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# Too Late for Thinking: The Curious Quest for Emancipatory Potential in Meaningless Affect and Some Jurisprudential Implications

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# Too Late for Thinking: The Curious Quest for Emancipatory Potential in Meaningless Affect and Some Jurisprudential Implications

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## Abstract

The “affective turn” presents a number of important challenges to law and the humanities. One such challenge concerns our ability to resist the temptation to romanticize the inhuman. Theorists from Nietzsche to Massumi have been so taken by the emancipatory promise of affective intensity that they risk relinquishing responsibility for freedom’s necessary social, political, and legal pre-conditions. Our responsibility for narrative construction and narrative choice carries with it an ethical imperative to understand the orchestration of affect. Downplaying the importance of reflective consciousness (including our capacity for prudent judgment) in favor of spontaneous affective events threatens to rob freedom of its meaning and open democratic societies to grave risks.

## Keywords

affect theory, affective turn, politics of affect, neuroscience, ideology, liberation, irrational exuberance, critical theory, law and humanities

Shifts in intellectual fashion are multi-determined. Theorists paint themselves into all sorts of corners and may have to wait for the next upstart generation to design an exit strategy. Sometimes that strategy might be inspired by developments in other disciplines, like when humanities scholars venture for insight on the frontier of neuroscience. That’s the way it is: familiar yearnings – for knowledge, power, meaning, and

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liberation – motivate the quest for new forms of expression to replace the ones that went before. Dashed hopes prompt new paths for hope's renewal.

Like numerous intellectual movements that preceded it, the so-called “affective turn” is multi-determined in its origin and heterogeneous in what it claims to know. To be sure, the humanities can learn a great deal from the sciences. But knowledge doesn't always translate into wisdom. And in an era like ours, in which explanation, quantification, and big data often take precedence over prudent interpretation and the search for meaning, the humanities' core values are particularly vulnerable.

Neuroscience today is a growth industry. It makes sense that scholars from less esteemed fields might want to enhance the value of their intellectual capital by investing abroad. Whether they do so out of loss of faith in the family business or as a strategic gamble for renewed legitimacy, when cultural critics proffer a scientific explanation for a non-scientific purpose questions are sure to arise.

Given the stakes when law and politics enter the scene, it is worth sorting this out. What is to be gained, and how might things go awry when law joins the affective turn?

Making this kind of critical assessment is what the humanities are for. Practical wisdom does not and cannot come from the sciences. This is, of course, old hat.<sup>1</sup> Yet, for a variety of reasons, the case for interpretive wisdom in the quest for shared meaning still has to be made.

Our first order of business is to identify, albeit in summary fashion, what the neurobiology of affect claims to know. This is especially important given that the neurobiology of affect haphazardly applied to law has the potential of encouraging conditions of juridical skepticism akin to Legal Realism on steroids. My critique of one particular branch of affect theory, associated in particular (but not exclusively<sup>2</sup>) with the Spinoza- and Deleuze-inspired work of Brian Massumi, seeks to head off such an unfortunate and unnecessary outcome.

Once we have teased into view the “vitalist/liberation” ideology that underlies this branch of affect theory we will be in a better position to appreciate what the science is good for, and what it's not. My hope is that the ensuing clarification of goals and methods also will help to shore up the cultural standing of humanities research. The humanities' age-old commitment to critical interpretation and the concomitant responsibility for collective meaning making is vital, particularly in democratic societies. When it comes to legal studies, losing sight of this commitment by deferring to disciplines whose goals, methods, and standards for knowledge are substantially different ultimately risks undercutting the very foundation of freedom under the rule of law.

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1. As Martin Heidegger famously said: “Science does not think.” Martin Heidegger, *What is Called Thinking?* (New York: Harper & Row, 1968), p. 134. See generally Georg Von Wright, *Explanation and Understanding* (Ithaca, NY: Cornell University Press, 2004) and Hans-Georg Gadamer, *Truth and Method* (New York: Crossroad, 1975).
  2. See, for example, the work of William E. Connolly, *Neuropolitics: Thinking, Culture, Speed* (Minneapolis, MN: Minnesota University Press, 2002) and Jane Bennett, *Vibrant Matter* (Durham, NC: Duke University Press, 2002).

