotions," which reduce sentiments to beliefs and attitudes that can be analyzed in rational or syllogistic fashion.⁴⁷ In Goldie's view, such narrowly cognitive accounts are doubtful because the constitutive beliefs and attitudes can be held with or without emotion.⁴⁸ According to Goldie, "[m]uch philosophical work on the emotions tends to over-intellectualize emotional thought, feeling, and action, seeking to force them into the mould of a rationalizing explanation when often the best one can hope for is an explanation which makes them intelligible."⁴⁹ In this, he is in basic agreement with Gabriele Taylor, who observes that explanations for emotional states need not be constrained

42. See CLARK, *supra* note 34, at 229-36 (describing the role of "microhierarchies" and "micropolitics" in the expression and management of emotion in and among families, friends, and co-workers).

43. PUGMIRE, *supra* note 3, at 97-103.

44. *Id.* at 97.

45. *Id.* at 101-02.

46. GOLDIE, *supra* note 3, at 48-49.

47. *Id.* at 38. In using the term "propositional emotion," Goldie draws on the work of Donald Davidson, *Hume's Cognitive Theory of Pride*, reprinted in DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 277-90 (1980).

48. GOLDIE, *supra* note 3, at 39. A similar point has been made by Eric Posner in critiquing Sunstein's approach to fear. See *supra* note 24 and accompanying text.

49. GOLDIE, *supra* note 3, at 3.

by a normative rationality. Rather, “[t]he appeal is no longer to the wholly rational being; it is to the admittedly far less neat and precise notion of what it would be human and natural for a person to feel under certain circumstances, given that person’s relevant other beliefs and attitudes.”⁵⁰ In addition to the intelligibility of an emotion, Goldie identifies considerations of appropriateness and proportionality that “have ethical dimensions which go beyond mere questions of rationality, and which allow for considerable cultural variation through the education of the emotions.”⁵¹ In his view, people learn the appropriate and proportionate responses to a perceived state of affairs through their upbringing, as they witness the reactions of others. Someone who is badly brought up can respond inappropriately by “recogniz[ing] situations as emotion-invoking but . . . respond[ing] in quite a different sort of way to how the rest of us are brought up.”⁵² Alternatively, “someone can be brought up badly in another way: to respond in the same sort of way as the rest of us, that is with the same sort of emotion, but disproportionately.”⁵³

To apply this framework in evaluating the emotions of others, an observer must “piece together or fill in the gaps in the person’s narrative by bringing to light the episodes of the emotion in a way which will make the best sense of this part of his life.”⁵⁴ Although the rationality and logic at the core of propositional emotion are impersonal, Goldie treats emotion as normative and personal. To penetrate another’s point of view, acts of imagination as well as reason are required. Two of the most important forms of imagination involve: (1) putting one’s self in another’s shoes; and (2) envisioning what another’s experience is like in those circumstances. These two approaches differ in a significant respect. The first allows the individual to project his or her own personal characteristics into the scenario that triggered another’s emotion. The second demands that the individual adopt as closely as possible the characteristics of the other in evaluating the emotional response.⁵⁵ When asked what they would do in the same situation, people need a comprehensive description of the event that triggered the emotion. Yet, when people must imagine what another would do in that situation, they have to know not only about the event but also about the other’s personal history, character, and disposition.⁵⁶ The two approaches can yield quite different results when “characterization *goes deep*, as [Goldie] put[s] it: this is where a person’s characterization substantially affects his way of thinking, reasoning, and feeling.”⁵⁷

50. GABRIELE TAYLOR, *PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT* 14 (1985).

51. GOLDIE, *supra* note 3, at 3.

52. *Id.* at 34.

53. *Id.* at 35.

54. *Id.* at 177.

55. *Id.* at 178-79.

56. *Id.* at 197-99.

57. *Id.* at 179.

To understand the difference, consider the following experiment by Daniel Kahneman and Amos Tversky.⁵⁸ The subjects are asked which of two people is more upset, Mr. Crane or Mr. Tees.⁵⁹ All that they know about the two men is that they arrived at the airport thirty minutes after the scheduled departure time for their flight.⁶⁰ Mr. Crane learned that his flight left on time, while Mr. Tees discovered that his flight was late and he missed it by only five minutes.⁶¹ Ninety-six percent of the subjects indicate that Mr. Tees is more upset than Mr. Crane.⁶² In reaching this conclusion, the subjects know nothing about Mr. Crane's or Mr. Tees' personal characteristics except that they are men who fly on planes.⁶³ So, the conclusion that Mr. Tees is more upset than Mr. Crane depends almost entirely on the description of the contemporaneous event.⁶⁴ As a result, the subjects must imagine themselves in Mr. Crane's and Mr. Tees' positions, rather than trying to envision the characteristics of the fictional travelers and how they would experience missing their flights.⁶⁵

