TWO SIDES OF THE COIN—EXPLORING DYADIC EMOTIONS IN IMMIGRATION AND ALIENAGE JURISPRUDENCE

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Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

—Eleanor Roosevelt[1]

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1. *10 Inspiring Eleanor Roosevelt Quotes*, UNITED NATIONS FOUNDATION, https://unfoundation.org/blog/post/10-inspiring-eleanor-roosevelt-quotes/ (last visited Oct. 25, 2019).

I. INTRODUCTION

A group of scholars gathered in North Carolina on a rainy day in February to talk about the relationship between emotion and law.[2] What emerged was a panoply of ideas about emotion, law, reason, rationality, rhetoric, well-being, and ethical counseling. It was clear that all of the presenters agreed that emotions are relevant to the study of law and that much could be learned by exploring each of these areas.[3]

Law and emotions scholarship now has a rich foundation, and certain scholars have articulated an analytical framework for considering various affective analyses of law.[4] Scholars have structured three dimensions for considering the intersections of law and emotion.[5] *Illumination* identifies an emotion in the context of a legal concept.[6] *Investigation* delves deeply into an interdisciplinary understanding of the target emotion at play within the law.[7] Finally, *integration* seeks to offer normative suggestions that are buoyed by affective analysis.[8]

This Article employs the foregoing three-dimensional framework to study emotion in immigration and alienage jurisprudence. Immigration and alienage jurisprudence are rich targets for this affective analysis as the issues in this context are both divisive and emotion-driven.[9] There are weighty questions about who should be

2. We met to consider emotion and the law in light of Harold Lloyd's interesting exploration in Harold Anthony Lloyd, *Cognitive Emotions and the Law*, 41 LAW & PSYCHOL. REV. 53 (2016).

3. *See* Lloyd, *supra* note 2, at 55–56.

4. *See, e.g.*, Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2001–02 (2010).

5. *Id.* at 2002.

6. *Id.* at 2034–40.

7. *Id.* at 2040–49.

8. *Id.* at 2049–68.

9. *See, e.g.*, David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 127 (2018).

included in the national community and how immigration classifications impact human rights in the United States.[10] These issues lend themselves to a consideration of how contrasting emotions drive the balance between the competing notions of inclusion and exclusion.[11]

This Article thus offers a unique perspective with respect to selecting an affective focus for studying the law. While much of the law and emotions scholarship aims to align a particular emotion with a legal doctrine or framework, such as the role of disgust in laws that discriminate on the basis of sexual orientation,[12] this Article crafts a largely uncharted lens of contrasting emotions, or dyadic emotions, to study competing theories in immigration and alienage jurisprudence.

Situated in this context, I assert that two paradigms—personhood and membership—which operate in immigration and alienage jurisprudence may be rooted in the contrasting or dyadic emotions of trust and disgust.[13] In the *illumination* context, this Article considers how trust might animate the personhood paradigm, while its dyad, or contrasting emotion, disgust, might undergird the membership paradigm.[14] Following that premise, this Article *investigates*, in an interdisciplinary analysis, these contrasting emotions.[15] Bolstered by this interdisciplinary understanding, this Article *integrates* this affective lens, suggesting its use in considering structural or normative change in the immigration and alienage body of law.[16]

Part II begins with a brief overview of law and emotions scholarship, recognizing that law is not mere logic but is influenced in myriad ways by emotions. Part III then examines the foregoing framework for law and emotions scholarship. Part IV offers the affective, dyadic frames of trust and disgust as implicated in the personhood and membership paradigms. In Part V, this Article considers an interdisciplinary examination of those emotions, once again set in the context of immigration and alienage jurisprudence. Part V then pivots to an analysis of how the contrasting or dyadic emotional lens might inform structural or normative change in this area.

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10. *See id.*
11. *See id.*
12. *See generally* MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010) (addressing the divisive nature of immigration law in current U.S. culture).
13. *See infra* Part II.
14. *See infra* Part IV.
15. *See infra* Part V.
16. *See infra* Part VI.

II. LAW AND EMOTIONS RECONCILED

In recent decades, legal scholars have challenged the fiction that emotion does not drive the creation or application of law.[17] In *The Passions of Law*, Susan Bandes, a law and emotions pioneer, asserts, "Emotion pervades the law."[18] She notes that the law is "imbued with emotion," most noticeably in criminal law with its emphasis on vengeance and redemption but also relevant in civil law.[19] She therefore questions "law's insistence on neutral, emotionless judging [and its] devotion to the myth of an emotionless, cognition-driven legal system."[20] Bandes surmises that this disconnect is based on law's unwillingness to consider other disciplines.[21] She suggests that because emotions are complicated and messy, law seeks to exclude emotions from what it hopes to maintain as rule-driven and categorical legal system.[22]

Jeremy A. Blumenthal, a noted law and psychology scholar, observes the historical failure of legal scholars to engage in law and emotions analysis.[23] Among other reasons, he highlights the lack of consensus in the social sciences about emotions as an impediment to law and emotions scholarship.[24]

Professor Hila Keren offers a different perspective on law's resistance to emotions.[25] Keren observes, "Embracing the historic dichotomy between reason and emotion as axiomatic, conventional law has long been portrayed as an enterprise that both *is* and *should* be clearly affiliated with reason and patently distanced from emotion."[26] She argues that the characterization of law as a science, or "an intellectual process of deduction and induction resulting from textually based acts of reading and writing: the ultimate expression of abstract logic and reason," contributed to the dichotomy between

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17. *See, e.g.*, Abrams & Keren, *supra* note 4, at 1999–2000.

18. SUSAN BANDES, THE PASSIONS OF LAW 1 (1999).

19. *Id.* at 2 ("[E]motions that pervade law are often so ancient and deeply ingrained that they are largely invisible.").

20. *Id.* at 6–7 (noting that longstanding theory on the rule of law "greatly overstates both the demarcation between reason and emotion, and the possibility of keeping reasoning processes free of emotional variables.").

21. *Id.* at 7 (questioning "well-known insularity and unwillingness to learn from other disciplines").

22. *Id.* ("Law is wary of ambiguity, and likes predictable outcomes. The notion of the rule of law is based, at least in part, on the belief that laws can be applied mechanically, inexorably, without human fallibility.").

23. Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 3 n.4 (2007).

24. *Id.* Blumenthal observes, "[T]here is debate even among empirical social scientists about the nature and phenomenology of emotions, as well as about the processes by which emotion affects, influences, interacts with, controls, or is subject to, more 'rational' cognitive processes," but he concedes "[a]lthough the disagreement this debate has led to can be overstated, it can nevertheless yield a misleading picture of the field as somewhat incoherent." *Id.* (citation omitted).

25. Hila Keren, *Valuing Emotions*, 53 WAKE FOREST L. REV. 829, 832 (2018).

26. *Id.* at 848.

law and emotion.[27] Solidifying this contrast, emotions are cast as wild and uncontrollable, thereby "standing to obstruct and disfigure legal doctrines."[28] These competing characterizations, "either intuitively or with deliberation," have operated "to distance law from emotions in order to protect and fortify its apparent rationality."[29]

Notwithstanding real or purported obstacles to reconciling law with emotion, Bandes asserts that law's unwillingness to engage with emotions is damaging.[30] She argues that "[t]he development of law—of its content, its structures, its actors, and the dynamics among them—has been harmed and stunted by the failure to heed the lessons learned in every discipline that has studied emotions."[31] Bandes asserts that emotion actually improves law and decision-making because "emotion in concert with cognition leads to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions."[32] Emphasizing these points, Bandes urges that the law may learn a great deal from emotions theory that has been explored in other disciplines.[33] In keeping with this observation, this Article acknowledges that scholars may benefit from an affective analysis of the law.

III. A FRAMEWORK FOR THE DYADIC ANALYSIS

Acknowledging on the basis of the foregoing that the study of emotions can yield rich insights into law and legal theory, we will now turn to the application that is the focus of this Article: using a continuum of contrasting or dyadic emotions as a lens to consider competing paradigms in immigration and alienage jurisprudence. In order to have some structure for our analysis, we will now more fully consider a heuristic for law and emotions scholarship.

In *Who's Afraid of Law and the Emotions?*, Kathryn Abrams and Hila Keren catalog a brief history of law and emotions scholarship and outline a framework for the ways in which affective inquiries can be used in legal scholarship.[34] Their model is based upon three dimensions that can inform both the more modest end of improving legal doctrine and decision-making, and the more ambitious aspiration of using law to produce desirable emotional effects.[35] The

27. *Id.* at 848–49.
28. *Id.* at 849.
29. *Id.*
30. BANDES, *supra* note 18, at 7.
31. *Id.* ("Since the law has no choice but to traffic in emotions, it needs to understand and evaluate them.").
32. *Id.*
33. *See* Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974, 978 (2001) (discussing Bandes's thesis).
34. Abrams & Keren, *supra* note 4, at 2050–60.
35. *Id.* at 2033 (Interdisciplinary resources "will also help us develop a conception of law as a vehicle for attending, accommodating, and engaging in a variety of pragmatic ways these fundamental dimensions of human response.")

dimensions of inquiry—*illumination*, *investigation*, and *integration*—are explored briefly below.[36]

A. Illumination

The first dimension, illumination, seeks to identify ways in which emotions are implicated in legal settings.[37] Illumination encourages an examination of the law from an affective standpoint.[38] Because emotions are not typically revealed explicitly in legal issues or patterns, in order to illuminate, we must "dig beneath the surface and ask ourselves how emotion might be implicated in such contexts. This process often permits us to see that emotions play a role in law that has not been acknowledged, or that they have been misapprehended in the context of existing legal doctrine."[39] Illumination may reveal emotions that have been obscured by conventional legal analysis, belying the historical distinction between law and emotion.[40] Illumination study may also make apparent previously unacknowledged emotions underlying law and decision-making.[41]

The authors acknowledge that the goal of influencing emotions may be more controversial. *Id.* at 2050; *see also* Kathryn Abrams, *Seeking Emotional Ends with Legal Means*, 103 CALIF. L. REV. 1657, 1658 (2015) ("[T]here is more ambivalence about whether we can or should use the instrumentalities of the law to encourage or shape emotions in socially ameliorative ways.").

36. Abrams & Keren, *supra* note 4, at 2033–34 (observing that not all scholarship will explore each dimension).

37. *Id.* at 2034.

38. *Id.*

39. *Id.*

40. *Id.* ("This is both a remainder and a reminder of the traditional dichotomy between law and emotions and its consequences. Typically in such cases, the accepted rationalist understanding of the subject either ignores the emotions altogether, or alludes to them briefly or shallowly as a matter that requires no inquiry or explanation.").

41. *Id.* at 2036–37. For example, citing the work of Clare Huntington, the authors underscore that "[c]onventional family law, according to Huntington, assumes a simplistic binary affective model that dichotomizes love and hate." *Id.* at 2037 (citing Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1254 (2008)).

> For example, a couple is either married (love) or divorced (hate); birth parents either retain custody of their children (love) or relinquish their children completely to other adults (hate). But, this reductive model is at odds with what psychologists and other social scientists have learned about the affective cycles that typify intimate relationships: these cycles often move from love to anger to guilt to efforts at repair. By recognizing a limited affective model, which acknowledges only rupture but not a possible repair, the law freezes familial relationships at the moment of breakdown and "exacerbates emotional harm within families." By surfacing emotions that the law has tended to neglect, or demonstrating why legal doctrine requires a more thorough understanding of their operation, affective analysis in its "illumination" mode permits a new understanding of family functioning.

Id. (internal citations omitted).

