

Emotions in the Mobilization of Rights

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What is the relation between emotions and rights? It is not a question for which answers spring readily to mind, particularly for legal scholars. Rights² may be conceived as inhering in, or being conferred upon, a post-Enlightenment, rationalist subject, who is hardly a creature brimming with affect. They may be associated, for some, with abstract claims of entitlement, and, for others, with intricate Hohfeldian frameworks that connect them with state or private obligations: neither association brings emotions to mind. Moreover, the literatures which explore the meaning, mobilization, recognition, and constitutive effects of rights provide little more guidance. Few acknowledge the emotions;³ those that do often neglect the diverse con-

¹ Herma Hill Kay Distinguished Professor of Law, UC Berkeley School of Law. I am grateful for the careful attention these ideas received at the 2010 Berkeley Law Faculty Retreat, and the Mindful Lawyer Conference at UC Berkeley School of Law. My argument benefitted greatly from thoughtful comments provided by Susan Bandes, Hila Keren, Vicky Plaut, and Leti Volpp. Genevieve Renard Painter provided not only outstanding research assistance but also insightful commentary.

² When I first conceived this paper, my focus was on civil rights—such as the rights to be protected against discrimination in employment, to receive an education, to vote, or to access other public opportunities. But as I continued my research, I noticed that many of the arguments that I was making—and many of the examples that I was using—comprehended other kinds of rights: common law rights, such as the right to compensation for wrongful injury or the right to performance or enforcement of one's contracts; statutory rights to a fair wage or decent working conditions, or to the enjoyment of clean air or water; or human rights (including socioeconomic rights) which might not be formally recognized in U.S. law, but which find expression in international treaties or conventions. In addition, in some places, such as my discussion of capital lawyering, *infra* text accompanying notes 121–24, I reference the rights of the accused. My examination of indignation, *infra* Section II.A, relates in particular to rights that have an assumption of equality or equal citizenship as their underlying predicate.

³ Emotion is a concept that is both contested and dynamic, within and across disciplines. Although some theorists identify a set of primary emotions—happiness, sadness, fear, anger, surprise, and disgust—that exist across cultures and that have a biological basis, most agree that cultural context can shape the meaning and interpretation of emotions and the ways that they are communicated to others. See ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* 51 (1999) (describing primary and secondary emotions that appear across cultures and acknowledging the role of culture in shaping them); See Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 *LAW & CONTEMP. PROBS.* 1, 5 (2009) (even as to basic emotions, "social context shapes not only how they are communicated to others, but how they are formed, experienced and interpreted by the individual"). My own understanding of emotion accords with many elements of the following statement by Susan Bandes, which emphasizes the complex and contextually-various dimensions of both neurological and socio-cultural understandings of the term:

There is no accepted definition of the term *emotion*. Indeed, the more light is shed on the dynamics of cognitive processing, the less clear it is that emotion defines a discrete function or phenomenon. . . . Current neurobiological research views emotions as a set of processes, distributed throughout the brain, that assist us in appraising and reacting to stimuli, and that are very sensitive to context. Recent work in psychology and sociology also portrays emotions as processes; formed, interpreted

texts of rights assertion, and the differentiation or social formation of emotions.

Stepping back from legal analysis, however, images relating emotions to rights begin to take shape. There is the worker, anxiously weighing his outrage at an injury against his fear of retaliation or the disruption that would arise from a lawsuit. There are the buoyant emotions of public rights mobilization: the excitement and elevation of being part of a cause bigger than oneself; the ardent hope for an envisioned future; the joy or pleasure in public theater; the anger or outrage at being thwarted; the sense of warmth or connection to one's fellow activists. There is ambivalent aftermath, including the disappointment, pain, or confusion that may flow from seeing one's vision confined to a domesticated legal form, or seeing oneself as a victim, albeit of a recognized legal wrong.

This article aims to bridge these two worlds of imagery and understanding: to incite a conversation among legal scholars and actors about the role of emotions in the processes of rights assertion and recognition. In Part I, I offer an exploratory typology of the ways in which emotions may be implicated in the experiences of those who perceive, mobilize, or claim rights, and whose claims may be recognized by the public or embodied in law. In so doing, I highlight one literature in which the relations between emotions and rights are beginning to be explored: the sociology of social movements. In Part II, I examine two constellations of emotions that appear to be central in many accounts of emotion in the social movement literature. The first is a set of "reactive"⁴ emotions that respond to the violation of norms or entitlements: anger, outrage, and most centrally, indignation. And the second is a set of "reciprocal" emotions that emerge from connections among those who participate in social movements: respect, affection, trust, and hope. I argue that while rights mobilization in the legal context is in many ways a distinct phenomenon, these emotions may have distinct value in animating

and communicated in social context. They influence the way we screen, categorize and interpret information. They influence our evaluations of the intentions and credibility of others. They help us decide what is important or valuable. Perhaps most important, they drive us to care about the outcome of our decision-making, and motivate us to take action, or refrain from taking action, on the situations we evaluate. All these processes are shaped, refined and communicated in a social and cultural context.

Id. at 6–7 (internal citations omitted).

⁴ I take the terms "reactive" and "reciprocal" emotions from the work of James Jasper, one of the leading theorists of emotion in social movements. See generally James M. Jasper, *The Emotions of Protest: Affective and Reactive Emotions In and Around Social Movements*, 13 Soc. F. 397 (1998). "Reactive" emotions are "responses to events [and] information." *Id.* at 407. Grief due to a loss and anger at a crime are both examples of reactive emotions. "Reciprocal" emotions are a sub-category of what Jasper calls "affects" or emotional responses toward others. *Id.* at 405. They are feelings that people have for each other (i.e., feelings that are returned). *Id.* at 417. A feeling of solidarity or trust between two people in a movement, for example, would be a reciprocal emotion. Although Jasper distinguishes between emotions and affects, I will not do so in this paper: I will frequently use the term "affective" as a synonym for "emotional."

and sustaining those who claim legal rights. I ask what lawyers and other legal actors might do to attend to or encourage the emergence of these emotions among rights claimants in the legal system.

I. RELATIONS BETWEEN EMOTIONS AND RIGHTS: AN EXPLORATORY TYPOLOGY

Emotion is intertwined with rights claiming in many different ways. In this Section, I examine several phases of experience, interpretation, and action through which rights may be mobilized in political and legal contexts. I consider the role that emotions generally, or particular emotions, may play in each phase of this process. In constructing this typology,⁵ I draw insights and inferences from several literatures that have touched on emotions only in passing. Most illuminating, however, is an emerging literature on the emotions of social movements, which has begun to detail the ways that emotions influence the recruitment, motivation, strategy, and sustenance of participants.⁶ Yet rights claiming in the social movement context reflects both the

⁵ The phases of rights claiming, as I elaborate them below, have some overlap with the framework of “naming, blaming, and claiming” introduced by Felsteiner, Abel, and Sarat. *See generally* William L. F. Felsteiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC’Y REV.* 631 (1980–81). While it would be possible to use the “naming, blaming, claiming” framework to highlight the operation of emotions in different phases of rights claiming, I chose to introduce a slightly different—and less felicitously labeled—framework for several reasons. First, my account focuses on the movement from individual to group-mediated emotion, so outreach from one affected individual to (groups of) others is an important step that is not specifically underscored in the “naming, blaming, claiming” framework. Second, outreach often precedes and facilitates blaming—or attribution of responsibility—because one of the functions of the groups that coalesce as people reach out is to help them understand the injury that they have sustained, including possible ascriptions of responsibility. Third, I use the term “mobilization” to describe the final stage (although I use “claiming” and “mobilization” and other synonymous terms throughout the article), because my goal in this section is to offer a dual, comparative focus on political and legal forms of rights mobilization, rather than to focus primarily on the emergence of legal disputes.

Interestingly, “Naming, Blaming, Claiming,” one of the earliest works to schematize the process of rights claiming, acknowledges a role for certain emotions in influencing the transformation of an injury into a legal dispute. The authors do not identify emotions as an independent category for analysis, but consider them within other categories or factors affecting the transformation of disputes, such as “parties,” “attribution,” “ideology,” or “representatives and officials.” Felsteiner, Abel & Sarat, *supra*, at 639–47. Curiously, the invitation this early analysis offers—to integrate analysis of emotions into a more far-reaching analysis of rights assertion—has rarely been taken up, except in a relatively small and recent sociological literature on the emotions of social movements. *See* Jasper, *supra* note 4, at 397–99 (explaining how emotions, which had “disappeared from models of protest,” have recently reemerged). It has been largely, and pointedly, absent from the scholarly work on rights claiming in law.

⁶ The work of James Jasper and his collaborators Jeff Goodwin and Francesca Polletta has been an invaluable route into this literature. *See, e.g.*, *PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS* (Jeff Goodwin, James M. Jasper & Francesca Polletta eds., 2001) [hereinafter *PASSIONATE POLITICS*]; Jeff Goodwin, James M. Jasper & Francesca Polletta, *The Return of the Repressed: The Fall and Rise of Emotions in Social Movement Theory*, 5 *MOBILIZATION* 65 (2000) [hereinafter Goodwin, Jasper & Polletta, *Return of Repressed*]; Jasper, *supra* note 4.

continuities and discontinuities with more formal legal contexts. In the final section of this discussion, I consider the implications of these similarities and differences for the affective dimensions of rights claiming. This discussion lays the groundwork for my consideration in Part II of two constellations of emotions that are prominent in the social movement context, which may prove similarly animating and sustaining for legal rights claimants.

A. *Responding to a Moral Shock*

As Felsteiner, Abel, and Sarat observe in their classic sociolegal analysis, “Naming, Blaming, Claiming,”⁷ rights assertion begins with the recognition of an injury. A present injury, or the discovery that one has been injured in the past, constitutes what sociologists of protest call a “moral shock”⁸: a startling and significant event that has the potential to reorient us to our environment and the other actors who populate it. Apprehending this shock—understanding that one has sustained an injury—may be the initial stage of this reorientation; but this perception is followed by an equally important phase of interpretation. The affected individual must perceive the effect as something that is not an inevitable state of affairs,⁹ but is rather a development to which she might productively respond. Although many accounts characterize this progression as a predominantly cognitive process, a range of emotions—which I understand to be entwined with cognitive judgments¹⁰—may help prospective claimants achieve these perceptions and understandings.

Some of these emotions are individual responses. Experiencing a moral shock may itself trigger a range of emotions that vary with the nature of the shock and the person receiving it: from grief or shock (at a devastating change in life circumstances) to fear (about the present or future effects of such a change) to anger (at suffering or seeing another suffer poor treatment) to shame (at being subjected to such treatment). Whether these initial emotions lead to the conclusion that the moral shock or injury is the product of a wrongful act that should be addressed (or redressed), rather than an inevitable state of affairs, may depend on still other emotions or affective dispositions: dispositions toward the self and the relation of the self to the world it

⁷ Felsteiner, Abel & Sarat, *supra* note 5, at 633–35.

⁸ See Jasper, *supra* note 4, at 409. The term was first used in James M. Jasper & Jane D. Poulsen, *Recruiting Strangers and Friends: Moral Shocks and Social Networks in Animal Rights and Anti-Nuclear Protests*, 42 *SOC. PROBS.* 493 (1995).

⁹ Felsteiner, Abel & Sarat, *supra* note 5, at 635.

¹⁰ See, e.g., MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 24–31 (2004) (highlighting cognitive character of emotions as embodying beliefs or judgments of value); ANTONIO R. DAMASIO, *DESCARTES' ERROR, EMOTIONS, REASON, AND THE HUMAN BRAIN* 34–51 (1994) (using case studies involving subjects with damage to prefrontal areas of the brain to demonstrate that when emotional responses are impaired, subjects cannot engage in cognitive processes such as making daily decisions).

inhabits.¹¹ For example, the emotion of self-respect—the sense of oneself as a person who is entitled to some basic level of decent treatment by others, or to better than the injurious treatment that she has received—provides a potent affective backdrop to the prospective claimant’s efforts to respond to the perception of injury. It may determine whether the person perceiving an injury is able to move from fear or shame, both of which tend to immobilize or turn the injured party inward, into outrage¹² or indignation, which can fuel outward-directed efforts to stop the injury or to seek some form of redress. Also implicated is the emotion of hope, which Hila Keren and I have defined elsewhere as the capacity to envision and direct oneself toward a goal—a future different from the present—which may be difficult, though not impossible, to achieve.¹³ Without this capacity, it becomes likely that those suffering a wrong or injury will perceive even highly undesirable states of affairs as natural, inevitable, or at least dauntingly difficult to change.

But response to a moral shock—regardless of whether it is created by an injury warranting some response—is not conditioned entirely by *individual* emotions. It may also be shaped by emotions shared with others or emotions fostered by one’s connection to others. Affective connections with others, for example, may permit individuals to perceive patterns of injury that they would have been unable to identify on their own. One woman may mention to another an uncomfortable experience in the workplace, and learn that other people had experienced similar incidents. This communication might help her to see her experience as part of a pattern of unequal or sexualized treatment, and it might shape her individual, affective response to it. Affective connections among people may also condition responses at a more collective level. Sharon Erickson Nepstad and Christian Smith argue, for example, that church activists who had worked previously in Latin America recognized the moral and political threats implicit in certain repressive Central American regimes long before other Americans, because of their affective connections with people in the region.¹⁴ “Emotion norms” or “emotion cultures”—i.e., shared understandings regarding appropriate affective response among members of a family, group, community, or culture—may

¹¹ The affective dynamics described above may occur whether the moral shock in question is an individual injury, such as harassment in the workplace, or a collective injury, such as global warming. Perception of the shock may be more challenging in the case of diffuse, collective, or temporally-extended phenomena such as global warming, and mobilization may depend more on the ability to coalesce with others, as individual action is likely to feel vastly disproportionate to the scope of the problem, and this disproportion may give rise to feelings of resignation or despair.