## I. What does the Neuro-biochemical Theory of Affect Claim to Know?

The literature on the so-called affective turn frequently focuses on core phenomena and core historical sources. The core phenomena are physiological in nature, by which I mean to say: non-cognitive. Paradigmatic of this kind of physiological process is the famous half-second of brain activity before a subject can consciously respond to stimuli.<sup>3</sup> As Joseph LeDoux puts it, there are neural circuits in the brain, such as the subcortical cluster of neurons known as the amygdalae, which process certain emotions (like fear) more quickly than cognitive processes can discern.<sup>4</sup> This pre-cognitive processing operates automatically, without conscious awareness. Because affects form too quickly for the conscious mind to grasp, we can only speak of them as visceral forces or intensities.<sup>5</sup> As Gregg and Seigworth put it:

Affect is found in those intensities that pass body to body ... [It's] the name we give to those forces – visceral forces alongside, or generally other than conscious knowing, vital forces insisting beyond emotion – that can serve to drive us toward movement, toward thought and extension ... or that can leave us overwhelmed by the world's apparent intractability.<sup>6</sup>

In this view, affects are non-cognitive. They are ciphers of force, inassimilable to representation. As Nietzsche presciently put it well over a century ago: “Life is will to power ... Moral evaluation is an exegesis, a way of interpreting. The exegesis itself is a symptom of certain physiological conditions, likewise of a particular spiritual level of prevalent judgments. Who interprets? – Our affects.”<sup>7</sup>

Spinoza, another frequently cited historical source, expresses a similar insight in his *Ethics*: “By emotion (*affectus*) I understand the modification of the body by which the power of action of the body is increased or diminished, aided or restrained, and at the same time the idea of these modifications.”<sup>8</sup>

It is a basic premise of what has come to be known as the “dual process” theory of cognition that what actually causes me to register a corporeal affect differs from what I may subsequently say about it. By the time thoughts or feelings occur, my behavior has already been altered. As Jonathan Haidt puts it, “thinking is the rider; affect is the elephant.”<sup>9</sup>

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3. Constantina Papoulias and Felicity Callard, “Biology’s Gift: Interrogating the Turn to Affect,” *Body & Society* 16, (2010), 40.

4. See J.E. LeDoux, *The Emotional Brain: The Mysterious Underpinnings of Emotional Life* (New York: Simon and Schuster, 1996), pp. 161–5, 250.

5. See Ruth Leys, “The Turn to Affect,” *Critical Inquiry* 37, (2011), 437–8.

6. Melissa Gregg and Gregory J. Seigworth, *The Affect Theory Reader* (Durham, NC and London: Duke University Press, 2010), p. 1.

7. Friedrich Nietzsche, *The Will to Power* (New York: Vintage, 1968), p. 148.

8. *Ethics* III def. 3, cited in Nigel Thrift, *Non-representational Theory* (London and New York: Routledge, 2008), p. 178.

9. Jonathan Haidt, *The Righteous Mind* (New York: Vintage, 2013), p. 66.

Thus construed, the dual process model leaves us in a quandary. If the primary process of affection is blind, how can the secondary *post hoc* act of reasoning or interpretation or judgment be trusted? After all, whatever I say about what my body has already silently registered may be only contingently related to the affect in question.<sup>10</sup> In a sense, my mind is already made up.

Affects happen – beyond the reach of signification. By contrast, feelings and emotions express something about what has happened. They begin the cognitive process by telling me something about whatever or whoever it is that affected me. Feelings and emotions have different logics, different epistemologies, if you will. Feeling emerges out of my personal or subjective history. Emotion comes from the various archival sources that I've inherited from being embedded in a particular society at a particular time.

This distinction between non-cognitive affect and its pre- (or nascently) cognitive offshoots reflects a dramatic version of the Cartesian mind/body problem. If affect is how the body prepares us for action (by adding a quantity of sub-lingual intensity to experience), feeling and emotion are simply the mind's effort to make sense of those actions. It's how the rider tries to follow where the elephant has already gone. In this respect, the subjective and social contingency of finding reasons for action is reminiscent of what Stanley Fish has been up to for many years in his irony-drenched theory of literary interpretation.<sup>11</sup>

As this reference to Fish suggests, affect theory's neurobiological interest in non-intentionalism speaks rather directly to some of the most conspicuous claims of literary or cultural theory in recent years. If thinking comes too late for affect, claims regarding an actor's intent must be taken with a rather large grain of salt.<sup>12</sup> As Fish would put it, all we can say for sure is that we're making permissible moves in the cultural game that