Further, illumination may focus on the impact of law on emotion.[42] Affective analysis can consider law's negative impact on emotions, such as the award of hedonic damages to individuals disabled in accidents based on a "flawed assumption that those disabled by an accident suffer substantial losses in 'enjoyment' of life."[43] This flawed assumption induces arguably unjustified pity on disabled persons whose enjoyment of life may "return[] to earlier levels after a short period of adjustment."[44] Alternatively, the affective lens can illuminate areas where the law stands to encourage positive emotions, such as reforms fueled by the emotion of forgiveness in family law.[45]

Illumination can therefore be "aimed at exposing law's limited or mistaken assumptions, about emotions in general or about particular emotions."[46] This type of analysis may be explicit or implicit and may be active or reactive.[47] Explicit analysis begins where the connection between law and emotion is evident. Where the connection is not evident, a "scholar may grasp the connection between law and a particular emotion or multiple emotions only in retrospect, after she has developed some knowledge regarding these emotions."[48] In this more reactive scenario, the scholar may then proceed from the illumination of emotions in particular contexts to consider normative or practical applications of emotions.[49] "Making both kinds of

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42. *Id.* at 2037–39.

43. *Id.* at 2037–38 (citing Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 778–84 (2007)). *But see* David M. Studdert et al., *Rationalizing Noneconomic Damages: A Health-Utilities Approach*, 74 LAW & CONTEMP. PROBS. 57, 78 (2011) (observing that "critics arguing that the losses hedonic damages purport to compensate overlap to an unacceptable degree with losses already covered by general damages").

44. Abrams & Keren, *supra* note 4, at 2038.

45. *Id.* at 2038–39. The authors reference the work of Solangel Maldonado, who "[d]raw[s] from forgiveness models developed by scholars in other disciplines, [and] argues that family law can cultivate forgiveness by offering 'Healing Divorce Programs' to high-conflict divorcing couples." *Id.* (citing Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 444 (2008)).

46. *Id.* at 2039.

47. *See id.* at 2034.

48. *Id.* at 2039 (noting that some scholarship begins with an analysis of emotion that is later connected to a legal context).

49. *Id.* The authors explain,

> For example, writing about the role of emotions in risk regulation, Dan Kahan begins with three leading theories for conceptualizing this role, and only then turns to what he calls "normative and prescriptive implications." In exploring such questions as whether legislatures should "limit access to guns in order to avoid the risk of shooting accidents or violent crime," Kahan demonstrates the way his view of the emotions (as expressing and protecting cultural norms) can contribute to a better understanding of a particular legal dilemma.

efforts—from doctrine deeper into the emotions and from emotions back to doctrine—is crucial to realizing the full potential of affective analysis."[50]

B. Investigation

The second dimension, investigation, contemplates an interdisciplinary analysis of emotion.[51] In the investigation dimension of law and emotions inquiry, Abrams and Keren focus on the need to highlight interdisciplinary research that deeply analyzes emotion.[52] Explaining that an interdisciplinary examination of emotions is a critical step in law and emotions inquiry,[53] Abrams and Keren assert, "In the work with greatest pragmatic potential, thorough interdisciplinary investigation of the emotions is the crucial predicate for normative thinking about the law: either about its amelioration or about its role in shaping the affective lives of its subjects."[54]

This second dimension, while essential, is fraught with complication, due in no small measure to the complexity of interdisciplinary emotions research.[55] For instance, there is no definitive list of emotions and, as the authors assert, there should not be one, so as to accommodate advancements in interdisciplinary research.[56] Indeed, in this phase of orienting research into specific emotions, the scholar not only lacks a definitive list of emotions, but also carries the burden of evaluating the cognitive phenomena within a framework of varying affective responses.[57] The authors explain, "This phase of analysis may also involve analyzing alleged affective phenomena which may not, on careful examination, turn out to be emotions, and may not function the way that advocates or analysts have suggested that they do."[58] Notwithstanding,

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Id. at 2039–40 (citing Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 744, 760, 763 (2008)).

50. *Id.* at 2040 (noting the breadth of inquiry into both varied doctrinal areas of law as well as legislation and policy and concluding that "[t]his variety suggests a wealth of possible targets for such scholarship, as well as the potential for broad contribution by its practitioners.").

51. *Id.* at 2034.

52. *Id.* at 2041.

53. *Id.* at 2040.

54. *Id.* at 2041.

55. *Id.* at 2046 ("Those who study emotions in other fields, however, observe that emotions cannot be discussed monolithically.").

56. *Id.* at 2046–47 (emphasizing the lack of consensus regarding the concept of emotion and the complication emanating from the varied nomenclature used by emotions researchers). The authors assert, "The list, we argue, is almost infinite and should remain open to accommodate new research and reflection from a variety of fields." *Id.* at 2046.

57. *Id.* at 2047.

58. *Id.* at 2046 n.204.

> [T]he key to breaking the traditional alienation between law and emotions is to be found in deepening the familiarity of legal actors with the emotions: with various affective dynamics, with the importance of the emotions to any "rational" decisionmaking, and with concrete emotions that are tightly connected to law and/or highly influenced by it.[59]

C. Integration

The third dimension, integration, is focused on using the affective information gathered through the illumination and investigation efforts to recommend legal reform.[60] Scholarship in the integration dimension seeks to apply emotions research to legal issues, including those related to substantive law, policy, and rhetorical strategy.[61]

Abrams and Keren explore two attributes of integration. First, they consider the normative goals of integration, meaning "what law and emotions scholars aim to achieve by using affective analysis to inform legal intervention."[62] Second, they examine the normative means of integration, meaning "instrumentalities that law and emotions scholars have used to forward their normative aims."[63]

1. Normative goals

Goals addressed by integration scholars range from studying the manner in which "[l]aw may . . . serve as a vehicle for expressing society's collective response,"[64] to how "[l]aw may . . . seek to modify an emotion that is already present among some group of legal subjects."[65] The integration inquiry may also evaluate how law can be used to manage emotions,[66] including channeling or moderating

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59. *Id.* at 2049.

60. *Id.* at 2034.

61. *Id.* at 2049. The authors explain that "this dimension has proved more controversial than the first two [because the] development of normative legal proposals—particularly those which use law to foster, direct, or discourage specific emotions—may arouse both epistemological and practical concerns in some legal scholars and readers." *Id.*

62. *Id.* at 2050.

63. *Id.* at 2062.

64. *Id.* at 2051. The authors note that "[i]n this role, law serves to mirror, project, or in some cases, support or amplify, an emotion that is already present," such as in the context of criminal law which, by punishing specific acts, becomes the vehicle for society to express "anger, indignation, or disgust at these crimes." *Id.*

65. *Id.* at 2052. The authors cite the work of Susan Bandes, who addressed the ability of victim impact statements to "induce intense empathy, which can prevent juries from reaching just conclusions in capital cases." *Id.* (citing Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 392–93 (1996)).

66. *Id.* at 2053 ("The goal of this management, which is most often applied to specific emotions, rather than to affective response as a general category, is to adjust specific emotions upward or downward in response to challenges in the specific context.").

emotions[67] or scripting emotions "to prescribe the emotions that should be felt in particular contexts, or the particular persons or groups who are entitled to feel them."[68]

2. Normative means

With regard to normative means suggested by integration scholars, Abrams and Keren outline four normative strategies, including "doctrinal revision, institutional design, rhetorical and deliberative strategies, and programmatic/policy initiatives."[69]

Focused on revising or refining doctrinal law, scholars have argued "that doctrine is flawed either because it is based on a flawed understanding of the emotions, or it fails completely to apprehend the operation of emotion in the specific legal context."[70] Scholars employing an institutional competency or design framework focus not on a particular doctrinal issue but on the optimal decisionmaker.[71] Other scholars are interested in "[u]nderstanding [how] the affective dimensions of a problem can . . . fuel new rhetorical strategies, or approaches to structuring public debate," asking questions, such as "whether debates should be framed in affective (as opposed to rational) terms, or whether particular emotions should play a prominent role in legal argument."[72] Finally, some scholars evaluate how an affective analysis can inform normative goals in policy assessment or programmatic design.[73]

Armed with the Abrams and Keren framework for affective analysis, let us now turn to its application in immigration and alienage jurisprudence. We will illuminate the personhood and membership paradigms with contrasting emotions of trust and disgust, respectively.[74]

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67. *Id.* at 2054. The authors explain, "Here we refer not simply to controlling the intensity of particular emotions, but to reshaping or redirecting them," typically with a "purposive dimension." *Id.*

68. *Id.* "Scripting may be understood as a more intensive form of legal intervention than management or channeling, because it may encourage subjects to experience emotions in contexts where they might not otherwise have felt them (or discourage them in contexts where they might otherwise have arisen)." *Id.*

69. *Id.* at 2062–63.

70. *Id.* at 2063 (noting suggested reforms in areas such as contract, constitutional, and tort law).

71. *Id.* at 2064. The authors contrast the work of Cass Sunstein, whose "concern with flawed heuristics in risk assessment leads him to delegate certain forms of such assessment to experts who have been schooled to avoid such reliance," with that of Dan Kahan, whose work advocates that "[t]he goal of legal policy should instead be to educate laypersons about the evaluative power of their emotions, and to frame policy alternatives in ways that demonstrate their responsiveness to a range of worldviews." *Id.* at 2064–65 (footnotes omitted).

72. *Id.* at 2066.

73. *Id.* at 2067–68.

74. *See infra* Subpart IV.B.

IV. ILLUMINATION: CONTINUUM DYADIC EMOTIONS ANALYSIS IN IMMIGRATION/ALIENAGE

A. Dyads as Emotional Lens

Much of the law and emotions scholarship seeks to align emotions within specific legal doctrines or frameworks.[75] In this tradition, I investigate the emotions at work in the immigration and alienage context. I depart somewhat from earlier law and emotions scholarship in that I offer analytically contrasting emotions for the affective inquiry, rather than a single emotion.[76] I also offer the dyads on a continuum, rather than as binary alternative emotions.[77] Specifically, I employ the concept of contrasting or *dyadic* emotions as the lens for analyzing how competing emotions may animate immigration and alienage jurisprudence.[78]

B. Potentially Contrasting Emotions in the Immigration/Alienage Jurisprudence

In order to align the paradigms of membership and personhood in immigration and alienage jurisprudence with the contrasting emotions of disgust and trust, a necessary overview of membership and personhood follows. I note at the outset that the operation of paradigms is not entirely clear within immigration and alienage jurisprudence. Observing that "[t]he ideas of citizenship and personhood have an ambiguous relationship in constitutional thought," Professor Linda Bosniak explains that the concepts have been treated by some scholars as aligned, and by others as opposing.[79] For these purposes, I will consider the explanations offered by immigration experts for how the paradigms operate, and the recommendations those scholars make for structural reform in this

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75. Keren, *supra* note 25, at 881–82.

76. *See* Carlton J. Patrick, *A New Synthesis for Law and Emotions: Insights from the Behavioral Sciences*, 47 ARIZ. ST. L.J. 1239, 1247 (2015) (noting that law and emotions scholarship was "fueled by a shift in focus from the legitimacy of emotions in law to more specialized examinations of the individual emotions themselves").

77. *See supra* Part III.

