

VALUING EMOTIONS

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This Article illuminates an unresolved legal enigma: Why is private law so reluctant to compensate victims for emotional harms while it is fully committed to compensating them for any other type of harm? It proposes a novel analysis of the deeper roots of the problem and a solution. This Article shows that the persistent resistance to compensation in the affective domain comes from a broader legal misunderstanding and mistreatment of emotions. Opponents of compensation are wrong to assume that emotional harms are trivial, easy to fake, or impossible to value. Rather, with the help of scientific and technological progress, it should be clear by now that the devaluation of emotional harms is unjustified, injurious to victims, and toxic to relational norms of behavior. What's worse, as this Article exposes, is that while the debate has continued without resolution, reality has dramatically changed. Outside of law and under a neoliberal worldview, the value of emotions has been celebrated, making emotions a new type of personal property and an important component of people's human capital. The Article thus demonstrates that in today's hypercompetitive world the refusal to compensate for emotional harms is more devastating than ever before. For that reason the Article proposes that it is about time we start valuing emotions—recognizing their importance and compensating those who suffered emotional harms. The Article then discusses how to shape the necessary reform, mainly by utilizing existing remedial tools to cope with concerns related to verification and measurement—a challenge that is in no way unique to emotional harms and should not continue to prevent appropriate compensation.

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I. INTRODUCTION

People may harm each other, whether intentionally, carelessly, or despite their efforts to avoid such results. Indeed, vulnerability to harms from others is an important part of our universal human condition. For the legal system, the question then becomes: Should remedies be considered and awarded in appropriate cases? When humans inflict on others an economic harm—for example by damaging their neighbor's property, say a fence¹ or a car²—the answer seems simple enough and remedies are handsomely offered by various fields of law designed to protect private property, mainly the laws of torts and contracts. Our embodied vulnerability is similarly protected and physical harms, for example a disfigured nose resulting from an unsuccessful plastic surgery,³ typically yield recovery even if body parts are not conceived as property per se but

1. *Krueger v. State*, 35 Ill. Ct. Cl. 736, 737 (1982).

2. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 969 (2010).

3. See *Sullivan v. O'Connor*, 296 N.E.2d 183, 185 (Mass. 1973).

only as quasi-property.⁴ However, when it comes to emotional harms things get complex. Much more complex. Although affective vulnerability is an inevitable part of our human condition, emotional harms are treated differently than harms to property or quasi-property; they are subject to a general rule of no recovery.⁵

One way to explain the different response to otherwise comparable aspects of human vulnerability is to emphasize the fact that emotions, on the one hand, and cars and noses, on the other, are poles apart. Emotions are simply *not property* and thus cannot be protected by the same laws that protect private property. However, a major challenge to this explanation has been recently presented by the increasing dominance of neoliberalism.⁶ Under neoliberalism, emotions are increasingly framed *as property*, an integral part of individuals' human capital.⁷ And yet, despite this radical shift, the law continues to generally overlook emotional harms, deepening the effects of affective vulnerability.⁸

Surely, some (typically fairly narrow) categories of exceptions exist, and cases in which the legal system has responded to the causation of emotional harms can be found.⁹ However, the general truth of the matter remains a continuous and deep resistance to the idea that one's emotions deserve legal protection akin to the protection of traditional property and the human physical body.¹⁰ Indeed, while the law's approach to all other harms is sympathetic, when it comes to emotional harms the ordinary rules do not apply. Rather, as one court explained in the contractual context, "the general rule, with few exceptions, is to 'uniformly [deny]' recovery for mental distress damages."¹¹ Importantly, such expressions of reluctance are

4. See generally *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 383–86 (Tex. 2012) (explaining that the closest relatives of a deceased person only have quasi-property rights in the body, and thus, individual body parts, of the deceased).

5. See RESTATEMENT (SECOND) OF TORTS § 313 (AM. LAW INST. 1965) (stating that if an actor's conduct results only in emotional distress and no bodily harm, then the actor is not liable for that emotional distress).

