

## LAW AND THE COGNITIVE NATURE OF EMOTION: A BRIEF INTRODUCTION

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*As an introduction to this Wake Forest Law Review symposium issue entitled Cognitive Emotion and the Law, I set out these brief remarks to help frame the excellent articles that follow and to help frame the engaging presentations given at the actual Symposium on February 22, 2019. By way of this Article, I also express my gratitude to the speakers and to the members of the Wake Forest Law Review who made this wonderful symposium a reality.*

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\* Harold Anthony Lloyd 2019. This Article is drawn from a more detailed previous article, *Cognitive Emotion and the Law*, 41 LAW & PSYCHOL. REV. 53, 61 (2016), to which I direct the reader seeking further details and context. I also want to thank Laura Jordan for her review of this Article and Jojo Fina for her review of this Article and her extremely hard work in putting on the symposium. Any errors in this Article are of course my own.

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#### I. LANGDELL AND COMMON MISUNDERSTANDINGS OF EMOTION

Law schools are still much infected with Christopher Columbus Langdell's obsession with redacted appellate cases.<sup>1</sup> This obsession is predicated on the odd notion that law is a science that can be developed with certainty from redacted appellate cases.<sup>2</sup> If law is a science (and a certain science at that), how can emotion play any role whatsoever in proper legal study or analysis? When we brief our redacted appellate cases in law school, we therefore look for facts, law, and reasoning. We thus train students from the outset that there is no place for emotion in legal reasoning.<sup>3</sup>

Additionally, even if one rejects notions of law as an inductive science based on redacted appellate cases, commonly held beliefs can also steer us wrong here.<sup>4</sup> Many believe emotion is merely feeling.<sup>5</sup>

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1. See Harold A. Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 WAKE FOREST L. REV. 1213, 1228 (2014) [hereinafter Lloyd, *Exercising Common Sense*]; Harold A. Lloyd, *Raising the Bar, Razing Langdell*, 51 WAKE FOREST L. REV. 231, 233 (2016) [hereinafter Lloyd, *Raising the Bar*].

2. See Lloyd, *Exercising Common Sense*, *supra* note 1, at 1228 (citing LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 617 (2d ed. 1985)); Lloyd, *Raising the Bar*, *supra* note 1, at 232 (quoting C.C. LANGDELL, *A SELECTION OF CASES ON CONTRACTS* at vi (2d ed. 1879)).

3. Harold A. Lloyd, *Cognitive Emotion and the Law*, 41 LAW & PSYCHOL. REV. 53, 55 (2016) (citing Caroline Maughan, *Why Study Emotion?*, in *AFFECT AND LEGAL EDUCATION: EMOTION IN LEARNING AND TEACHING THE LAW* 11, 18 (Paul Maharg & Caroline Maughan eds., 2011)).

4. See *id.*

5. See *id.* (“[O]ne can also easily believe that ‘emotions are primitive responses’ which are ‘brutish’ or mere ‘gut reactions,’ which we must control ‘lest they interfere with reason.’”) (quoting JAMES R. AVERILL & ELMA P. NUNLEY, *VOYAGES OF THE HEART: LIVING AN EMOTIONALLY CREATIVE LIFE* xi (1992)).

And if emotion is merely feeling, how can emotions as feeling contribute to (rather than interfere with) clear-headed reasoning? Many also believe that emotion is just the sort of irrational behavior that we see, for example, in a child's temper tantrum.<sup>6</sup> What can such irrational behavior possibly have to do with good legal analysis?

All such beliefs, however, fail to grasp the real nature of emotion. As discussed below, emotion is neither feeling nor irrational behavior.<sup>7</sup> Instead, emotion has cognitive structure and is therefore hardly always doomed to the irrationality we might see in a child's temper tantrum. In fact, modern neuroscience teaches the inseparability of reason and emotion.<sup>8</sup> Thus, the lawyer who would reason well (and who would also have good mental health for herself and her clients) cannot afford to ignore the inseparability of emotion and reason.<sup>9</sup>

## II. FEELING VS. EMOTION

To begin to achieve a clearer understanding of emotion, we must thus dispense with the notion of emotion as feeling.

### A. *Defining Feeling*

James Averill tells us that "feeling" is one of English's "vaguest terms."<sup>10</sup> We can "feel," for example, a "prick of a pin," a "touch of velvet," the "cold of a winter day," or the "pounding of [our] heart"; we can also "feel" "ill," "nauseous," "confused and disoriented," or "knowledgeable or enlightened," and this is hardly an exhaustive list of what we can "feel."<sup>11</sup>

To help get a handle on such a vague term, I will use "feeling" in its affective sense to mean "a sense, experience, or consciousness of being in some affective state, such as having a certain emotion, or being in a certain mood."<sup>12</sup> I will also use "feel" in the broader sense of "experiencing, sensing, or having a conscious process."<sup>13</sup>

Of course, feeling in the more precise sense that I have given above does often occur with emotion.<sup>14</sup> For example, we can feel terrible when we are remorseful, and we can have pleasant feelings when we are joyous.

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6. *Id.*

7. *See infra* Parts II—III.

8. *See infra* Part VIII.

9. *See infra* Part VII.

10. James Averill, *I Feel, Therefore I Am—I Think*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 379, 379 (Paul Ekman & Richard J. Davidson eds., 1994).

11. *Id.*

12. Lloyd, *supra* note 3, at 61.

13. *Feeling*, *THE PENGUIN DICTIONARY OF PSYCHOLOGY* (4th ed. 2009).

14. *See* Lloyd, *supra* note 3, at 61.