78. The concept of dyadic emotions as related to a legal context has been explored elsewhere. John W. Cooley employed dyadic emotions in the context of mediation, using the classical rhetorical frame of pathos to study, for example, anger and calmness in hypothetical mediation. John W. Cooley, *A Classical Approach to Mediation-Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83, 91 (1993). While Cooley did not necessarily characterize his work as situated in the law and emotions context, he did illuminate a dyadic framework for considering rhetorical strategies. *Id.*

79. *See* Linda Bosniak, *Persons and Citizens in Constitutional Thought*, 6 INT'L J. CONST. L. 9, 9 (2010). Bosniak observes that some scholars view the paradigms "as aligned, even as identical," while for others, "citizenship and personhood are regarded as opposing concepts." *Id.*

area.[80] In keeping with the dyadic analysis, I suggest we consider that the lack of clear demarcation between the paradigms, and between the policies underpinning suggested structural reform, may be influenced by competing or contrasting emotions that work beneath the surface in this area.[81]

One additional caveat must be noted involving the management of terms. The membership and personhood paradigms likely find their roots in the Fourteenth Amendment of the Constitution, which uses both the terms "citizen" and "person."[82] The use of these terms has prompted considerable constitutional and alienage scholarship addressing competing notions of *citizenship* and *personhood*.[83] As we will see, later scholars have labeled these paradigms *membership* and *personhood*, with membership invoking the exclusionary emphasis on national citizenship as a basis for recognizing rights.[84] For purposes of this Part, I employ the personhood and membership terminology used by immigration and alienage experts.

In light of the complexities at issue in this area, scholars have characterized United States immigration law as "schizophrenic."[85] Nonetheless, personhood and membership have been invoked to determine the rights of noncitizens.[86] Studying the "anomalous place of the undocumented worker in the United States,"[87] Bosniak notes that United States immigration policy "has deprived [undocumented immigrants] of recognition as members in most contexts, but it has

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80. *See infra* Subpart VI.B.

81. *See infra* Subpart VI.B.

82. U.S. CONST. amend. XIV.

83. *See* Bosniak, *supra* note 79.

84. Victor C. Romero, *Expanding the Circle of Membership by Reconstructing the "Alien": Lessons from Social Psychology and the "Promise Enforcement" Cases*, 32 U. MICH. J.L. REFORM 1, 5 (1998). Romero explains,

> American history reveals, and contemporary scholars assert, that there are two competing views of noncitizens' rights in U.S. law: one views the noncitizen as someone not entitled to constitutional protection (the "membership" paradigm), and the other values the personhood of the noncitizen and the citizen equally and thus entitles the noncitizen to constitutional protection (the "personhood" paradigm).

Id.

85. Victor C. Romero, *A Meditation on Moncrieffe: On Marijuana, Misdemeanants, and Migration*, 49 GONZ. L. REV. 23, 24–26 (2014). ("In immigration scholarship, this schizophrenia has found expression in how our law and our culture alternately invoke membership and personhood as theories for adjudicating immigrant rights.") (citations omitted); *see also* Fatma Marouf, *Alienage Classifications and the Denial of Health Care to Dreamers*, 93 WASH. U. L. REV. 1271, 1273 (2016) ("The application of equal protection principles to noncitizens remains one of the most perplexing areas of constitutional law. While courts have tried to articulate various principles to synthesize the case law in this area, inconsistencies and uncertainties remain pervasive.").

86. Bosniak, *supra* note 79, at 9–10.

87. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 956 (1988).

also extended them such recognition in others."[88] Victor Romero addresses this disconnect, explaining that it may reflect competing narratives—themselves possibly animated by competing emotions—about the rights and roles of immigrants in the United States.[89] One narrative envisions an immigrant nation, "invoking Lady Liberty, Ellis Island, the Mayflower, and other iconic images of integration and assimilation."[90] Conversely, a more exclusionary narrative situates rights in membership in the community, holding "steadfastly to the notion that U.S. citizenship confers special privileges upon its beneficiaries appropriately withheld from foreigners, where high border walls, Guantanamo Bay, and enemy combatant status help maintain exclusion and separation."[91] Romero has thus noted that "[p]erhaps unsurprisingly, our Founders reflected the same schizophrenia in adopting the Fourteenth Amendment, which utilizes both the exclusive term, 'citizen,' and the more inclusive one, 'person.'"[92]

Distinguishing between immigration policies that pertain to entry into the country, and those that regulate participation in the national community, Bosniak explains that rules and practices governing community membership can be envisioned at two levels that are related but conceptually distinct.[93] The concern at one level is who is a part of the community—"with determining the subjects of community membership."[94] At another level, rules address the entitlements of community membership, "establishing the meaning or substance of membership."[95]

This observation relates to the distinction between two veins of law within what many categorize as the law of immigration. On the one hand, immigration laws are those "created by Congress to define which people may enter and what status they will be granted."[96] On

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88. *Id.*
89. Romero, *supra* note 85, at 24.
90. *Id.*
91. *Id.*
92. *Id.*
93. Bosniak, *supra* note 87, at 961.
94. *Id.*
95. *Id.* Bosniak explains,

> Any movement of people into the United States, across the nation's borders, entails some accommodation or balancing of the exclusionary border and internal relations projects. The national community is forced to define the conditions under which it opens itself to outsiders or prevents them from entering, and the community must specify its obligations toward the immigrants and the obligations of the immigrants toward the national community if they do enter. Most importantly, the nation is required to determine where the imperatives of one membership project end and the other begin and which project prevails if they should come into conflict.

Id. at 964.

96. Sara N. Kominers, *Caught in the Gap Between Status and No-Status: Lawful Presence Then and Now*, 17 RUTGERS RACE & L. REV. 57, 68 (2016).

the other hand, there are state and federal laws of alienage that "determine the rights of noncitizens by differentiating among individuals on the basis of citizenship status."[97]

Further complicating this area of jurisprudence is the existence of a variety of statuses conferred upon immigrants.[98] For example, legal statuses can be permanent visas, temporary visas, or asylum status.[99] Scholars have asserted that it is a misnomer to refer to a foreign national with no Department of Homeland Security status as illegal, because "the illegality of a noncitizen's presence is fluid; it can be made and unmade in many ways."[100] Adding to the uncertainty of categorizing on the basis of lawful status, some individuals are lawfully presiding in the United States.[101] Immigrants with lawful presence do not have lawful status and are not likely on a path to citizenship; they are merely granted permission to remain in the country for a period of time.[102] Thus, the complex framework of immigration and alienage jurisprudence, and the complicated and fluid array of categories for foreign nationals, may explain the "schizophrenia" of immigration and alienage jurisprudence characterized by immigration experts.[103]

In light of these complexities, immigration law scholar Michael Scaperlanda endeavored to superimpose structure in this area and traced the development of the personhood and membership

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97. *Id.* Even this distinction is not entirely clear. Linda Bosniak explains, "[T]he very existence of alienage is a product of [the government's immigration power] because the government designates aliens as such in the exercise of its immigration power." Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1056 (1994). Noting that "alienage as a legal category also lies in the world of social relationships among territorially present persons," Bosniak observes that "the law has constructed alienage as a hybrid legal status category." *Id.*

98. Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 133–38 (2012) (describing the "[f]uzzy [c]ategories [b]ased on [i]mmigration [s]tatus and the [p]orous [b]oundaries [b]etween [t]hem").

99. Kominers, *supra* note 96, at 60.

100. *Id.* at 61 (citations omitted); *see also* Marouf, *supra* note 98, at 136 ("To the extent that 'illegal alien' exists as a legal category, it is a category with porous boundaries, through which rights ebb and flow.").

101. Kominers, *supra* note 96, at 64–65 (explaining "a third category, *lawful presence*, which sits in tension between" legal and illegal status).

102. *Id.* at 65. Kominers explains,

> A grant of lawful presence means that although the individual has no status, he or she is permitted to remain in the United States for a period of time. However, without lawful status, these individuals are only permitted to stay and apply for work authorization at the discretion of DHS. Lawful presence does not put individuals on a path to permanent resident status or citizenship, nor does it allow individuals to petition for lawful status for family members.

Id. (citations omitted).

103. *Id.* at 57–58.

paradigms in early Supreme Court alienage jurisprudence.[104] Scaperlanda describes the development of the personhood paradigm as "one rooted in individual rights"[105] emanating from the Supreme Court's decision in *Yick Wo v. Hopkins*.[106] In that case, the City of San Francisco passed an ordinance requiring a permit to operate a laundry business under certain circumstances.[107] A Chinese national, Yick Wo, challenged San Francisco's determination to issue a limited number of permits to Chinese nationals.[108] The Court recognized the rights of the petitioner and ruled that the City had acted in a discriminatory manner under the Equal Protection Clause.[109] As Scaperlanda describes, the Court's ruling is rooted in notions of common humanity and inclusivity:

> The rights of the petitioners . . . are not less because they are aliens and subjects of the Emperor of China. . . . The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . .(Its) provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . .[110]

Scaperlanda explains that this case established the personhood paradigm, that noncitizens "'having our common humanity, . . . are protected by all the guaranties of the Constitution.'"[111] The personhood theory is thus rooted in the universality of rights based on personhood under the constitution, irrespective of citizenship status.[112]

The membership paradigm, in contrast, differentiates rights by privileging "Congress's plenary power to expel those not possessing membership in the national community."[113] Scaperlanda notes that this paradigm finds its origins in the Supreme Court case *Fong Yue*

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104. Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 718 (1996) (emphasizing "[l]ike the noncitizen, the Court finds itself straddling two worlds, the one rooted in individual rights (whether the rights tradition of the Founders or the one created by the Court in the Warren era) and the other deeply concerned with communal formation").

105. *Id.*

106. 118 U.S. 356 (1886).

107. Scaperlanda, *supra* note 104, at 718.

108. *Id.* Scaperlanda explained that the City required a permit to operate a laundry in a building that was not made of bricks or stone. *Id.* The City received over 200 applications from Chinese nationals and granted only eighty. *Id.*

109. *Id.*

110. *Id.* at 718–19 (citing *Yick Wo*, 118 U.S. 356).

111. *Id.* at 719 (citing Fong Yue Ting v. United States, 149 U.S. 698, 754 (1893) (Field, J., dissenting)).

112. Romero, *supra* note 85, at 25 (explaining, "personhood theory recognizes the equality of all before the government, regardless of immigration status").

113. Scaperlanda, *supra* note 104, at 719.

Ting v. United States.[114] In *Fong Yue Ting*, the Court affirmed deportation orders of three Chinese nationals who had been in the country for many years, finding that the federal government's "power to expel, like the power to exclude, derives from international law and is an 'absolute and unqualified' power 'inherent in (a nation's) sovereignty.'"[115] In contrast with the Court's analysis in *Yick Wo*, the legitimacy of the deportations was substantiated by the government's power to exclude and expel.[116] Thus,

> [If] the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are not actual hostilities with the nation of which the foreigners are subjects.[117]

Scaperlanda explains that the Court's analysis emphasizes the government's authority to expel noncitizens because of their lack of membership in the community.[118] He further clarifies how the Court "distinguished *Yick Wo* and the personhood tradition: *Yick Wo* addressed the constitutional limits to a state's power over continually residing noncitizens; *Fong Yue Ting*, in contrast, addressed the federal government's plenary power 'to put an end to their residence.'"[119]

While I will invite reader to consider how the operation of these paradigms may be influenced by competing emotions,[120] it is not altogether clear[121] whether the paradigms are alternative analytical[122] or normative[123] strategies. One potential organizing

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114. 149 U.S. 698 (1893); *Id.* (citing *Fong Yue Ting*, 149 U.S. at 698).

115. Scaperlanda, *supra* note 104 at 719 (citing *Fong Yue Ting*, 149 U.S. at 705).

116. *Id.* at 719–29.

117. *Id.* at 719–20 (citing *Fong Yue Ting*, 149 U.S. at 706) (citations omitted).

118. *Id.* at 720.

119. *Id.* (citing *Fong Yue Ting*, 149 U.S. at 725).

120. *See supra* Subpart III.C.

121. *See, e.g.*, Scaperlanda, *supra* note 104, at 711 (noting "the Supreme Court developed a rich, complex, and seemingly incoherent jurisprudence of the noncitizen").