¹² See Jasper, *supra* note 4, at 409.

¹³ Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319, 324 (2007) (using as a point of departure a definition from St. Thomas Aquinas: “a future good that is arduous and difficult but nevertheless possible to obtain”).

¹⁴ Sharon Erickson Nepstad & Christian Smith, *The Social Structure of Moral Outrage in Recruitment to the U.S. Central America Peace Movement*, in *PASSIONATE POLITICS*, *supra* note 6, at 159–74.

powerfully condition reaction to a moral shock.¹⁵ Kari Norgaard describes, for example, the way that a small Norwegian community declined even to discuss, let alone respond politically, to palpable signs of global warming because of prevalent emotion norms of stoicism, optimism, and tendency to focus on problems that were evidently within the community's power to affect.¹⁶

B. *Coalescing with Others*

The recognition that one has sustained an injury which may transform one's life circumstances can be an affectively isolating event. A feeling of grief may make it difficult to relate to others, or even to conduct oneself conventionally in the presence of others. A feeling of shame about this mark of difference, or anxiety about whether one is somehow responsible for this suffering, may lead the person who has experienced a moral shock to withdraw from others. But in many cases the sense of impending isolation produced by a reorienting event or injury may have precisely the opposite effect: it may cause people to reach out to others. In the first instance, those who have sustained an injury may reach out to their family, friends, neighbors, or co-workers, who may help them to regain their affective balance in the midst of an unfamiliar circumstance, or to strategize about possible ways of responding.¹⁷

Sometimes, however, an injury may create a sense of separation from one's familiar or accustomed communities; the resulting feeling of loneliness may cause an injured party to seek out others who are similarly situated. Parents whose child has been diagnosed with a life-limiting disease may suddenly feel distant from their usual circle of friends and neighbors, and may seek out other parents whose children have been similarly afflicted. Often this outreach stems from a simple need to know that one is not alone in a particular form of suffering, or from a desire for the access to information or emotional support that can arise from shared, challenging circumstances. In other cases, those who have suffered a moral shock reach out in

¹⁵ Kari Marie Norgaard, "People Want to Protect Themselves a Little Bit": *Emotions, Denial, and Social Movement Nonparticipation*, 76 SOC. INQUIRY 372, 379 (2006). Norgaard states: "emotion norms tell us what we ought to feel—they prescribe the appropriate range, intensity, duration, and targets of feelings in different situations." *Id.*

¹⁶ *Id.* at 379–83.

¹⁷ The American Psychological Association's amicus curiae brief in *Harris v. Forklift Systems* observes that a key factor in a subject's psychological response to the experience of sexual harassment in the workplace is the strength of and support provided by her familial and larger social networks. See Brief for American Psychological Association as Amicus Curiae in Support of Neither Party at 10, *Harris v. Forklift Sys.*, 510 U.S. 17 (1993) (No. 92-1168), available at <http://www.apa.org/about/offices/ogc/amicus/harris.pdf> [hereinafter Brief for Amicus Curiae APA] ("[A] victim's social support can, to some degree, insulate some victims of sexual harassment from psychological harm. Research on other forms of sexual victimization has shown that victims who receive support from friends and family show better adjustment than those who lack it.").

order better to understand their predicament. This dynamic, for example, was central to the early stages of the second-wave feminist movement. Women who suffered disturbing instances of nonconsensual sex, or who were unsettled by the realization that they were unsatisfied with the ostensible ideal of suburban married life, sought out others through “Take Back the Night” rallies and “consciousness raising” groups.¹⁸ This pattern is also prevalent in the stories of those who have joined the Tea Party movement. Deeply shaken by the immediate impacts of the recession—the loss of a job, or of the family home—these formerly apolitical individuals went for the first time to a local meeting, whether of the Tea Party itself, the 9/12 Project, the Friends of Liberty, or the Oath Keepers,¹⁹ in order to try to understand their loss in its broader public context.²⁰

This desire to reach out to others may also be mediated by those who might be described as “emotional entrepreneurs”: those who identify or even seek to foster particular feelings in a group of people that has suffered a moral shock in order to bring them together. This effort may be primarily other-oriented or altruistic, such as the work of a non-profit organization that seeks to bring together cancer survivors for mutual support, sharing of information and strategy, and the sense of commitment to a collective effort. Or this entrepreneurship may be undertaken by those who seek to harness shared feelings of loss, anger, distrust, or indignation to fuel some form of legal or political action that they view as individually or collectively advantageous. The lawyer depicted in Atom Egoyan’s film “The Sweet Hereafter” seeks to spark anger in a community that has lost many of its children in a bus accident, so as to encourage the filing of lawsuits.²¹ Glenn Beck and other opinion leaders connected with the rise of the Tea Party movement sought to act on feelings of anger and disillusionment stemming from the recession and the election of Barack Obama to animate a new political movement.²²

C. *Ascribing Responsibility*

Groups that coalesce in response to a specific moral shock, or the feelings that arise from it, frequently aim to explain that shock as a first step toward responding to it. This explanation may relate the events producing the shock to other historical or contemporaneous developments. But such explanations more frequently have the goal of attribution: ascribing respon-

¹⁸ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83–105 (1989).

¹⁹ See David Barstow, *Lighting a Fuse for Rebellion on the Right*, N.Y. TIMES, Feb. 16, 2010, at A1 (describing these groups as collaborating with and having overlapping membership with official Tea Party organizations).

²⁰ This pattern emerges repeatedly in Barstow, *supra* note 19.

²¹ THE SWEET HEREAFTER (Fine Line Features 1997).

²² Barstow offers this analysis to describe the role of Beck and Richard Mack. Barstow, *supra* note 19.

sibility for the shock and its material and emotional effects to a particular actor or institutions.²³

But the process of ascribing responsibility for a particular injury is often strongly mediated by emotion. Anger may provide the energy necessary to track the lines of causation to a responsible party, as well as the motivation to hold a responsible party accountable. Conversely, an overwhelming feeling of grief in the wake of a loss or injury, for example, may render the focus on a responsible party irrelevant.²⁴

Emotions may also influence which actors are likely to be held responsible for an injury or other moral shock. In an affectively infused search for a perpetrator—a search which is often articulated in the register of blame rather than the more neutral register of responsibility—“we want [the wrong] to be the result of a choice to act by someone capable of reasoning.”²⁵ This may make it easier for rights claimants to mobilize in response to acts attributable to individual choice, and harder for them to mobilize in response to acts attributable to governmental inaction, inattention, or neglect. It may also, as Bandes argues, cause those claiming a wrong to anthropomorphize governmental action, which can lead to distortions in claims for and adjudication of governmental responsibility.²⁶ Efforts by leaders to mobilize members of social movements may also shape and even distort ascriptions of responsibility. As William Gamson has argued, “injustice frames”—narratives which describe an injury as a wrong perpetrated by

²³ This effort may also highlight actors, such as state actors, who may not be directly responsible for the shock, but who may control critical legal, political, or economic resources necessary to address it.

The act of coalescing with others can promote the ascription of responsibility, by permitting those who have suffered a common injury to share information or divide the tasks of investigation. For example, when a group of neighbors in Woburn, Massachusetts came together following the diagnosis of their children with a rare leukemia, some wondered about possible connection to an unusual taste and smell in the local drinking water, while others noted the discovery of highly toxic chemicals in two local wells and beneath the soil of a nearby plot of land. See JONATHAN HARR, *A CIVIL ACTION* 11–50 (1995). This exchange of information helped fuel the investigation that led to a major lawsuit.

However, some individuals who have suffered an injury begin to address the question of attribution, or even consult with a lawyer, before reaching out to others. Some proceed to litigation, supported primarily by family and friends who have not suffered the same injury. But what I describe above is a common pattern, particularly for those who sustain an injury that is shared by others.

²⁴ THE SWEET HEREAFTER, *supra* note 21. In THE SWEET HEREAFTER, a group of townspeople overwhelmed by the loss of many of their children in a bus accident, responds ambivalently to the appeals of a lawyer who encourages them to find and seek relief from a responsible party. Several of the grief-stricken parents respond that a lawsuit “won’t bring [their children] back” and decline to become involved in prospective litigation. For an analysis of the film, which focuses on the role of fathers and norms of fathering, but which also thoughtfully explores many of the emotional issues raised by the accident and the prospective lawsuit, see Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in The Sweet Hereafter*, 34 *LAW & SOC’Y REV.* 3 (2000).

²⁵ Susan Bandes, *Not Enough Blame to Go Around: Reflections on Requiring Purposeful Government Conduct*, 68 *BROOK. L. REV.* 1195, 1207 (2003).

²⁶ *Id.* at 1196–98.

some identifiable actor against others—help prospective claimants respond to their injuries with outrage or indignation rather than sadness or resignation.²⁷ They fuel the “fire in the belly and steel in the soul”²⁸ that enables those injured to press their claims. Gamson notes, however, that social movement leaders often point to ostensibly responsible actors, even in the face of ambiguity about their causal role, because this identification produces a galvanizing emotional response.²⁹

Ascription of responsibility may also be affected by the “emotion cultures”³⁰ of the groups to which individuals turn for support. These norms may encourage or discourage the search for responsible actors in general. For example, an emotion culture that values fearlessness in speaking of truth to power, or defiance in calling wrongdoers to account, may bolster the process of looking for a responsible or remedial actor. But a group that is committed to helping its members to “move on,” or to achieve emotional healing, after an accident or natural disaster may be deeply ambivalent about becoming mired in the process of assigning blame. Moreover, some emotion cultures may tend to attribute responsibility to particular kinds of actors. Historian Sean Wilentz has recently argued that the nascent Tea Party movement is marked by a potent fear and distrust of particular institutions, including the federal government, the Federal Reserve System, the Internal Revenue Service, and the Council on Foreign Relations.³¹ This, in turn, fosters the Tea Party’s tendency to look to these institutions for explanations of injurious contemporary developments.³²

The identification of a responsible party may itself fuel emotional responses that affect the ability of those who have suffered an injury to contemplate mobilizing a right. “Injustice frames”—which point to a wrong perpetrated by some identifiable actor—can inspire the outrage and indignation that motivate action.³³ However, identification of a responsible actor

²⁷ WILLIAM A. GAMSON, *TALKING POLITICS* 32 (1992).

²⁸ *Id.*

²⁹ *Id.* at 33.

³⁰ The idea that groups tend to develop a shared set of norms regarding which emotions are appropriate in which contexts pervades the literature on the sociology of emotions. This understanding is signaled by a variety of different terms. Deborah Gould, for example, uses the terms “emotional common sense,” Deborah B. Gould, *Life During Wartime: Emotions and the Development of ACT UP*, 7 *MOBILIZATION* 177, 180 (2002) [hereinafter Gould, *Life During Wartime*], “emotional habitus,” DEBORAH B. GOULD, *MOVING POLITICS: EMOTIONS AND ACT UP’S FIGHT AGAINST AIDS* 32–36 (2009) [hereinafter GOULD, *MOVING POLITICS*], “emotive conventions,” Deborah Gould, *Rock the Boat, Don’t Rock the Boat, Baby: Ambivalence and the Emergence of Militant AIDS Activism*, in *PASSIONATE POLITICS*, *supra* note 6 [hereinafter Gould, *Rock the Boat, Don’t Rock the Boat, Baby*], at 135, 144, and “emotion cultures,” *id.* at 143. Kari Norgaard speaks of “emotion norms,” Norgaard, *supra* note 15, at 390. In this article, I will most frequently use the terms “emotion cultures” and “emotion norms” to designate this understanding.

³¹ See Sean Wilentz, *Confounding Fathers: The Tea Party’s Cold War Roots*, *NEW YORKER*, Oct. 18, 2010, at 32. Wilentz argues that these patterns of fear and distrust directly parallel those articulated by members of the John Birch Society in the 1960s.

³² *Id.*

³³ GAMSON, *supra* note 27, at 33.

can also produce emotions that impede the claiming or mobilization of rights. Anxiety about a protracted struggle or the resulting effects on one's community or family may emerge when the responsible party is revealed to be a powerful or heavily-resourced actor.³⁴ Where the responsible party is one's employer, fear of retaliation, isolation in the workplace, or even job loss may stop the move from blaming toward rights claiming in its tracks.³⁵

D. Mobilizing Rights

Identifying a responsible actor, or one who can intervene to prevent future injury, is a necessary but not a sufficient step toward the mobilization of rights claims. It locates the possible targets of action, but does not entail a claim that some social or legal entitlement has been violated, or that some remedy or response is required. The decisions to articulate one's injury as a violation of rights and to press for greater visibility, remediation, or prevention are distinct parts of the trajectory that I examine here. Although they are importantly structured by cognitive judgments—actors might ask, for example, whether there is a law or broader social understanding that prohibits the actions in question—they are also shaped by a variety of affective responses.