*B. Parsing Feeling and Emotion*

However, feeling is not an essential part of emotion. First, “contradictory” feelings can accompany a single emotion.<sup>15</sup> Love, for example, can be both elevating and gut wrenching. Second, we can induce feeling apart from true emotion.<sup>16</sup> A bourbon can temporarily make us “feel” good even though we are actually unhappy. Similarly, in a laboratory setting, adrenaline injections given with various cognitive suggestions can make us believe that we are experiencing emotions that we are not.<sup>17</sup> Third, feeling does not always accompany emotion.<sup>18</sup> We can, for example, repress our feelings or simply be too tired to experience feeling, or we can otherwise allocate our energies in different ways.<sup>19</sup> Thus, as therapists attest, an angry or jealous person is “sometimes the last and not the first to recognize that condition.”<sup>20</sup> Fourth, the same feelings can be framed as different emotions.<sup>21</sup> For example, “precisely the same state of physiological arousal [can] be labeled ‘joy’ or ‘fury’ or ‘jealousy’ or any of a great diversity of emotional labels depending on the cognitive aspects of the situation.”<sup>22</sup> Fifth, even if we think that we “feel” a certain emotion, such as anger, we cannot truly be angry unless we have the appropriate cognitive state for anger.<sup>23</sup> As discussed in more detail below, this appropriate cognitive state requires believing that someone or something has, in a culpable manner, caused us unjust harm for which we wish to punish that person or thing.<sup>24</sup> Finally, feeling can accompany reason as well as emotion and thus cannot be a marker simply of emotion. Philosopher and psychologist William

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15. Rick Nauert, *Explaining Emotional Contradictions*, PSYCHCENTRAL, <https://psychcentral.com/news/2014/11/12/explaining-emotional-contradictions/77245.html> (last updated Aug. 8, 2018).

16. See David Pugmire, *Real Emotion*, 54 PHIL. & PHENOMENOLOGICAL RES. 105, 105–06 (1994).

17. Stanley Schachter & Jerome E. Singer, *Cognitive, Social, and Physiological Determinants of Emotional State*, in WHAT IS AN EMOTION? CLASSIC AND CONTEMPORARY READINGS 110, 112 (Robert C. Solomon ed., 2003). As Averill also notes, we “can feel angry without being angry” and therefore feelings can be “hallucinatory” in that way. See Averill, *supra* note 10, at 379–80.

18. Pugmire, *supra* note 16, at 111.

19. Justin D’Arms & Daniel Jacobsen, *Demystifying Sensibilities: Sentimental Values and the Instability of Affect*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF EMOTION 585, 600 (Peter Goldie ed., 2010).

20. Averill, *supra* note 10, at 379.

21. See Pugmire, *supra* note 16, at 111.

22. Schachter & Singer, *supra* note 17, at 117–18 (discussing different ways various subjects interpreted the effects of adrenaline injections in light of the “cognitions available” to them); see also Michael Stocker, *The Irreducibility of Affectivity*, in WHAT IS AN EMOTION? CLASSIC AND CONTEMPORARY READINGS 258, 261 (Robert C. Solomon ed., 2003) (noting that one might “misidentify” an “emotional state as anxiety or boredom” rather than as anger for example).

23. See *infra* Part V.

24. See *infra* Part VI.

James famously makes this point with his “sentiment of rationality.”<sup>25</sup>

*C. Importance of Feeling*

Although feeling is not a necessary element of emotion, this is not to say that feeling is unimportant.

First, we often associate certain feelings with certain emotions, and such feelings can therefore be evidence that we are experiencing such emotions.<sup>26</sup>

Second, feelings often “pick up on something” that may not fit under any specific “conventional rational category” available.<sup>27</sup> The fictional character Huck Finn, for example, helps a slave escape even though his “rational” and “moral” categories tell him that theft of property is evil.<sup>28</sup> If Huck Finn ignores these feelings of deeper conscience, he will act immorally despite his current “rational” categories dictating otherwise.<sup>29</sup> Fortunately, Huck Finn’s deeper conscience indicates a compelling need to revise his current “rational” categories wrongly condemning liberation of a slave.<sup>30</sup> As Huck Finn’s example shows, deeper conscience can push back where our categories are wrong, and we should allow ourselves to feel that pushback. Lawyers can also have their “Huck Finn” moments, and legal progress can no doubt depend upon such moments.

Third, as I have written elsewhere, feeling can also alert us to facts we might otherwise miss or misjudge.<sup>31</sup>

I make these points to underscore that I am not downplaying the importance of feeling as I have defined the term. Instead, I am taking care to show how feeling does not equate with emotion. I return to feeling again in Subpart V.C below.

### III. EMOTION AS INTENTIONAL AND THUS CAPABLE OF RATIONALITY

Once we have discarded the erroneous notion that emotion is “merely feeling,” we can begin to see the cognitive dimensions of

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25. WILLIAM JAMES, *The Sentiment of Rationality*, in *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 63, 64 (1956) (“This feeling of the sufficiency of the present moment, of its absoluteness—this absence of all need to explain it, account for it, or justify it—is what I call the Sentiment of Rationality.”).

26. See Lloyd, *supra* note 3, at 56.

27. See Patricia Greenspan, *Reasons to Feel*, in *WHAT IS AN EMOTION? CLASSIC AND CONTEMPORARY READINGS* 265, 267 (Robert C. Solomon ed., 2003).

28. See Sabine A. Döring, *Why Be Emotional?*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF EMOTION* 283, 284–85 (Peter Goldie ed., 2010).

29. See *id.*

30. See *id.*

31. See Lloyd, *supra* note 3, at 63–64 (discussing Lieutenant Commander Michael Riley’s rapid and right feelings as to whether radar blips were incoming missiles or American fighter jets).

emotion. We can then begin to see how emotions refer to and cognitively engage with the world.<sup>32</sup>

For example, if I am angry with a car dealer because I believe that he sold me a defective car, my anger is directed toward that aspect of the world, toward the car dealer's wrongful sale of the car. When so referring to an aspect of the world, such anger thus has "intentionality," a property which philosophers of language define as "that property of many mental states and events by which they are directed at or about or of objects and states of affairs in the world."<sup>33</sup>

Since emotions are thus directed at the world, they can help us "apprehend something about the world itself" and thereby help us better manage that world.<sup>34</sup> Far from being necessarily "irrational and disruptive," intentional emotions can therefore "provide us with information about ourselves and the world," which information we can rationally consider when evaluating and interacting with the world.<sup>35</sup>

For example, if I am angry at the car dealer above because I believe he sold me a defective car, reason tells me that the direct object of my anger is the car dealer because he is the one who did the improper deed. Reason also tells me that the car is the indirect object of my anger, since my anger is driven by the car dealer's deed.<sup>36</sup> Grasping the indirect object status of the car also helps me see that it would be foolish to take my anger out on the car (the indirect object) by kicking it or slamming the door—though many of us might first have that knee-jerk reaction.