6. See Jeff Sugarman, *Neoliberalism and Psychological Ethics*, 35 J. THEORETICAL & PHIL. PSYCHOL. 103, 109–11 (2015).

7. See, e.g., Fred Luthans, Carolyn M. Youssef & Bruce Avolio, *PSYCHOLOGICAL CAPITAL: DEVELOPING THE HUMAN COMPETITIVE EDGE* 199 (2007).

8. See Betsy J. Grey, *The Future of Emotional Harm*, 83 FORDHAM L. REV. 2605, 2620–21 (2015) (noting that courts generally consider emotional distress claims to be of lesser importance and thus place severe limitations on emotional distress claims).

9. See *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 792 (D.C. 2011) (en banc) (allowing plaintiff to recover for negligent infliction of emotional distress even though he was not in the "zone of physical danger").

10. See, e.g., *Reeves v. Edge*, 484 S.E.2d 498, 503 (Ga. Ct. App. 1997) (explaining the general rule that a plaintiff is barred from recovery when the only injury suffered is emotional distress).

11. *Valentine v. Gen. Am. Credit, Inc.*, 362 N.W.2d 628, 630 (Mich. 1984).

not unique to contract law. A similar approach exists in other fields of law, including torts,¹² constitutional law,¹³ and criminal law.¹⁴ All of those fields are much more willing to protect the human ownership of, say, land, cars, finances, reputation, and even body parts (which have been considered a form of “quasi-property”¹⁵). At the same time, all of those fields of law are generally unwilling to grant similar treatment to human feelings because they are conceived utterly different.¹⁶

But how *should* law respond to the occurrence of emotional harms? For example, should remedies for a breach of contract include damages for harms to the emotions? For many years contract law has answered this question negatively, but not without some confusing exceptions and ongoing self-doubt.¹⁷ Many courts have followed the general rule, according to which “[r]ecovery for emotional disturbance will be excluded,”¹⁸ offering a variety of justifications to the approach that singles out emotional harms in that way. To abbreviate, this Article will frequently refer to this rule as “the exclusionary rule.” Other courts have struggled to apply the rule, especially when dealing with cases of severe and credible harms to the emotions.¹⁹ Noticing adjudicators’ disagreements, legal theorists have offered a range of

12. See, e.g., Grey, *supra* note 8, at 2607, 2621 (noting that most courts bar recovery in tort claims where there is only emotional, and not physical, harm).

13. See, e.g., Emily F. Suski, *Dark Sarcasm in the Classroom: The Failure of the Courts to Recognize Students’ Severe Emotional Harm as Unconstitutional*, 62 CLEV. ST. L. REV. 125, 125 (2014) (“Not only do the courts not find stand-alone emotional harm sufficient to make out a constitutional violation, they also collectively evaluate students’ emotional harm very differently than their physical harm.”).

14. See, e.g., Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 MICH. L. REV. 607, 609 (2015) (discussing the general lack of criminal culpability for emotional distress absent physical injury or threat of physical harm).

15. In the narrow context of private remedies, damages are awarded in cases of harms to the physical body as if body parts are not different than conventional categories of property. The broader question of classifying body parts as property in other contexts is a complex one that falls beyond the scope of this Article. For a general discussion on the topic, see *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (en banc); see also JESSE WALL, *BEING AND OWNING: THE BODY, BODILY MATERIAL, AND THE LAW* (2015).

16. See Suski, *supra* note 13 (noting that most courts evaluate emotional harm very differently than physical harm).

17. See RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (AM. LAW. INST. 1981) (explaining that damages for emotional harm is typically not allowed unless (1) the emotional harm accompanies bodily injury or (2) the breach is of such a kind that serious emotional harm was a particularly likely result).

18. *Id.* § 353.