122. *See, e.g.*, Romero, *supra* note 84 (explaining variations of the membership and personhood models articulated by Bosniak and Scaperlanda); *see also* Bosniak, *supra* note 79, at 9 (suggesting that "[m]uch of the ambiguity of the personhood–citizenship relationship results from the multivalence of the idea of citizenship itself").

123. Bosniak, *supra* note 97, at 1138. As noted, Bosniak explores potential demarcation between what she refers to as "convergence" and "separation":

> These models could be said to reflect competing strands of normative political sentiment in our society about the nature of the relationship between the individual and the political community. The separation model stresses both limits on government power and the equal rights of persons; to the extent it is concerned with membership at all, it tends

principle could be to align membership with immigration jurisprudence and personhood with alienage jurisprudence, although in practice those lines are not clearly demarcated.[124] Scaperlanda asserts that, rather than drawing a line between membership and personhood theories at the immigration versus alienage divide, cases within all of alienage jurisprudence tend to use membership as the threshold lens. [125] He asserts that the "Court proceeds from a membership baseline in its alienage jurisprudence. Where membership issues are present, the Court has consistently refused to seriously consider the constitutional claims made by noncitizens or their citizen families, much less balance those claims against purported governmental interests."[126]

> to presume the membership of territorially present persons, at least for most purposes, and it devotes itself to thinking about the nature of the relationships that prevail amongst them. The convergence model, in contrast, emphasizes formal community ties as the fundamental source of standing in any national society; it envisions status in the national community as structured by a series of concentric circles of belonging, with those individuals located in the innermost circle enjoying the full benefits and burdens of membership and those further from the center possessing progressively fewer claims on the community.

Id.

124. *See, e.g.*, Bosniak, *supra* note 97, at 1088–89 (1994). Bosniak notes that patterns appear in alienage jurisprudence, including,

> [D]octrines and drawn lines that distinguish, for example, between state-sponsored and federally-sponsored alienage discrimination; between deprivations of constitutional and subconstitutional rights; between the rights afforded to permanent resident aliens and those afforded to undocumented and other nonresident aliens; between economic and political forms of alienage discrimination; and between discriminatory action taken by different branches or agencies of the federal government.

Id. at 1088. Notwithstanding this helpful explanation of possible structural lines within this complex jurisprudence, Bosniak acknowledges that "regulatory spheres whose boundaries the field debates are social constructions; they reflect particular historical commitments which are bound to time and place and are therefore subject to change." *Id.* at 1141–42.

125. Scaperlanda, *supra* note 104, at 714 ("While I agree that plenary power marks the outer edges of the deferential membership paradigm, the constitutional anomaly it creates, far from being cabined within immigration law, pervades the entire alienage jurisprudence.").

126. *Id.* at 721 (citation omitted). Scaperlanda emphasizes, "With respect to core federal membership issues (those involving admission, exclusion, and expulsion), the Court has consistently held that the government's sovereign power to develop immigration restrictions is plenary, rendering any rights claims irrelevant." *Id.* Thus, he explains,

> The membership paradigm provides the baseline, unifying a seemingly incoherent alienage jurisprudence. When the Court perceives that a governmental entity is engaged in the process of communal formation, the Court applies a deferential "membership" standard allowing the political branches to go about their substantive work unencumbered by noncitizens' claims of constitutional protection.

Id. at 707.

In Scaperlanda's view, "membership and personhood traditions collapse into a unified whole because of the Court's approach to prioritizing these categories."[127] Where membership issues arise, the Court "ignores or severely discounts the noncitizen's interests," but when there are no membership issues, the "Court generally heightens its scrutiny allowing the noncitizen's personhood to trump any asserted state interest. Simply put, membership interests trump and render negatory any substantive rights claimed by aliens."[128]

In an effort to propose a new approach, Scaperlanda explores membership and personhood jurisprudence at the state and federal level, finding that membership is applied more broadly at the federal level.[129] Noting that "[s]tate membership cases are built on the affirmative responsibility of the people to form a political community," whereas "federal membership cases rest on a negative, unwritten, absolute, and even arbitrary power of the governing bodies to set policy,"[130] Scaperlanda argues that "the community building rationale of the state cases provides the better model."[131]

Victor Romero further explains Scaperlanda's position that "the Court should justify its preference for membership over personhood only when membership involves the citizenry's attempt at self-definition in accordance with constitutional mandates."[132] To the

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127. *Id.* at 715.

128. *Id.* at 716.

129. *Id.* ("At the federal level, all issues pertaining to entry into the social, economic, and political community fall within membership's parameters."); *see also* Marouf, supra note 85, at 1289. Marouf explains,

> While alienage-based classifications by states are generally subject to strict scrutiny, federal classifications usually receive only rational basis review. The deference given to the federal government stems from the plenary power doctrine, which ties the federal immigration power to foreign affairs and national security, issues largely immune from judicial review.
>
> With respect to both state and federal classifications, however, significant questions that bear on the appropriate standard of review remain unanswered to this day. Regarding state classifications, there is currently a circuit split about whether strict scrutiny is limited to legal permanent residents ("LPRs") or extends to others who are lawfully present. With respect to federal classifications, the division of immigration authority between Congress and the President remains unclear, as evidenced by the pending litigation challenging the legality of the DACA and DAPA policies. Furthermore, the allocation of immigration authority within the executive branch has remained largely unexamined by courts and scholars alike, yet is highly relevant to assessing alienage-based classifications made by executive agencies. Another layer of complexity emerges when federal and state programs are entangled; courts have sliced this type of "Gordian knot" in conflicting ways.

Id. (citations omitted).

130. Scaperlanda, *supra* note 104, at 716.

131. *Id.* at 716–17.

132. Romero, *supra* note 84, at 18.

extent Scaperlanda asserts that under the current membership model the "plenary power or the 'inherent sovereign power' paradigm is essentially unbounded," Romero explains Scaperlanda's alternative model[133] "that requires that communal formation be tempered by the Constitution and then weighed against the noncitizen's personhood claim—[this] forces the government to recognize that it has limited power. The primacy of the Constitution prevents the government from playing the membership card to trump personhood."[134]

The foregoing discussion illustrates that experts in this body of law may not agree on a clear, unified line between or among the membership and personhood paradigms as they operate across the spectrum of immigration and alienage jurisprudence.[135] Perhaps the complexity of this area of law can be attributed to a degree to the contrasting emotions that undergird its competing policies and paradigms.[136] I offer a dyadic lens as another way to navigate personhood and membership debates. I suggest that the membership paradigm might be viewed through the emotion of disgust and its variations, and the contrasting paradigm of personhood might be viewed through the dyadic emotion of trust together with its variations.[137] Having illuminated a potential connection between dyadic emotions and competing legal paradigms, we turn now to an investigation of the interdisciplinary evaluation of these contrasting emotions. It is only with that thorough understanding that we will be poised to consider possible applications of this interdisciplinary, emotion-driven lens in viewing membership and personhood.[138]

V. INVESTIGATION: TARGET EMOTIONAL DYAD: DISGUST AND TRUST

The investigation dimension will require us to ascertain what interdisciplinary experts have to say about the dyadic emotions of trust and disgust. Before we turn to that, a brief acknowledgement about the complexity (and lack of uniformity) that exists within emotions research is in order.

A. Framing the Discussion: What Are Emotions?

In the investigation dimension of law and emotions scholarship, we are asked to delve deeply into what interdisciplinary experts assert about emotion. However, I would begin this endeavor by

133. *Id.*

134. *Id.* As we will see Romero considers social psychology theory and stereotypes to consider how to "engag[e] in a more informed dialogue about citizenship and membership in the U.S. polity" along the lines envisioned by Scaperlanda. *Id.* at 38.

135. *Id.* at 6–8.

136. Kominers, *supra* note 96, at 59.

137. *See infra* Part V.

138. *See* Patrick, *supra* note 76, at 1246–47 (explaining the necessary analysis of emotional concerns by lawmakers).

reminding the reader of observations noted by Abrams and Keren, cautioning that there is little consensus in emotions research about basic questions, including exactly what an emotion is, and whether there are basic or universal emotions.[139] Indeed, scientists who study emotion do not have a single, consistent framework for categorizing, much less contrasting, emotion.[140] Some researchers have gone so far as to assert that emotions are social constructs rather than basic instincts or intuition.[141] Nonetheless, an overview of the various attempts to categorize and contrast will be useful for our application.

In terms of categorizing emotions, in 1890, American philosopher and psychologist William James proposed that there were four basic, or coarse, emotions: fear, grief, love, and rage.[142] Later, American emotions psychologist Paul Ekman used facial expressions to identify (initially) six, "basic" emotions, including anger, disgust, fear, happiness, sadness and surprise.[143] Ekman later added eleven additional emotions to his list of basic emotions but indicated that the later additions could not be encoded on the basis of facial expressions.[144] In 1996, researchers expanded the list of basic

139. Abrams & Keren, *supra* note 4, at 2047 (explaining the lack of agreement regarding the term "emotion" and underscoring the complexities created by the use of different terms in emotions research).

140. *See, e.g.*, Little, *supra* note 33, at 980 ("Herein lies the unique challenge of law and emotion study: not only must participants in this scholarship master more than one area of academic knowledge, but at least half of the undertaking probes a body of literature that is distinct, but not itself yet a discipline.").

141. *See, e.g.*, LISA FELDMAN BARRETT, HOW EMOTIONS ARE MADE: THE SECRET LIFE OF THE BRAIN xii–xiii (2017). Challenging the relatively stable assumption emotions are part of our biological nature and are universal across culture, Barrett argues,

> [E]motions are not built-in but made from more basic parts. They are not universal but vary from culture to culture. They are not triggered; you create them. They emerge as a combination of the physical properties of your body, a flexible brain that wires itself to whatever environment it develops in, and your culture and upbringing, which provide the environment. Emotions are real, but not in the objective sense that molecules or neurons are real. They are real in the same sense that memory is real – that is, it is hardly an illusion, but a product of human agreement.

Id.

142. 2 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 442 (1890).

143. Paul Ekman, *Are There Basic Emotions?*, 99 PSYCHOL. REV. 550, 550 (1992).

144. Paul Ekman, *Basic Emotions*, *in* HANDBOOK OF COGNITION AND EMOTION 55 (Tim Dalgleish & Mick Power eds., 1999) (revising the list of basic emotions to include "amusement, anger, contempt, contentment, disgust, embarrassment, excitement, fear, guilt, pride in achievement, relief, sadness/distress, satisfaction, sensory pleasure, and shame").

emotions to 15,[145] and the list was later expanded to include 27 emotions.[146]

The foregoing suggests there is little consensus as to whether emotions are instinctive or socially constructed; whether there are basic emotions, and, if so, what those basic emotions are; and whether there are universal emotions.[147] In spite of this challenge,[148] we turn next to an interdisciplinary analysis of contrasting, or dyadic emotions.

B. Emotions on a Continuum

In addition to considering whether there are basic emotions, researchers have also made various attempts to map emotions in the context of their relationship to one another.[149] The question of categorizing and contrasting basic emotions was perhaps first considered by Aristotle, who addressed emotion and considered dyads of positive and negative emotions.[150] Modern scholars have taken the dyadic concept even further, identifying attributes of emotion that distinguish them from sensations, feelings, and moods.[151] In this context, one researcher crafted the following rubric of contrasting positive and negative emotions[152]:

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145. RICHARD LAZARUS & BERNICE LAZARUS, PASSION AND REASON: MAKING SENSE OF OUR EMOTIONS 6 (1996) ("The fifteen emotions dealt with in this book are anger, anxiety, guilt, shame, envy, jealousy, relief, hope, sadness, happiness, pride, love, gratitude, compassion, and those aroused by aesthetic experiences.").