The ability to mobilize a claim framed in the language of rights—whether it be a legal right or a declaration that “no one has the right to treat us like that!”—itself requires certain emotions. The rights claimant, as Jeremy Waldron has argued, is “aware and vigorously conscious of what [she] is entitled to demand from others”; she has “or can develop the capacity and virtue to stand bravely witness to, and indomitably defiant of, assaults on [her] dignity as [a] person[.]”³⁶ Although Waldron's vision evokes an ideal type, it captures emotions that may undergird rights claiming, even when it is less formal or more ambivalent. Rights claiming requires a feeling of self-respect or dignity: a feeling that one is worthy both of decent treatment by others and of commanding their attention when one does not receive it. It is sometimes the tension between this feeling of self-respect or entitlement, and the conspicuous lack of respect in the way that one is being treated by others, that motivates the move to action. Deborah Gould has argued, for example, that the growing self-respect of gay men and lesbians

³⁴ Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 *LAW & SOC'Y REV.* 67, 75 (1999). Morgan states that “maternal responsibilities, marital commitments, parental approval, and the impact that litigation might have on their families” were the main factors that women weighed when deciding whether to sue. *Id.* Sometimes these relationships were “assets for successful litigation; at other times they were listed as liabilities For most the decision to sue rested upon assessments of their abilities to do so while also being good mothers, wives, and daughters.” *Id.*

³⁵ See Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 *SIGNS* 421, 436 (1987).

³⁶ Jeremy Waldron, *The Role of Rights in Practical Reasoning: “Rights” Versus “Needs,”* 4 *J. ETHICS* 115, 130 (2000).

prior to *Bowers v. Hardwick*³⁷ contrasted sharply with that decision's devaluation and civic exile of gays and lesbians, fueling the mobilizations of ACT UP.³⁸ This feeling of self-respect may also verge on a sense of entitlement, a feeling that some rule, agreement, or social practice has given one an expectation that has been violated, producing feelings of anger or indignation. Rights claiming may also require a measure of courage: a claimant is insisting on that dignity, or that entitlement, to a certain minimum of decent treatment, even in the face of its conspicuous violation. Scholars such as Patricia Williams have also suggested that the affective stance associated with the assertion of rights has a performative dimension: the assertion of one's entitlement to fair treatment causes one to feel, or to feel more strongly, the dignity and self-respect that the claim assumes.³⁹

Among the choices that individuals or groups must make is selecting the strategy through which claims of right might be mobilized, and violations publicized, remedied, or prevented.⁴⁰ Claimants may engage in some form of public statement, protest, or movement that involves similarly motivated others. This form of political action articulates a claim of right, but may or may not have specifically legal goals. Claimants might also make a claim of legal right: this kind of claim, which may emerge from political protest or may be framed independently, may be addressed to a court, to a legislature, or to other governmental regulators.

³⁷ 478 U.S. 186 (1986).

³⁸ Gould, *Rock the Boat, Don't Rock the Boat, Baby*, *supra* note 30. Gould argues that gays' and lesbians' ambivalence about their sexuality and place in society, which caused them to fluctuate between feelings of shame and pride, was beginning to be reconciled in the direction of pride or self-respect, due in part to their compassionate and responsible reaction to the AIDS epidemic, when the Supreme Court handed down its decision in *Bowers v. Hardwick*. *Id.* at 146–52. This unexpected denial of the most basic rights of citizenship allowed feelings of gay and lesbian pride to be articulated as indignation and anger, rather than solely as non-confrontational expressions of care and responsibility for the sick. *Id.* at 149–51. These subtle changes in emotion norms both fueled and were fueled by the emergence of groups such as AIDS Coalition to Unleash Power (“ACT UP”). *Id.* at 152–55.

ACT UP was a direct-action movement that formed in New York City in March 1987 to protest flagrant governmental neglect of the rapidly escalating AIDS crisis. During its political life, “there were more than eighty ACT UP chapters in the United States and more than thirty internationally.” GOULD, *MOVING POLITICS*, *supra* note 30, at 4. Gould's extraordinary book, which draws on material from many of the articles that I cite in this essay, explores the change in emotion norms in gay and lesbian activism that created the conditions of possibility for the emergence of a confrontational, grass-roots, direct-action movement like ACT UP.

³⁹ Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.–C.L. L. REV. 401, 431 (1987) (“‘Rights’ feels so new in the mouths of most black people. It is still so deliciously empowering to say.”).

⁴⁰ As the above examples suggest, the choice of vehicles may depend substantially on the emotion culture of the group. But the forms of protest utilized may also depend in part on the group's reception within the formal state or legal system. More orderly forms of legal rights claiming may occur where the group is characterized by norms of affective moderation and self-control, and where instrumentalities of the State have proved at least mildly receptive to the formal claiming of the group. Civil disobedience, or more unconventional or disorderly forms of direct action, may be a strategy where groups characterized by similar emotion cultures of moderation face a more resistant government.

As with recognition of a moral shock or injury, the decision whether and how to mobilize rights may be a matter of individual affective response: an individual who feels impelled to win compensation for her specific injury is more likely to choose a legal claim; those whose sense of satisfaction may be derived from a public performance or claim of right may select a social movement context. But, particularly when those who have suffered injuries contemplate more particularized choices among strategies, their conclusions are rarely the product simply of individual emotions. Groups that coalesce in response to moral shock may develop different emotion norms or emotion cultures, which in turn draw them toward different forms of response. The culture of the early civil rights movement was characterized by strong affective self-discipline, including the control of anger and the suppression of fear, which was supported by the movement's foundation in the religious teachings and rituals of the black church.⁴¹ This committed and meticulous control was consistent with and reinforced by strategies of civil disobedience, on the one hand, and litigation, on the other. Emotion cultures can also change in response to changing circumstances or collective self-understandings, which can lead to different strategic choices. Deborah Gould has noted the historical moment at which the gay and lesbian community's emotion norms in relation to the AIDS epidemic began to shift from quiet constancy in the care of the sick and dying, to outraged, sometimes purposefully theatrical, protest over the neglect and indifference of the federal government.⁴² Tucker Culbertson and Jack Jackson identify the recognition of the first same-sex marriages, in Massachusetts and San Francisco, as a moment in which emotion norms of some gay and lesbian groups swung back in the opposite direction, with such organizations advocating the conventional norms of fidelity, domesticity, and quiescent, orderly petitioning of the State for the right to marry, be embraced.⁴³

In the remainder of this Part, I will examine two major strategies for rights mobilization: protest or political action through a social movement and legal action, primarily through the vehicle of a lawsuit. These choices, of course, have implications for emotions as well.

⁴¹ See Jeff Goodwin & Steven Pfaff, *Emotion Work in High-Risk Social Movements: Managing Fear in the U.S. and East German Civil Rights Movements*, in *PASSIONATE POLITICS*, *supra* note 6, at 282. Goodwin and Pfaff note that suppression of fear and general affective control was supported by rituals such as the singing of movement songs (many of which had their origins in the church). *Id.* at 291–92. But it is also possible that music provided a form of affective catharsis, which permitted activists better to control their emotions in other facets of their movement activities.

⁴² Gould, *Life During Wartime*, *supra* note 30, at 180–84 (2002). Gould argues that this occurred sometime between the late 1980s and early 1990s and was mediated by, among other influences, the new “emotional common sense” of the direct-action group ACT UP.

⁴³ Tucker Culbertson & Jack Jackson, *Proper Objects, Different Subjects and Juridical Horizons in Radical Legal Critique*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 135, 140–45 (Martha Fineman, Jack Jackson & Adam Romero eds., 2009).

i. Mobilization of Rights Through Social Movement Activity

By the time a person begins to contemplate participation in a protest or other social movement, she has likely experienced some of the mobilizing emotions discussed above, and escaped the effects of their de-mobilizing counterparts.⁴⁴ She has responded to the moral shock of ill treatment or injury with anger or indignation rather than unmitigated grief, dread, or despair. She has the hope or capacity to envision and work toward an alternative trajectory necessary to suspect that it is not an inevitable state of affairs. She has been unimpeded by emotion norms that counsel stoicism, temporizing, or uncomplaining adaptation. Or she has been supported by norms that value the speaking of one's truths or the calling of others to account. She may or may not have identified a responsible party or thought systematically about how her injury might be redressed.

One of the first contributions of a social movement is to offer potential claimants and members "frames" that respond to these unresolved questions.⁴⁵ In so doing, it fuels the mobilizing "responsive" emotions of its prospective participants, and moves them toward demands framed in legal terms or in the broader political discourse of rights.⁴⁶ It may offer an "injustice" frame that connects their injury to a particular responsible party, fueling and directing their feelings of indignation.⁴⁷ It may buttress their sense of self-respect by suggesting their entitlement to better treatment. It may articulate demands or proposals for redress which foster hope by challenging the inevitability of the status quo.

A social movement may offer the rights claimant two other forms of emotional inducement or sustenance. First, it offers her an opportunity to ameliorate or satisfy some of her responsive emotions through the vehicle of protest itself. Different strategies of protest may draw participants by appealing to their own affective tendencies or emotion cultures, or creating new emotion cultures that support particular forms of response. Strategies of civil disobedience may appeal to the dignity and self-respect of prospective participants, or to the steadfast commitment with which they approach

⁴⁴ The structure of the following discussion is shaped, in important respects, by the various typologies offered in Jasper, *supra* note 4; Goodwin, Jasper & Polletta, *Return of Repressed*, *supra* note 6; and Jeff Goodwin, James Jasper & Francesca Polletta, *Introduction: Why Emotions Matter*, in *PASSIONATE POLITICS*, *supra* note 6, at 1–24. However, in this section, I am also drawing on sources that have followed from their pathbreaking work, and I am organizing the categories somewhat differently, in anticipation of their comparison with the legal context.

⁴⁵ Jasper, *supra* note 4, at 412–13.

⁴⁶ See Waldron, *supra* note 36, at 116 ("People use the language of rights to express their vision of the good society, or their conception of the respect we owe each other. They use it in conversation, in legislatures, in pressure groups, in academic seminars, in theoretical deliberations of all sorts [I]t has long ceased to be a language specific to (the threat of) legal proceedings.")

⁴⁷ Jasper, *supra* note 4, at 413–14; see also GAMSON, *supra* note 27.

their goals. The irreverent political theatre of ACT UP or Code Pink⁴⁸ may capture the outrage that participants feel about a particular violation or injury. Still others, who find in political contestation a source of improvisation and pleasure, may be drawn to the “fun and laughter” of culture jamming.⁴⁹ There may be some whose emotion cultures make them wary of the confrontational or indecorous character of these strategies (or of visible, audible displays of informal protest); they may seek other vehicles for rights claiming or decline to vindicate their rights at all. But for others, strategies of social movement protest may help to satisfy them by allowing them to express feelings of anger or indignation; they may find pleasure or relief in highlighting injustice through the vehicle of street theatre. Such emotional satisfaction may be available to participants whether or not a movement succeeds in its articulated substantive goals. They may in some cases become part of that goal itself.

Another way that social movements respond to the emotions of their prospective participants is to facilitate connections with others who have experienced similar affronts or losses. Suffering an injury or a wrong, as noted above, may give rise to feelings of isolation, disaffection, and vulnerability. Encountering others who have experienced similar violations may provide a salve to such feelings. It mitigates the sense that one is alone and brings the resources of others to bear on the shared losses. Affection for, or trust in, others can affect the decision to raise a collective claim.⁵⁰ These affective connections not only make it easier to see common patterns of injury or causation; they also can fuel the courage and resolve necessary to confront those who may be responsible or to persist during difficult times. During Argentina’s Dirty War, mothers of the “disappeared” began holding vigils in the Plaza de Mayo in Buenos Aires, voicing the simple demand that

⁴⁸ Code Pink, a direct-action, non-violent protest group, was formed by several longtime feminist activists in 2002 in response to the U.S. invasion of Iraq. In a statement on its website, the group described itself in the following way: “With an emphasis on joy and humor, CODEPINK women and men seek to activate, amplify and inspire a community of peacemakers through creative campaigns and a commitment to non-violence.” *Pink Action Principles*, CODEPINK, <http://www.codepink4peace.org/section.php?id=439> (last visited Mar. 6, 2011).

⁴⁹ Åsa Wettergren, *Fun and Laughter: Culture Jamming and the Emotional Regime of Late Capitalism*, 8 SOC. MOVEMENT STUD. 1, 2 (2009). Wettergren defines “culture jamming” as “a symbolic form of protest located in a field of anti-corporate activism where tensions between democratic principles and the undemocratic principles of the ‘free’ market are articulated as pivotal contemporary political conflicts.” *Id.* He notes that “the emotional (sub) regime of culture jamming” is “centered on the core emotion of fun.” *Id.*

⁵⁰ Conversely, fear, distrust, or antagonism toward those who have determined to raise a rights-based claim may defeat any impulse to join with them. This affective calculus may extend not simply to those with whom one might actually join in raising a claim, but to others who have raised similar claims in the past. Thus, one might be drawn to a protest organized by National Association for the Advancement of Colored People (“NAACP”) because of the positive-affective resonance of its involvement with desegregation, or one may eschew alliance with a campus organization protesting acquaintance rape because of a perceived association with a “victim” mentality.

the government tell them what had happened to their children.⁵¹ The bonds of shared experience, trust, and ultimately love that emerged among these women led them to turn what was initially a spontaneous gathering into an ongoing practice that became the center of a nationwide protest movement.⁵² Respect for or trust in a leader may fuel rights claiming within a social movement,⁵³ as mobilizations led by Martin Luther King Jr., Cesar Chavez, and other strong movement leaders demonstrate.