Reason also helps me evaluate whether my anger here is justified.<sup>37</sup> Are my beliefs about the car dealer and the car well grounded? Did the car dealer truly sell me a defective car? If these beliefs are not justified, my anger is not justified. I will return to anger in further detail below.<sup>38</sup>

#### IV. EMOTION AND RELATED APPRAISALS, CATEGORIES, CONCEPTS, METAPHORS, AND NARRATIVES

Since emotions are directed at and help us characterize the world (as in the case above where I believe I have been sold a defective car), they involve appraisals, concepts, metaphors, and narratives that are

32. See Pugmire, *supra* note 16, at 110.

33. Carole Adam, et. al., *A Logical Formalization of the OCC Theory of Emotions*, 168 *SYNTHESE* 201, 204 (2009) (citing JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* 1 (1983)); see also Harold A. Lloyd, *Crushing Animals and Crashing Funerals: The Semiotics of Free Expression*, 12 *FIRST AMEND. L. REV.* 237, 247–48 (2013).

34. Ronald De Sousa, *The Rationality of Emotion*, in *WHAT IS AN EMOTION? CLASSIC AND CONTEMPORARY READINGS* 248, 248 (Robert C. Solomon ed., 2003).

35. See *id.* at 249.

36. See Lloyd, *supra* note 3, at 65–66.

37. See *id.*

38. See *infra* Parts VI—VII.

necessary for such characterization of the world.<sup>39</sup> On its face, for example, my anger about the car sale thus involves appraisals of both the car and car dealer, as well as any categories, concepts, metaphors, and narratives cognitively necessary for such anger. I will thus next briefly address emotional appraisals and related cognitive frameworks.

A. *Emotional Appraisals and Appraisal Checklists*

As for appraisals, Professor Klaus R. Scherer usefully summarizes “five major checks” often used in emotional appraisals.<sup>40</sup> First, a “novelty check” appraises whether we are encountering “a change in the pattern of external or internal stimulation.”<sup>41</sup> Second, an “intrinsic pleasantness check” appraises “whether a stimulus event is pleasant or unpleasant.”<sup>42</sup> Third, a “goal/need significance” review appraises “whether a stimulus event is relevant to important goals or needs.”<sup>43</sup> Fourth, a “coping potential check” appraises both the “causation of stimulus event” and the “coping potential available to the organism” in light of the type of causation.<sup>44</sup> Fifth, a “norm/self-compatibility check” appraises conformance with applicable norms.<sup>45</sup>

Awareness of these five appraisal checks can shed much light on emotional responses, including emotional responses of the highest order. As Professor Olympia Duhart persuasively argues in this Issue for example, these five appraisal checks can help explain tragically different presidential responses to such nearly contemporaneous natural disasters as Hurricanes Harvey and Maria.<sup>46</sup>

Scherer’s “five major checks” also generate a useful starting checklist for lawyers grappling with various specific problems.<sup>47</sup> First, is there any applicable precedent to guide the lawyer? Second, how agreeable or disagreeable is the matter to the client? As I have noted, “Good lawyers, like good doctors, should also have good bedside manners.”<sup>48</sup> Third, despite what the client may initially believe, what are the client’s true needs and goals? Fourth, what options does the

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39. See generally Harold A. Lloyd, *Good Legal Thought: What Wordsworth Can Teach Langdell About Forms, Frames, Choices, and Aims*, 41 VT. L. REV. 1 (2016) (discussing the role of metaphors in legal argument and strategy); Harold A. Lloyd, *Law as Trope: Framing and Evaluating Conceptual Metaphors*, 37 PACE L. REV. 89 (2016) (discussing the structure of legal argument forms).

40. Klaus R. Scherer, *Evidence for Both Universality and Cultural Specificity of Emotion Elicitation*, in THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 172, 174 (Paul Ekman & Richard J. Davidson eds., 1994).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Olympia Duhart, *Emotional Appraisals in the Wake of Hurricanes Harvey and Maria*, 54 WAKE FOREST L. REV. 973, 990–97 (2019).

47. Scherer, *supra* note 40, at 174.

48. See Lloyd, *supra* note 3, at 74.

client actually have? Fifth, which of the available options are normatively best for the client in terms of both the client's needs and legal/social norms?

*B. Emotional Appraisals and Related Cognitive Frameworks*

In doing emotional appraisal checks, lawyers must, again, use categories, concepts, metaphors, and narratives just as they do when evaluating any other aspect of the world.<sup>49</sup> Rational appraisals thus require mapping out these cognitive tools in ways that permit their proper application. This includes mapping out concepts and narratives at all applicable levels,<sup>50</sup> including “paradigm scenarios” we use to recount our emotions.<sup>51</sup> Returning to anger, we can note that deception is immoral and therefore deserves anger,<sup>52</sup> and we can cognitively and rationally act accordingly by reporting the car dealer to appropriate officials for a sanction (rather than by irrationally kicking and denting the car).

Focusing on anger, we can now attempt to build a more detailed cognitive rubric of the emotion. As I have suggested before,<sup>53</sup> we can attempt an anger rubric along the following lines:

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49. See generally sources cited *supra* note 39 (discussing concepts discussed in this Article in greater detail).