146. Alan S. Cowena & Dacher Keltnera, *Self-Report Captures 27 Distinct Categories of Emotion Bridged by Continuous Gradients*, 114 PNAS E7900, E7900 (2017).

147. Ekman, *supra* note 144, at 45.

148. *See, e.g.*, Little, *supra* note 33, at 981. Little explains one of the "shortcomings in emotion scholarship that affect understanding of law and emotion," which is "the failure of thinkers to agree on a definition of emotion, and the lack of consensus on the role of cognition in emotion." *Id.* She notes that "scholars take widely different approaches, with taxonomies ranging from two basic emotions to lists that include forty or more." *Id.*; *see also* BANDES, *supra* note 18, at 10. Bandes explains,

> Emotion theorists have never come close to agreeing on a definition of emotion; indeed, there seems to be widespread agreement on the impossibility of finding one. Emotions may be active or passive, reducible to physical processes or psychological states, rational or nonrational, voluntary or involuntary. They are variously described as motives, attitudes, character traits, moods, or feelings. The depth of the disagreement on how to define emotion, however, has not seemed to inhibit the rich interdisciplinary debates that make up emotion theory.

Id.

149. *See, e.g.*, Ekman, *supra* note 144, at 45.

150. Cooley, *supra* note 78, at 101.

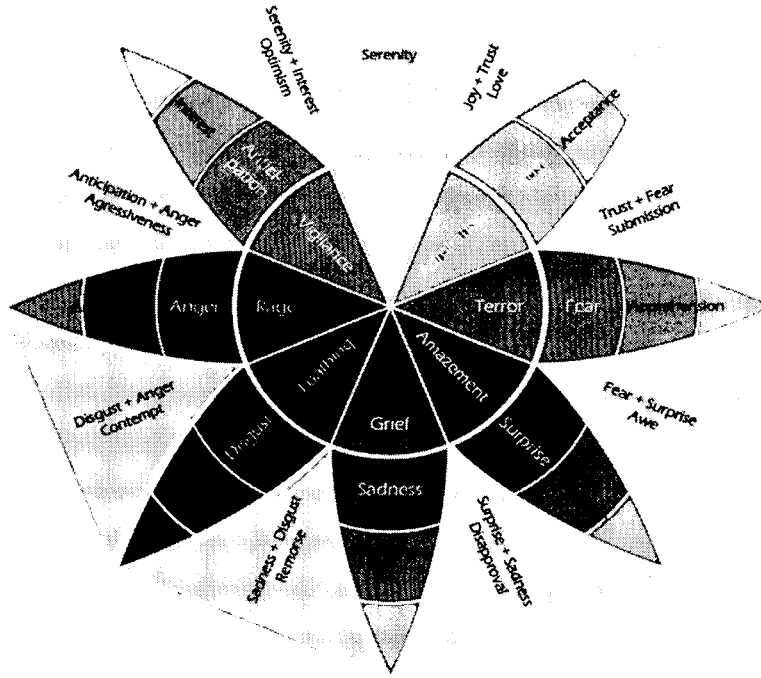
151. *See, e.g.*, Lloyd, *supra* note 2, at 56 (distinguishing emotion, feeling, and mood).

152. David L. Robinson, *Brain Function, Mental Experience and Personality*, 64 NETH. J. PSYCHOL. 152, 152 (2009).

Kind of emotion	**Positive emotions**	**Negative emotions**
Related to object properties	*Interest*, curiosity, enthusiasm	*Indifference*, habituation, boredom
	Attraction, desire, admiration	*Aversion*, disgust, revulsion
	Surprise, amusement	*Alarm*, panic
Future appraisal	*Hope*, excitement	*Fear*, anxiety, dread
Event-related	*Gratitude*, thankfulness	*Anger*, rage
	Joy, elation, triumph, jubilation	*Sorrow*, grief
	Patience	*Frustration*, restlessness
	Contentment	*Discontentment*, disappointment
Self-appraisal	*Humility*, modesty	*Pride*, arrogance
Social	Charity	Avarice, greed, miserliness, envy, jealousy
	Sympathy	Cruelty
Cathected	*Love*	*Hate*

In a similar endeavor, in 1980, American psychologist and emotions scholar Robert Plutchik constructed a "Wheel of Emotions" diagram to illustrate the range of what he considered primary emotions, and the relationship between contrasting emotions.[153] The illustration below illustrates Plutchik's vision of twenty-four Primary, Secondary, and Tertiary dyads.

153. Robert Plutchik, *The Nature of Emotions*, 89 AM. SCIENTIST 344, 349 (2001).



Plutchik's work therefore further explores contrasting, or dyadic, emotions and opposites, conceived on a spectrum of weak to intense.[154]

Subsequent scholars expanded on the Plutchik model, envisioning more specificity in the intensity of emotion contrasts and across affective dimensions.[155] To the extent that researchers who primarily focus on categorizing and contrasting emotions remain divided on a unified approach, we should not be constrained by attempting to substantiate a singular model. Indeed, to the extent the Plutchik model provides a useful framework for visualizing emotion dyads and triads, and for visualizing the contrast between primary pairs, it provides a plausible and helpful illustration for our inquiry.[156]

C. Dyadic Emotions in Context: Disgust and Trust

In the immigration context, I have chosen to situate theories of personhood and membership within the trust/disgust dyad. Disgust

154. *Id.*

155. *See, e.g.*, Erik Cambria et al., *The Hourglass of Emotions*, *in* COGNITIVE BEHAVIOR SYSTEMS 144, 146–48 (Anna Esposito, et al., eds., 2011).

156. *Id.* at 146.

as an "othering" emotion seems consistent with the demarcation aspect of the membership paradigm, drawing a line between "us" and "others," whereas the more inclusive personhood model may invoke notions of trust, or its tertiary emotion, acceptance. The competing aspects of these emotions are reflected in *The Anatomy of Disgust*, which explains that "[d]isgust rules mark the boundaries of self; the relaxing of them marks privilege, intimacy, duty, and caring."[157] In this investigation context, a comprehensive, interdisciplinary evaluation of these competing emotions will enable us to transition to the integration focus, exploring how these contrasting emotions might work in immigration and alienage jurisprudence, and to consider rhetorical strategies for effecting change within that doctrinal space.

1. Membership: Disgust as Aversion

According to the *Encyclopedia of the Mind*, emotions serve two key functions.[158] The first is to "facilitate rapid responses toward potentially dangerous aspects of the environment, and the second is to facilitate social interactions with other individuals.[159] Disgust plays an important role in both respects. Although it was originally concerned with the avoidance of potentially harmful substances, it is also involved in the "social enforcement of norms."[160] As noted, emotions scholars disagree as to whether there is a concrete set of basic emotions,[161] but for those scholars who do assert such a list, all include disgust as one of the basic emotions.[162]

Researchers have addressed three types of disgust: core disgust; animal nature disgust; and sociomoral disgust.[163] Core disgust likely "evolved in the context of food consumption as an emotion that protects from various contaminants, such as spoiled food, bad taste, and unpleasant odors, in order to prevent ingestion of substances that may potentially be harmful."[164] Animal nature disgust is typically directed at bodily functions, including bodily wastes and reproduction.[165] Sociomoral disgust, arguably at play within the immigration context, "is based on basic physical disgust that was extended to more abstract contexts such that people find situations disgusting in which moral standards are violated. Thus, disgust is a

157. WILLIAM IAN MILLER, THE ANATOMY OF DISGUST xi (1997).
158. HAROLD E. PASHLER, ENCYCLOPEDIA OF THE MIND 253 (2013).
159. *Id.*
160. *Id.*
161. *See supra* Subpart IV.A.
162. PASHLER, *supra* note 158, at 254 ("Theoretical debates continue regarding the existence of a fixed number of basic emotions; however, all proposed lists of basic emotions include disgust as one of them, usually together with happiness, sadness, anger, fear, and surprise.").
163. *Id.*
164. *Id.*
165. *Id.*

reaction to offensive objects, as well as offensive actions."[166] As one study explains,

> Although disgust evolved as a food-related emotion, it was well suited for use as an emotion of social rejection. Across many cultures, the words and facial expressions used to reject physically disgusting things are also used to reject certain kinds of socially inappropriate people and behaviors, some that involve the inappropriate use of the body (e.g., cannibalism, pedophilia, torture), others that do not (e.g., hypocrisy, fawning, betrayal).[167]

There is a great degree of law and emotions scholarship on disgust—it is a widely studied emotion in law.[168] Nonetheless, scholars' positions on disgust in law vary considerably, both in terms of its normative place in the law and with regard to a description of its intrinsic qualities.[169]

Notwithstanding this uncertainty, it seems settled that disgust is present in the law,[170] and particularly in legal frameworks that exclude categories of persons, creating "others."[171] Disgust, together with contempt, are emotions that have been used to "confirm others as belonging to a lower status."[172] Prominent law and emotions scholar Martha Nussbaum addressed the "politics of disgust," differentiating between "primary" and "projective" disgust.[173] She acknowledges that "[i]n virtually all societies, disgust is standardly felt toward a group of *primary objects*: feces, blood, semen, nasal discharges, menstrual discharges, corpses, decaying meat, and animals/insects that are oozy, slimy, or smelly."[174] Laws that are motivated by primary disgust are generally useful, as they protect the community from things that are realistically harmful.[175]

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166. *Id.* ("Thus, disgust is an emotion that acts as guardian of both the body and the soul, ensuring that no physical or moral contamination taints the self.").

167. Simone Schnall et al., *Disgust as Embodied Moral Judgment*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1096, 1097 (2008).

168. Little, *supra* note 33, at 976.

169. Laura E. Little, *Adjudication and Emotion*, 3 FLA. COASTAL L.J. 205, 215–18 (2002) ("[D]ebates rage among emotion theorists about such matters as the precise definition of an emotion as well as the intersection of cognition and emotion.").

170. Indeed, disgust as an emotion has been prominently studied in the law. *See, e.g.*, Patrick, *supra* note 76, at 1244–45 ("William Miller's *The Anatomy of Disgust* similarly touched off what would prove to be a long-lived discussion of the role of disgust in the law.").

171. MILLER, *supra* note 157, at x.

172. *Id.*

173. NUSSBAUM, *supra* note 12, at 15.

174. *Id.*

175. *Id.* at 21 (observing that, in this context "disgust at primary objects rightly plays a limited role in the law, providing part of the content of the nuisance").

In contrast, projective disgust imputes disgust to individuals or groups of people.[176] Nussbaum asserts that projective disgust is one mechanism by which societies stigmatize vulnerable minorities.[177] When projective disgust is removed, however, as when "aversion to physical contact with a racial minority is no longer present[], other modes of hierarchy tend to depart along with it."[178] Because projective disgust is imaginary, and because it is employed to stigmatize categories of people in order to subordinate them, Nussbaum argues, "projective disgust plays no proper role in arguing for legal regulation, because of the emotion's normative irrationality and its connection to stigma and hierarchy."[179]

Nussbaum asserts that disgust should be eradicated from law, turning from the "politics of disgust" to the "politics of humanity."[180] Professor Courtney Cahill describes Nussbaum's position as such:

> If the politics of disgust is all about separation and recoiling from those who disgust you, then the politics of humanity is all about association and trying to walk in those persons' shoes for a while and, in the process, seeing them as people who are in some sense 'like oneself.'[181]

Cahill has taken issue with this framework, asserting that this type of "humanity-through-similarity might lead to descriptive imprecision" and that "more normatively, humanity-through-similarity does very little to advance a thick notion of cultural, social, and marital pluralism."[182] We will return to this debate in our consideration of trust.[183]

Here, I assert that disgust as an emotion may animate one paradigm of immigration theory—that of membership—as it is a paradigm of exclusion, in contrast with the more inclusive paradigm of personhood.[184] In connection with viewing disgust as connected to

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176. *Id.* at 16 ("Projective disgust (involving projection of disgust properties onto a group or individual) takes many forms, but it always involves linking the allegedly disgusting group or person somehow with the primary objects of disgust.").