10. See, e.g., Itzhak Fried, Charles L. Wilson, Katherine A. MacDonald and Eric J. Behnke, "Electric Current Stimulates Laughter," *Nature* 391 (1998), 650 (discussing the case of a 16-year-old girl who while having surgery to control seizures due to epilepsy laughed when the anterior part of the supplementary motor area of her cerebral cortex was electrically stimulated).
11. Consider, for example, Stanley Fish, *Is There A Text in This Class?* (Cambridge, MA: Harvard University Press, 1980), p. 341 ("Each new reading is elaborated in the name of the poem itself, but the poem itself is always a function of the interpretive perspective from which the critic 'discovers' it."). Controversy surrounding Fish's theory of interpretation spilled over into law in a famous exchange with Dennis Patterson. See Dennis Patterson, "The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory," *Texas Law Review* 72 (1993), 1; Stanley Fish, "How Come You Do Me Like You Do? A Response to Dennis Patterson," *Texas Law Review* 72 (1993), 57; and Dennis Patterson, "You Made Me Do It: My Reply to Stanley Fish," *Texas Law Review* 72 (1993), 67. See also Thomas, Brook, "Stanley Fish and the Uses of Baseball: The Return of the Natural," *Yale Journal of Law & the Humanities* 2 (1990), 59–88.
12. Paul Ekman's work on facial cues, for example, has served a useful role in all but eliminating meaning and intention from the unconscious perception of facial expressions. See Paul Ekman, *Emotions Revealed: Understanding Faces and Feelings* (London: Wiedenfeld & Nicolson, 2003). For recent applications of Ekman's theory to social media, see Raffi Khatchadouria, "We Know How You Feel," *The New Yorker* (January 19, 2015), 50–59 (on how sophisticated algorithms are being used in the emotional economy on line).

we're playing.<sup>13</sup> Feeling boxed in by ineluctably contingent conventions, it may not prove surprising that recent theorists such as William E. Connolly,<sup>14</sup> Jane Bennett,<sup>15</sup> and Brian Massumi,<sup>16</sup> among others, have been seeking non-cognitive sources of the real, what Bennett refers to as material sources of re-enchantment. If intentionality is untrustworthy, perhaps we'll have better luck exploring non-intentionally sedimented physical traces of reality, such as lost objects.<sup>17</sup>

In short, for at least one camp of affect theorists, largely identified with the work of Massumi,<sup>18</sup> Thrift,<sup>19</sup> and Sedgwick,<sup>20</sup> the intensity of affect and its insusceptibility to cognition offer multiple in-house payoffs for critical theory. For one thing, the non-signifying, non-representational aspect of affects relieves theorists of a longstanding headache. In the Derridean age of deconstruction, critical theory has long toiled under the shadow of contingency and subjectivity. Surely, there must be something that is not de-constructable.<sup>21</sup>

Massumi's brand of "vitalist/liberation" affect theory may be viewed in a continuum with the post-Derridean effort to escape from a world in which it's constructs all the way down, where there is no respite from making moves in the game of interpretation. Since affects were never socially or subjectively constructed in the first place they cannot be deconstructed. Affects suggest a way out.

Judging from the current literature, however, the bio-neuroscience of affects cannot confirm the "vitalist/liberation" model's vision of affect as pure vitality. In the gap between theory's aspiration and scientific explanation a strange excess reverberates. The irrationality of that excess is symptomatic of ideological yearning.

## II. Irrational Exuberance and the Ideology of "Vitalist/Liberation" Affect Theory

In the history of western culture we can point to three historic moments of epistemological de-centering. The Copernican revolution taught humanity that we do not dwell at the

13. According to Fish, there are no interpretive moves that are not moves in the game, including the move by which one claims no longer to be a player. See Fish, *Is There A Text in This Class?*, note 11, *supra*, at p. 355.
14. William E. Connolly, note 2 *supra*.
15. Jane Bennett, note 2 *supra*.
16. Brian Massumi, *Parables for the Virtual* (Durham, NC: Duke University Press, 2002).
17. For insight into the historical context for shifting preferences regarding sources of evidentiary truth, see Alexander Welsh, *Strong Representations* (Baltimore, MD: Johns Hopkins University Press, 1995) and Rebecca Schneider, *Performing Remains* (New York: Routledge, 2011).
18. See Massumi, note 16 *supra*.
19. See Nigel Thrift, *Non-representational Theory*, note 8, *supra*.
20. Eve Sedgwick, *Touching Feelings: Affect, Pedagogy, Performativity* (Durham, NC: Duke University Press, 2003).
21. A range of solutions to this perceived *aporia* has been offered. See, e.g., Jean-Luc Nancy, *Inoperative Community* (Minneapolis, MN: Minnesota University Press, 1991) (arguing for an understanding of community and society that is undeconstructable because it is prior to conceptualization) and Emmanuel Levinas, *Otherwise Than Being* (Pittsburgh, PA: Duquesne University Press, 1998).



center of the universe. The Freudian revolution taught us that the “I” is a lonely island besieged on all sides by a raging sea of irrational, unconscious forces. Then quantum theory taught us that the universe is indeterminate: subject to uncanny chance operations. Affect theory, perhaps as an extension of the Darwinian evolutionary account of selective adaptation, humbles rationalist pretensions further by subordinating mind to material, bio-chemical processes. If thinking is always an after-thought, an after-the-fact construction, then we can never reliably account for how we’ve actually been affected by things and others in the world around us.