50. Lloyd, *supra* note 3, at 74.

51. See De Sousa, *supra* note 34, at 255; see also Richard A. Shweder, *You're Not Sick, You're Just in Love: Emotion as an Interpretive System*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 32, 32 (Paul Ekman & Richard J. Davidson eds., 1994) (explaining that different emotion invokes a “particular story-like, script-like, or narrative kind that any people in the world might (or might not) make use of to give meaning and shape to their somatic and affective ‘feelings’”).

52. See De Sousa, *supra* note 34, at 255.

53. See Lloyd, *supra* note 3, at 82. As I have also noted before, I do not claim that my initial proposed emotional rubrics are in any way definitive. I set them out in hopes for comments and further suggestions and improvements. For the most part in this Article, I set out this rubric and other rubrics (and various notes accompanying such rubrics) in the form set out in Lloyd, *supra* note 3, at 99–106.



*Anger*

Prototypical Direct Object	Anyone or anything perceived as an agent subject to moral judgment. <sup>54</sup>
Prototypical Appraisal	The Direct Object as culpably causing an “unjust harm” to someone or something. <sup>55</sup>
Prototypical Narrative	Judging and punishing wrongdoers. <sup>56</sup>
Prototypical Desire	“To punish” the Direct Object. <sup>57</sup>

The lawyer making an anger appraisal would thus combine the five initial appraisal steps above with the four aspects addressed in the rubric. I will return to anger again in other Parts below.<sup>58</sup>

## V. EMOTIONAL INTELLIGENCE AND THE NECESSARY ELEMENTS OF EMOTION

### A. *Emotional Intelligence*

Having parsed through the basic cognitive nature of emotion and having given a rubric of one emotion, we can now briefly address both the nature of emotional intelligence and the necessary elements of emotion itself. To help perform such tasks, I shall use the following definition of “emotional intelligence”: the “[a]bility to monitor one’s own and other people’s emotions, to discriminate between different emotions and label them appropriately, and to use emotional information to guide thinking and behaviour.”<sup>59</sup>

To monitor one’s and others’ emotions and to discriminate between such emotions both cognitively and with proper labels requires an analysis of the specific emotions at play and an understanding of the necessary elements of emotion itself.<sup>60</sup> We have seen such a specific emotional analysis in the rubric provided for anger above. I will return to that specific analysis again and will introduce a contrasting specific analysis of frustration as an example of how we can parse specific emotions. I will also do the same briefly

54. *Id.* at 99.

55. See Jon Elster, *Emotional Choice and Rational Choice*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF EMOTION 263, 268 (Peter Goldie ed., 2010).

56. See ROBERT C. SOLOMON, THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE 229 (1993).

57. *Id.* Anger can often be identified by a “collection of physical reactions, . . . [such as] facial grimaces and body positions . . .” Lloyd, *supra* note 3, at 99 (quoting *Anger*, THE PENGUIN DICTIONARY OF PSYCHOLOGY (4th ed. 2009)). Anger can be a “fairly strong emotional reaction” that “hedges into other emotional reactions of similar kind such as animus, rage, hostility, hatred.” *Id.*

58. See *infra* Part VI.

59. *Emotional Intelligence*, THE OXFORD DICTIONARY OF PSYCHOLOGY (3d ed. 2009).

60. Lloyd, *supra* note 3, at 106.

for the emotions of guilt, remorse, and regret, which lawyers often confuse to the detriment of their mental health.<sup>61</sup>

*B. Six Necessary Elements of Emotion*

Before briefly turning to these other specific emotions, however, we can also make more progress with the elements of emotion itself. In light of the discussion above and for the reasons discussed below, we can now see that any emotion has six necessary elements: (1) at least one object, (2) an appraisal or other such cognitive response, (3) a resulting desire or motivation, (4) core themes distinguishing different emotions, (5) acuteness, and (6) a personal stake or concern.<sup>62</sup> Lawyers who would reason or persuade well must necessarily focus upon each of these elements with respect to a particular emotion at play.<sup>63</sup> I thus take up each such element in turn.

As to the first element, the discussion of anger has shown that emotions are directed toward aspects of the world.<sup>64</sup> In the anger example previously discussed, the direct object was a car dealer and the indirect object was a car. That example of anger would make no sense without reference to those objects in the world, and we can thus see that any such world-directed emotion by definition requires at least one object.

As to the second and fourth elements, we saw with anger above and Scherer's appraisal types above, that emotions perform appraisals using our available categories, concepts, metaphors, and narratives.<sup>65</sup> Thus, emotional intelligence requires exploring such appraisals and related categories, concepts, metaphors, and narratives.

As to the third element, we saw with anger above that emotion includes "desires to act."<sup>66</sup> For the reader curious about desires to act involved with emotions other than anger, I have provided elsewhere proposed rubrics for a number of other emotions.<sup>67</sup>

As to the fifth element, acuteness follows from the general definition of emotion as a "short-term evaluative, affective, intentional, psychological state."<sup>68</sup> For those who have a deeper interest, I have also attached Exhibit A which parses emotion and

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61. For a more detailed analyses on those emotions, see *id.* at 92–96.

62. *Id.* at 71. Emotions may also be accompanied by (but need not be accompanied by) feeling and certain action tendencies. *See id.*

63. *See id.* at 71–72.

64. *Id.* at 65.

65. *See* sources cited *supra* note 39.

66. *See Emotion*, THE PENGUIN DICTIONARY OF PSYCHOLOGY (4th ed. 2009); *see also* Elster, *supra* note 55, at 264.

67. *See supra* note 53.