19. See *id.* § 353 cmt. a (noting that certain contracts, such as ones dealing with the disposition of bodies or delivery of messages concerning death, are so likely to cause serious emotional harm that recovery for emotional loss should be allowed).

reasons to abandon or uphold the legal refusal to offer recovery for emotional harms.²⁰ However, the debate seems stagnant and the exclusionary rule stands.

In this Article, I enter the debate from a novel direction, offering for the first time an analysis of the issue from the critical perspective of law and emotions. My analysis suggests that what might explain the peculiar survival of the exclusionary rule despite the abundance of criticism is the complex relationship between law and emotions and particularly law's desire to appear rational. Unless we uncover and confront this issue, any change is highly unlikely. I argue, however, that we cannot afford to wait much longer for a reform. While contract law keeps excluding emotional harms, a new "rationality" has emerged and must be taken into account. The increasing influence of neoliberalism in the last few decades has transformed the meaning of emotions and the magnitude of emotional harms.²¹ Such metamorphosis, I maintain, should incentivize us to move more rapidly towards a revision of the law and a better recognition of the value of emotions.²²

Beyond offering new grounds for a much-needed legal reform, I hope that the discussion of the enigmatic refusal of law to cope with emotion-related problems would advance an examination of two broader questions concerning law as a social institution. One relates to the power of law to impact emotions in general and moral emotions in particular. The other involves the role of law in neoliberal times, when so many mechanisms designed to hold communities together are severely challenged by relentless pressure for self-maximization and fierce competition.

The analysis unfolds in four Parts. The first Part introduces the general rule that excludes contractual damages for emotional harms and the exceptions to the rule. It also describes the different justifications of the exclusionary rule and its exceptions as gleaned from judicial decisions and commentators' works. This Part also discusses the debate concerning the exclusionary rule, presenting the main arguments of the rule's opponents. The second Part brings to the debate new critical arguments made from the fresh perspective of law and emotions. In this Part, I investigate the motivations that underlie the unequal treatment of emotional harms, proposing that they produce important novel reasons to address emotional harms as all other harms caused by a breach of contract. The third Part adds the dramatic impact of neoliberalism to the analysis and suggests

20. See generally David A. Hoffman & Alexander S. Radus, *Instructing Juries on Noneconomic Contract Damages*, 81 FORDHAM L. REV. 1221, 1222–30 (2012) (discussing the various arguments for allowing or disallowing recovery for emotional harms).

21. See Sugarman, *supra* note 6, at 103, 109–11.

22. For a similar call, made for different reasons and offering different solutions, see Omri Ben-Shahar & Ariel Porat, *The Restoration Remedy in Private Law*, 119 COLUM. L. REV. (forthcoming 2018).

that changes in the configuration of emotions make the refusal to award damages for emotional harms more troubling than ever before. The fourth Part describes and explains the reform that is much needed in light of the new concerns exposed and discussed in Parts two and three.

To make the analysis clearer, a few comments regarding scope and terminology seem in place. First, for precision reasons the discussion directly focuses on the treatment of emotional harms under contract law, purposely separating it from the neighboring, and often intertwined, question of liability under tort law. However, the core reluctance to compensate for emotional harms goes far beyond the domain of contracts and for that reason much of the new critical analysis offered here is relevant to any context in which law resists valuing emotions. Second, within contract law the issue of emotional harms has several other designations, such as “mental suffering,” “emotional disturbance,” and “emotional distress.” To simplify, I refer to them all as “emotional harms.” Third, other than in the context of the term “emotional harm,” I make an effort to avoid using the word “emotional” because, as I will later show, this adjective is sometimes used in a derogatory manner and leads to marginalization. Instead, I use the word “affective” to refer to anything that is emotion-laden or relates to the emotions, including our affective life, affective processes, affective welfare, and—under neoliberalism—also affective labor and affective products.²³