How oppressive never to escape the grip of contingent social constructs. How depressing, if endless deconstruction yields only more fragmentation. Surely something must abide, some Higgs Boson-like elementary particle that can withstand deconstruction’s powerful blows. Is there anything real enough to withstand critique? Is there any basis left to hope for emancipation from the destabilizing mutability of human fabrication?

In Brian Massumi’s view, there is. As he puts it: “The world always already offers degrees of freedom ready for amplification.”<sup>22</sup> This takes us to the heart of the vitalist/liberation impulse, namely: “escape from crystallized power structures.”<sup>23</sup>

In Massumi’s writings, affect operates as a cipher – a black box into which he can pack his emancipatory ideal.<sup>24</sup> (“‘Affect’ is the word I use for ‘hope.’”<sup>25</sup>) What Massumi does not and perhaps cannot, or simply does not care to do is formulate a coherent basis for political judgment. While he at some points expresses a preference for “caring” and “belonging,”<sup>26</sup> he offers no basis in affect theory for why those forms of behavior are preferable to other perhaps more intense alternatives, such as “anger” and “shock,” which he also embraces.<sup>27</sup> But choices must be made. As Martha Nussbaum has noted, a society that cultivates conditions of anger and disgust, for example, is different from one that promotes empathy, dignity, and love.<sup>28</sup>

Massumi is enamored of the anti-structural,<sup>29</sup> the spontaneous emergent process that Deleuze called “pure immanence.” But with affective intensity as his ultimate value<sup>30</sup>

22. Brian Massumi, *Politics of Affect* (Cambridge: Polity, 2015), p. 111.

23. *Ibid.*, p. 104.

24. An argument could be made that “affect” serves a function similar to the political designation of the “sacred” or the “exception.” To paraphrase Carl Schmitt, “Sovereign is he who declares the affective disruption.” See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago, IL: University of Chicago Press, 2005), p. 1. See also Richard Sherwin, “Law in the Flesh: Tracing Legitimation’s Origin to ‘The Act of Killing,’” *No Foundations: An Interdisciplinary Journal of Law and Justice* 11, June 2014, 38–60.

25. Massumi, note 22 *supra*, p. 3.

26. *Ibid.*, pp. 6, 43.

27. *Ibid.*, pp. 8–9.

28. See Martha Nussbaum, *Political Emotions* (Cambridge, MA: Harvard University Press, 2013).

29. A similar affinity for the antinomian (and the charismatic) has been historically associated with thinkers linked to fascist ideology, such as Carl Schmitt, Mircea Eliade, and Georges Bataille. See, for example, Martin Jay, “The Reassertion of Sovereignty in a Time of Crisis,” in *Force Fields: Between Intellectual History and Cultural Critique* (New York and London: Routledge, 1972), pp. 49–60.

30. Massumi, note 22 *supra*, p. 99.

Massumi remains trapped in a double bind. No critical judgment is forthcoming so long as intensity may be amplified.<sup>31</sup> Because of this Massumi cannot coherently critique manifestly oppressive political structures (such as futurism, Nazism, and other intensity-fueled political regimes). How could he if the masses have opted to embrace such regimes for the intensity they provide?

Massumi's resistance to making judgments is consistent with his theory, which minimizes to the vanishing point the human capacity for choice. For Massumi, the very notions of "individual will" and "subjective reflection" are a fiction. ("There is no individual outside its own trans-individual becoming."<sup>32</sup>) Body is always conditioning mind – presumably without our conscious awareness. In the end, "events decide."<sup>33</sup> What could human freedom mean under such conditions?