68. *Emotion*, THE OXFORD DICTIONARY OF PSYCHOLOGY (3d ed. 2009) (emphasis added).

other affective states based upon differing durations and types of objects.<sup>69</sup>

As to the sixth element, since emotions refer to objects in the world, how do we distinguish emotions from nonemotional propositions that also refer to the world? In my view, the difference turns on whether one has a personal stake or concern in the matter or matters at hand (which personal stake or concern can relate either to oneself or to other persons or things for which one has concern). Thus, for example, if I read about a car dealer selling a defective car to a gang leader I know nothing about and would not wish to know anything about, it is hard to see how I could be emotionally angry. I can of course still make the rational judgment that the sale was improper, but it is hard to see that situation as a cause of my emotion. However, if the car dealer sold the defective car to me or to someone I cared about (such as a relative, friend, student, or vulnerable person that I found sympathetic), it makes sense for me to have an emotionally angry response. In my view at least, emotion therefore requires such a personal stake or concern.<sup>70</sup>

### C. *Two Contingent Aspects of Emotion*

One can also note two phenomena that can but need not occur with emotions.

First, as we discussed above, feeling often accompanies emotion but cannot be considered a part of emotion.<sup>71</sup>

Second, we can recognize that certain emotions frequently have common associated responses.<sup>72</sup> Fear provides a classic example. We often tend to flee what frightens us. Thus, as Professor Jon Elster notes, there are scholars who maintain that “[e]ach emotion has associated with it a characteristic action tendency . . . an incipient action, a state of readiness of the organism, including a desire to act in a certain way,” and context determines “[w]hich of the several possible emotions and action tendencies” are triggered.<sup>73</sup> Although it is of course helpful to know that fear often leads to flight, it does not and cannot always do so. For example, a paralyzed person cannot flee without help and may therefore have devised other unique coping mechanisms that suit her.<sup>74</sup> Furthermore, it seems to me that the true constant with fear, for example, is the desire to avoid perceived danger. This desire is sometimes accomplished by flight, sometimes

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69. See *infra* Exhibit A.

70. Lloyd, *supra* note 3, at 91.

71. See *supra* Part II.

72. Averill, *supra* note 10, at 379–80.

73. Elster, *supra* note 55, at 271 (emphasis omitted).

74. See BEN ZE’EV, THE SUBTLETY OF EMOTIONS 62 (2000) (Ben-Ze’ev claims that a person “suffering from total paralysis may have emotions, although . . . unaccompanied by any muscular activity. But even in such cases the action tendency is present.”). I find it odd at best to say that one can have a tendency to do what one cannot do.

by hiding in place, and sometimes by other strategies that involve inaction. I thus prefer to focus on prototypical motivations or desires (rather than “action tendencies”) when constructing rubrics of various emotions.

#### VI. ANGER, FRUSTRATION, AND INTELLIGENT EMOTION IN PRACTICE

Having now explored both the elements of emotion and the definition of emotional intelligence, we can now briefly explore how to monitor emotions by discriminating between particular emotions, by evaluating particular emotional appraisals and by applying such efforts to “guide thinking and behaviour.”<sup>75</sup> Thus, I next briefly contrast anger and frustration.

##### A. *Anger and a Hypothetical Law Student*

We can imagine a hypothetical law student who has failed an anonymously graded exam that all other students passed with high grades. She is angry at her professor because of the failing grade that “he gave her.” To “get the law professor back,” she gives the professor a terrible anonymous end-of-term evaluation that she hopes will do substantial damage to the professor’s career. Smiling and satisfied, she takes no further action.

To analyze her “anger,” we can review the rubric of anger. Again, that rubric requires appraisals of unjust harm, narratives of punishing wrongdoers, and desires to punish such wrongdoing:<sup>76</sup>

#### *Anger*

Prototypical Direct Object	Anyone or anything perceived as an agent subject to moral judgment. <sup>77</sup>
Prototypical Appraisal	The Direct Object as culpably causing an “unjust harm” to someone or something. <sup>78</sup>
Prototypical Narrative	Judging and punishing wrongdoers. <sup>79</sup>
Prototypical Desire	“To punish” the Direct Object. <sup>80</sup>

To be justifiably and thus intelligently angry at her professor, the student must, at the very least, rationally conclude that the professor has culpably caused her an unjust harm. She must also rationally conclude that the professor’s culpable action fits within the moral narrative that culpable wrongdoing should be punished and she must desire as a part of such rational consideration to punish the professor

75. *Emotional Intelligence*, *supra* note 59.

76. *See* Lloyd, *supra* note 3, at 99.

77. *Id.*

78. *See* Elster, *supra* note 55, at 268.

79. *See* SOLOMON, *supra* note 56, at 229.

80. *Id.*

(which of course means actually and not merely seeming to punish the professor.)

It is rather simple to see how the student's "anger" here fails scrutiny. There is no evidence that the professor has culpably caused the student unjust harm. The exam was anonymously graded, so she could not have been targeted, and all of the other students who took the exam did well, thereby suggesting that the exam was not objectively unfair. Additionally, the form of "punishment" chosen by the student is questionable. Student evaluations that are "outliers" are often ignored as static. As such, the evaluation may well have no impact whatsoever upon the professor, and if so, "anger's" punishment would fail.<sup>81</sup>

Thinking about the elements of anger therefore not only helps clarify whether the emotion is appropriate but also whether the emotional response is appropriate. Such elemental review also helps us see how "having" the wrong emotion plays out wrongly (or can play out wrongly) at multiple levels.<sup>82</sup> Anger here does nothing to help the student understand why she did so poorly on the exam. In fact, anger distracts her from the real matter at issue. Anger focuses her attention on the professor as its direct object, while the exam and her attendant failures are relegated to indirect objects. This is backwards. In such confusion, the student continues to suffer from her lack of knowledge both of the subject matter tested and of deficiencies in the ways she actually took the exam. Anger thus harms her through perpetuating her continued ignorance in both such matters. Additionally, if the evaluation is not treated as static, her anger may well cause the professor unjustified harm.

*B. Frustration and a Hypothetical Law Student*

What is the more intelligent emotion for the student here? I believe that her emotion should instead be frustration. To explore whether I am right, I would propose the following rubric of frustration which I have explored in more detail elsewhere<sup>83</sup>:

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81. See Lloyd, *supra* note 3, at 93.