177. *Id.* at 17.

178. *Id.*

179. *Id.* at 20.

180. *See id.*

181. Courtney Megan Cahill, *Disgust and the Problematic Politics of Similarity*, 109 MICH. L. REV. 943, 945 (2011). *Id.* at 945–46. Casting Nussbaum's remedy to disgust as "involv[ing] the exercise of one's imagination and the simultaneous cultivation of similarity between one and the so-called disgusting other," Professor Courtney Cahill questions its descriptive and normative precision. *Id.*

182. *Id.* at 945—46.

183. *See supra* Subpart V.C.2.

184. It also seems a reasonable counterpart to visualizing trust as an emotion animating personhood theory, with its more inclusive underpinnings. As Nussbaum observes, "projective disgust seems a bad source of law in a nation of

laws that create "others," the membership perspective as exclusive has been characterized as limiting: "The membership perspective privileges formal citizenship status, as when a community crafts policies aimed at self-definition. Perhaps the paradigmatic example of this is limiting the franchise to full citizens."[185]

Notions of othering, and of projective disgust, appear in immigration rhetoric.[186] Professor David S. Rubenstein addresses emotion in the immigration context, noting, "Fear and loathing of migrant outsiders trace to the early Republic, with Chinese and other Asian migrants among the first blamed for contaminating American society."[187] To be fair, Rubenstein's analysis is on the role of blame in the immigration context—both the blame placed on migrant communities and the blame placed on the politicians who regulate their entry and status within the border.[188] Nonetheless, Rubenstein's observation, and its emphasis on contamination, is keenly linked with disgust rhetoric, and his reference to loathing, which sits adjacent to disgust on Plutchik's wheel of emotions, suggests that disgust may also operate in the immigration context.[189]

Disgust in immigration law also operates to differentiate in order to exclude:

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equals, given its links with irrational fantasy and its tendency to establish unjust hierarchies." NUSSBAUM, *supra* note 12, at 26; *see also* Jenny-Brooke Condon, 69 RUTGERS U.L. REV. 563, 574 n.49 (2017). Condon notes that "Equal protection doctrine involving immigrants reflects consummate line-drawing [and that] [t]his line-drawing exposes what Linda Bosniak has argued are conflicting theories of immigrants as equal, rights-holding members of society versus outsiders lacking meritorious claims for equivalent treatment." *Id.*

185. Romero, *supra* note 85, at 25.

186. David S. Rubenstein has explored the role of blame in the immigration context:

> Fear and loathing of migrant outsiders trace to the early Republic, with Chinese and other Asian migrants among the first blamed for contaminating American society. Ever since, the cultural-threat narrative has weaved through American history mostly unabated; what changes is the primary targets of this opprobrium. In the early twentieth century, for example, it was migrant Jews, eastern Europeans, and socialists whom were most disparaged. From the Great Depression, and continuing today, Latinos have borne the brunt of migrant blame. Following the 9/11 terrorist attacks, Muslims and Arabs have been branded as threats to American values and national security.

David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 136 (2018) (footnotes omitted).

187. *Id.* Rubenstein observes, "As conceived here, 'immigration blame' is a sprawling phenomenon. Beyond blaming migrants, we blame politicians, bureaucrats, and judges. Meanwhile, these players routinely blame each other, all while trying to avoid being blamed." *Id.* at 128.

188. *Id.* at 125.

189. *Id.* at 136.

> [I]mmigration law presumes differences among citizens and noncitizens and creates others among noncitizens; thus, while it is already difficult to extend the circle of empathy beyond family and friends to strangers, it is particularly difficult to do so within a field like immigration law, which is designed to maintain boundaries between citizen and "alien."[190]

Thus, in this context, I simply offer disgust and its companion emotions as potentially motivating the exclusionary membership paradigm in an effort to encourage readers to consider how the dyadic emotions may be driving the competing paradigms of membership and personhood. We turn next to disgust's dyadic emotion, trust, and endeavor to tether that emotion to the personhood paradigm.

2. Personhood: Trust as Connection

Trust is a social emotion, and one that enhances community and cooperation.[191] Trust is a linking emotion, rooted in expectations of reciprocity.[192] As one author notes, "Trust may include the 'confident expectation of the benign intentions' of others . . . ; but, more completely it is the confidence that another's actions will correspond with one's expectations (benign or otherwise) of them. Trust therefore includes the feeling that one can somehow rely upon others."[193]

Trust as a social emotion is important to our consideration of immigration policy. And, while trust as an emotion has not been as widely considered in the law and emotions framework, trust has received considerable attention by sociologists, psychologists, and social identity scholars.[194] Their views on trust as an emotion are far ranging, and predictably, not necessarily consistent.[195] Nonetheless, trust is an important consideration in an increasingly global environment and in the consequent immigration context:

> The ever-present and escalating nature of today's globalization phenomenon impacts social trust to an extraordinary extent . . . . Globalization more and more means dealing with strangers, who often are foreigners not only from a national standpoint but also from ethnic, cultural, linguistic and

190. Victor C. Romero, *Elusive Equality: Reflections on Justice Field's Opinions in* Chae Chan Ping *and* Fong Yue Ting, 68 OKLA. L. REV. 165, 166 (2015).

191. J.M. Barbalet, *Social Emotions: Confidence, Trust and Loyalty*, 16 INT'L J. SOC. & SOC. POL'Y 75, 75 (1996) ("Confidence, trust and loyalty are three social emotions necessary respectively for the social processes of agency, cooperation and organization.").

192. *Id.* at 77.

193. *Id.* ("Without such a feeling it would not be possible to confidently cooperate with others who are free to act on their own behalf.") (citation omitted).

194. Masamichi Sasaki & Robert M. Marsh, *Introduction* to TRUST: COMPARATIVE PERSPECTIVES 1, 1 (Masamichi Sasaki & Robert M. Marsh eds., 2012).

195. *Id.*

> religious standpoints. All this complicates the establishment of social trust. Trust—or more specifically one's level of trust—is not just an individual trait but also a national or cultural trait. Identifying how given nations and cultures trust, mistrust, distrust, or come to trust, or not to trust, is especially important work for social scientists.[196]

Social scientists' views on trust as an emotion–and particularly the importance of similarity or affiliation in driving trust and trusting behavior–may provide a helpful framework for contrasting disgust and trust in the immigration context. These experts agree that trust is an important emotion both socially and politically, and its impact is therefore relevant to our consideration of trust in the immigration context.[197]

Empathy and identification—likely related to acceptance, which is the tertiary emotion of trust on Plutchik's wheel—are relevant to trust.[198] In *The Dynamics of Trust: Communication, Action, and Third Parties*, Bart Nooteboom emphasizes "the importance for trust of empathy and identification, yielding the ability to dwell in (empathy) or share (identification) others' categories of understanding and motivations."[199] He explains, "[I]t is part of trust, then, to understand another's cognition and motivation, as a function of conditions, in knowledge-based trust, to sympathize with them in empathy-based trust, or identify with them in identification-based trust."[200]

Similarly, linking the importance of trust to an increasingly global community, sociologist Barbara Misztal has argued "the recent increase in the visibility of the issue of trust can be attributed to the emergence of a widespread consciousness that existing bases for social cooperation and consensus have been eroded and that there is a need to search for new alternatives."[201] Related to our present endeavor to align trust with an immigration and alienage personhood paradigm, Misztal observes, "The pressure exerted by global changes on the cohesion of national electorate, on the autonomy of national economies and on the extent of economic inequalities between social

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196. *Id.* at 8.

197. *Public Sociology, Trust and Informal Practices*, 7 STUD. TRANSITION STS & SOC'YS 1, 1 (2015).

198. Bart Nooteboom, *The Dynamics of Trust: Communication, Action, and Third Parties*, *in* TRUST: COMPARATIVE PERSPECTIVES 19 (Masamichi Sasaki & Robert M. Marsh eds., 2012).
supra note 194, at 19.

199. *Id.*

200. *Id.* However, Nooteboom also underscores the "paradoxical aspects of trust; trust is based on both the lack and availability of information . . . in trust, rationality and affect are intertwined . . . trust is both the basis for and the outcome of interactions between people." Sasaki & Marsh, *supra* note 194, at 1.

201. BARBARA A. MISZTAL, TRUST IN MODERN SOCIETIES: THE SEARCH FOR THE BASES OF SOCIAL ORDER 3 (1996).

groups and between regions make the production of trust increasingly problematic."[202]

For instance, Misztal "discerns three different kinds of trust connected with three different kinds of social order":

> *Stable order* is the kind of order in which trust is apparent as a routine background to everyday interaction. Here, trust consists of the formation of habits, reputations, and collective memory (trust as habitus). People are able to live more pleasantly given justifiable trust in their social environment. In *cohesive order*, trust is based on familiarity, bonds of friendship, and common faith and values as experienced in bonds with family, friends, and society (trust as passion). Finally, for *collaborative order* one needs trust to cope with the freedom of others and foster cooperation (trust as policy).[203]

Many social scientists have explored social identity theory, and the impact of identification and group membership on trust.[204] As one study notes, "In general, people tend to trust those with whom they share a group identity or a membership in a given category more than people with whom they do not."[205] Social psychologists Martin Tanis and Tom Postmes conducted studies on the trusting behavior of individuals, considering the impact of shared social group membership.[206] They differentiated between perceived trustworthiness, which is an interpersonal evaluation of the trustworthiness of others, and behavioral trust, which has "to do with the behavioural consequences of trust, in that trust also entails relinquishing some degree of control or power to the other."[207]

Tanis and Postmes noted that perceived trustworthiness and trusting behavior do not necessarily coincide.[208] They tested their hypothesis that people exhibit trusting behavior based on expectations of reciprocity.[209] They explain, "[a]lthough reciprocity expectations can be created by interpersonal perceptions of trustworthiness (and indeed many have treated them as

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202. *Id.* at 7.

203. Chris Snijders, Book Review, 102 AM. J. SOC. 1724, 1724 (1997) (reviewing MISZTAL, *supra* note 201).

204. Markus Freitag & Sara Kijewski, *Negative Experiences and Out-Group Trust: The Formation of Natives' Trust Toward Immigrants*, 59 INT'L J. INTERCULTURAL REL. 9, 10–11 (2017).

205. *Id.* at 10.

206. Martin Tanis & Tom Postmes, *Short Communication: A Social Identity Approach to Trust: Interpersonal Perception, Group Membership and Trusting Behavior*, 35 EUR. J. SOC. PSYCHOL. 413, 413 (2005).

207. *Id.* They assert, "There is a subtle difference between perceptions of trustworthiness and trusting behaviour. Unlike perceptions of trustworthiness, trusting behaviour involves relinquishing power over outcomes valuable to the self." *Id.* at 414.

208. *Id.*

209. *Id.* at 419–20.

synonymous), we know from research that they can also be created by higher order perceptions of similarity and interchangeability, such as those induced by shared social group membership."[210]

Building on extensive research studying the impact of shared social identity on perceived trustworthiness and trusting behavior, Tanis and Postmes demonstrated that group membership predicted trusting behavior.[211] Studying the impact of personal identity cues on trusting behavior, such as first names and portrait pictures, the researchers found that such cues had no impact on the trusting behavior for "ingroup members."[212] The researchers hypothesized that "this is because the shared social identity compensates for any loss of individuating information (and the perceived trustworthiness associated with it)."[213]

In contrast, for trust in outgroup members, personal identity cues had a positive impact on expectations of reciprocity and behavioral trust.[214] The researchers concluded that people are perceived as more trustworthy in the presence of cues to personal identity, because:

> [T]he presence of cues to personal identity affects the interpersonal relationships of people and leads to feelings of 'intimacy' and 'immediacy' . . . [which] is in line with the general belief that 'trust needs touch,' [] suggesting that in order to achieve perceived trustworthiness, personal contact (even if this is not physical, but virtual in the form of pictorial or textual information) is beneficial, if not necessary.[215]

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210. *Id.* at 414.