II. THE DEBATE

A. *The Refusal*

What if a breach of contract caused the injured party an emotional harm? The current version of the *Restatement (Second) of Contracts* answers that as a general rule “[r]ecovery for emotional disturbance will be excluded,”²⁴ clarifying that American contract law is reluctant to compensate injured parties for harms to their affective welfare. The original version of the *Restatement* also expressed a similar unwillingness, declaring that “damages will not be given as compensation for mental suffering.”²⁵ Summarizing long decades of

23. My use of the term “affective” draws on its definition as relating to, arising from, or influencing feelings or emotions. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 21 (11th ed. 2003). This is not, of course, the only way one could define “affect.” See, e.g., KEITH OATLEY ET AL., UNDERSTANDING EMOTIONS 29 (2d ed. 2006) (defining “affective” as comprehending a larger domain including emotions, moods, and dispositions).

24. RESTATEMENT (SECOND) OF CONTRACTS § 353. To this general reluctance the Restatement adds two exceptions: when the breach also “accompanies a bodily injury,” or when “the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.” *Id.* § 353 cmt. a.

25. RESTATEMENT OF CONTRACTS § 341 (AM. LAW. INST. 1932).

American case law, both versions of the *Restatement* reflect the fact that harms to the emotions—as distinguished from economic and physical harms—are subject to unsympathetic legal treatment by contract law.²⁶ To better appreciate the resistance, we must recognize the extent to which this approach deviates from the general proclaimed goal of contract law, which is to protect the expectation interests of injured parties.²⁷ To that end, contract law awards full recovery for all harms resulting from a breach in order to put injured parties in the same position they would have been but for the breach.

Accordingly, the law's approach to most harms is sympathetic and is subject only to the limitations of causation, certainty, and foreseeability set by the famous English case *Hadley v. Baxendale*.²⁸ However, when it comes to emotional harms, the ordinary rules do not apply. Rather, as one court explained, "the general rule, with few exceptions, is to 'uniformly [deny]' recovery for mental distress damages although they are 'foreseeable within the rule of *Hadley v. Baxendale*.'"²⁹

What might justify treating emotional harms differently at the cost of protecting the expectation interest of contractual parties? Surely, much can be attributed to the sheer power of tradition in shaping the common law. Once a general rule of excluding damages for emotional harm was established, many courts believe they must adhere to it unquestioningly, even in the most compelling situations. A fine example can be found in the emotion-laden case of Keri Keltner.³⁰

When Keri was only fourteen years old she obtained information regarding the identity of a murderer of a nine-year-old child and the location of the murder weapon.³¹ Fearful of the murderer's retaliation, she entered into a confidentiality agreement with the police before revealing the information she had.³² In a clear breach of this agreement, the police included Keri's identity as an informant in reports that were shared with the murderer's lawyer, who in turn shared them with his client.³³ Keri and her mother sued, claiming that the breach of contract caused each one of them significant "mental anguish" and seeking appropriate damages.³⁴ The trial court

26. *See id.*; see RESTATEMENT (SECOND) OF CONTRACTS § 353.

27. RESTATEMENT (SECOND) OF CONTRACTS § 344.

28. (1854) 156 Eng. Rep. 145; 9 Ex. Ch. 341.

29. *Valentine v. Gen. Am. Credit*, 362 N.W.2d 628, 630 (Mich. 1985) (quoting MCCORMICK, DAMAGES, § 163 at 637–38 (1935), and cases cited therein).

30. *Keltner v. Washington Cty.*, 800 P.2d 752 (Or. 1990).

31. *Id.* at 753.

32. *See id.*

33. *Id.*

34. *Id.*

dismissed the claim,³⁵ the court of appeal affirmed,³⁶ and on a third review of the matter, Oregon's Supreme Court agreed that there were indeed "no grounds to reconsider the well-established rule that damages are not recoverable in contract for purely emotional distress."³⁷ None of the courts doubted that the breach caused significant emotional harm, with the court of appeal calling the facts "compelling."³⁸ Instead, as the Supreme Court explained, leaving the harm uncompensated necessarily resulted from following former similar decisions of the jurisdiction.³⁹

When courts not only follow tradition but also attempt to explain their resistance to awarding contractual damages for emotional harms, several rationalizations emerge. I hereinafter abbreviate these rationalization as "the seven Fs," to refer to concerns regarding fear, fit, frequency, flooding, fabrication, fortitude, and fluidity. What follows is a concise description of each.