82. See *id.* at 66.

83. *Id.* at 101.

*Frustration*

Prototypical Direct Object	Anyone or anything. <sup>84</sup>
Prototypical Appraisal	The Direct Object as desired but blocked, interfered with, or disrupted. <sup>85</sup>
Prototypical Narrative	Situations (or life) as unpredictable or difficult or both. <sup>86</sup>
Prototypical Desire	To have the Direct Object. <sup>87</sup>

The frustration analysis here quickly shows a much more logical and productive emotional attitude than anger.<sup>88</sup> First, we can now see that the direct object of the student's emotion is the failed exam. The appraisal can now be that the exam results were undesired, the narrative can now be that achieving good exam results requires work or struggle, and the desire can now be to have good exam results. This analysis would focus the student back on the exam itself and her need to put in the work necessary to achieve good exam results. In addition to focusing her attention on the subject matter of the exam, this approach should encourage her to work with the professor rather than attack the professor. An emotionally intelligent student here should approach the professor to go over the exam rather than anonymously try to damage the professor through an "outlier" nasty student evaluation.

*C. Further Distinguishing Anger and Frustration*

I have chosen the above example because I believe that confusion between anger and frustration is the source of much unnecessary suffering in this world. Hopefully, we can learn from the student's example. When we are frustrated, we often default instead to anger and lash out in ways that cause needless harm to ourselves and to others. Emotionally intelligent persons avoid such error and harm.<sup>89</sup>

*1. Anger, Frustration, and Public Law: Enforcement and Proportionality*

I have also chosen this hypothetical because it helps illustrate a cautionary tale for legislatures and for judges when determining the consequences of failing to follow specific rules.<sup>90</sup> For example, public officials can reasonably consider a car owner's accidentally missing an undriven car's license tag renewal by one day a frustrating event

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84. *Id.*

85. *See Frustration*, THE PENGUIN DICTIONARY OF PSYCHOLOGY (4th ed. 2009).

86. Lloyd, *supra* note 3, at 101.

87. *Id.*

88. *See id.* at 99 n.221.

89. I wonder how many marriages or other relationships have failed because of conflating frustration with anger. I would predict a sadly astonishing number for any non-trivial time period chosen.

90. *See* Lloyd, *supra* note 3, at 93.

because it interferes or disrupts the license tag renewal process to a marginal degree. It is hard, however, to see the matter as reasonably meriting anger, i.e. as meriting judgments of the car owner's having culpably caused an unjust harm to someone or something that deserves punishment, such as a year in jail. Using emotional intelligence in such a case goes to the very heart of proportionate response and is hardly irrelevant to legal reasoning.<sup>91</sup> Such proportionate response on its face requires public officials "to discriminate between different emotions and label them appropriately, and to use emotional information to guide thinking and behaviour."<sup>92</sup>

## 2. *Anger, Frustration, and Private Law: Contracts and Penalties*

In private law, one can also explore the distinction between anger and frustration by examining, for example, how contract law privileges frustration over anger.<sup>93</sup> Hopefully, these brief remarks on contract law might inspire others to explore these specific points in more detail and to explore how other areas of the law privilege some emotions while downplaying others.

It is commonplace that the law of contracts does not typically enforce penalties because the purpose of contract law enforcement is "compensatory not punitive."<sup>94</sup> Thus, if A agrees to paint B's house for the total cost of \$500, we will not punish A's failure to paint the house. However, we will alleviate B's frustration by giving him his monetary bargain. Thus, if it would cost B \$1000 to have anyone else paint the house, we will give him a monetary judgment of \$500 (\$1000 minus \$500). B now has the means to have his house painted for the out-of-pocket sum of \$500 as originally bargained.

In many ways, this remedy without punishment makes much sense.<sup>95</sup> A could have many "innocent" reasons for failing to perform, such as overestimating his capacity, becoming ill, becoming unable to find materials or workers, and so on. Furthermore, even if A's failure were not morally "innocent," how can contract law accurately discern and quantify in monetary terms moral rather than performance failure?

Additionally, even if a promisor revels in the very deed of promise breaking, he can be doing good by the breach. A classic example is the efficient breach.<sup>96</sup> To take our example above, imagine it would

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91. *See id.* at 106.

92. *Emotional Intelligence*, *supra* note 59.

93. *See infra* text accompanying notes 94–102.

94. *See* RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. a (AM. LAW INST. 1981). We do of course temper this in certain situations, such as those covered by certain unfair trade practice statutes. *See* 17 AM. JUR. 2D *Consumer Protection* § 297 (2019).

95. *See Efficient-Breach Theory*, BLACK'S LAW DICTIONARY (11th ed. 2019).

96. *See id.*

cost A the sum of \$550 to perform, thereby generating a loss of \$50 for him. Imagine also that B could find another contractor C to paint his house for \$300 (where C's costs will be \$250). In this case, it would benefit all three parties for A to breach, and it would thus make little economic sense here for contract law to punish A's failure to keep his promise in this particular case. By breaching the contract, A effectively makes \$50 by avoiding his loss, B gets a windfall of \$200 (\$500 in contract damages minus \$300), and C makes \$50. This breach has thus made money for all three parties.

All that said, however, there can be troubling downsides that we should balance against upsides when we decline to punish breach of contract as a general matter.<sup>97</sup> For example, we sometimes hear painful economic decisions justified with the phrase, "that's just business." We should, however, carefully study whether such a "cover" encourages otherwise immoral or at least harsh action that would not be tolerated outside of "business."<sup>98</sup> We would cringe, for example, at the thought of paying a neighbor's child an embarrassingly low price for helping us rake our yard on a single occasion. However, many take it in stride that a company can morally try to keep salary payments to employees as low as possible even if it could otherwise afford higher payments.<sup>99</sup> Again, that can be seen as "just business." I of course lack the space to explore these and similar questions in detail in this introductory Article, and I am not saying that every breach of a contract should entail a penalty—far from it.<sup>100</sup> However, I am saying that as lawyers we have duties to be emotionally intelligent when reflecting upon doctrine as well as upon practice.<sup>101</sup> Where contract or business practices offend the conscience in ways that demand punishment, we should recall Huck

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97. See DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 84–85 (rev. and expanded ed. 2010).