211. *Id.* at 421 ("Group membership was an independent and strong predictor of trusting behavior.").

212. *Id.* ("In particular, whether or not cues to personal identity (and the perceived trustworthiness accompanying it) mattered for the behavioural trust was largely determined by the target's social identity—for ingroup members such cues to personal identity made no difference.").

213. *Id.*

214. *Id.* at 419–20 (noting that "when the counterpart was an outgroup member, more behavioural trust was shown when cues to personal identity were present, because these cues increased expectations of reciprocity"). When participants had no personal identity cues, they had less expectation of reciprocity from outgroup members and engaged in less trusting behavior. The researchers explain,

> Reciprocity was not expected from an anonymous outgroup member and, as a consequence, less trusting behaviour was demonstrated under those conditions. However, when cues to personal identity were present, participants expected more reciprocity even from an outgrouper, and proved to be more willing to transfer their money as a result.

Id. at 421.

215. *Id.* (citations omitted).

Social psychologists Margaret Foddy, Michael J. Platow, and Toshio Yamagishi studied the impact of stereotypes and expectations in the context of trusting strangers.[216] They assert,

> When people trust strangers, they usually do not do so blindly, and instead use cues for trustworthiness associated with the stranger. Among the cues often used is the social category of that person. In particular, people may trust strangers with whom they share a salient social category more strongly than those with whom they do not; we call this *group-based trust.*[217]

The authors distinguished stereotype-based trust, defined as "the attribution of more favorable characteristics to the in-group than the out-group," from group heuristic-based trust, defined as "the expectations of altruistic and fair behavior from in-group members."[218] They then conducted a study in which participants were asked to receive an allocation of money from one of two potential allocators, one from an in-group allocator and one from an out-group allocator.[219]

To evaluate the potential difference between stereotype-based trust and group heuristic-based trust, they "manipulated the supposed knowledge the allocator had about the participant's group membership."[220] One condition was described as "common-knowledge," in which the participants were told the allocators knew the group membership of the participants.[221] They hypothesized that participants would expect more favorable treatment from allocators because of the awareness of shared group membership.[222] The other condition was the "private knowledge" condition, in which participants were told that allocators were not aware of the participants' group membership.[223]

The results were not surprising. In the common knowledge condition participants selected the ingroup allocator 100% of the

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216. Margaret Foddy et al., *Group-Based Trust in Strangers: The Role of Stereotypes and Expectations*, 20 PSYCHOL. SCI. 419, 419 (2009). The authors explain,

> The concept of trust and, in particular, trust in strangers, has attracted increasing attention in sociology, psychology, and related disciplines. In part, this reflects the emergence of new forms of social and economic relationships made possible through electronic communication and developments in global economic and political systems, in which the establishment of 'fast trust' among strangers is crucial.

Id. (citations omitted).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 420.

221. *Id.*

222. *Id.* (explaining that, in the same group condition, recipients' expectations were based on shared group membership).

223. *Id.*

time.[224] In contrast, in the private knowledge condition, participants selected in-group allocators only 53% of the time.[225]

Turning their attention to the possible significance of the stereotypes associated with the out-group, the researchers conducted an additional study that replicated the former, but varied the positive and negative stereotypes associated with the possible out-group allocator.[226] Under those conditions, the researchers suspected that participants would still place their trust in an in-group allocator under the common-knowledge condition, even when the impact of the out-group stereotype was more positive than that of the in-group.[227] They suspected that, under the private-knowledge condition, where the allocator was described as not knowing the social group of the participant, participants would only select an in-group allocator when the impact of the out-group stereotype was more negative than that of the in-group.[228]

Their expectations were confirmed.[229] Participants in the common-knowledge condition continued to prefer in-group allocators, using the group heuristic-based trust to inform expectations of favorable treatment.[230] Under private-knowledge conditions, however, stereotype-based trust did matter. Participants favored an in-group allocator when the stereotype of the out-group allocator was more negative than that of the in-group allocator and favored an out-group allocator when the stereotype of the allocator was more positive

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224. *Id.* ("Group-based trust occurred in the common-knowledge condition, with 100% of the participants choosing the in-group allocator.").

225. *Id.*

226. *Id.* at 421. Participants (in-group) were psychology students and potential allocators were either nursing students or economics students.

> A preliminary study with 57 La Trobe University students indicated that stereotypes of psychology students were 16 percentage points more positive and 17 percentage points less negative than stereotypes of economics students, but were 30 percentage points more negative and 24 percentage points less positive than stereotypes of nursing students.

Id.

227. *Id.* ("The stereotype valence of the out-group may have an effect, but it was expected not to override the strong effect of the expectation-based trust.").

228. *Id.* The study explains,

> In the private-knowledge condition, however, in which expectations of in-group-favoring behavior are not expected to operate, the choice of the allocator should reflect the stereotype valence of the particular group used as the out-group. Thus, participants in the private-knowledge condition were expected to choose an in-group allocator more frequently than an out-group allocator only when the valence of out-group stereotypes was more negative than the stereotypes of the in-group.

Id.

229. *Id.*

230. *Id.* at 422 ("[P]reference for the in-group allocator was high under common-knowledge conditions, regardless of the valence of the stereotype of the in-group relative to that of the out-group.").

than that of the in-group allocator.[231] Thus, shared social identity is a powerful indicator of trust, as are positive stereotypes associated with out-groups when social identity cues are absent.[232]

How is this dive into interdisciplinary research on trust useful in the context of personhood as a paradigm for immigration? If social psychologists are correct in finding that trust is favorably impacted by perceived affiliation or positive stereotype, trust as an animating emotion in immigration must be tied to some reconciling affiliation. Could trust as an affective lens support the notion that personhood as an immigration paradigm is one rooted in the universality of humanity and a universal desire for rights under the government—the equality of all vis-a-vis the United States government,[233] regardless of difference in terms of ethnicity, race, immigration status, and the like? Might inclusivity themes, rooted loosely in the emotion of trust and its variant, acceptance, help us engage in Scaperlanda's proposed model of calling for a Constitutional dialogue of "We the People," to foster "immigration and alienage policies that balance the legitimate interest of the national community (and its local constituent parts) with the human dignity and value of the noncitizen person"?[234]

To link the Nussbaum/Cahill debate to this discussion, I attempt to reconcile Nussbaum's suggestions that the antidote to disgust is "humanity-through-similarity" with Cahill's criticism that this antidote fails to properly acknowledge difference.[235] Specifically, I offer trust in personhood as motivating universality of *humanity*, rather than (necessarily) the *similarity* of the in-group.[236] I question whether the antidote to disgust must depend, as Cahill asserts in the Nussbaumian context, on "refiguring [] subjects [of disgust] as similar to ourselves."[237] Envisioning a "humanity through difference" framework,[238] Cahill identifies an alternative to similarity politics that suggests a "useful context in which to consider how to cast arguments in universal ways that are attentive to similarity without sacrificing particularity and the 'deep respect for qualitative difference.'"[239] Citing Justice Ginsberg's decision in *United States v.*

231. *Id.* at 421 ("In the private-knowledge condition, the stereotype valence of the outgroup mattered. The percentage of participants who chose an ingroup allocator was larger when the out-group was economics majors (80%) than when it was nursing majors (41%).").

232. *Id.*

233. I acknowledge that the question of universality of human rights, or humanity, at the global level is complicated by religious, political, moral, and philosophical considerations.

234. Scaperlanda, *supra* note 104, at 773.

235. Cahill, *supra* note 181, at 945.

236. *See supra* text accompanying note 180.

237. Cahill, *supra* note 181, at 959.

238. *Id.*

239. *Id.*

Virginia,[240] Cahill observes that the decision "recognizes the rich differences that do exist between the sexes but at the same time is attentive to the similarities and universals that bind them—in that case, the universal desire on the part of men and women to attend a quality public military institution."[241] Could then, the perception of similarity or affiliation within the trust/personhood construct be not the absence of difference, but the awareness of universality of humanity and the desire of all people to enjoy basic civil rights?[242]

I acknowledge that linking trust and acceptance to personhood and disgust to membership will not result in a perfect fit – this dyadic framework is theoretical. Nonetheless, as we turn our attention to integration, we may find that the affective dyadic lens provides a new way to consider these paradigms.

VI. INTEGRATION: HOW ARE DYADIC EMOTIONS USEFUL IN IMMIGRATION /ALIENAGE JURISPRUDENCE

We have now endeavored to *illuminate* emotions in law, exploring the dyadic emotions of trust and disgust as animating the personhood and membership paradigms of immigration policy. Further, in keeping with the Abrams and Keren framework, we attempted to *investigate* the work of interdisciplinary experts' and their views on trust and disgust.[243] At this point, we pivot to *integration*, setting our sights on how an understanding of law—immigration and alienage—and emotion—trust and disgust—might inform normative ends and normative means.[244]

A. Normative Ends: Acknowledging Emotions in Immigration and Alienage Jurisprudence

Given our dyadic affective lens of trust and disgust in immigration and alienage jurisprudence, how might the suggestion

240. 518 U.S. 515 (1996).

241. Cahill, *supra* note 181, at 959. Cahill observes the Court's opinion "demonstrates that sex equality, the acknowledgement of difference, and progress . . . are by no means mutually exclusive ideals." *Id.* at 959–60.

242. *Id.* at 961. Cahill might reject such a position, emphasizing the need to deeply respect difference. She notes, "While surely not an inherently bad thing, couching equality claims in the language of universal desire, as with transcending disgust for the other by noting our similarities to or with her, fails to address the 'studious nonperception of difference.'" *Id.* She thus concludes, "It would seem that the real achievement from an antidiscrimination perspective would be to move from disgust to humanity, or to achieve gains in civil rights, because of, rather than despite, our differences." *Id.*

243. *See supra* Part V.

244. *See infra* Subpart VI.A. To be clear, an exhaustive consideration of integration strategies is beyond the scope of this article. Its goal is to suggest a new, affective lens to consider legal issues, one that might be particularly useful where the legal issues implicate thorny policy considerations. To the extent that immigration law and policy has been increasingly divisive, I offer this affective lens as a new perspective.

that trust motivates the personhood perspective and disgust motivates the membership perspective inform normative reform in this area? At this juncture, we return briefly to Martha Nussbaum's assertion that projective disgust has no proper role in the law and, as such, laws that are motivated (in part) by disgust should be entirely eradicated.[245] She has taken the position, which we have noted is not without its detractors, that "the specific cognitive content of disgust makes it always of dubious reliability in social life, but especially in the life of the law."[246]

Because of the complexity of immigration and alienage jurisprudence, the lack of a clear divide between both those veins of jurisprudence, and the national interests at stake in both the extreme cases and those within the margin, I do not argue that disgust, as it potentially motivates the membership paradigm, need be eradicated. My rejection of this categorical approach may be influenced by the dyadic affective framework I selected—viewing contrasting emotions on a continuum.[247] Laura Little observes that the ambiguity inherent in defining emotion clouds the ability to discern whether Nussbaum or her detractors are correct with respect to eradicating disgust in the law, noting "If, for example, one subscribes to the view that *emotions are part of a subtle continuum*, one might be less likely to condemn disgust for all legal purposes, given the possibility that disgust might be related to or confused with a more salutary phenomenon such as outrage or indignation."[248] Rather, I suggest that the disgust as potentially motivating a paradigm should be acknowledged and made transparent.[249]

After all, acknowledging emotions that are at play in a given legal context is a normative goal.[250] Given the noted complexity of immigration and alienage jurisprudence, it is challenging to recommend doctrinal reform. Nonetheless, here I will once again capitalize on the work of immigration expert Michael Scaperlanda, and I will assert that some of his recommendations for normative

245. NUSSBAUM, *supra* note 12, at 26 ("[P]rojective disgust seems a bad source of law in a nation of equals.").

246. Martha C. Nussbaum, *"Secret Sewers of Vice": Disgust, Bodies, and the Law*, *in* THE PASSIONS OF LAW 19, 22 (Susan A. Bandes ed., 1999).