The shift to an interpersonal setting raises new questions about the relationship between law and emotion. In interpersonal settings, Goldie argues that emotions must be evaluated in holistic, not merely rational or syllogistic form. Moreover, he suggests that both reason and imagination have a place in understanding another's emotions. Does this framework have any application to legal proceedings or does it venture too far afield from strict rationality to be relevant? In fact, the common law already makes allowances for a reasonable fear that is not necessarily rational. Juries apply this principle of reasonableness when relationships go sour by looking at whether a fear was intelligible, appropriate, and proportional under the circumstances. Under a definition that equates fear with a distorted perception of risk, rational fear is an oxymoron; yet, reasonable fear is a wholly comprehensible concept under the common law.

Take, for example, "the battered woman's defense," which allows battered women who kill an abusive partner to present evidence on a history of domestic violence. Nearly all states now recognize the defense, but its application differs depending on the jurisdiction.⁶⁶ In some places, the defense can absolve a woman of guilt, while in others it diminishes responsibility and

58. Daniel Kahneman & Amos Tversky, *The Simulation Heuristic*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 201 (Daniel Kahneman et al. eds., 1982).

59. *Id.* at 203.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. GOLDIE, *supra* note 3, at 200-01.

66. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 977-78 (1999).

leads to a reduced sentence.⁶⁷ Some states allow a jury to weigh the evidence of battering without expert testimony, while others require such testimony to establish the defense.⁶⁸ Most controversial is the decision by some jurisdictions to permit a woman to raise the defense even when she kills her husband or boyfriend in his sleep.⁶⁹

These jurisdictional differences reflect distinct views about how fear should be defined when it is presented as a legal defense to murder. In some states, a reasonable fear must be rational to be relevant.⁷⁰ Under this view, the history of abuse helps the jury to assess the accuracy of a woman's perception of risk.⁷¹ Battered women have a more sophisticated understanding of the danger than someone who has not experienced abuse because "local knowledge" specific to these relationships alerts them to hazards that others might fail to perceive.⁷² The history of abuse is not offered to enable the jury to understand the battered woman's subjective emotional state. Rather, information about past battering improves the jury's capacity to decide whether the perception that the abuser posed a threat was accurate, that is, rational.⁷³ Here, an information processing approach suffices to define the parameters of the battered woman's defense.

In other jurisdictions, a reasonable fear need not be rational.⁷⁴ The defense can be used even when the perception that the abuser poses a risk of imminent harm is faulty.⁷⁵ Expert testimony on the psychopathology of battered woman's syndrome is admitted to show how repeated episodes of violence lead to "learned helplessness" and diminished self-esteem.⁷⁶ As a result, victims feel like captives of the abuse with no way to escape. The killing occurs when the woman is pushed beyond her endurance, loses it, and reacts to

67. See Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 377-83 (1998); Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 492-94 (1996).

68. David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 81-91 (1997); Holly Maguigan, *Battered Women and Self-defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 386, 425-31 (1991).

69. Kadish, *supra* note 66, at 978; Maguigan, *supra* note 68, at 468 n.7.

70. See, e.g., Arthur Ripstein, *Self-defense and Equal Protection*, 57 U. PITT. L. REV. 685, 688-94 (1996).

71. *Id.* at 701-02.

72. Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798, 812-14 (1991); Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L.J. 1039, 1061-63 (1998).

73. Moran, *supra* note 20, at 17-18.

74. See, e.g., Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 997 (1995).

75. *Id.* at 1006-07 (describing successful use of defense in these circumstances but also noting failures in jurisdictions that require an objectively reasonable fear of imminent danger).

76. *Id.* at 997-99.

a life that seems increasingly out of control.⁷⁷ Precisely because the battered woman has reached her limits, she can snap even when she is watching her abuser sleep.⁷⁸

This version of the defense does not ask the jury to assess the rationality of the battered woman's thought processes. Instead, jurors are expected to adopt her psychological perspective, given the history of abuse. They must imagine what emotion the battered woman was experiencing given her background, character, and disposition as well as the specifics of the situation that faced her at the moment she killed her abuser. Having done so, the jurors then have to make a normative and personal evaluation of her emotional response: Was it intelligible, appropriate, and proportional, always allowing for the vantage point of the particular battered woman? If this is the task at hand and most jurors have not themselves been victims of domestic violence, the problems of identifying emotionally with the woman on trial can seem enormous. For this reason, expert testimony becomes essential, a way to bridge the emotional distance, when the characterization goes deep.⁷⁹