The upshot is plain: in Massumi's politics of affect, human freedom loses its capacity to signify. Choices are a fiction, and in any event no apparent normative basis exists for affirming, much less institutionalizing a preferred set of power structures. Affective intensity lacks structure by definition. Indeed, that is its appeal. ("Intensity is a value in itself."<sup>34</sup>) But as Anthony Kronman has eloquently argued, without coherent structures, the legal, political, and cultural conditions necessary for the meaningful exercise of freedom (including political judgment) are unlikely to emerge – and if they do, they are unlikely to be sustainable.<sup>35</sup> The latter point is borne out by the very political events that Massumi identifies as exemplary of his theory. If the "Arab Spring" and the "Occupy Movement"<sup>36</sup> illustrate anything it is the effervescence of political action based on spontaneous intensity. In the absence of adequate political structures, this kind of political action is destined to pass with the next day's tide.

The emancipatory *cri du coeur* that can be heard echoing in the work of cultural theorists like Massumi may have landed on "trans-individual" affect as the intensive Higgs Boson wave-particle of political science. Its indeconstructability promises freedom from subjective and cultural contingency – the prison house of "crystallized power structures." But there is a price to be paid. The radical devaluation of reflective consciousness produces a species of freedom that signifies nothing. Perhaps this is what it is like to embrace a *Zeitgeist* of "de-humanism."<sup>37</sup>

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- 31. *Ibid.*, p. 209 ("Affect is neither good nor bad. [It] concerns the revaluation of values ... What it promises is intensity.").
  - 32. *Ibid.*, pp. 214–15
  - 33. *Ibid.*, p. 215.
  - 34. Massumi, note 22 *supra*, p. 99.
  - 35. See Anthony Kronman, "Rhetoric," *University of Cincinnati Law Review* 67 (1999), 677. See Emmanuel Levinas, "Freedom and Command," in *Collected Philosophical Papers* (Dordrecht/Boston/Lancaster, Martinus Nijhoff Publishers, 1987), pp. 15, 17.
  - 36. Massumi, note 22 *supra*, p. 98.
  - 37. Massumi's skeptical view of human choice reflects a more comprehensive skepticism toward the normal homo-sapien mind ("neuro-typicals") more generally. *Ibid.*, p. 127. From his celebration of autistic ways of being in the world to the activity of brainless earthworms that still manage to creatively adapt to their environment, Massumi's "de-humanist" perspective is readily discernible. Indeed, for Massumi "reflective consciousness" is a "*reduction* of the body's capacities" (*Ibid.*, p. 211 [emphasis added]).



In Massumi's politics of affect we can discern the impetus for "vitalist/liberation" ideology. As Ben Anderson writes: "There is always already an excess [affect] that power must work to recuperate but is destined and doomed to miss. It is that excess that is central to the creativity of bio-political production and thus the power of naked life."<sup>38</sup> Affect in this sense is "a movement of creative production" that always eludes capture. And this is what conveys a sense of its emancipatory power.<sup>39</sup> The intensity of affect liberates us from bondage to contingent cultural entanglement.

Corporeal ontology precedes cultural epistemology. This move away from the centrality of cognition marks the demise not only of identity politics, but of identity itself, perhaps even of psychology.<sup>40</sup> Simply stated, affect theorists like Massumi romanticize the unknowable "fluid materiality of excitable networks" as a way of disrupting familiar social and cultural hierarchies.<sup>41</sup> In so doing, they elevate raw process over social and cultural regimentation and subjugation. It is the neurobiological equivalent of Rousseau's primitive origin of society, an updated version of the Romantics' myth of enchantment.

If only questions about freedom and responsibility for shared values, justice included, could be resolved by so simple an expedient as the vitalist/liberation category shift from human agency to "trans-individual affective process." Much can be learned about the various forms of political violence that affective intensity has assumed over the course of human history. But one needn't take the historical path to discern trouble for Massumi's emancipatory project. One can start with neuroscience itself.<sup>42</sup>

Theorists like Massumi play down (as they must) a variety of obstacles that stand in the way of affective emancipation: from the constraints of evolution to the biological programming of the amygdala itself.<sup>43</sup> Indeed, what constitutes "fearfulness," for example, depends upon programming the amygdala based on a habituated pattern of external stimuli.<sup>44</sup>

There are other problems as well. For instance, a great deal of uncertainty surrounds the question of how communication occurs among different levels of the mind/body complex. As Steve Pile writes, for theorists like Massumi "affect is defined in opposition to cognition, reflexivity, consciousness and humanness."<sup>45</sup> Feelings, on the other hand, occupy a space between non-cognitive affect and highly socialized emotions. Feelings in this sense are pre-cognitive ("a response to transpersonal affects").<sup>46</sup> Our response to affects personalizes them. Through feelings we associate affects with the subject who

38. Ben Anderson, "Modulating the Excess of Affect," in Gregg and Seigworth, *The Affect Theory Reader*, note 6, *supra*, p. 167.