247. Little, *supra* note 33, at 985.

248. *Id.* (emphasis added).

249. And in this respect I suggest the dyadic model as one that presents alternatives, in keeping with Little's observation that perhaps we can reconcile scholars' views on the place of disgust in the law if we approach it with a different orientation. Little notes, "Similarly, one might be less likely to embrace Nussbaum's unqualified rejection of disgust if one believed the sentiment was capable of transmogrification into a more positive social force—a process Jon Elster observes that allows humans to make lemonade from sour lemons (rather than sour grapes from sweet ones)." *Id.* at 985–86.

250. Abrams & Keren, *supra* note 4, at 2050.

reform can be further illuminated through the lens of trust and disgust.[251]

Scaperlanda analyzes discrepancies between the membership and personhood analysis in alienage cases at the state and federal level, noting that in the latter context, the plenary power, which drives membership, often negates any consideration of personhood claims.[252] Membership is prioritized over personhood at the federal level because "[i]n regulating this relationship between the national community and the noncitizen, the dual membership concerns of communal formation and protection reign paramount, permitting discriminatory classifications as an 'incentive' to noncitizens to become full participatory members of the community through naturalization."[253] Membership considerations are primary at the federal level because of its ultimate responsibility for determining the scope of the federal community, which "touches a broader array of issues, and its reach extends further than limitations on governmental employment to issues of admission and exclusion, to questions of deportation, and beyond the border and immigration law to the benefits and burdens attendant to partial membership, and the qualifications for full membership."[254]

In contrast, at the state level, "this task is limited to the formation of the political community since the states lack the power to police the border."[255] Using the less restrictive state case methodology as a potential model for reform, Scaperlanda suggests,

> Instead of casting the conflict in terms of a clash between inherent sovereign power (an alien concept in our jurisprudence) and the rights of recognized persons, it could be recast as a conflict between the rights of 'We the People' to create a constitutional community and the rights of

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251. Scaperlanda, *supra* note 104, at 769.

252. *Id.* at 733. Scaperlanda observes,

> the Court seems to hold that if the political branches of the federal government adopt a discriminatory posture adversely affecting aliens or a group of aliens outside the immigration context, the Court will apply at most a rational basis review. Where, however, a federal agency possessing no residual immigration power adopts the discriminatory rule, the Court will apply some form of heightened scrutiny, but its review will still fall short of the strict scrutiny analysis applied in the state cases.

Id.

253. *Id.* at 734.

254. *Id.* at 770 (footnote omitted). Scaperlanda observes, "The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others." *Id.* (quoting Foley v. Connelie, 435 U.S. 291, 295 (1978)).

255. *Id.* at 769–70.

> nonmembers and partial members to the benefits of constitutional protection.[256]

And while he certainly does not frame this suggestion as rooted in emotion, if we can imagine disgust as motivating the membership paradigm of exclusion (to a degree), and trust as motivating that of personhood, we can envision this balancing as being facilitated by competing emotions.[257] In other words, the affective lens might inform the dialogue as to how we calibrate the balance between competing paradigms, particularly in alienage jurisprudence.

The trust and disgust dyadic lens may also find traction in the work of immigration scholar Fatma Marouf, who has explored concerns about social cohesion based both on race and immigration.[258] She asserts that these concerns can be addressed by considering social categorization strategies designed to reduce intergroup bias.[259] Marouf explains that "[l]egal status and race [are] intertwined in th[e] process of constructing difference"[260] and that categorization of legal and illegal status in United States immigration law has undermined social cohesion and promoted anti-immigrant and nativist movements.[261] She therefore identifies three strategies to reduce intergroup bias.[262] The first is decategorization, which "focuses on eroding or erasing group boundaries."[263] The second, recategorization, involves "combining members of different groups into a single, more inclusive group, . . . [thereby] reduc[ing] intergroup bias 'by changing the nature of categorical representation from "us" and "them" to a more inclusive "we."'"[264] Finally, crossed categorization "proposes bringing out multiple, unrelated group identities as a way of creating more complex portraits of people that avoid simple group-based stereotypes."[265]

Each of these strategies is designed to turn away from the type of prejudicial categorization that creates others and that may be motivated by disgust.[266] Each of the strategies may also be rooted in

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256. *Id.* at 769.

257. *Id.* at 710–12.

258. *See generally* Marouf, *supra* note 98 (discussing the effects of immigration on social cohesion).

259. *Id.* at 142.

260. *Id.* at 133.

261. *Id.* at 137 ("Policies that attempt to fortify the boundary between 'legal' and 'illegal' status have done little to promote social cohesion within the United States. On the contrary, such policies have gone hand-in-hand with the rise of anti-immigrant and nativist movements.").

262. *Id.* at 142.

263. *Id.*

264. *Id.* (citations omitted) (quoting Richard Crisp, *Prejudice and Perceiving Multiple Identities*, *in* THE SAGE HANDBOOK OF PREJUDICE, STEREOTYPING AND DISCRIMINATION 508, 510–21 (John F. Dovidio et al., eds. 2010)).

265. *Id.* at 143.

266. *Id.* at 132 (explaining that "ingroup favoritism is particularly likely to lead to outgroup hostility in the U.S. immigration context").

notions of trust. For example, Marouf explains that an "outright erasure of category boundaries" might "involve creating open borders and voiding status-based categories altogether."[267] Similarly, a comprehensive recategorization strategy could "delink[] the concepts of citizenship and nationality, and turn[] instead to ideas such as 'global citizenship,' 'transnational citizenship' and 'postnational citizenship.'"[268] Marouf's suggestions may resonate with our consideration of trust and affiliation, as she asserts her "proposed reforms represent modest ways to use law as a tool to deconstruct the category of 'illegal aliens' as a social identity and move towards a more cohesive society."[269]

B. Normative Means: Rhetorical Strategies

Victor Romero has also made suggestions for normative reform in immigration and alienage rhetorical strategies.[270] Asking "[w]hat can be done to redefine and expand the circle of membership,"[271] Romero traces social psychological research on the role of stereotypes in the immigration context, and the work of Professor Jody Armour, to explore ways to "[r]eassert[] the [i]mportance of [p]ersonhood."[272]

Further exploring Scaperlanda's suggestions regarding possible ways to reinforce personhood considerations in immigration and alienage jurisprudence,[273] Romero traces Armour's social psychological research:

> Armour's research serves as a useful starting point for engaging in a more informed dialogue about citizenship and membership in the U.S. polity along the lines envisioned by Scaperlanda: If social psychologists are correct, American citizens can train themselves to guard against any lingering stereotypes they may have against immigrant groups--such as those maintained against non-English whites, Chinese, and Mexicans--and reject the primacy of membership in cases where personhood should prevail, as in the promise enforcement cases discussed above.[274]

Supplementing this analysis with additional social psychological findings, Romero posits certain rhetorical strategies.[275] He observes that research supports that "most people are, in varying degrees,

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267. *Id.*
268. *Id.* at 181–82 ("The emergence of European citizenship, the formalization of a shared European cultural identity, provides one example of a superordinate identity that transgresses national borders and highlights the goal of social cohesion.").
269. *Id.* at 181.
270. Romero, *supra* note 84, at 1.
271. *Id.* at 34.
272. *Id.*
273. *Id.*
274. *Id.* at 38.
275. *Id.* at 43.

ambivalent about out-group members, and that ambivalent people are more effective than unambivalent people in processing information about the out-group."[276] Therefore, he argues that "it behooves us all to develop strategies to communicate positive messages about personhood to citizens acting to define membership in this polity."[277]

Immigration jurisprudence reflects the use of metaphors of otherness and could be reimagined through this affective lens with use of inclusive metaphors.[278] Explaining that United States immigration law has used othering metaphors such as "criminality, flood, and attack,"[279] Keith Cunningham-Parmeter proposes "two alternative metaphors: unauthorized immigrants should be referred to as *migrants*, and illegal immigration should instead be thought of as a process of obtaining *economic sanctuary*."[280] As he explains them, the metaphors invoke trust and personhood:

> In contrast to existing terms that describe nonhumans who attack, migration describes people who move. Whereas the Supreme Court's current immigration metaphors focus on criminality, economic sanctuary focuses on the human consequences of globalization and the displacement of workers. Finally, while current frames signify a loss of economic security and cultural hegemony, the proposed terms highlight immigrants' economic contributions and potential for social belonging.[281]

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276. *Id.*

277. *Id.* These suggestions underscore the difficult legal and policy considerations at issue in this area. If, for example, national security is a legitimate obstacle to more trusting behavior in the immigration context, we still want to guard against stereotyping. The goal, therefore, is neither to engage in blind trust or kneejerk disgust, but to observes and respond to those emotions where we recognize them. *Id.*

278. *See generally* Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1560 (2011) (asserting "that the metaphoric construction of immigrants is a conceptual process that cuts across ideological lines").

279. *Id.* at 1550 (emphasis in original). Cunningham-Parmeter addresses the use of a "shadow population" metaphor in *Plyler v. Doe*, 457 U.S. 202 (1982), a case in which the U.S. Supreme Court ruled that unauthorized immigrant children were entitled to protection under the Fourteenth Amendment. Cunningham-Parmeter argues that the Court's result was buoyed by the its use of a metaphorical, defenseless "shadow population." *Id.* at 1560–63. Linda Berger asserts that the Court made use of a novel characterization of the children as permanent residents, enabling the Court to invoke the "master story" of *Brown v. Board of Education*. Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & POL'Y 147, 189 (2013). Berger explains, "The decision in *Brown*, said the majority opinion [in *Plyler*], symbolized the core purpose of the equal protection clause: to abolish 'governmental barriers . . . to advancement on the basis of individual merit.'" *Id.* at 189–90 (quoting *Plyler v. Doe*, 457 U.S. at 223).

280. Cunningham-Parmeter, *supra* note 278, at 1550.

281. *Id.* at 1550.

VII. CONCLUSION

Immigration and alienage issues are increasingly divisive in society.[282] Questions about who should be included in "We the People" and how we should treat individuals who are in the country with varying degrees of legal status are complicated by a dizzying jurisprudence and deep-rooted, contrasting emotions.[283] While the foregoing discussion asserts that law and emotions scholarship provides a useful framework for analyzing competing paradigms in the immigration/alienage jurisprudence, many questions remain.[284] Using an affective lens of dyadic emotions may be one way in which to envision reform and healing in this area.

282. Derek Thompson, *How Immigration Became So Controversial*, ATLANTIC (Feb. 2, 2018), https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125/.

283. *Id.*

284. As Carlton J. Patrick emphasizes,

> The claim that emotions are in fact present in the law seems no longer contested; it is difficult to find a facet of the law that has not been addressed in the law and emotions scholarship. Within the literature, however, many questions continue to perplex scholars . . . . If there is any consensual answer to be gleaned from the existing scholarship, it is only: *it's complicated.*

Patrick, *supra* note 76, at 1249–50 (emphasis added).

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