But the emotional work performed by social movements is not limited to their members. Social movements accomplish much of their moral and political work through recourse to the emotions of their target audiences. Many movement strategies compel the attention of their public or institutional audiences not simply through their cognitive claims but through their expression, or performance, of particular emotions; and they produce change by eliciting particular emotions in those outside the group. Change in the emotion norms of stigmatized groups or the broader society can be a direct goal of social movements⁵⁴: replacing sexual shame with pride for gays and lesbians was one such goal; legitimating feelings of anger and frustration on the part of women during the second-wave feminist movement was another.⁵⁵ More often, however, emotions are deployed as an instrument to achieve a substantive goal that is not primarily affective.

Movement activists may seek to inspire particular emotions in members of the public by expressing those emotions in the context of protest. The outrage of the feminist activists of Code Pink over the initiation and conduct of the Iraq war, for example, was harnessed to stimulate similar feelings of outrage in what members viewed as a public that was overly quiescent. They pursued this goal of galvanizing the public both through direct critiques of government action, and through efforts to provoke their audiences—by stopping traffic on bridges, or presenting “pink slips” (oversized pieces of lingerie) to legislators who supported the war effort.⁵⁶ Movements may also seek to evoke emotions in their target audiences by the use of metaphor (or other figurative language), ritual, or drama. The stark “silence = death” or staged “die-ins” of ACT UP,⁵⁷ or the stylized wrestling matches staged by Superbarrio to protest governmental failures to address poverty in Mexico City, sought to jolt audiences out of apathy or inertia and inspire a feeling of

⁵¹ For a thoughtful overview of women’s practices of protest in the context of Argentina’s Dirty War, see generally DIANA TAYLOR, *DISAPPEARING ACTS: SPECTACLES OF GENDER AND NATIONALISM IN ARGENTINA’S DIRTY WAR* (1997).

⁵² Fernando J. Bosco, *Emotions that Build Networks: Geographies of Human Rights Movements in Argentina and Beyond*, 98 *TJDSCHRIFT VOOR ECONOMISCHE EN SOCIALE GEOGRAFIE* 545, 552 (2007).

⁵³ Jasper, *supra* note 4, at 407.

⁵⁴ *See id.* at 407–08.

⁵⁵ *See* Jasper, *supra* note 4, at 408.

⁵⁶ *See* Kathryn Abrams, *Women and Anti-War Protest: Rearticulating Gender and Citizenship*, 87 *B.U. L. REV.* 849, 865 (2007).

⁵⁷ *See generally* Lucas Hilderbrand, *Retroactivism*, 12 *GLQ: J. LESBIAN & GAY STUD.* 303, 312 (2006).

indignation at the wrongs perpetrated against these groups. Participants may also manifest emotions whose appearance in a particular context is designed to prompt other, desired emotion on the part of the public. In the early civil rights movement, leaders hoped that protesters' expression of calm resolve, particularly in the face of hatred and brutality on the part of segregationists, would evoke outrage and indignation among large segments of the public. This example elucidates another facet of the affective work of social movements: sometimes the emotions of protest are not simply expressed but are also performed. It may require active management of the initial affective responses of protesters to produce the desired response on the part of target audiences. Jeff Goodwin and Steve Pfaff, for example, have examined the ways that devices from ritualized song to individual shaming were used to suppress the fears and bolster the courage of activists involved in the civil rights movement.⁵⁸

Finally, if they are to sustain their political efficacy and their membership, social movements must also engage in constant efforts of affective monitoring and adjustment. Changes in institutional contexts or political circumstances may require a shift in affective frames or scripts. Nancy Whittier explains how, in its efforts to address state regulators, the movement against child abuse embraced a trauma frame, which was familiar to state officials and permitted recourse to psychological experts.⁵⁹ Julian McAlister Grove demonstrates that distrust of "emotionalism" and "pet loving" in the animal rights movement led many proponents to adopt a predominantly cognitive, affectively neutral style of presentation.⁶⁰ Similarly, social movements must respond to fatigue and frustration among their members and sustain their energy and aspiration during periods of inactivity or abeyance.⁶¹

ii. *Mobilization of Rights Through Legal Action*

A person who turns to the legal system to mobilize a rights claim negotiates a set of emotions that are both similar to and different from those which affect prospective members of a social movement. To arrive at the threshold of legal action, she has most likely surmounted the demobilizing emotions of grief, shame, despair, or dread. She may be feeling anger or vengeance, desire for justice, or fear about future dangers to herself or those

⁵⁸ See Goodwin & Pfaff, *supra* note 41, at 282, 288–98, 301 (noting neglect of "emotion management" in the emerging literature on the emotions of protest, and examining management of fear in two "high-risk social movements").

⁵⁹ Nancy Whittier, *Emotional Strategies: The Collective Reconstruction and Display of Oppositional Emotions in the Movement Against Child Sexual Abuse*, in *PASSIONATE POLITICS*, *supra* note 6, at 233.

⁶⁰ Julian McAlister Groves, *Animal Rights and the Politics of Emotion: Folk Constructions of Emotions in the Animal Rights Movement*, in *PASSIONATE POLITICS*, *supra* note 6, at 212.

⁶¹ Jasper, *supra* note 4, at 419–20.

who are close to her. She may have been galvanized by the effects of an “injustice frame,” which may have included the identification of a responsible wrongdoer. Her receptivity to the thought of claiming rights in court may be shaped by the “emotion cultures” of which she is a part: as Kristin Bumiller demonstrated in her landmark study of prospective civil rights claimants, those who valued stoical adaptation to hardship, or who dreaded the role of “victim,” proved reluctant to right even demonstrable wrongs through recourse to a lawsuit.⁶²

Yet, the rights claimant’s feelings may also be different than those that animate members of a social movement. A prospective litigant may be less concerned with voicing a broad claim of injustice or affirming her sense of belonging to either the polity or a smaller group. One who has sustained an economic or physical injury may primarily desire to be made whole or to be secured against future injury. She may feel less strongly the need to coalesce or establish common cause with others. Instead of anticipating joy or catharsis in the public performance of protest, she may be filled with anxiety or dread about the unfamiliar processes of the law. One source of anxiety for a potential litigant may be the way that the legal system responds to emotions themselves.

When the audience for a rights claim is a court, claimants engage a decisionmaker characterized by emotion norms importantly distinct from those of the general public. The norms of judicial decisionmakers not only privilege rationality (of a sort structured by specialized rules), but treat emotion as a potentially disruptive force capable of compromising sound decisionmaking.⁶³ This means that the kind of direct affective appeals that are at the core of rights mobilization by many social movements are beside the point, even counterproductive. A forceful example of this contrast may be found in the dissent in *Planned Parenthood v. Casey*, in which Justice Scalia evoked the clamor of pro-abortion activists rallying on the National Mall as a sign of the disruptive politicization of abortion doctrine.⁶⁴ The privileging

⁶² See Bumiller, *supra* note 35, at 430–33 (describing “ethic of survival” in which “honor subdues aggression” and “pride subdues powerlessness,” and describing “dread” of being a “victim of discrimination, a role that seizes and marks its possessor”). The emotion cultures that Bumiller describes may in fact have some relation to socioeconomic status (“SES”). Social psychologists Alana Snibbe and Hazel Markus have observed that understandings of agency and control vary according to SES, with individuals with lower SES conceiving agency in terms of “maintaining integrity, adjusting to contingencies, and resisting influence”—an understanding that appears to be confluent with Bumiller’s “ethic of survival.” See Alana Snibbe & Hazel Markus, *You Can’t Always Get What You Want: Educational Attainment, Agency, and Choice*, 88 J. PERSONALITY & SOC. PSYCHOL. 703 (2006).

⁶³ See generally Terry Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. (forthcoming 2011). See also Susan Bandes, *Repellent Crimes, and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489, 492–93 (2009). These issues surfaced with particular force during the confirmation hearings of Justice Sonya Sotomayor. See, e.g., Kathryn Abrams, *Dean’s Lecture: Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 280 (2010).

⁶⁴ See *Planned Parenthood v. Casey*, 505 U.S. 833, 995–96 (1992) (Scalia, J., dissenting).

of stylized forms of rationality also foregrounds the role of the lawyer, who speaks for the claimant, framing her experience in ways that conform not only to legal doctrine but to the judges' (emotion) norms.

The presence of judicial norms that foreclose resort to direct emotional appeals does not, however, remove emotion from bench trials or appellate arguments. The affective austerity or detachment that is viewed as appropriate to the judge's role is itself an emotional stance that may have to be carefully cultivated by members of the judiciary.⁶⁵ Moreover, there are many forms of indirect emotional argumentation in appeals to judges, from the tone and general comportment of the lawyers to the presentation of the parties, or central witnesses, through certain ideal types that are often infused with emotion. That is, judges may look for vulnerability in the victim of subordination or remorse in the criminal defendant. Victims who are angry or defiant, or defendants who are unrepentant,⁶⁶ may jeopardize their own cases. This complexity underscores, again, the role of the lawyer, who must not only frame the claim but frame the client for the observation of the court. Lawyers may encourage certain affective tendencies or performances, on the part of their clients, in order to meet the expectations of judges.⁶⁷

When a case involving rights-based claims is tried before a jury, the target audience (and its attendant emotion norms) may be closer to those addressed by a social movement. Jurors are, by design, members of the lay public, rather than professionals socialized to an objective or dispassionate stance. As such, emotion is often more salient in jury trials than in bench

⁶⁵ The writings and speeches of Justice Sonia Sotomayor, a jurist who believes that emotional response is integral to some portions of the adjudicative process, highlight different ways that she strives to move from that affective response to a more detached, rational posture. At times she suggests that intuitive or emotional response is useful in helping her to frame or situate a case, but then she moves self-consciously to a more objectivist or rational phase of decision in which she applies the relevant law. See Abrams, *supra* note 63, at 280–81. She also notes that as a judge, it is her responsibility constantly to re-examine and second-guess her affectively infused perspectives. See Sonya Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 93 (2002) ("I owe [people] constant and complete vigilance in checking my assumptions, presumptions *and perspectives* and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me require[.].") (emphasis added). Indeed, one could argue that Sotomayor's slightly dry, formal, and formalist (i.e., distinguishing between apprehending the facts and applying the law) presentation during the confirmation hearings is an example of a self-conscious effort to model this kind of stance. Activists may also cultivate this kind of a controlled, rationalist affective stance. See Julian McAlister Groves, *supra* note 60, at 214–24 (describing the way that many mainstream animal-rights activists have cultivated a stance of rationalist, philosophically grounded commitment that mirrors the presentation of their scientific opponents).

⁶⁶ See Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, in *THE PASSIONS OF LAW* 168, 168 (Susan A. Bandes ed., 1999).

⁶⁷ For an example of a lawyer who struggled with this dilemma, in presenting both the substance and the affective dimensions of her client's claim, see Lucie White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1–58 (1990).

trials or appeals.⁶⁸ Lawyers may think more concertedly about the emotional responses that their arguments, or their styles of presentation, evoke; and they may make more direct emotional appeals than in bench trials. Such appeals are, however, constrained by the decorum of the courtroom, which generally prevents recourse to the kind of outrageous, ironic, or theatrical strategies that have become the province of many contemporary social movements. It would be a highly unusual, and most likely counterproductive, strategy, for example, to stage a “die-in” in a courtroom. Emotionally charged argumentation and jurors’ ability to take their emotional responses into account may be constrained by rules of evidence, which may exclude testimony or physical evidence thought to be inflammatory,⁶⁹ and jury instructions. A source of particular controversy, for example, has been the “anti-sympathy” instruction frequently offered in capital cases, which informs the jury that it “must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.”⁷⁰

A lawsuit may also speak less directly to the affective needs of a claimant than to engagement with a social movement. The movement activist may find joy, interest, partial satisfaction of anger or indignation, and other forms of emotional catharsis, in the activities of protest, demand, and confrontation that comprise the work of many social movements. She also predictably draws support from the reciprocal emotions that arise through her connection to others within the movement. Affection, mutual respect, trust, and feelings of solidarity with other participants may all sustain her in her efforts to raise awareness and seek redress. She can seek the support of others who have suffered similar wrongs at times when she feels demoralized or uncertain. The legal claimant typically acts alone: even in a case with multiple plaintiffs or a class, claimants may not meet regularly or even know each other. Although a claimant may develop a feeling of solidarity or shared purpose with her attorney,⁷¹ this is a contingent development that may

⁶⁸ See Richard A. Posner, *Emotion Versus Emotionalism in Law*, in *THE PASSIONS OF LAW*, *supra* note 66, at 309, 311 (“The idea of emotion as a kind of cognitive shortcut explains why jurors, like children, are more likely to make emotional judgments than judges.”).

⁶⁹ FED. R. EVID. 403 (providing under Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time: “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence”). Evidence with a strong affective valence may fall readily under one of more of these “prejudicial” rubrics.

⁷⁰ See *California v. Brown*, 479 U.S. 538, 545 (1986) (upholding the instruction). For a thoughtful and lucid discussion of the sometimes incoherent approach to emotion in the doctrine related to capital decisionmaking, see generally Susan Bandes, *Repellent Crimes and Rational Deliberation*, 33 VT. L. REV. 489 (2009).