39. *Ibid.*

40. See Margaret Wetherell, *Affect and Emotion* (Los Angeles, CA: Sage, 2012), p. 124.

41. Papoulias and Callard, "Biology's Gift," note 3, *supra*, 35

42. See Ruth Leys, "The Turn to Affect," note 5, *supra*, and Clare Hemmings, "Invoking Affect: Cultural Theory and the Ontological Turn," *Cultural Studies* 19 (2005), 548–67.

43. Papoulias and Callard, "Biology's Gift," note 3, *supra*, 41.

44. *Ibid.*, 47.

45. Steve Pile, "Emotions and Affect in Recent Human Geography," *Transactions* 35 (2010), 5–20.

46. *Ibid.*

experiences them. For their part, emotions reflect a shift from pre-cognitive subjectivity to the cognitive domain of socially constructed experience.<sup>47</sup> Emotions, in this sense, are how I interpret what I'm feeling through language and other representational or cultural symbolic practices.

Affect theorists like Massumi insist that my choices and perhaps even my feelings may turn out to have nothing to do with the affect my body has already processed without my knowing it. This view preserves the purity of affective intensity by keeping it free of subjective or social significance. If you are in the "vitalist/liberation" camp of affect theory along with Massumi, affect can never be symbolized, which means it can never be cognized. Affect, in this view, is always beyond consciousness. It's like the dark matter that makes up the universe: we know it's there, we just can't say anything about it.

The problem for "vitalist/liberation" theorists like Massumi is that they want to eat their cake and have it too. Affects for them are ciphers – free-ranging radicals incapable of signifying. Yet, at the same time, many of these same theorists engage in searing critiques of those "in power" who use mass media along with other instrumentalities of affective manipulation for purposes of enhancing social or political control.<sup>48</sup> The difficulty is this: If affect is being actively engineered to manipulate people's behavior – whether in the form of habits of consumption, political judgments, or jury verdicts – it is incumbent upon the theorists to account for how exactly this manipulation is being carried out. As Pile cogently notes, how are the agents of affective manipulation able to "know the unknowable" sufficiently well to control their course and impact in society?<sup>49</sup>

Thrift's recourse to metaphors such as "pipes and cables" is hardly sufficient to bear the burden of scientific explanation. Indeed, the nomenclature that has emerged to account for the engineering of affect – ranging from "affect flow between bodies," "transmissions," and "contagion"<sup>50</sup> – all seem to suffer from the same fundamental lack of explanatory power. If we cannot know what affects are, it stands to reason that we cannot know how to control their flow and impact in society.

Greater clarification becomes possible when we move from the "vitalist/liberation" camp to affect theorists who question the idea of ineluctable unassimilability. Like psychoanalytic theory, where the unconscious ("repressed") makes its way to the preconscious (for example, in slips of the tongue or dreams), which in turn may be subject to conscious interpretive ("psychoanalytic") decoding, a more moderate affect model describes a much more entangled network of mind/body relationships.<sup>51</sup> Ways of conceiving strategic transmission and manipulation thus become possible.

Of course, there is also a price to be paid for this "compromise" with affect's putative incapacity to signify. The yearning for liberation from social or cultural construction (and subsequent deconstruction) becomes harder to satisfy. What is lost by way of

47. See Daniel Gross, *The Secret Life of Emotions* (Chicago, IL: Chicago University Press, 2006), p. 137 ("Emotion is social all the way down").

48. See Massumi note 22, *supra*, p. 32 ("Direct affect modulation takes the place of old-school ideology."). Steve Pile, *supra*, note 45, 12.

49. Pile, note 45, *supra*, 15.

50. *Ibid.*, 15–16.

51. *Ibid.*, 13–14; Hemmings, note 42 *supra*, 551–2.

ideological disenchantment, however, may be more than made up for by the pragmatic insights and meaningful choices that we gain.

### III. Implications for Legal Theory and Practice of the Affective Turn

If the elephant (non-cognitive affect) calls the shots and the rider's reasons for acting are no more than contingent *post hoc* fabrications, decision-making takes on the appearance of farce. This is what I meant earlier when I described the application of "vitalist/liberation" affect theory to law as akin to "Legal Realism on steroids." Fortunately, the science does not support this outcome. It remains reasonable to believe that there is sufficient intermingling among non-cognitive affects, pre-cognitive feelings, and cognitive emotions for trust in the meaning-making process of human choice and judgment.