All of this suggests that emotions have special significance in interpersonal settings, meanings that cannot be captured through a cognitive account that turns solely on information processing. To the extent that the law recognizes these normative complications, it does so largely in the context of disputes among a small number of parties. The court's role is reactive, to do justice after an alleged wrong has taken place. The common law penalizes departures from the social and cultural norms that govern relationships among family, friends, and strangers. Emotions become relevant as a barometer of the quality of these connections. By forcing jurors to put themselves in another's position, the court can place the dispute in the context of the ongoing relations that triggered an act of intimate violence. By mitigating or excusing misconduct, the law reinforces obligations of mutuality and reciprocity. So, the reasonable fear of a battered woman serves as the legal means to recognize betrayal and violation so severe as to abrogate an ethic of care and respect. Emotion offers the language in which outrage is expressed and moral judgment enforced.

77. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 128-30 (1987).

78. Beth Bjerregaard & Anita Neuberger Blowers, *The Appropriateness of the Frye Test in Determining the Admissibility of the Battered Woman Syndrome in the Courtroom*, 35 U. LOUISVILLE J. FAM. L. 1, 4-5 (1996-97).

79. Of course, the stature of psychological experts can be diminished by battles over the authenticity of portraits of a battered woman's subjective experience. Moreover, insofar as these experts are called in to rehabilitate a defendant who is already perceived as morally defective, psychologists may find themselves tainted by association with the weak, unfit, and misbegotten. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 30-31 (1963). Goldie's account of the emotions helps to shed new light on the role of psychiatric evidence as not simply an empirical concession to the damaged but a normative imperative of emotional life. GOLDIE, *supra* note 3, at 174-75.

III: A LETTER PUBLISHED: EMOTION AND THE PUBLIC MOOD

When Pfc. Givens' letter was published in the *New York Times*, an entirely new audience had the opportunity to reflect on his complex expression of fear, regret, remorse, and love. Unlike his family, these readers were strangers, but even so, many of them undoubtedly were moved by his letter as I was. In evaluating this emotional response, it is tempting to focus on whether it facilitates rational public choice.⁸⁰ Because deliberations about issues like the war in Iraq take place in large, impersonal settings, the nuanced emotional obligations of close interpersonal relationships seem irrelevant. Given the social distance among citizens who share a nationality but are otherwise quite diverse,⁸¹ the logic of all-against-all in the relentless pursuit of self-interest takes on an air of inevitability. Yet, as I will argue, there is a place for emotion as more than a mere informational heuristic even in the public realm.

For information processing theorists, the responses to Givens' letter serve as a quick fix on a complicated issue, a way to set the public mood when few have time to study the Iraqi conflict in depth. Political psychologists "define [the] public mood as a diffuse affective state, having distinct positive and negative components, that citizens experience because of their membership in a particular political community."⁸² Shaped by public events, this mood is a "social emotion" because it arises through group attachment rather than a more individualized experience.⁸³ Even so, the public mood is experienced by individuals in varying degrees, not by some amorphous entity called "the public."⁸⁴ So, the public mood is the product of an interior experience that in turn is mediated by affiliations to far-flung groups, like fellow citizens in the nation-state. In contrast to small and cohesive social groups,

80. See AMARTYA SEN, *RATIONALITY AND FREEDOM* 26-29 (2002) (describing application of rational choice theory to politics).

81. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 7 (rev. ed. 1992) (describing how sovereignty is built on an imagined community that conceives of the nation as a "horizontal comradeship" despite "actual inequality and exploitation"; this sense of fraternity is so powerful that it prompts "millions of people . . . willingly to die for such limited imaginings").

82. Wendy M. Rahn et al., *A Framework for the Study of Public Mood*, 17 *POL. PSYCHOL.* 29, 31-32 (1996).

83. Eliot R. Smith, *Social Identity and Social Emotions: Toward New Conceptualizations of Prejudice*, in *AFFECT, COGNITION, AND STEREOTYPING: INTERACTIVE PROCESSES IN GROUP PERCEPTION* 297, 304 (Diane M. Mackie & David L. Hamilton eds., 1993).