⁷¹ A number of scholars have commented on the intense affective bonds that may sometimes develop between a defendant accused of a serious crime and his or her attorney. As David Feige observes: “I care about the person I know. In most cases, the complainant is an abstraction to me. His victimization is an abstraction. My client, on the other hand, is very human and very real. It is his tears I see, his hand I hold and his mother I console.” David Feige, *How to Defend Someone You Know is Guilty*, N.Y. TIMES, Apr. 8, 2001, § 6 (Maga-

depend on factors ranging from the professional style of the attorney, to the time that she may have to devote to the case, to the correspondence between the optimal legal strategy for the case and the claimant's own understanding of her circumstances. The emergence of feelings of solidarity is in most cases mitigated, or at least mediated, by the lawyer's status as a professional and the socioeconomic hierarchy that exists between lawyer and client.⁷² A plaintiff may find hope or sustenance in the possibility of a concrete remedy—a prospect that may elude many movement participants—but she may also experience fear or anxiety about its uncertainty. While some claimants derive satisfaction from the opportunity to have their “day in court,” which may reinforce their sense of dignity and agency, others may be dismayed by the stylized norms of self-presentation, or may feel lost in an apparently arcane set of processes.⁷³

My goal, in offering this juxtaposition, is not to suggest that a lawsuit should function, affectively, in the way that a social protest movement does. The substantive goals and institutional contexts of each vary too greatly to make this a plausible position. Nor are they mutually exclusive alternatives: as many scholars of social and political change have observed, law may be a valuable expedient for social movements,⁷⁴ and social movements may lay the groundwork for legal action.⁷⁵ My point is that if both the violation of rights and the effort to respond to that violation have potent affective dimensions, legal scholars and actors need to think more carefully about the ways that legal processes approach those dimensions. In Part II, I turn to that task.

E. The Emotional Effects of Mobilization

As the foregoing discussion suggests, the mobilization of rights is informed and infused by varied forms of affect: it also produces its own emo-

zine), at 59–60. The emotions of empathy, affection, or solidarity may arise from a variety of sources, including the high personal stakes of a criminal charge, and the psychological need of the lawyer to humanize her client (and sometimes de-humanize or distance herself affectively from the victims of her client's alleged crimes) in order to engage in zealous defense. For thoughtful discussions of these issues, see, for example, Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 *BUFF. CRIM. L. REV.* 339 (2006); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 *HOFSTRA L. REV.* 925 (2000).

⁷² See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 1–56 (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 100 *YALE L.J.* 2107, 2111 (1991).

⁷³ For an interesting discussion of this problem in the context of transitional-justice regimes, see generally ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* (2005).

⁷⁴ MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY AND THE POLITICS OF LEGAL MOBILIZATION* 48 (1994); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 13 (2d ed. 2004). See also Douglas NeJaime, *Winning Through Losing*, 96 *IOWA L. REV.* 941 (2011), available at <http://ssrn.com/abstract=1592667>.

⁷⁵ Amy Kapczynski & Jonathan M. Berger, *The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa*, in *HUMAN RIGHTS ADVOCACY STORIES* 43, 47 (Deena R. Hurwitz, Margaret L. Satterthwaite & Doug Ford eds., 2009).

tional consequences. The emerging sociology of social movements creates the impression that there is a surging emotional “inside” of a protester and a calm emotional “outside” of governmental and other institutional actors. This is hardly the case. Governmental actors, who bear collective political responsibility for the laws, policies, or circumstances that may be the focus of rights claiming, are themselves astute performers and managers of emotion. They may be acutely aware of the emotional resonance of social movements, and intervene subtly or energetically to blunt their impact. A dramatic example occurred at the 1964 Democratic Convention, when Lyndon Johnson preempted the television broadcast of the testimony before the Credentials Committee of Fannie Lou Hamer of the Mississippi Freedom Democratic Party, because he feared that her candid and emotionally compelling testimony was generating sympathy and even outrage among members of the viewing public.⁷⁶

Individual defendants, in the context of a legal action, may also experience strong affective responses to the claiming of rights. An adverse judgment or even the filing of a legal action may fill defendants with shame or guilt about the actual decision or incident, as well as fear or dread about reputational or economic consequences. Their efforts to negotiate these emotions, while defending against a loss in the legal forum, often require a complicated dance.

One vehicle for managing these conflicting concerns, which has been increasingly used by both governmental and corporate actors, is the public apology. Institutional apologies have been praised by some commentators for foregrounding the interpersonal dimensions of a conflict and the humanity of those who claim the deprivation of their rights.⁷⁷ They also bring the

⁷⁶ The Freedom Democratic Party arose from the voter registration efforts initiated by civil rights activists in Mississippi during the first “Freedom Summer” program. Recognizing that Mississippi had selected an all-white delegation to the Democratic Convention, the Freedom Party selected its own slate, which included recently enfranchised African American delegates such as Mrs. Hamer. They went to the Convention in Atlantic City to attempt to have their delegation seated at the convention. The matter was referred to the Credentials Committee, which held televised hearings. Ultimately, Hubert Humphrey, who was himself seeking the Vice-Presidential nomination, engineered a compromise that offered the Freedom Democrats two seats in the Mississippi delegation. After a public statement by Mrs. Hamer that “we didn’t come all this way for no two seats, when all of us is tired,” the Freedom Democratic delegation walked out of the convention in protest. See *Eyes on the Prize: America’s Civil Rights Years 1954–1985: Mississippi: Is This America? (1963–1964)* (Blackside 1987).

⁷⁷ There appear to be at least two categories of commentators who highlight the transformative potential of apologies, when made by institutions or individuals in litigation or other public contexts. Some commentators focus on the moral dimension of the act, arguing that it permits the party who has committed the wrong to accept responsibility and demonstrate sorrow and contrition, and permits the party who has been wronged to forgive or to give up his resentment. See, e.g., Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 *YALE L.J.* 1135 (2000) (arguing that in the litigation or mediation context, apology only remains a moral act when the offender who apologizes is prepared to accept the consequences of admitting the wrongfulness of his act). Some commentators focus on the instrumental dimension of the act, arguing that apology can be a tool for advancing the goal of settlement, and downplaying the issues of authenticity or willingness to accept responsibility that comprise its

affective dimension of a conflict—the feelings it ostensibly inspires in a wrongdoer—into political and legal fora from which it is often banished. The recognition of loss it provides to the claimant has also had the effect, in some controversies, of reducing polarization and encouraging face-to-face negotiations and settlements. In the much publicized litigation over the death of Michael Woods, brother of actor James Woods, a face-to-face apology from the CEO of the hospital led to a series of negotiations which culminated in the settlement of the lawsuit.⁷⁸ Other hospitals are now investigating this strategy as a means of reducing tort damages and litigation costs.⁷⁹

But as this example and other public apologies⁸⁰ suggest, this may be an ambivalent strategy from the standpoint of those who seek to vindicate rights. The acknowledgment of loss may be a potent salve to long-neglected feelings of injury. Yet the cost-effectiveness of the strategy may create corrosive doubts about the sincerity of the expressed contrition.⁸¹ Moreover, a public apology may deprive rights claimants—at least temporarily—of the moral high ground, as wrongdoers deploy the discourse of responsibility and ostensibly recognize the affective dimensions of the controversy.⁸² As more players become alert to the strategic value of emotion in rights-related controversies, the complex expressive and instrumental aspects of their role are likely to become more apparent.

moral dimension. See, e.g., Marshall H. Tanick & Teresa J. Ayling, *Alternative Dispute Resolution by Apology: Settlement by Saying "I'm Sorry,"* HENNEPIN LAW., July–Aug. 1996, at 22, available at <http://www.mansfieldtanick.com/CM/Articles/Alternate-Dispute-Resolution.asp>.

⁷⁸ Diane Curtis, *Sometimes, an Apology Can Deter a Lawsuit*, CAL. B.J. (July 2010), <http://www.calbarjournal.com/July2010/TopHeadlines/TH1.aspx> (describing the Woods case and the growing role of apology in the settlement of tort actions).

⁷⁹ *Id.* As University of Illinois law professor Jennifer Robbennolt explains,

[t]he apology fulfills some of the goals that triggered the suit, such as a need for respect to assign responsibility and to get a sense that what happened won't happen again. So receiving an apology can reduce financial aspirations and make it possible for parties to enter into discussions about settlement.

Id. (quoting Robbennolt). See generally Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2004).

⁸⁰ President Clinton, for example, apologized on behalf of the nation to the survivors of the Tuskegee Syphilis Experiment. See *Lehrer News Hour: An Apology 65 Years Late* (PBS television broadcast May 16, 1997), available at http://www.pbs.org/newshour/bb/health/may97/tuskegee_5-16.html.

⁸¹ For thoughtful discussions of the risks of generating “counterfeit” emotions when affective expression becomes the focus of legal decisionmakers, or part of a litigation strategy, see Carol Sanger, *The Role and Reality of Emotions in Law*, 8 WM. & MARY J. WOMEN & L. 107, 110–13 (2001); Sarat, *supra* note 66, at 169–70.

⁸² Cf. Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 362–63 (2008) (death penalty opponents could more effectively communicate the stakes of capital punishment by deploying a rhetoric that gave voice to emotions).

II. THE EMOTIONS OF LEGAL RIGHTS CLAIMING

In this section, I examine two constellations of emotions that are likely to figure importantly in the experience of the legal-rights claimant. The first is a set of “responsive” emotions that might be termed the emotions of injustice. They comprehend a range of related responses to a violation or injury, from frustration or anger to indignation to rage. The second is a set of “reciprocal” emotions—affection, trust, solidarity—that not only help claimants to sustain the challenges of rights vindication, but also help them to build capacity, so that they can more effectively address their task. I will consider the way that these emotions emerge, or fail to emerge, in the violation or vindication of legal rights, and the difficulties that their absence may create for claimants in many legal processes. I will argue that changes in the ways that these emotions are understood and addressed by actors in the legal system could ameliorate the affective experience of those who seek to vindicate rights through law.

A. *Responsive Emotions: The Emotions of Injustice and Indignation*

Most people, as we have seen, respond to a wrong done to them with a strong affective reaction. In the first instance, this is frequently an immobilizing—or demobilizing—response, such as shock, grief, or shame at being injured or devalued. For some people, these are their most forceful, or indeed, their final reactions. For other people, a constellation of distinct emotions soon come to the fore. These feelings may range from anger to indignation to rage. They are based on the undeserved character of the wrong, and the sense in which it violates some shared norm, frequently a norm reflecting their place in society. These emotions are likely to be crucial factors in animating the turn to law: they lead the claimant to seek a rule that identifies or reflects the norm that has been violated, and to seek redress. But while legal actors may recognize the initial, motivating force of these emotions, they often pay them little heed in the context of the lawsuit, or in the relationship between the lawyer and the client. I will argue that one of these emotions in particular—the emotion of indignation—deserves more focused attention from legal scholars and actors. Indignation may be useful in sustaining the claimant because it underscores norm violation or wrongdoing, and it points to the need for remediation. Indignation is also an emotion which is appropriate to the context of legal action in ways that can potentially serve the interests both of claimants and of actors in the legal system. Indignation is an emotion that is capable of being expressed in the context of a legal action, without violating the emotion norms of legal decisionmakers. It may be an accurate and useful affective frame for perceiving or describing a rights claimant, both for legal actors and for members of the broader public. Finally, indignation may be an emotion that legal action can

actually hold out the prospect of satisfying, if it is properly attended in the judicial process.

The emotions of injustice, as I have designated them above, have certain features in common, although they also have differentiating characteristics.⁸³ All of them entail a response to what is believed to be an undeserved wrong.⁸⁴ Anger “occurs with respect to specific understandings about established commitments and the violation or betrayal of legitimate expectations.”⁸⁵ Anger requires an emotional foundation of self-respect: if a person does not believe that she is entitled to be treated well, she is unlikely to feel angry when she is treated poorly. Deborah Gould has argued with respect to the emergence of ACT UP that a shift in gay and lesbian feelings about their non-conforming sexuality—from a shame fanned by the epidemic in the direction of greater pride—was necessary before they could experience and express anger about the federal government’s failure to respond to AIDS.⁸⁶ Indignation adds to anger an additional dimension of entitlement. Daniel Kahneman and Cass Sunstein have argued that “[i]ndignation is invoked in an observer by an agent who, intentionally and without provocation or adequate reason, causes a victim to suffer harm.”⁸⁷ And harm, as they define it,

⁸³ The distinctions among these emotions are a matter of discussion and disagreement among the theorists who study them. Any set of distinctions may be viewed in some ways as arbitrary because the differences, for example, between indignation and outrage, or what I am calling “righteous indignation” versus ordinary indignation are not physiologically measurable states. See E-mail from Susan Bandes to Kathryn Abrams (October 25, 2010) (on file with author) (citing comment by psychologist Lisa Feldman Barrett). What I attempt to do in this section is to describe a continuum of affective response, segments of which are distinguished from each other by differences in some of the evaluative judgments or the behavioral responses with which they are associated. I argue that the emotion that I identify with a particular part of that continuum may be valuable in connection with rights claiming in the legal system.

⁸⁴ Michael Lambek & Jacqueline S. Solway, *Just Anger: Scenarios of Indignation in Botswana and Madagascar*, 66 *ETHNOS* 49, 52–53 (2001) (describing anger and indignation as having roots in behavior which is wrongful according to shared expectations and notions of desert).

⁸⁵ *Id.* at 52.

⁸⁶ Gould, *Rock the Boat, Don’t Rock the Boat, Baby*, *supra* note 30, at 143–52.