Still, something new is surely afoot here. The dual process model is exerting significant influence. While the exact nature of the interrelationships among affects, feelings, and emotions have yet to be worked out with precision, the play of unconscious forces on human behavior can hardly be denied. Of course, Freud taught us as much over a century ago – though the shift from psychoanalysis' interpretive reconstruction of unconscious (or preconscious) material to neurobiological imaging of physical processes presents us with a very different epistemological register.

Over the years, Freud's insights have been assimilated into more sophisticated legal theory and practice without placing undue stress on the juridical system. The same is likely to be the case with regard to law's assimilation of more recent developments concerning dual process cognition and the affective unconscious. The work of lawyering theorists such as Jerome Bruner, Anthony Amsterdam, and my own writings over the last two decades,<sup>52</sup> along with others influenced by recent developments in cognitive psychology, such as Cass Sunstein, Richard Thaler<sup>53</sup> and Dan Kahan,<sup>54</sup> to mention only a few, is suggestive of how the process of adaptation is taking shape. This "micro-jurisprudence of the subliminal"<sup>55</sup> represents a distinct gain both for legal theory and legal practice.

For one thing, this literature suggests that we ought not to exaggerate the Cartesian split between mind and body, as if affect reigns in an autonomous realm beyond intentional or reflective or interpretive engagement. As Hemmings writes, judgment links the

52. See Richard K. Sherwin, "Lawyering Theory," *New York Law School Law Review* 37 (1992), 9–53. See also Richard K. Sherwin, *When Law Goes Pop* (Chicago, IL: Chicago University Press, 2000) and *Visualizing Law in the Age of the Digital Baroque* (London and New York: Routledge, 2011); Anthony Amsterdam, "An Analysis of Closing Arguments to a Jury," *New York Law School Law Review*, 37 (1992) and Anthony Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge, MA: Harvard University Press, 2000).

53. Cass Sunstein and Richard H. Thaler, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven, CT: Yale University Press, 2008).

54. Dan Kahan, "The Cognitively Illiberal State," *Stanford Law Review* 60 (2007), 115–54, and Dan Kahan and Donald Braman, "Cultural Cognition and Public Policy," *Yale Law & Public Policy* 24 (2006), 147.

55. Compare Thrift, note 8, *supra*, p. 187 (on the "micro-politics of the subliminal").

body and the social and gives both interpretive meaning.<sup>56</sup> Indeed, if as Haidt points out, even so small a matter as building time for reflection into a problem solving exercise can alter the outcome, then affect is unlikely to operate in the purely autonomous, non-cognitive way that “vitalist/liberation” affect theorists describe.<sup>57</sup>

This means that legal advocates who wish to exploit unconscious processes involving affect or other non-reflexive processes, such as cuing popular cultural heuristics, layering emotions onto narratives and videos, or leading jurors and judges to fill in gaps within a particular verbal or visual story with generic expectations (about how a particular story goes or how a particular character typically acts) may be trained to do so, with potent effects inside the courtroom. At the same time, however, they must also be prepared to run the gamut of adversarial testing – so long as opposing counsel are equally adept at spotting and deliberately deconstructing specious cognitive and non-cognitive manipulations.

Affects exert real effects in everyday life, including the everyday life of the law. If studies show, for example, that juries act more leniently toward attractive defendants, defense lawyers may be expected to dress their clients and stage their behavior accordingly. The same goes for culturally and socially adapted storytelling, including visual storytelling.<sup>58</sup> Once we teach lawyers to understand these processes of persuasion, as in advertising and politics, advocacy migrates into the dark space of the unconscious.<sup>59</sup>

The key point to emphasize is that legal theory and legal practice have the means of ratcheting up their game within the conventions of adversarial justice. This is a matter of pedagogic adaptation and the ethical regulation of knowledge and technique. In the vernacular of dual process theory one might say: yes, it is possible to reverse engineer the subliminal manipulation of “system I” affect from the vantage of “system II” cognition. And though the occurrence of sophisticated critical interventions cannot be guaranteed, uncertainty has always haunted the battle for belief inside the courtroom. This is, of course, why innovative cognitive and cultural training for advocates, judges, and the lay public more generally, is so vital for robust liberal democratic societies today.

## IV. Conclusion

The “affective turn” presents a number of important challenges to law and the humanities. One such challenge concerns our ability to resist the temptation to romanticize the inhuman. Theorists from Nietzsche to Massumi have been so taken by the emancipatory promise of affective intensity that they risk relinquishing responsibility for freedom’s necessary social, political, and legal pre-conditions.

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56. Hemmings, *supra*, note 42, 564.