84. Wendy M. Rahn, *Affect as Information: The Role of Public Mood in Political Reasoning*, in *ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY* 130, 133 (Arthur Lupia et al. eds., 2000).

these identifications can be formal and abstract. However, when the salience of national identity is heightened by events like terrorism at home and war abroad, public mood can significantly influence private sentiment by heightening a sense of anxiety and distress.⁸⁵

From the standpoint of information processing, public mood is a low-cost way for those with limited knowledge to make choices about complex political issues. In a study of the North American Free Trade Agreement (NAFTA), Wendy M. Rahn found that “despite being the focus of many public debates, [NAFTA] had low salience to the mass public.”⁸⁶ When she analyzed opinions about NAFTA, she found that public mood had a tremendous impact when compared to other factors such as partisanship and ideology, general knowledge, self interest, and reference groups.⁸⁷ Moreover, the impact was greater for those who knew relatively little about NAFTA and was “much smaller for those people who had heard a lot about NAFTA.”⁸⁸ Rahn concludes that:

Public mood . . . seems to have a greater impact on policy preferences at the lower end of the information range. For those less knowledgeable, this general-purpose consideration may be the only one operative. For those more informed, affective information is just one source of many, and it only starts to lose its utility at the very highest range of information, when partisan and other predispositions come to dominate.⁸⁹

In short, public mood need not mean that individuals ignore other information; rather, it is a handy way to make political judgments “when other information may be lacking or when the judgment is inherently a difficult and complex one.”⁹⁰

That said, one might wonder whether *New York Times* readers are typically among the better informed, so that they are unlikely to rely on the public mood in making judgments about the war in Iraq.⁹¹ Even if this is true, this audience may be particularly influential in setting the public mood for others, precisely because the readership includes members who are widely perceived as knowledgeable and sophisticated. As Sunstein would put it, these are indi-

85. *Id.* at 132.

86. *Id.* at 136.

87. *Id.* at 136-38.

88. *Id.* at 138.

89. *Id.*

90. *Id.* at 150.

91. Indeed, a study of New Haven residents during the 1980s found that *New York Times* readers were better informed about the Middle East than others in the sample. Shanto Iyengar, *Shortcuts to Political Knowledge: The Role of Selective Attention and Accessibility*, in INFORMATION AND DEMOCRATIC PROCESSES 160, 164-65 (John A. Ferejohn & James H. Kuklinski eds., 1990).

viduals who can strongly influence the flow of information because of reputational cascades.⁹² Moreover, publication of material like Givens' letter is not the only way that the public mood is set. The mass media can shape public sentiment through powerful visual representations of terror and war.⁹³ Today, television is the dominant source of political news in the United States,⁹⁴ and this coverage tends to provide a small amount of content accompanied by highly evocative images. Indeed, this approach is shaped by market forces, which require media outlets to dramatize the news in order to distinguish themselves in the flood of information available. Or as Barry Glassner puts it, "Television news programs survive on scares."⁹⁵ Moreover, politicians are aware of the power of emotional messages in shaping the public mood.⁹⁶ Looking back on the Persian Gulf War, Glassner contends that government officials drummed up support for the conflict by relying on false or exaggerated horror stories.⁹⁷ Or, as Arthur Rowse, a former editor for *U.S. News and World Report*, observed, publicists readily recognized that Americans "would be more likely to fight because of atrocity stories than because one feudal fiefdom was invaded by another."⁹⁸

All of these accounts of fear suggest that it is an inadequate and easily manipulated emotion that undercuts sound public choice rooted in rational

92. See *supra* note 22 and accompanying text.

93. Consider, for example, the controversy over a Nightline program entitled *The Fallen* in which newscaster Ted Koppel read the names of all American casualties in Iraq as photographs of the deceased appeared on the screen. One broadcasting group refused to run the show, concluding that it was an "attempt to disguise political speech as news content" and had "no journalistic value." Tim Rutten, *Regarding Media: A Real Threat to Expression?*, L.A. TIMES, May 8, 2004, at E1. In response, John MacArthur, author of *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR* (1992), insisted that "Americans have a right to know what's being done in their name. And one consequence of war is corpses. Unless you're showing corpses, you're not showing the consequences of war. Americans can't make informed decision about what to do in Iraq by censoring the reality of Iraq. It's irrational." Eric Boehlert, *Reality Check* (May 6, 2004), available at <http://www.salon.com/news/feature/2004/05/06/images/index4.html>.

94. Press Release, Pew Research Center for the People & the Press, *Perceptions of Partisan Bias Seen as Growing—Especially by Democrats; Cable and Internet Loom Large in Fragmented Political News Universe* (Jan. 11, 2003), available at http://www.pewtrusts.com/pdf/pew_research_internet_voters_011404.pdf.

95. BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* xxi (1999).

96. Victor C. Ottati & Robert S. Wyer, Jr., *Affect and Political Judgment*, in *EXPLORATIONS IN POLITICAL PSYCHOLOGY* 296, 311 (Shanto Iyengar & William J. McGuire eds., 1993) (describing how candidates rely on "feel good" political campaigning to manipulate the public mood and capitalize on voters' tendencies to use mood as information).