⁸⁷ Daniel Kahneman & Cass R. Sunstein, *Indignation: Psychology, Politics, Law* 10 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Series, No. 171, 2007), available at http://ssrn.com/abstract_id=1002707 (emphasis omitted). One salient feature of Kahneman and Sunstein’s understanding that should be referenced in this discussion is their view of indignation as a “System 1” cognitive response: that is, one that is the product of rapid, intuitive processing, rather than a deliberative, rule-based response. *Id.* at 5. While System 1 responses may subsequently be justified by reference to reasons, their emergence is not, in the first instance, responsive to such reasons. They emerge in response to rapid assessments that Kahneman and Sunstein analogize, for example, to a fear of spiders. *Id.* at 2. These intuitive assessments may sometimes be schooled into instinct by long-term acculturation to the norms of a particular community (which creates a “socially endorsed . . . reference state,” departures from which induce intuitive affective response); however, they may sometimes be difficult to explain at all (resulting in the phenomenon that the authors refer to as “moral dumbfounding”). *Id.* at 9–13. The System 2 process of deliberation and reflection on reasons may then modify this initial response: it may tamp down the intensity of some responses, or summon the agent to respond where she may initially have felt no intuitive response (though one might have been justified by the giving of reasons—a phenomenon that Kahneman and

“is a loss relative an entitlement. An individual’s entitlements are governed by rules and expectations that are shared by the community.”⁸⁸ Thus, indignation is a response not simply to a wrong that violates agreements or expectations: it is a response to a wrong that violates shared, collective norms.⁸⁹ Indignation sometimes references conventional or context-specific norms about appropriate treatment, but it also arises from shared understandings about equality and belonging: about the “rightful place [of the claimant] in the world,”⁹⁰ or about “what a mass of people in a society owe one another as equals.”⁹¹ It is the violation of these norm-based expectations, these presumptions of equality or belonging, that give indignation its particular sting. Gould observes, for example, that the stark contrast between the sense of belonging that many gay men enjoyed (if not in their sexual identities, then in their lives and identities as economically self-sufficient white males), and the civic exile performed by *Bowers v. Hardwick*, catalyzed a sense of indignation among gay activists.⁹² Indignation may also be modulated by norms of moderation or proportion: because it responds to a violation of a norm, the extent of indignation may parallel the extent of the violation. Moreover, the relation of indignation to norms implicating belonging and the dignity of the subject may also modulate its force: self-respect and respect for the people with whom one shares the norms in question may impose limits on the objection to their violation.

When indignation becomes detached from this attribute of modulation, it may shade over into less bounded and less other-respecting forms of emo-

Sunstein refer to as “moral numbing”). These two systems may also be concurrently active, with “automatic and controlled cognitive operations compet[ing] for the control of overt responses.” *Id.* at 5. For a more complete discussion of the distinction between these two modes of cognition, see generally Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

In the discussion that follows, I sometimes offer an elaborated account of the shared norms that give rise to the operation of indignation. Although this may suggest a view that indignation is more of a System 2 response, I see my account as consistent with a view that the apprehension of these norms often operates below the level of conscious deliberation to form a culturally-specific “reference state,” thus rendering the emergence of indignation a more rapid or intuitive process.

⁸⁸ Kahneman & Sunstein, *supra* note 87, at 10. Deborah Gould mirrors this understanding, describing indignation as “born from a sense of entitlement betrayed.” Gould, *Rock the Boat, Don’t Rock the Boat, Baby*, *supra* note 30, at 150.

⁸⁹ Jon Elster, *Emotions and Economic Theory*, 36 J. ECON. LITERATURE 47 (1998).

⁹⁰ Lambek & Solway, *supra* note 84, at 52–53. Lambek and Solway are discussing the indignation that they see as underlying anger. While I see anger and indignation as distinct, albeit related, emotions, I find their discussion of indignation to be consonant with my own views.

⁹¹ Waldron, *supra* note 36, at 132. I should be clear that when Waldron uses this language, he is describing the understanding that underlies rights claims in general, not the understandings that underlie the emotion of indignation. However, I reference his language here because it seems to me to evoke precisely that notion of equality-based entitlement that seems to underlie many forms of indignation.

⁹² Gould, *Rock the Boat, Don’t Rock the Boat, Baby*, *supra* note 30, at 146–49.

tion.⁹³ When a subject feels the sting of a violation of shared norms, but her sense of the rectitude of her position swamps consideration of others and their views, we might say that she is experiencing righteous indignation. We might identify this shift in the emotions of a social movement at the moment when members cease to protest their own treatment and lapse into ad hominem derogation of their opponents. Indignation (righteous or otherwise) may merge into outrage, as it escapes the boundaries of conventionally acceptable comportment through tone or other aspects of behavior. This excess may arise from an intensity of feeling that exceeds the capability of restraint; it may also entail an aspect of self-conscious, excessive performance or “outrageousness”, meant to underscore the egregiousness of the violation. When even this exaggerated, unstable notion of proportion evaporates, we might identify the emotion not as outrage, but as pure rage. Rage devours limits and may be incapable of satisfaction. Rage “[gives] little sense of its unfolding in any way other than increasing violence; [it] escapes the bounds of personal and social circumspection and containment and there is no immediate individual or mutual understanding of what might constitute a satisfactory conclusion.”⁹⁴

I would argue that indignation, an intermediate emotion on this spectrum, merits closer attention from legal scholars and actors. Legal actors do not entirely neglect indignation. Individual lawyers may see it as a resource for sustaining their clients in litigation that is protracted or that takes unexpected turns. In criminal trials, indignation may play a more public role, as it is invoked by the prosecutor or the sentencing judge in response to a crime that particularly abrades public morality.⁹⁵ Judges may express, or seek to foster, indignation when they describe in their written opinions the violation of preexisting or newly recognized⁹⁶ civil rights. But just as emotion is rarely recognized as a ground for legal action, responding to it is not acknowledged to be a desired end of law.⁹⁷ These understandings of emotion are likely to be muted, or subordinated to other frames for conceiving or

⁹³ Again, these are not physiologically distinct states but points on a conceptual and behavioral continuum. I use terms that might seem to identify them as distinct emotions in order to emphasize their distinct cognitive and behavioral features.

⁹⁴ Lambek & Solway, *supra* note 84, at 54.

⁹⁵ For a fascinating discussion of whether indignation or disgust is the emotion that is more appropriately expressed and referenced in these contexts, compare Martha C. Nussbaum, “*The Secret Sewers of Vice*”: *Disgust, Bodies, and the Law*, in *THE PASSIONS OF LAW*, *supra* note 66, at 26 (arguing for indignation), with Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *THE PASSIONS OF LAW*, *supra* note 66, at 63 (arguing for disgust).

⁹⁶ In *Tribute to Professor Melvyn R. Durchslag: Exploring the Affective Constitution*, 59 *CASE W. RES. L. REV.* 571, 577–79 (2009), I argue that the unusual heated rhetoric employed by the Supreme Court in *Shaw v. Reno*, 509 U.S. 630 (1993), reflects an effort to incite indignation at the use of race in drawing electoral districts, an act which had not previously been treated as constitutionally problematic.

⁹⁷ Cf. Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 *MINN. L. REV.* 1997, 2034–40, 2068–73 (2010) (describing the difficulty that legal actors may have in seeing the emotions implicated in particular cases or doctrines, and in understanding law as a vehicle for influencing affective states).

explaining the vindication of legal rights. The following argument seeks to resist this tendency, and encourages more self-aware understanding by legal actors of the prospective role(s) of indignation in legal rights claiming. With its relation to norms, to belonging, and to a sense of limits or proportion, indignation has the potential to be of value both to claimants who seek to vindicate their rights through law, and to the legal system itself in approaching the victim of rights violations.

Martha Nussbaum argues that indignation “rests on reasons that can be publicly articulated and publicly shaped.”⁹⁸ The indignant party may be able to point to the norm or entitlement that was violated by her injury: but the ability to articulate the underlying causes does not render indignation a simple cognitive response. Indignation—which translates the sting of exclusion or devaluing treatment into a kind of justified anger—“puts our body behind”⁹⁹ the assessment of violation, signaling its salience to the aggrieved, and to the audience that presumably shares the cited norm. Yet the urgency or insistence of indignation is also tethered, as I note above, to a sense of proportion. Indignation is grounded in the dignity of the subject: it protests treatment that fails to accord her what she is due, as a law-abiding citizen, for example, or as an equal member of a political community. This implied status as a dignified subject may operate, as I note above, as a constraint on the expression of indignation.

Indignation is frequently identified in the social movement literature as a “mobilizing” emotion: the combined sense of violation and justification fuels energy and stimulates action. Social scientists have found that subjects for whom particular injustices arouse feelings of indignation (as opposed to emotions such as sympathy) are more likely to make “pro-social” commitments, such as joining or contributing to social movements or making personal sacrifices for the betterment of a group.¹⁰⁰ Indignation seems likely to provide emotional sustenance to claimants who must endure the ups and downs of a lengthy and uncertain lawsuit: more durably or consistently perhaps than emotions such as fear or desire for monetary gain. Much as “injustice frames” are used to incite indignation in prospective members of

⁹⁸ Nussbaum, *supra* note 95, at 26. This, as Nussbaum suggests, is because it responds to a wrong that violates shared norms. Nussbaum notes that “Aristotle’s *Rhetoric* gives the aspiring orator elaborate recipes for provoking indignation in an audience, by presenting reasons they can share with regard to a putative wrong.” *Id.*

⁹⁹ William Miller, *THE ANATOMY OF DISGUST* 181 (1997). Miller’s statement was connected with the emotion of disgust and its role in public discourse: “The disgust idiom puts our body behind our words, pledges it as security to make our words something more than words.” *Id.* But his statement also applies to other emotions, such as indignation, that bring a visceral dimension to public discourse and debate.

¹⁰⁰ See Leo Montada & Angela Schneider, *Justice and Emotional Reactions to the Disadvantaged*, 3 *SOC. JUST. RES.* 313 (1989). Montada and Schneider’s research, however, pertained to the emotional reactions sparked by observing injustice in the lives of others. While such observations can certainly be a motivation for joining social movements, the focus in most of the above discussion has been on the relation between observing injustice in one’s own life and joining social movements.

social movements, one could imagine a lawyer using such frames to spark indignation in a prospective litigant. When and whether a lawyer should use indignation to incite a client to litigate is a complicated question, which turns on the merits of the individual case, and one's view both of client autonomy and of whether particular groups of wronged parties tend to underclaim.¹⁰¹ But a legal advocate might well have recourse to indignation to rally a client who becomes demoralized at a critical juncture of a case.

Indignation is also an emotion that can, in its more modulated forms, be expressed consistently with the emotion norms of the courtroom. First of all, it entails the "giving of reasons": the explicit referencing of those norms of belonging or of decent treatment that have been violated. But its frequent relation to what one is entitled to as a member of a polity or an equal member of a community underscores the commitment to equality under law. And a claimant who is protesting assaults on his dignity has particular reason to behave in a dignified fashion. These factors point to the conclusion that indignation signals salience without threatening disruption. It may thereby conform well to the affective norms of the courtroom, just as the solemn protests at the Plaza de Mayo suited its character as the site of a historic call to accountability, and the theatrical outrages of ACT UP fit the chaotic, pluralistic emotion norms of the streets of Manhattan.

This view of indignation as the affective discourse of violated rights faces certain challenges or complications. Indignation can sometimes be grounded in a sense of entitlement that derives from norms distinct from or even contrary to norms of equality—the idea, for example, that one's wealth or status entitles one to a particularly elevated form of treatment. Even when not derived from such partial norms, indignation, or the sense that one's dignity has been violated, may be expressed more readily or convincingly by those who have enjoyed a lifetime of entitlements: those entitlements which extend to all political equals and those which do not. Those whose formal equality has rarely been respected in practice may find it more difficult to summon such a performance—although the accounts of poverty lawyers offer a compelling reminder that a sense of basic entitlement to decent treatment is not the exclusive province of the economically privileged or well-educated.¹⁰²

A greater challenge may lie in the ways that expressions of indignation are received by decisionmakers, even when they are plausibly rendered. Indignation may function as a kind of "clean hands" emotion: indignation by

¹⁰¹ Both Bumiller and Felsteiner et al. seem to support this conclusion. Felsteiner, Abel & Sarat do so more explicitly. See Felsteiner, Abel & Sarat, *supra* note 5, at 651 ("transformation studies [i.e., using the naming, blaming, claiming frame] render problematic one of the most fundamental political judgments about disputing—that there is too much of it . . ."). Bumiller makes this suggestion more implicitly through her qualitative empirical argument that many who might be able to claim violations of Title VII decline to do so. Bumiller, *supra* note 35, at 436–39.

¹⁰² See, e.g., White, *supra* note 67, at 45–51.

a criminal defendant, or an undocumented immigrant, at the violation of her rights by law enforcement officials may fail to evoke the same response as indignation by a civil rights claimant, because the defendant is alleged to have and the undocumented immigrant affirmatively has violated shared norms, in the form of the public laws. There may also be a tension between expressions of even modulated indignation and the presentation—both affective and substantive—that courts appear to expect of some kinds of litigants. Lucie White and Tony Alfieri, for example, have described the abject performances that are sometimes required of welfare claimants: there are substantive requirements that funds disbursed be expended for absolute necessities, as well as expectations that claimants assume dependent, apologetic postures invoking extremity or ignorance of regulatory requirements.¹⁰³ Similar expectations have sometimes been imposed on women claiming spousal abuse or sexualized injuries¹⁰⁴: the images of the helpless victim or the violated innocent which most successfully engage the courts may be inconsistent with expressions of indignation. One way in which an understanding of indignation could be more broadly useful within the legal system is to signal a paradigmatic way in which the subject who has suffered a violation of rights can be understood. That subject is neither an abject nor an innocent placing her wounded subjectivity at the mercy of the court, but a subject with legitimate expectations of civic membership or fair treatment, protesting the violation of those norm-based expectations.