98. This concern is of course related to the complex and fascinating topic of monetizing social norms. See *id.* at 75–102. Ariely notes: "[W]e live simultaneously in two different worlds – one where social norms prevail, and the other where market norms make the rules." *Id.* at 76. Thus: "In economic exchanges, we are perfectly selfish and unfair. And we think that following our wallets is the right thing to do." *Id.* at 107.

99. See *id.* at 88–90 (describing how "the current obsession with short-term profits, outsourcing, and draconian cost cutting threatens to undermine" the relationship between employer and employee).

100. Penalties, in fact, can cause undesirable contract results. For example, one day care center found that fining parents who picked up their children late did not help the problem of late pickups. Once the fines were introduced, the fines became a part of the deal, and market norms replaced social norms—parents could feel like they now had a market choice to be late if they were paying for that choice. See *id.* at 84–85. Ariely also invites the emotionally-intelligent person to reflect upon "how market norms have gradually taken over our lives in the past few decades – with their emphasis on higher salaries, or income, and more spending." *Id.* at 96.

101. See Lloyd, *Exercising Common Sense*, *supra* note 1, at 1215 (rejecting the doctrine-practice distinction).



Finn's courage in challenging "settled" doctrine and practice.<sup>102</sup> Slavery, too, was once "just business."

#### VII. EMOTION AND LAWYER MENTAL HEALTH: GUILT, REMORSE, AND REGRET

It is well-known that lawyers disproportionately suffer from mental health and substance abuse issues.<sup>103</sup> Any introductory article to this symposium issue should thus at least touch on lawyer mental health and emotional intelligence.

As I have argued elsewhere in more detail, I believe that much of the mental health anguish of the bar turns on lawyers' failure to distinguish properly between guilt, remorse, and regret.<sup>104</sup> I briefly insert here proposed rubrics for these three emotions and then briefly discuss one lawyer hypothetical and one variation.

Let us therefore assume the following rubrics for guilt, remorse, and regret:

##### A. *Guilt*

Prototypical Direct Object	Oneself.
Prototypical Appraisal	"Extreme self-dislike and reproach" of oneself " <i>in general</i> " <sup>105</sup> where one "has violated moral standards" and deserves "self-administered punishment." <sup>106</sup>
Prototypical Narrative	Oneself as an "inadequate and offensive creature." <sup>107</sup>
Prototypical Desire	"To punish oneself . . . short of self-destruction (which would eliminate possibility for further punishment)." <sup>108</sup>

102. *See supra* text accompanying notes 27–30.

103. Frederic S. Ury & Deborah M. Garskof, *Health and Fitness*, in *ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER* 219, 220 (Paul A. Haskins ed., 2013) (stating that lawyers "have the highest rate of depression" and that the American Bar Association "estimates that 15 to 20 percent of all lawyers suffer from alcohol or substance abuse") (internal citations omitted).

104. Lloyd, *supra* note 3, at 92–96.

105. *See* SOLOMON, *supra* note 56, at 259–60.

106. *Guilt*, *THE PENGUIN DICTIONARY OF PSYCHOLOGY* (4th ed. 2009).

107. Lloyd, *supra* note 3, at 105 (citing ROBERT C. SOLOMON, *THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE* 260–61 (1993)).

108. *Id.* at 261.

*B. Remorse*

Prototypical Direct Object	Oneself. <sup>109</sup>
Prototypical Appraisal	Blaming oneself for an event, act, or omission which is wrong or undesirable but in either case pardonable. <sup>110</sup>
Prototypical Narrative	“Oneself as responsible yet imperfect and thus subject to pardon or forgiveness if genuinely sought.” <sup>111</sup>
Prototypical Desire	Pardon or forgiveness <sup>112</sup> plus remedying the act or omission.

*C. Regret*

Prototypical Direct Object	Oneself. <sup>113</sup>
Prototypical Appraisal	One’s act or omission as undesirable yet beyond one’s control. <sup>114</sup>
Prototypical Narrative	Life as determined in whole or in part. <sup>115</sup>
Prototypical Desire	Something more desirable than what transpired. <sup>116</sup>

*D. Parsing Guilt, Remorse, and Regret*

Let us now imagine the following hypothetical involving an emotionally intelligent lawyer. That lawyer spends a great deal of time negotiating and drafting a complex lease agreement. As a part of the lease execution, she carefully reviews every page of the counterparts, including the exhibits. After the closing, she notices the omission of a crucial exhibit. Being a Type A person like many other lawyers, she is a perfectionist and is naturally first prone to guilt as a default reaction to her “failure.”

However, as a lawyer who has studied emotional intelligence, she knows better than to fall into the trap of guilt in such a situation. That emotion has no proper place here whatsoever because it would effectively trap the lawyer in endless self-flagellation that directs her energy away from more productive use. Instead, our emotionally intelligent lawyer has trained herself to feel remorse in such a situation. She rightly blames herself for the error, but she sees it as both ultimately pardonable and flexible. She immediately notifies her client and counsel for the other party. She then fixes the problem

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109. *Id.* at 105.

110. Solomon also distinguishes between “remorse” and “regret,” and I find this useful as well. *See* SOLOMON, *supra* note 56, at 287–89.

111. Lloyd, *supra* note 3, at 105.

112. *See* SOLOMON, *supra* note 56, at 289.