First, there is an expression of *fear*. As early as 1894, one court rejected the idea of changing the rule, asserting in a cautioning tone: "The truth is, once depart from the old rule, and we are all at sea, without either rudder or compass."⁴⁰ As the warning suggests, part of the threat in offering recovery for emotional harms comes from dreading a change, any change, of well-established tradition.

Second, the *fit* between law, on the one hand, and emotions, on the other hand, is doubted. On this point, some American cases—relating to contracts, torts, or not distinguishing between the two—cite to the famous English tort-based decision in *Lynch v. Knight*.⁴¹ In that case, Lord Wensleydale memorably stated that "[m]ental pain or anxiety the law cannot value, and does not pretend to redress."⁴²

Third, the *frequency* of emotional harms in cases of breach of contracts presents a problem. Time and again judges have reasoned that it is impossible to apply the general rule of *Hadley v. Baxendale* in these situations because almost all breaches evoke a certain amount of negative emotions, and thus, under such a rule "damages for mental distress would be recoverable for virtually every breach of contract."⁴³

Fourth, and related to the frequency problem, is the risk of *flooding* the courts. As one court put it, without excluding damages for emotional harms, infinite numbers of injured parties may seek

35. *Id.*

36. *Id.*

37. *Id.* at 758.

38. *Id.* at 753 (quoting *Keltner v. Washington Cty.*, 784 P.2d 127, 128 (Or. Ct. App. 1989)).

39. *Id.* at 757-78.

40. *Francis v. W. Union Tel. Co.*, 59 N.W. 1078, 1081 (Minn. 1894).

41. (1861) 11 Eng. Rep. 854; 9 H.L.C. 577.

42. *Id.* at 863.

43. See, e.g., *Valentine v. Gen. Am. Credit*, 362 N.W.2d 628, 629 (Mich. 1985).

recovery, “giving rise to a flood of speculative litigation.”⁴⁴ And, as another court stated: “Surely, a court should be slow to open so vast a field as this without cogent and overpowering reasons.”⁴⁵

Fifth, it is argued that emotional harms invite *fabrication*.⁴⁶ Courts have described them as “vague” and “shadowy,” emphasizing that claims for emotional harms are “impossible to disprove.”⁴⁷

Sixth, a high level of *fortitude* is expected from contracting parties, making compensation unwarranted. As one English court put it: “Contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude.”⁴⁸

Lastly, seventh, the *fluidity* of emotional harms makes it impossible to measure their magnitude and then determine a concrete amount of money that might remedy the harm in full but not in excess. As one court defined the problem: “[T]here is no possible standard by which such an injury can be justly compensated or even approximately measured.”⁴⁹ According to this view, awarding damages for emotional harms lacks “any guide as to the measure of damages except the whim of the jury, or the arbitrary standard that may be adopted by the particular judge who tries the cause.”⁵⁰

Overall, most discussions of the issue start by expressing a general resistance to the idea of recovery for emotional harms, sometimes presenting a variety of combinations of the above “seven Fs” and often without offering any explanation at all.⁵¹ Indeed, one court went as far as to declare that “it is *axiomatic* that a plaintiff may not recover for emotional distress caused by a defendant’s alleged breach of contract.”⁵²

The general exclusion of recovery for emotional injury caused by a breach of contract has two stated exceptions. According to the first exception, damages may be available if the emotional harm does not stand alone but rather occurs together with a physical harm to the body.⁵³ The second deviation from the exclusionary rule might be

44. *Francis*, 59 N.W. at 1082.