97. GLASSNER, *supra* note 95, at 154-57.

98. Arthur E. Rowse, *Lapdogs for the Pentagon*, *PROGRESSIVE*, JULY 1992, at 38.

discourse. By confining the role of fear to a rough proxy for complex information, emotion once again assumes the diminished status of deficient thinking. Accordingly, scholars like Sunstein insist that experts should dominate official deliberations because they can overcome popular error through the application of scientific method.⁹⁹ Under an information processing model, it seems difficult to rehabilitate emotion in public life. To do so, one must argue that feeling generates information in its own right, information that can be quite valuable to the decision making process. For example, sentiment may be a barometer of the intensity of preferences. It is true that an individual could simply assert "I strongly favor X" or "I weakly favor X" to communicate this information. Still, as political talk shows on television make plain, shouting appears to be a relatively commonplace way of expressing the intensity of beliefs, and this shouting has emotional overtones.¹⁰⁰ Similarly, many activists reveal the strength of their commitment through emotional displays at rallies and protests.¹⁰¹

This defense of emotion in the public realm is a weak one. First, while emotion can suggest the intensity of preference, it may not be a reliable guide. People with equivalent degrees of commitment can have distinct emotional styles, so that a stoic's small display of sentiment is highly noteworthy and the histrionic's demonstrative behavior means very little.¹⁰² Moreover, emotion can be faked for strategic reasons, including personal gain.¹⁰³ So, individuals can affect an intensity they do not feel in order to extract a surplus from the political process. Interestingly, there is some evidence that indifference is quite difficult to fake successfully.¹⁰⁴ If true, this asymmetry could make relying on emotion to gauge intensity of preference particularly treacherous. After all, there would be accurate information about those who were largely indifferent, while there might be highly misleading information about the distribution of strongly favorable and unfavorable positions.

99. Sunstein, *supra* note 6, at 1166.

100. Abraham Genauer, *Shouting with a Sense of Humor*, THE HILL, July 23, 2003, at 38; Matt Kempner, 'Crossfire' Reloading the Ammo; *New Shouters: Pioneer Interrogation Show Changing Left-Wing Hosts, Format After Ratings Slide*, ATLANTA J.-CONST., Feb. 27, 2002, at 1D.

101. See Francesca Polletta, *The Laws of Passion*, 35 LAW & SOC'Y REV. 467, 482-87 (2001) (book review).

102. AARON BEN-ZE'EV, THE SUBTLETY OF EMOTIONS 153-54 (2000) (noting that differences in emotionality can reflect differences in both emotional intensity and emotional expressivity). See also GOLDIE, *supra* note 3, at 99 ("[L]ack of universality in humans' actual emotional behaviour or in their mature emotional capabilities (just like lack of universality in language capabilities of mature individuals) is an unsurprising consequence of diversity in the culture and environment in which a child can be placed . . .").

103. BEN-ZE'EV, *supra* note 102, at 182-83.

104. JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 71 (1983).

To defend the role of emotion in the public realm, scholars have moved beyond rationality and information processing to introduce other normative values. For example, Paul Slovic justifies giving some weight to popular fears by invoking a “rival rationality.”¹⁰⁵ According to Slovic, agencies look only at the number of lives at stake, but the general public worries about whether the risk is dreaded, potentially catastrophic, inequitably distributed, involuntary, uncontrollable, new, and faced by future generations.¹⁰⁶ As the term “rival rationality” suggests, this normative alternative does not do away with rationality but instead relaxes some classical theoretical assumptions. As I have argued elsewhere, Slovic’s approach fits nicely with the emergence of behavioral law and economics.¹⁰⁷ According to this school of thought, rational choice theory must be modified to account for bounded rationality, bounded willpower, and bounded self-interest.¹⁰⁸ Bounded rationality refers to the reliance on cognitive heuristics as a mental shortcut when information is scarce or issues are complex.¹⁰⁹ Bounded rationality lies at the heart of Sunstein’s critique of fear as distorted risk perception.¹¹⁰ As a result, he rejects Slovic’s call for a rival rationality because it enshrines sloppy thinking and opens the regulatory process to “paranoia and neglect.”¹¹¹

This exclusive focus on bounded rationality is a bit puzzling insofar as Sunstein is himself a leading proponent of behavioral law and economics. Arguably, a consideration of bounded willpower and bounded self-interest might provide grounds for endorsing Slovic’s rival rationality or at least for not denouncing it as an unmitigated disaster for public decision making. Bounded willpower describes “the fact that human beings often take actions that they know to be in conflict with their own long-term interests.”¹¹² For instance, people may spend money to gain immediate gratification, even when they know they should save for the long run. Aware of their lack of self-control, these spenders sometimes arrange for automatic deposits to a retirement fund from their bank accounts, thereby sparing themselves the temptation of consuming now and suffering later.¹¹³

105. PAUL SLOVIC, *THE PERCEPTION OF RISK* 231 (2000).

106. *Id.*

107. Moran, *supra* note 20, at 5-7.

108. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW AND ECONOMICS* 13, 14-16 (Cass R. Sunstein ed., 2000). *See also* RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991) (exploring the limitations of traditional rational choice theory in explaining consumer choice and financial markets).