113. Lloyd, *supra* note 3, at 104.

114. *Id.*

115. *Id.*

116. *Id.*

by agreeing with the other party's counsel to slip-sheet the missing exhibit into all of the counterparts as though it had originally been included. Emotionally intelligent counsel for the other party should feel similar remorse for also not having noticed the missing exhibit. Having two emotionally intelligent lawyers increases the chances of a fix as well as reducing the unproductive and senseless pain of a guilt reaction with, again, its endless misdirected self-flagellation that directs energy away from more productive use.<sup>117</sup>

To complete parsing these three emotions, we can also imagine a slight variation to the above facts. The crucial exhibit was attached to the counterparts, but all counterparts of the exhibit were somehow damaged or lost in transit from the place of closing through no fault of the attorneys. In this case, of course, the emotionally intelligent lawyers for both parties will feel the emotion of regret. Something undesirable has happened, but it was beyond their control, and they have no responsibility for the loss itself. However, they would again feel responsible for fixing the loss by agreeing to slip-sheet the crucial exhibit in all the counterparts of the lease agreement.

When these three emotions are parsed with such simple examples, I hope readers will see the results as obvious even to the point of hardly needing stating. I also hope readers will remember such emotionally intelligent reactions because, in the heat of actual error in practice, these distinctions are often not at all obvious to an attorney panicking at, or overwhelmed by, the error.<sup>118</sup>

Speaking of the "obvious," I will close out this Subpart by one last point that should also be obvious but that rarely, if ever, is obvious in the heat of actual error in practice. Emotionally intelligent lawyers understand that multiple emotions may apply to single situations.<sup>119</sup> A remorseful error can also be accompanied by joy at multiple levels, such as the joy that one has completed a complex real estate transaction whose fruits will soon become tangible and such as the joy that one is human and alive and thus capable of human error.<sup>120</sup>

#### VIII. CONCLUSION: MODERN NEUROSCIENCE AND THE INTERDEPENDENCE OF EMOTION AND REASON

In closing, I must also note that modern neuroscience underscores the cognitive nature of emotion sketched above. Scholar Caroline Maughan, for example, tell us, "We are not the rational

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117. *See id.* at 93.

118. *See id.*

119. *See* Steven Handel, *Accepting Emotional Complexity: Why We Often Experience a Cocktail of Different Emotions at Once*, EMOTION MACHINE (Feb. 21, 2019), <https://www.theemotionmachine.com/accepting-emotional-complexity-why-we-often-experience-a-cocktail-of-different-emotions-at-once/>.

120. I owe this last insight to Professor Alan Palmiter and to Saint Augustine: "Si fallor, sum." *See* AUGUSTINE, THE ESSENTIAL AUGUSTINE 20, 33 (Vernon J. Bourke ed., Marcus Dods trans., Hackett 1974) ("[I]f I make a mistake in thinking, I exist.").

beings we think we are . . . . A large part of our frontal cortex is involved with emotion; reason and emotion are co-dependent.”<sup>121</sup>

Thus, it should come as no surprise that when the brain is damaged in such a way that “we can’t grasp our emotions,” it also disrupts our decision-making ability.<sup>122</sup> Consistent with this insight, people lacking emotions (such as victims of brain damage) can therefore suffer impairment in making rational decisions.<sup>123</sup>

Psychologist Daniel Goleman gives us a striking case of such impairment. He tells us of a “brilliant corporate lawyer” whose brain tumor surgery required cutting “circuits that connect key areas of the prefrontal cortex . . . and the amygdala in the midbrain’s area for emotions.”<sup>124</sup> After the surgery, the lawyer’s “IQ, memory, and attention” remained intact, but his days as a lawyer were over because he could no longer “connect his thoughts with the emotional pros and cons.”<sup>125</sup> Those of us who would be brilliant lawyers should take heed.

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121. See Caroline Maughan, *Why Study Emotion?*, in AFFECT AND LEGAL EDUCATION: EMOTION IN LEARNING AND TEACHING THE LAW 11, 13 (Paul Maharg & Caroline Maughan eds., 2011).

122. *Id.*

123. Adam, et al., *supra* note 33, at 201; see also Maughan, *supra* note 121, at 13 (noting that when the brain is damaged “so that we can’t grasp our emotions, we don’t know what to think and so can’t make up our minds about anything”); Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2392 (2014) (“Scientific evidence indicates that emotion and rationality are not opposed, as the law often presumes, but rather inextricably linked. There is no judgment, whether moral or otherwise, without emotions to guide our choices. Judicial failure to grapple with this reality has produced some puzzles in the law.”).

124. DANIEL GOLEMAN, THE BRAIN AND EMOTIONAL INTELLIGENCE: NEW INSIGHTS 19 (2011).

125. *Id.*

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## INTRODUCTION

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## EXHIBIT A. CONTRASTING AFFECTIVE STATES

- Emotions are **nonenduring** and directed at specific objects (such as the fear of a specific bear running at us, which fear dissipates upon safety).<sup>126</sup>
- Moods are **nonenduring** and broadly directed at the world or universe rather than specific objects (such as anxiety as general fear which dissipates with time).<sup>127</sup>
- Sentiments are **dispositional (i.e., have stability over time)** and are directed at specific objects (such as an enduring fear of Professor Kingsfield).<sup>128</sup>
- Traits are **dispositional (i.e., have stability over time)** and are not directed at specific objects (such as a coward's cowardice as opposed to his specific fear of a particular bear).<sup>129</sup>

Why should we care about parsing different types of affective states? Good lawyers of course need to know the types of affective states they encounter with others and with themselves.<sup>130</sup> For example, is a “frightened” client exhibiting (1) “fright” as emotion, (2) “fright” as sentiment, (3) “fright” as anxiety, (4) “fright” as cowardice, or (5) some combination of the above? The directional and durational distinctions set forth above should assist the lawyer in handling such “fright.” If the “fear” is truly emotion, there would likely be more hope of dissipation than if the “fear” is the trait of cowardice. The lawyer must evaluate and act accordingly.

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126. See Lloyd, *supra* note 3, at 68.

127. *Id.* at 69.

128. *Id.* at 68–69.

129. *Id.* at 70.

130. See *id.*