One area in which doctrine has reflected this kind of a shift is the area of sexual harassment. In this area, as with welfare law, the imagery of victimization tended to be intertwined with the substantive definition of the right. At odds over what kind of an injury signaled the presence of hostile-environment sexual harassment, a claim in which a plaintiff does not have to demonstrate economic injury,¹⁰⁵ courts began to look at effects on the plaintiff. By the early 1990s a split emerged in the circuits, with some courts insisting that a sexual harassment plaintiff was obliged to demonstrate “serious psychological injury” in order to prevail.¹⁰⁶ Beyond shifting the focus of judicial scrutiny from the defendant’s conduct to the plaintiff’s response, this requirement risked instantiating in doctrine an image of a sexual harassment plaintiff as wholly compromised by her sexualized treatment in the workplace. Indeed the facts of *Harris v. Forklift Services*,¹⁰⁷ the case in which the

¹⁰³ See *id.* at 27–28; Alfieri, *supra* note 72, at 2123–31.

¹⁰⁴ Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 324–46 (1995); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 3–10 (1991).

¹⁰⁵ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

¹⁰⁶ Compare *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (requiring “serious psychological injury”), and *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (same), and *Downes v. FAA*, 775 F.2d 288, 292 (Fed. Cir. 1985) (same), with *Ellison v. Brady*, 924 F.2d 872, 877–78 (9th Cir. 1991) (rejecting such a requirement).

¹⁰⁷ 510 U.S. 17 (1993).

Supreme Court ultimately ruled on this requirement, ran afoul of this wounded imagery by featuring a plaintiff who was the very embodiment of modulated, indignant protest. Harris, a female manager who had sustained several years of sex-based derogation and physical touching, informed her supervisor, the president of the company, that she could not tolerate this unacceptable behavior. In a face-to-face confrontation, she warned him that if he did not stop, she would quit her job. He apologized, claimed that she had misunderstood his jocularity, and promised to do better. But when he ascribed one of Harris's professional achievements to sexual availability in front of another client, Harris quit her job. A lower court found that Harris—who notably remained dignified, agentic, and indignant throughout her tenure in the workplace—had not demonstrated “serious psychological injury.”¹⁰⁸

The Supreme Court, however, rejected the lower court's holding.¹⁰⁹ It found nothing in Harris's self-direction or the clear boundaries that she put up to be inconsistent with the conclusion that she had been harassed. The Court, in an opinion by Justice O'Connor, rejected the proposed requirement of psychological impairment, holding that there were many facts that were indicative of sexual harassment, and that “Title VII comes into play before the harassing conduct leads to a nervous breakdown.”¹¹⁰ Upholding the requirement of “serious psychological injury” would have helped to enshrine the image of a sexual harassment claimant as a vulnerable, damaged subject; but instead, the Court afforded a remedy to a claimant who delivered her own indignant ultimatum to her direct supervisor. This decision was in some respects a departure: its contrast with the often-compromised characterization of the sexual harassment victim may be explained by the fact that sexual harassment occurs in the more masculinized (and perhaps dignified) environment of the workplace, and that harassment is an episodic event that might reasonably be understood not to construct the entire psychic horizon of the claimant. But it may nonetheless point the way to an understanding of the affective dimension of rights-based injury as grounded not in disabling subjection but in violated dignity.

An understanding of the role that indignation may play in rights claiming may be valuable in one final way. It may signal a form of emotional satisfaction that claimants can reasonably hope to obtain through the vehicle of a lawsuit. A claimant cannot count on bringing a wrongdoer to justice, nor can she rely, given the vicissitudes of judicial judgment, on receiving compensation for her injuries. But the opportunity to appear and to explain and voice one's indignation is something that the system can provide, even if one does not prevail on one's substantive claim. A claimant can satisfy her

¹⁰⁸ *Id.* at 19–20 (describing order of federal magistrate, which was affirmed in a brief unpublished decision by the Sixth Circuit Court of Appeals).

¹⁰⁹ *Id.* at 21–23.

¹¹⁰ *Id.* at 22.

indignation, at least in part, by performing her dignity in the visible public setting of the courtroom. This is part of what claimants have historically sought out when they have demanded their “day in court.”¹¹¹ Yet, this goal has often been construed in a way that emphasizes the opportunity to tell one’s substantive story and to be heard.¹¹² In contrast, an approach that sees indignation as the affective discourse of rights violation emphasizes the opportunity to perform one’s dignity and to be seen in that performance. Particularly if decisionmakers can accept a less affectively-compromised image of the claimant, the opportunity to perform one’s own dignity may be the opportunity that arises from the resort to law, much as opportunities to express joy, outrage, or solidarity arise within social movements.

B. *Reciprocal Emotions*

Reciprocal emotions—or the feelings that those who are mobilizing rights may experience for each other—are a second important focus for legal actors interested in the affective dimensions of rights mobilization. The importance of reciprocal emotions, particularly those with a positive valence, is one of the most significant lessons to emerge from the study of rights claiming in social movements. Sociologists of emotion have demonstrated the importance of the bonds of trust and affection that run from members to leaders, as well as from members to each other, in motivating action and in fostering persistence within protest movements.¹¹³ For example, Goodwin and Pfaff’s study of activity within high-risk social movements demonstrates the importance of the reciprocal affections created by church meetings and movement songs; they also focus on the motivating force of sanctions of shame and pride imposed by group members on each other.¹¹⁴ Fernando

¹¹¹ Jerry Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–52 (1976) (examining the value of individual dignity as a justification for the legal requirement of due process).

¹¹² According to some contemporary political theorists, being seen and recognized as a member of a political community comes prior to and is necessary for the assertion of formal rights within the legal or political institutions of that community. In the work of Hannah Arendt, where this idea finds its foremost expression, this form of recognition is part of the “right to have rights.” See Hannah Arendt, *THE ORIGINS OF TOTALITARIANISM* 294–95 (1951). Achieving recognition in this way requires a context in which human beings can act, speak, and engage with one another. See Seyla Benhabib, *The Democratic Moment and the Problem of Difference*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 3, 10 (Seyla Benhabib ed., 1996). Although the context of politics, where Arendt believes human beings enjoy this opportunity, is distinct from that of adjudication, there may be an echo of it in the latter context. Claiming rights through litigation may be not only about securing particular goods, but also about being seen and treated with dignity by members of one’s community. I thank Genevieve R. Painter for helping me to see this connection.

¹¹³ See, e.g., Jasper, *supra* note 4, at 407.

¹¹⁴ See Goodwin & Pfaff, *supra* note 41, at 295–98. In the latter example the emotions are not strictly reciprocal: the sanctioning party may feel anger or indignation, and the sanctioned party shame, for example, but the feelings running between two movement members create powerful effects on movement activity.

Bosco's analysis of the Madres of the Plaza de Mayo demonstrates the central role that bonds of affection played in sustaining the movement, both in its riskier times and as it inspired worldwide "support" groups.¹¹⁵

This kind of affective support may be important to the legal vindication of rights claims in many ways. Most obviously, it may affect whether those suffering rights violations are willing to seek recourse to law. Litigation may not impose physical dangers, but it often exposes claimants to risks of a less dramatic but nonetheless palpable character: retaliation, costs, and the exposure of entire families to periods of uncertainty and pressure. These factors were cited by some of Bumiller's subjects as factors that militated against the vindication of anti-discrimination rights through legal action.¹¹⁶ Less obviously, but also importantly, psychological research has begun to suggest that positive emotions—some of which, like love and interest, may have reciprocal bases—do not simply bring pleasure or satisfaction to those who experience them. They are also important in undoing the physical and psychological effects of negative emotions; moreover, these emotions help to build capacity in those who experience them.¹¹⁷ As psychologist Barbara Fredrickson argues, they "have the ability to broaden people's momentary thought-action repertoires and build their enduring personal resources, ranging from physical and intellectual resources to social and psychological resources."¹¹⁸ This growth in personal resources can help people think and cope more productively within the context of an injury or a legal action.¹¹⁹

Notwithstanding these evident benefits, the process of vindicating a rights claim through law does not predictably produce the support of reciprocal emotions. This defect arises in many cases from structural or procedural features of the legal actions in which rights claims are mobilized. Most rights claims are not vindicated in collective contexts. Even those who are part of joint or class actions rarely interact on any sustained basis with other

¹¹⁵ See generally Bosco, *supra* note 52.

¹¹⁶ Bumiller, *supra* note 35, at 436–37.

¹¹⁷ Barbara Fredrickson, *The Role of Positive Emotions in Positive Psychology: The Broaden and Build Theory of Positive Emotions*, 56 AM. PSYCHOLOGIST 218, 219–220 (2001) [hereinafter Fredrickson, *The Role of Positive Emotions*]. See also Barbara Fredrickson, *What Good are Positive Emotions*, 2 REV. OF GEN. PSYCHOL. 300, 307–11 (1998). Fredrickson's focus is on the positive, not the reciprocal, character of the emotions. I reference her work, however, because I suspect that many of the emotions that operate to build capacity in social movements, and that might play the same role in the context of litigation, flow between people involved in rights mobilization and thus have the attribute of reciprocity.

¹¹⁸ Fredrickson, *The Role of Positive Emotions*, *supra* note 117, at 219.

¹¹⁹ A finding distinct from, but consistent with, this conclusion emerged from *Harris v. Forklift Systems*, 510 U.S. 17 (1993), the sexual harassment case discussed above. In that case, a brief filed by the American Psychological Association, in support of neither party, argued that the "serious psychological injury" of the plaintiff was not a reliable index of the severity of the sexual harassment she had endured. The APA brief cited findings that whether a person who was a target of harassment sustained serious psychological problems depended more on the strength of the personal support networks available to the victim, her own coping mechanisms, and other factors, than on the severity of the treatment she endured. See Brief for Amicus Curiae APA, *supra* note 17, at 10.

claimants. Some claimants may have relationships of trust and even affection with their lawyers. But many do not. Moreover, the lawyer may feel that her task is to formulate the client's claim in the way that best suits the doctrinally-driven assumptions of the court. In as much as there is an interpersonal dimension, the lawyer's goal may be to help the client understand the importance of moving toward this position. This does not always create strong reciprocal bonds between lawyer and client.¹²⁰

With respect to the role of indignation, the challenge for legal actors is to determine how a particular emotion, already extant or inchoate in the many contexts of legal rights claiming, might be highlighted, interpreted, and used to frame the subjectivity of rights claimants in the legal process. With respect to reciprocal emotions, the challenge is both more straightforward and more difficult: it is to determine how emotions that may be of value to claimants, and to the process of vindicating particular rights, might be fostered in a context which is not structurally designed to support them. There has been an important literature devoted to fostering the reciprocal emotions of trust and respect between lawyers and clients, particularly to bridge the inequalities of class, race, status, etc.¹²¹ Yet, there may be limits to what relationships between lawyers and clients can provide under a traditional model of litigation, given the constraints on lawyers in large-volume practices, and the lawyers' need to attend primarily to the framing of clients' legal claims. Rather than argue that such affective support can or should emanate from conventional lawyer-claimant relationships, I will examine several innovative efforts by lawyers to foster reciprocal emotions between clients and others or between groups of clients, in order to ameliorate the affective experience of, or to build capacity among, their clients. These examples may point to a more facilitative role that lawyers can play in cultivating reciprocal emotions in the context of legal action.

The first example comes from the context of post-conviction capital representation, where the extremity of the client's circumstances and the duration of the relationship of representation¹²² may foster a particularly intense focus on the client's affective state. In this setting, lawyers frequently recognize both the urgency of providing affective support to their clients, and the limits on their ability to do it themselves. In an ongoing empirical project ex-

¹²⁰ White, *supra* note 67, at 45–51. White, narrating a case on which she had worked as a legal aid lawyer, describes the difficulty of surmounting the circumstantial, role-based, and socioeconomic differences between herself and her client. She also depicts the tension that arose from her doctrinally-based need to depict her client as *in extremis*, and her client's personal need to convey her sense of felt, albeit constrained, agency or self-direction. *Id.* See also Alfieri, *supra* note 72, 2114–31 (focusing on the tension between narratives rather than on the personal relations between lawyer and client).

¹²¹ See White, *supra* note 67; see also Alfieri, *supra* note 72. See generally Hastings Symposium on Theoretic of Practice: *The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992).