109. Jolls et al., *supra* note 108, at 14-15.

110. *See supra* notes 19-20 and accompanying notes.

111. Sunstein, *supra* note 6, at 1123.

112. Jolls et al., *supra* note 108, at 15.

113. *Id.*

Bounded self-interest reflects the fact that most people “care, or act as if they care, about others, even strangers, in some circumstances.”¹¹⁴ That is, norms of fairness operate to limit the untrammelled pursuit of self-interest. To illustrate this point, proponents of behavioral law and economics point to an experimental game in which the Proposer is asked to offer to split a sum of money with the Responder.¹¹⁵ The Responder can either accept or reject the amount offered, but if the amount is rejected, both parties get nothing.¹¹⁶ A rational Proposer should offer the smallest figure possible (for example, a penny), and the Responder should take it because a penny is still better than nothing.¹¹⁷ But this is not what happens.¹¹⁸ Instead, Proposers are prone to offer a much more even split of the money, and Responders turn down meager offers.¹¹⁹ In short, both parties are applying an unspoken but shared norm of fairness.¹²⁰

Using the framework of bounded willpower and bounded self-interest as well as bounded rationality, Slovic’s rival rationality has a newfound appeal. As I have suggested elsewhere:

Returning to the factors that lay people weigh in evaluating risk, it is clear that the magnitude of the harm and the likelihood that it will materialize are both relevant considerations for rational risk assessment, whether bounded or not. The concerns with whether a risk is involuntary or uncontrollable implicate a sense of personal efficacy, or willpower. And, the equitable distribution of risk as well as its intergenerational consequences relate to norms of fairness, or bounded self-interest. Had Sunstein evaluated popular intuitions about danger in light of all three elements of behavioral law and economics, he might have reached a more sanguine—or at least more nuanced—conclusion about the normative relevance of popular concerns to the regulatory process.¹²¹

Even so, the concessions to fear that behavioral law and economics scholars arguably make should not be overstated. This school of thought still exists in the shadow of rational choice theory, for it is a series of deviations from that theory’s strictest assumptions rather than an alternative normative framework

114. *Id.* at 16.

115. *Id.* at 21.

116. *Id.*

117. *Id.*

118. *Id.* at 21-22.

119. *Id.* at 22.

120. *Id.* at 21-23. It should be noted that this experimental evidence is rooted in small, interpersonal settings, and the generalizability to public choice is simply presumed. In fact, there are reasons to question this ready extension of the meaning of emotion, as I suggested at the outset of this Section of the essay.

121. Moran, *supra* note 20, at 7.

with independent ethical principles. As Amartya Sen has observed, proponents of behavioral law and economics have made an important contribution by questioning the tendency to equate self-interest with self-centeredness.¹²² In particular, they have recognized that “one can get joys and pains from sympathy to others, and these derived joys and pains are quintessentially one’s own.”¹²³ The recognition of bounded self-interest is critically important to making room for alternative ethical traditions, traditions that might rehabilitate emotion in public life.

Building on the insight that the joys and pains of others can be felt as one’s own, scholars have searched for an emotion that captures this concept. Kenneth Arrow argues that sympathy is an especially promising candidate for understanding intersubjective judgments that are vital to collective choice and shared self-governance.¹²⁴ As Arrow explains, economic theory predicts that under certain conditions, it is impossible to move from individual preferences to a single social ordering, a situation that he describes as “the height of bad luck.”¹²⁵ Arrow has considered a number of ways to escape this dilemma, but for the purposes of an exploration of law and emotion, the most significant is his interest in sympathy as a basis for making intersubjective judgments of utility.¹²⁶ That is, emotion becomes a way to transcend one’s private epistemological universe and gain an impression of another’s experience. Arrow’s analysis has much in common with efforts to explain emotion in small interpersonal settings, and if he is right, even in the public domain sentiment may generate information, albeit imperfect, that is not accessible in any other way. Moreover, this information is vital in moving from individual states of experience to social choice.¹²⁷

While Arrow focuses on sympathy as a way out of the impossibility of creating a stable social ordering from individual preferences, others have addressed the role of emotion in overcoming collective action problems. One such problem relates to dilemmas of motivation; for instance, everyone may prefer to “free ride” on the efforts of others rather than contribute to a public good.¹²⁸ Because each person hopes to capture the benefit without making a contribution, too little of the good is produced. As a result, the group suffers even though each member has behaved rationally from a narrowly self-

122. SEN, *supra* note 80, at 31.

123. *Id.*

124. Kenneth J. Arrow, *Extended Sympathy and the Possibility of Social Choice*, 67 AM. ECON. REV. 219 (1977).

125. 1 KENNETH J. ARROW, *The Principle of Rationality in Collective Decisions*, in COLLECTED PAPERS OF KENNETH J. ARROW: SOCIAL CHOICE AND JUSTICE 45, 51 (1983).