45. *Summerfield v. W. Union Tel. Co.*, 57 N.W. 973, 975 (Wis. 1894).

46. See Ronnie Cohen & Shannon O’Byrne, *Cry Me a River: Recovery of Mental Distress Damages in a Breach of Contract Action—A North American Perspective*, 42 AM. BUS. L.J. 97, 141 (2005); David Frisch, *It’s About Time*, 79 TENN. L. REV. 757, 767 (2012).

47. *Summerfield*, 57 N.W. at 975.

48. *Johnson v. Gore Wood & Co.* [2002] 2 AC 1 (HL) 49.

49. *Summerfield*, 57 N.W. at 975.

50. *Francis v. W. Union Tel. Co.*, 59 N.W. 1078, 1082 (Minn. 1894).

51. See, e.g., *Valentine v. Gen. Am. Credit, Inc.*, 362 N.W.2d 628, 631 (Mich. 1984) (explaining that “[t]he primary purpose in forming [employment] contracts . . . is economic and not to secure the protection of personal interests”).

52. *Skypala v. Mortg. Elec. Registration Sys., Inc.*, 655 F. Supp. 2d 451, 461 (D.N.J. 2009) (emphasis added).

53. See RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. LAW INST. 1981).

called the highly emotional contracts exception.⁵⁴ Significant to our later discussion of the general rule, each of the exceptions works to strengthen some of the presumptions underlying the rule.

1. *The Bodily Harm Exception.*

According to the *Restatement (Second)*, “Recovery for emotional disturbance will be excluded unless the breach also caused *bodily harm . . .*”⁵⁵ This exception is frequently demonstrated using the classic case of *Sullivan v. O’Connor*.⁵⁶ In that case, a contract between a patient and surgeon to perform cosmetic surgery aimed at improving the patient’s aesthetics ended in a disfigured nose, which led to ongoing emotional distress.⁵⁷

Notably, not all jurisdictions follow *Sullivan* and allow for an exception in the case of similar or worse bodily harms.⁵⁸ Further, the case itself does not highlight the importance of having bodily harm as a condition to recovery for emotional harm.⁵⁹ And yet, *Sullivan* has, albeit obscurely, contributed to the establishment of the bodily harm exception, perhaps because the case represents the most typical scenario that combines harms to both the body and the emotions: a breach of the duty to perform an appropriate medical treatment.

When such a breach occurs, it usually raises claims in both torts and in contracts that claimants and judges often fail to separate.⁶⁰ It is thus possible that the “bodily harm” exception in the contractual context can be explained by the same logic that was offered by tort law prior to its shift to a more liberalized approach towards emotional harms caused by negligent conduct.⁶¹ Tort law’s older approach

54. *See id.*

55. *Id.* (emphasis added); *see also* 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 59.1 (rev. ed. 2005) (“In denying damages for mental distress caused by breach of ordinary contracts, the cases must be clearly distinguished from those in which physical pain and suffering are caused by the breach of a contract for a performance directly affecting *the human body.*”) (emphasis added).

56. 296 N.E.2d 183 (Mass. 1973).

57. *Id.* at 184.

58. *See, e.g.,* Kaplan v. Mayo Clinic, 947 F. Supp. 2d 1001, 1004, 1010–11 (D. Minn. 2013) (refusing to award damages for emotional distress caused by a breach of contract that resulted in the unnecessary removal of portions of a patient’s organs).

59. *See Sullivan*, 296 N.E.2d at 188–89 (explaining that in breach of contract cases involving claims for emotional harm damages, psychological and physical harm “*may be expected to figure somewhere in the recovery, depending on the particular circumstances*”) (emphasis added).

60. *See, e.g.,* Gault v. Sideman, 191 N.E.2d 436, 440, 443 (Ill. App. Ct. 1963) (holding that the plaintiff’s amended complaint against his physicians, in a malpractice case, did not properly plead a breach of contract cause of action).