57. Haidt, note 9, *supra*, p. 81.

58. See note 36, *supra*.

59. See William Poundstone, “Maddest of the ‘Mad Men’,” *Psychology Today*, <https://www.psychologytoday.com/blog/priceless/201001/maddest-the-mad-men> (January 17, 2010) (alluding to the highly successful television series that operationalizes for the lay public the way advertising seeks to manipulate human behavior).

The defense of freedom in a resilient democratic society requires informed choice as well as prudent deliberation in the decision-making process. Democracy cannot flourish as a non-cognitive phenomenon. Forgoing self-reflexive moral judgment and debate invites all manner of affective intensities. Futurism's romantic obsession with the affective intensity of war, Mussolini's fascist appeal to the cult of charismatic personality, and Hitler's hate-fueled vision of racial dominance exemplify (as have other social and political movements before them) the dynamics and consequences of political discourse driven by unthinking affective intensity.

Law's humanity requires clarity in the decisions we make as well as in the choices we forgo. This includes the capacity to consider who we become as individuals and as a society when we choose one narrative, rooted in one set of affective intensities, as opposed to another.

Our responsibility for narrative construction and narrative choice carries with it an ethical imperative to understand the orchestration of affect. Recent developments along these lines in legal and political theory invite us to be mindful of this need.<sup>60</sup> The issue for legal and political theory and practice today is not whether affects, feelings, and emotions play a role in the construction of social, political, and legal meaning. They do. The more challenging question is how this occurs, and with what impact upon our social, political, and legal institutions?

Downplaying the importance of reflective consciousness (including our capacity for prudent judgment) in favor of spontaneous affective events invites tragedy. In this respect, Massumi's romantic ideal is misplaced. It is not the indeconstructability of affect that ought to capture our imagination. What ought to concern us most is the nature of the social, political, and ethical implications of a given affective configuration. That configuration is not beyond us. It *is* us, or at least it implicates us, as part of what makes us who we are – either as participants actively contributing to, or spectators passively colluding in the world of meaning that our choices (or our failure to make choices) construct.

The cultivation of prudent judgment in this matter is not something that the natural sciences can provide. That is what the humanities are for. As recent historical experience has taught, it is one thing to learn of the practical efficacy or inefficacy of torture; it is something else again to consider the moral challenge that torture as a political act presents to members of a given society. In choosing the most suitable narrative to make sense of such a practice are we struck most by shame as an offshoot of empathy or by fear and loathing toward the alien other?

Here is where affect theory has a very real role to play. It asks us: who or what is behind our political and legal choices? What kind of affect, accessed by what narrative configuration, warrants the investment of power and belief? Like pop cultural programming, politicians and lawyers often serve as surrogates for affective reinforcement and confirmation in society. But do we recognize the role affect is playing, or the force that

60. See Martha Nussbaum, note 28 *supra*, p. 15 (“[A]ll of the core emotions that sustain a decent society have their roots in, or are forms of, love.”); Michael Hardt and Antonio Negri, *Commonwealth* (Cambridge, MA: Harvard University Press, 2011), pp. vi–vii (“Love provides another path for investigating the power and productivity of the common.”).



it wields? Is it being deployed in the service of naked power for its own sake? Does it advance a compelling narrative of shared values? Are we moved more by the nature of affective intensity than by the *social* or *legal* or *political* reality that that intensity conjures? If it is the former, a matter of affective intensity for its own sake, then surely the Nietzschean reduction of politics to aesthetics is at hand.<sup>61</sup> Investing the aesthetic with moral capital requires that we grow mindful of aesthetic effects in the service of particular social, political, and legal norms, for only then are we capable of choosing either to submit or resist.

Social, political, and legal meanings bind us with great intensity. Whether that bond is rooted in the intensity of Hobbesian fear or something nobler is a matter of collective choice.

Shelley once said that poets are the unacknowledged legislators of the world. The affective intensity of their words founds the *nomos* – the legal reality in which we live. The poetic power of affect is what holds our personal and collective narratives together, and makes their meaning stick. So we ask: by what intensities are we bound, or forced apart? To what acts of meaning do we say yes or no? And in so saying whom do we become? What kind of society do we create?

In a moral society we learn not only how to think and feel, but also to ask what it means (for self and others) to think and feel in particular ways under particular circumstances. That is the perennial legacy of the humanities. The living, adaptive reality of law consists in mindfulness and corporeal intensity prudently conjoined. That is something the neurobiology of autonomous affect will never adequately convey. But where we turn to justify affect is also a matter of choice.

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61. See Massumi, note 22, *supra*, p. 36 (praising “aesthetic politics” because it aims to expand “the range of affective potential.”).