126. Arrow, *supra* note 124, at 224-25.

127. See SEN, *supra* note 80, at 338-43.

128. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 11 (1965).

interested standpoint.¹²⁹ This classic account of rational but ultimately counterproductive choice is not borne out by empirical evidence. Instead, as Dan M. Kahan argues, people develop an emotionally nuanced logic of reciprocity:

When they perceive that others are behaving cooperatively, individuals are moved by honor, altruism, and like dispositions to contribute to public goods even without the inducement of material incentives. When, in contrast, they perceive that others are shirking or otherwise taking advantage of them, individuals are moved by resentment and pride to withhold their own cooperation and even to engage in personally costly forms of retaliation.¹³⁰

Kahan argues that this logic of reciprocity should substantially alter the way that law and policy address collective action problems by promoting trust as well as dispensing material incentives.¹³¹ He concludes that a logic of reciprocity poses strong challenges to the conventional wisdom of public choice theory, which equates citizens with self-interested wealth maximizers and ignores the public spiritedness rooted in goodwill and cooperation.¹³²

Another problem relates to difficulties of coordination. These problems arise when “each person wants to coordinate with others but there can be considerable disagreement about how to coordinate.”¹³³ That is, a person’s decision about whether to participate depends entirely on what others do; for instance, a person may want to go to a park only when it is not crowded, or someone may want to purchase an item of clothing only if it is trendy and popular, that is, if lots of others are buying it, too.¹³⁴ Just as Kahan argues that personal relationships of trust can mitigate collective action problems, social networks can help to solve coordination problems. The success of networks in this regard depends on whether they consist of strong or weak links.¹³⁵ As Michael Suk-Young Chwe explains, “[i]n a weak-link network, the friends of a given person’s friends tend not to be that person’s friends, whereas in a strong-link network, friends of friends tend to be friends.”¹³⁶ Because friendships take time to develop and sustain, strong links generate groups that grow slowly, while weak links produce groups that grow rapidly. An intimate circle

129. *Id.* at 1-2.

130. Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71 (2003).

131. *Id.* at 76-77.

132. *Id.* at 99-101.

133. See MICHAEL SUK-YOUNG CHWE, RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE 12 (2001).

134. *Id.* at 5, 12, 37-60.

135. *Id.* at 5.

136. *Id.*

of friends is likely to be relatively closed, while a network of acquaintances can include a wide range of people.¹³⁷ As a result,

communication is slower in the strong-link network in that as you get information from friends, then friends of friends, then friends of friends of friends, and so on, even by the fourth iteration, you still only get information from about one-third of the people. In the weak-link network, by four iterations you get information from almost everyone.¹³⁸

Based on this account, weak-link networks should be superior to strong-link networks in coordinating group action, yet just the opposite seems to be true.¹³⁹ According to Doug McAdam, this puzzling result can be explained by positing that strong links and weak links operate in fundamentally different ways.¹⁴⁰ In his view, weak links are better at diffusing information, but strong links are superior at influencing behavior.¹⁴¹ Strong links are a conduit not just for information but also for influence and feelings.¹⁴² These sentiments create a sense of trust that enables individuals to act, confident in their belief that others will do the same.¹⁴³ In fact, research on mass politics consistently reveals that “[a] primary satisfaction of political activists derives from the friendships and collegial activities of political life rather than any abstract political motives.”¹⁴⁴ Apparently, not only does this solidarity motivate individuals to participate but it also assures them that others will participate as well.

Chwe takes issue with McAdam’s account, arguing that strong links are more effective at communication because the parties share common knowledge, that is, “each person knows that there is enough collective sentiment to make group action possible.”¹⁴⁵ What is key for Chwe is that in a strong-link network

your friends are likely to be my friends, and the eagerness to participate among our group of friends would be common knowledge among us. If you and I are connected by a weak link, I don’t know your friends and you don’t know mine. In other words, the idea

137. *Id.* at 61-62.

138. *Id.* at 62.

139. *Id.* at 63.

140. Doug McAdam, *Recruitment to High-Risk Activism: The Case of Freedom Summer*, 92 AM. J. SOC. 64, 79-81 (1986).

141. *Id.* at 80.