61. For a concise description of this shift under tort law, *see* Ronald H. Jenson, *When Are Damages Tax Free?: The Elusive Meaning of “Physical Injury,”* 10 PITT. TAX REV. 87, 96–97 (2013) (“More recently, however, courts have significantly relaxed, and in some cases even eliminated, the impediments to

refused to award damages for such harms, reasoning that “in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance may be too *easily feigned* . . . and that to allow recovery for it might open too wide a door for *false claimants* who have suffered *no real harm* at all.”⁶² Note that to the extent that this is the leading reason for the bodily harm exception in contracts, the exception operates to reinforce the rule by echoing, even amplifying, concerns regarding fabrication of claims (the fifth “F” above).

2. *The Highly Emotional Contracts Exception.*

According to this exception to the exclusionary rule, the law offers recovery despite its general reluctance when “the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”⁶³ By requiring not only that the emotional harm be “a particularly likely result” but also that it be “serious,” the exception seems to aim at rare situations, thereby reinforcing the general belief that recovery is inappropriate in nearly all contractual cases. To appreciate the narrowness of the exception it is worth noting that with regard to all other injuries the general rule established in *Hadley v. Baxendale* only requires that the harm be “reasonably contemplated,”⁶⁴ and does not demand that the harm itself also be severe *and* particularly likely to occur. In this way, the limited exception designed for only the most unusual cases corroborates the notion that emotional harms are a frequent but insignificant side effect of the vast majority of breached contracts (the third “F” above).

Since the highly emotional contracts exception is quite vague, its application has yielded significant inconsistencies that will be discussed next. However, by and large, the question of whether a given breached contract should be discussed under the general rule or under the exception became tied to the subject matter of the contract. As one court explained: “[W]hen the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress.”⁶⁵ Accordingly, particular subject matters were recognized as better candidates than

recovery for emotional distress. All states today allow recovery for the negligent infliction of emotional distress under certain circumstances and some have abolished all restrictions on the recovery of such damages.”). For a fuller description, see John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789 (2007).

62. RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (AM. LAW INST. 1965) (emphasis added).

63. RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. LAW INST. 1981).

64. *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145; 9 Ex. Ch. 341.

65. *Erlich v. Menezes*, 981 P.2d 978, 988 (Cal. 1999).

others for damages for emotional harm.⁶⁶ One past example that had achieved a relative consensus until it became irrelevant was the willingness of courts to award recovery for the emotional harm caused by a breach of a promise to marry.⁶⁷ More disputed was the question of whether a contract with a telegraph company to deliver a sensitive message such as with regard to a severe illness or a death of a family member fit into the exception. Jurisdictions around the country were severely split, often criticizing each other for adopting the wrong approach, until modern technology made the question moot.⁶⁸ According to the *Restatement (Second)*, other recognized categories are contracts offering services of common carriers and innkeepers to their respective passengers and guests,⁶⁹ as well as contracts providing for the proper disposal of dead bodies.⁷⁰

The idea that breaches of *some* types of contracts are—by virtue of the contract's subject matter—particularly likely to cause emotional harms could have indicated a significant willingness to award recovery in a manner that narrows the general rule of exclusion. After all, in many contexts, breaches have a grave emotional impact that is fairly predictable. However, by and large,

66. Often, the request for emotional damages triggers a motion for an early dismissal. Thus, a contract in which the subject matter may justify an application of the exception rather than the rule will not necessarily result in recovery. In many cases, it is impossible to know whether additional litigation resulted in an award for damages.

67. See generally Neil G. Williams, *What to Do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019 (1995) (discussing the breach of a promise to marry action and the resulting damages that were often awarded). But see Shannon O'Byrne, *Law and Emotion in Bronte's Jane Eyre*, 25 TEX. J. WOMEN & L. 25, 37–40 (2015) (explaining the recovery in cases of breach of promise to marry as an exception that supports the general rule of hostility to emotional damages and arguing that Victorian contract law "[c]ould not develop a coherent approach to emotion because it continued the historical project of gendering emotion as unstable, female, and anti-law").