¹²² This is particularly true in states (for example, my home state of California) where post-conviction processes may continue for years. It is less true for states such as Texas, where executions occur at a rapid pace.

ploring the emotions of capital lawyering, Hila Keren and I have identified several strategies that lawyers use to foster reciprocal emotions of care, affection, interest, and trust. One straightforward vehicle has been the team-representation approach often used in capital litigation. Although the lawyers on the team may be required to place their focus elsewhere, there is often a member of the team—frequently a mitigation expert—whose focus on discovering the exculpatory details of the client’s life brings her into closer affective relation with the client, and renders her a better resource for emotional support.¹²³ In addition, lawyers, mitigation experts, or other team members often find it useful to identify and bolster the familial networks of their clients, so that family members can provide the kind of reciprocal affective support that clients require. This may entail resourceful and persistent efforts, as many clients on death row have attenuated family networks, or have been isolated from family members by long terms of incarceration at distant locations. Several lawyers report that one of the first things that they do when a client receives an adverse ruling or experiences a troubling downturn in prison conditions is to reach out to members of the client’s family, so that they can try to help sustain the client through the duration of the difficult period.¹²⁴ Similarly, for clients who have no families, or whose family bonds are irreparably attenuated, members of the team may create a network of support for the claimant, composed of death penalty activists, concerned clergy, former death row inmates, or even concerned celebrities.¹²⁵

In my second example, innovative lawyers bring the support of reciprocal emotions more directly into the structure of legal rights claiming. These lawyers have sought to combine legal representation with community organizing in order to provide reciprocal affective support *and* to build capacity among those involved in legal rights claiming. Julie Su of the Asian Pacific American Legal Center of Southern California used a lawsuit challenging sweatshop labor conditions as an opportunity to organize a diverse community of workers.¹²⁶ Su created a legal action that was novel, both in

¹²³ Interview with Attorneys A & B (December 4, 2007); Interview with Attorney I (February 18, 2008) (Pursuant to the memo of approval from UC-Berkeley’s Human Subjects Committee, we are required to maintain the anonymity of those lawyers we interviewed in connection with this project.).

¹²⁴ Interview with Attorneys A & B (December 4, 2007); Interview with Attorney C (February 14, 2008). Note that there may be a parallel to this practice from the area of restorative justice, where the use of “family circles” brings reciprocal emotions of love and trust—as well as interpersonal sanctions of guilt and shame—to bear in preventing individuals who have been accused or convicted of a crime from reoffending. See, e.g., Lorenn Walker, *Huikahi Restorative Circles, Group Process for Self-Directed Re-Entry and Family Healing*, 2 EUR. J. OF PROBATION 76 (2006); Heino Lilles, Circle Sentencing: Part of the Restorative Justice Continuum, Plenary Speech for “Dreaming of a New Reality” at the Third International Conference on Conferencing, Circles, and Other Restorative Practices (Aug. 9, 2002), available at http://www.iirp.org/article_detail.php?article_id=NDQ3.

¹²⁵ Interview with Attorney C (February 14, 2008); Interview with Attorneys F, G & H (February 18, 2008).

¹²⁶ See generally Julie A. Su, *Making the Invisible Visible: The Garment Industry’s Dirty Laundry*, 1 J. GENDER RACE & JUST. 405 (1998).

the scope of its targets (the workers filed claims against distributors and retailers, as well as producers)¹²⁷ and in the scope of the plaintiff group (Thai workers who were subject to criminal acts as well as labor abuses, and Latin American workers who were subject to labor abuses). She also organized the workers in the context of the lawsuit to contribute actively to the technical requirements of the legal action—assisting with document production, for example—and to see themselves as important voices for the group in the media and in the trial itself.¹²⁸ This meant that they learned to trust their own voices, when they were neither experts nor detached from the controversy, and when, in addition, many lacked knowledge of basic English. Su helped them to see the distinctive value that their perspective, situation, and emotion could contribute to public understanding of the case.¹²⁹ She also brought the workers together on a regular basis, so that their shared situation, decisionmaking, and labor could create affective bonds between them that would be sustaining. This required unusual measures like lengthy meetings and translation between Thai, Spanish, and English. The result of this innovative effort was a sense of capacity and purpose for the claimants, infused with and strengthened by strong reciprocal emotions. As Su describes:

A Thai worker says in Thai, “We are so grateful finally to be free so we can stand alongside you and to struggle with you, to make better lives for us all,” and her words are translated from Thai into English, then from English into Spanish. At the moment when comprehension washes over the faces of the Latina workers, a light of understanding goes on in their eyes, and they begin to nod their heads slowly in agreement, you feel the depth of that connection.¹³⁰

The connections among the workers, and between the workers and Su herself,¹³¹ helped them to feel supported in the precarious transition between oppressed labor and often intimidating litigation. It also built their capacity, in ways that Fredrickson might respect, to speak and to take action on their own behalf.¹³²

¹²⁷ *Id.* at 408.

¹²⁸ *Id.* at 413.

¹²⁹ *Id.*

¹³⁰ *Id.* at 411.

¹³¹ Su is unabashed about her feelings of affection for the workers, referring to the claimants with whom she worked as “some garment workers very dear to my heart.” *Id.* at 405. Su describes the ways that she cultivated her own affective relationships with the workers, in part by taking measures to reduce hierarchy among them (to take a small example, by referring to them as “workers” rather than “clients”), in part by respecting their dignity, and in part by violating the usual boundaries between lawyer and client by visiting them in their homes, doing personal errands for them, etc. *Id.* at 412–13, 416–17.

¹³² Jennifer Gordon has employed a strategy which was in some respects similar, in connection with the law clinic situated in her Workplace Project. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.–C.L. L. REV. 407 (1995). The Project organizes workers to fight

A second effort that combines the use of law as a tool with the use of organizing as a vehicle for fostering reciprocal emotions is City Life/Vida Urbana, a group working on housing issues in Boston.¹³³ City Life/Vida Urbana, which has been organizing for housing rights for several decades, has recently reconfigured itself to fight evictions arising from foreclosures. Working in collaboration with the Harvard Legal Aid Bureau and a community financial development institution known as Boston Community Capital (“BCC”), it has developed an innovative strategy for serving financially distressed homeowners. This strategy combines three elements—the “sword,” the “shield,” and the offer—to keep its participants in their homes.¹³⁴

The “sword” is the name given to the organization’s public action campaign. Members conduct outreach, often going door-to-door in neighborhoods experiencing high rates of foreclosure, to offer assistance to homeowners. At group meetings, organizers advise homeowners that they are not obliged to leave their homes until the banks have completed the legal process of eviction, and counsel them not to agree to an early departure. They encourage participants to consult with a Legal Aid lawyer who is stationed at the back of the meeting hall, but tell them to return to the meeting afterwards to plan collective actions. City Life/Vida Urbana also stages group protests—vigils or “eviction blockades”—outside the homes where tenants are facing foreclosure and outside the banks that hold the mortgages, demonstrating solidarity with the homeowners and creating adverse publicity for the banks.¹³⁵ The “shield” is the strategy simultaneously conducted

labor exploitation, particularly the exploitation of immigrant workers. Its team-based approach is aimed at getting workers to act for themselves, in a collective, solidaristic way that develops capacity directly and through their relationships with each other. The team approach also generates more solidaristic relationships and feelings between workers and staff assisting them (including the fact that lawyers are not strongly differentiated from other staff members except by the character of their substantive expertise). Legal services are used as a draw to involve workers in the program, but they are allocated to workers who want to be “active participants in [the] programs, rather than those who expect to be the passive recipients of services.” *Id.* at 443. Workers who receive legal services must identify other workers with the same problem and commit both to take an active part in their case and to participate in another aspect of the organization. *Id.* at 444. Cases with potential significance become part of a larger public action campaign, with workers involved in “press, pickets, leaflet[ing] and other conventional organizing techniques.” *Id.* at 444. These movements place prospective claimants’ needs for solidarity and support—an integral component of their political needs—at the fore of lawyers’ and organizers’ consideration. Though the formal aim may be the creation of capacity, the requirements of collaboration and a team-based approach offer claimants the trust, affection, and support that are required for them to develop new skills, attitudes, and strategies.

¹³³ The following description is drawn from interviews conducted by Bill Moyers and the Lehrer Reports’s Economic Correspondent, Paul Solman. See Transcript of *PBS NewsHour: Boston Group Helps Homeowners ‘Stand Up, Fight Back’ Against Foreclosure* (PBS television broadcast Oct. 19, 2010), available at http://www.pbs.org/newshour/bb/business/july-dec10/foreclosures_10-19.html [hereinafter *Boston Group Helps Homeowners*]; Transcript of *Bill Moyers Journal: Steve Meacham and City Life/Vida Urbana* (PBS television broadcast Dec. 18, 2009), available at <http://www.pbs.org/moyers/journal/12182009/transcript2.html> [hereinafter *Bill Moyers Journal*].

¹³⁴ See *Bill Moyers Journal*, *supra* note 133.

¹³⁵ See *id.*

by legal service providers. Lawyers working with City Life/Vida Urbana members scrutinize foreclosure documents, identifying flaws in the filings or other grounds for resisting foreclosure. These efforts buy time for the homeowner to find other housing arrangements, or if she has sufficient means, to attempt to secure the offer. This optimal outcome is possible when the homeowner, who may be unable to afford her current mortgage, can nonetheless afford to repurchase her home from the bank at market value. BCC offers to buy the property from the bank at market value, and resell it to the homeowner through an agreement that protects BCC's interest through payroll deductions and shared appreciation.¹³⁶

While the above explains City Life/Vida Urbana's political and legal strategies, their emotional effects also comprise a critical dimension of its work. Participants report that coming together with other distressed homeowners and receiving practical advice for resisting eviction eases the pervasive shame associated with foreclosure. A participant who fought foreclosure in 2008 relates: "When you come here, you automatically get connected. It was the only place I came. I was kind of looked down upon everywhere else I went. So I automatically felt a connection."¹³⁷ Those facing eviction also feel strongly supported, during a time characterized by isolation and stress, by those who rally outside of their homes.¹³⁸ Finally, taking part in direct action within the organization gives them a sense of capacity and efficacy at a time when they would otherwise be feeling powerless. As Steve Meacham, the lead organizer for City Life/Vida Urbana, explains:

People come in feeling demoralized, shaken, crying, just in complete despair, and they not only win their house or sometimes don't win their house back, but they become activists. They become protagonists in their own drama and in the drama of other people. And that transformation of people kind of taking leadership who come in . . . feeling so compressed . . . it's an incredibly powerful thing.¹³⁹

¹³⁶ Transcript of *PBS NewsHour: Boston Firm Offers Homeowners a Second Chance After Foreclosure* (PBS television broadcast Oct. 20, 2010), available at http://www.pbs.org/newshour/bb/business/july-dec10/banker_10-20.html.

¹³⁷ *Bill Moyers Journal*, *supra* note 133 (statement of Melonie Griffiths). Formerly a participant, Griffiths is now an organizer for City Life/Vida Urbana.

¹³⁸ Steve Meacham, the lead organizer for City Life/Vida Urbana, notes that people find "a community of struggle I guess you would say, where people are involved in dealing with opponents that they didn't really think they could deal with. And they built up a lot of camaraderie in the process of fighting those opponents." *Id.*

¹³⁹ *Boston Group Helps Homeowners*, *supra* note 133 (statement of Steve Meacham).

C. Further Normative Considerations

The foregoing understandings of the relations between emotions and rights may frame rather than resolve certain kinds of normative choices that legal decisionmakers face. We may conclude, for example, that indignation is more confluent with the emotion norms of the courtroom than rage, or that it is better for the law to characterize rights claimants as indignant actors rather than suffering victims. But whether and when a lawyer might seek to encourage or cultivate indignation in a (prospective) client is a more difficult question that is not resolved by the above analysis. This question may turn on what the lawyer considers to be the likelihood of success on the merits, or the prospect that the client will experience the satisfaction of her indignation through its public expression. A lawyer may also be more willing to cultivate indignation on the part of her (prospective) clients if she wants to encourage the litigation of a particular claim¹⁴⁰ or believes that a specific type of claim has been underlitigated.¹⁴¹ Finally, whether disparate access to vehicles for indignation, or disparate response to the performance of indignation, means that a focus on indignation would provide another form of advantage to those already privileged, is a question that demands further investigation.

Similarly, while cultivating reciprocal emotions may be satisfying and enabling to claimants, different examples of such efforts may have starkly different normative resonance. It is not clear, for example, that cultivating bonds of affection and trust among members of a white-supremacist group committed to the perpetuation of hierarchy and hate is a sound normative choice.¹⁴² Likewise, adoption of social movement or community organizing strategies by a neighborhood organization seeking to block a multi-family, low-income housing development could defeat that same substantive goals vindicated by the community organizing structure of City Life/Vida Urbana.¹⁴³

Even if apprehending the affective dimensions of rights claiming does not always yield clear normative answers, it will help us to comprehend more fully and accurately the normative stakes that lawyers face in assisting rights claimants. And it will provide lawyers with certain kinds of instruments that they may choose to use to support and ameliorate the experience of their rights-claiming clients.

¹⁴⁰ See, e.g., discussion of THE SWEET HEREAFTER, *supra* note 23 and accompanying text.

¹⁴¹ Cf. Felsteiner, Abel & Sarat, *supra* note 5, at 651–52 (observing that their analysis suggests that there may be underlitigation, rather than overlitigation of many kinds of disputes).

¹⁴² Thanks to Susan Bandes for this example.

¹⁴³ Thanks to Tim Tosti for this example.

CONCLUSION

Social movement leaders, and more recently social movement scholars, have learned that they ignore the affective states of participants at their own peril. Though emotions can be a potent source of mobilization, and a provident resource for cohesion and strategy, they can also contribute to demobilization, division, and fatigue. If movement actors can be stymied by misunderstood or neglected emotions, how much truer this must be of legal claimants, who are frequently solitary, hierarchized, surrounded by a maze of unintelligible procedures, and disciplined by forms of discourse that insistently privilege rationality. Some of these limits are inherent in the adversarial context of legal rights claiming, the aspirations to independence of the judiciary, and the process of representation by distinctly educated and socialized professionals. But by reflecting actively on the emotions of injustice that animate rights claiming in the courtroom, and by exploring means of bolstering the reciprocal emotions that can flourish outside of it, legal actors can make the experience of rights claiming more responsive to the emotions that inevitably infuse that process.