142. *Id.*

143. *Id.*

144. W. RUSSELL NEUMAN, *THE PARADOX OF MASS POLITICS: KNOWLEDGE AND OPINION IN THE AMERICAN ELECTORATE* 11 (1986).

145. CHWE, *supra* note 133, at 64.

that weak links are always better for communication relies on the assumption that communication is about “first-order” knowledge only and not about knowledge of what others know.¹⁴⁶

Chwe insists that his account is based on “‘cold’ rationality,”¹⁴⁷ yet he also concedes that common knowledge “is substantially related to issues of intersubjectivity, collective consciousness, and group identity.”¹⁴⁸ In fact, while the knowledge may turn on shared beliefs, the sense that it creates a common bond may depend on emotional connections. Under either McAdam’s or Chwe’s account, then, the success of social networks in coordinating group action is rooted in mutual identification, a process mediated at least in part by feelings.

Just as small-scale relationships make it necessary to imagine one’s self in the other’s position, these theorists argue that collective choice and action require intersubjective judgments. The process of adopting another’s perspective is undoubtedly complicated by the substantial scale and social distance inherent in public deliberations and decision making. For this reason, officials can not simply assume that interpersonal judgments or cohesive social networks will easily lead to a discourse that transcends self-interest and demonstrates a genuine regard for others. As Amartya Sen notes, “[t]he introduction of interpersonal comparisons is more than a ‘way out’ of impossibility; it is also a ‘way in,’ linking up normative social choice theory to ethical traditions that go back a long way and that have received a good deal of critical attention in recent philosophical discussions.”¹⁴⁹ These traditions create public norms that require a democratic state to cultivate as well as to reflect the citizenry’s capacity for sympathy, even in settings that force individuals to imagine another’s experience across profound experiential divides.

The work of Martha Nussbaum draws on these traditions, arguing that emotions can be a source of moral intuition, a part of the ethical discourse that guides deliberations in a liberal democracy.¹⁵⁰ Nussbaum is preoccupied not with fear but with compassion, an emotion that bears more than a passing resemblance to what Arrow terms “sympathy.” For Nussbaum, compassion is defined by three propositions: the suffering of another is profound and not trivial; the suffering is undeserved; and the suffering will affect one’s own flourishing.¹⁵¹ She distinguishes between an individual psychology of compassion and its incorporation into the design of institutions. For her, the relationship is “a two-way street: compassionate individuals construct institutions

146. *Id.* at 65.

147. *Id.* at 4.

148. *Id.* at 95.

149. SEN, *supra* note 80, at 338.

150. MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 401-54 (2001).

151. *Id.* at 306-21.

that embody what they imagine; and institutions, in turn, influence the development of compassion in individuals.”¹⁵² In arguing that compassion should play a role in public discourse, she notes that “all emotions are not equal” but compassion occupies a place of fundamental importance in an ethical society because of the judgments it entails.¹⁵³

What Nussbaum’s analysis suggests is that the move to the public domain does not automatically make emotion either an irrelevant or a harmful consideration. Instead, the potential for emotion to play a constructive role depends heavily on how it is incorporated into official institutions. A sentiment like fear certainly can be manipulated, but without a sense of compassion, public discourse can become empty and effete. When Pfc. Jesse Givens’ letter was published in the *New York Times*, it communicated his fear to a broad audience, yet what his message sparked may well have been compassion. Readers understood that his suffering was profound and undeserved and that his untimely death fell within the boundaries of their concern. For, Givens and other young men and women in the armed forces have died in the name of their fellow Americans, whose collective exercise of power has placed them in jeopardy in a foreign land. Under these circumstances, it is essential that the citizenry be reminded of what soldiers and their loved ones are suffering. After all, if the polity cannot imagine their point of view, it may not be able to make an ethical judgment about whether the political gain has been worth the personal sacrifice.

CONCLUSION

This has been a story of fear in three parts: as a private experience, as an interpersonal communication, and as a public event. I have argued that in each instance, different theories of emotion become relevant, but at no point does the significance of sentiment disappear. As Pfc. Givens’ letter suggests, at the core of all the theorizing is a basic feature of human experience, the capacity not just to think but to feel. As emotion moves from the realm of private experience to interpersonal communication to public event, the challenge is to understand the meaning of emotional life not just for ourselves but for others. The feats of imagination that are required will not always be successful. For instance, we may never know precisely how Givens felt when he wrote his letter or how his wife and children felt when they read it. Yet, I would argue, we are all better for the attempt if it reminds us of our shared human condition.

152. *Id.* at 405.

153. *Id.* at 453.