68. See Francis M. Burdick, *Tort Liability for Mental Disturbance and Nervous Shock*, 5 COLUM. L. REV. 179, 189–91 (1905) (describing the pioneering approach taken by Texas that allowed for the recovery of damages for emotional harm, and the subsequent rejection of that approach by other jurisdictions). For application of the Texas approach, see *C.O. S. Relle v. W. Union Tel. Co.*, 55 Tex. 308, 312–13 (Tex. 1881). For the opposing approach, see, e.g., *W. Union Tel. Co. v. Ferguson*, 60 N.E. 674, 675–77 (Ind. 1901).

69. RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (AM. LAW INST. 1981); see *Crawford v. Hotel Essex Bos. Corp.*, 143 F. Supp. 172, 174 (D. Mass. 1956) (hotel guest assaulted by house detective); *McClean v. Univ. Club*, 97 N.E.2d 174, 177–78 (Mass. 1951) (guest removed from room in private club despite his request for medical attention); *Frewen v. Page*, 131 N.E. 475, 476 (Mass. 1921) (action in contract against hotel manager for assault, false imprisonment, and slander); see also *Palano v. Bellagio Corp.*, No. 08-ADMS-40040, 2009 WL 1846347, *1 (Mass. App. Div. June 24, 2009) (hotel guests discovered illicit drugs in their room).

70. RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a.

courts have refused to broaden the exception to encompass new categories of contracts. For example, while humiliating mistreatment by innkeepers was deemed as particularly likely to create emotional harm,⁷¹ similar humiliation by theaters remained subject to the exclusion rule and yielded only a return of ticket price even in the most egregious situations.⁷²

Similarly, courts have shown an unwillingness to expand the logic of the classic burial cases to contracts in which the promised service related to living rather than dead family members. For example, in one case, parents had to leave their newborn baby girl in the hospital for further treatment.⁷³ While under the hospital's care, the baby was abducted and was only returned to her parents after four and a half months.⁷⁴ Although the parents reported "grief, mental torment, pain and anguish," the court denied their rights for recovery.⁷⁵ In another case along the same lines, a nursing home made a contract with two sisters to provide care for their mother, who suffered from Alzheimer's disease.⁷⁶ The breach caused the disappearance of the mother who was never found.⁷⁷ As one would expect, the disappearance was followed by continuous emotional harm to her daughters.⁷⁸ The court, however, was unwilling to award damages for such serious and predictable emotional injuries, explicitly insisting that "the exceptions to [the exclusion] rule are inapplicable to this case."⁷⁹

In keeping with restricting the reach of the exception, courts have not only refused to add highly emotional subject matters to the exception, but have also declined to include "mixed" subject matters in the exception—when both commercial aspects and emotional aspects were involved.⁸⁰ And courts have done so even when they agreed that the emotional harm caused by the breach was indisputably serious. In *Erlich v. Menezes*,⁸¹ for example, the court rejected the argument that the defective construction of a residential home, which caused years of highly stressful living conditions, should warrant recovery for emotional harm.⁸² Refusing to acknowledge that

71. *See id.*

72. *See De La Ysla v. Publix Theatres Corp.*, 26 P.2d 818, 819 (Utah 1933) (discussing Filipino plaintiff's mistreatment in a movie theater on account of his "race and color").

73. *Johnson v. Jamaica Hosp.*, 467 N.E.2d 502, 502 (N.Y. 1984).

74. *Id.*

75. *Id.*

76. *Oresky v. Scharf*, 510 N.Y.S.2d 897, 897 (N.Y. App. Div. 1987).

77. *Id.*

78. *Id.*

79. *See id.* at 898.

80. *See, e.g., Erlich v. Menezes*, 981 P.2d 978, 989 (Cal. 1999).

81. 981 P.2d 978 (Cal. 1999).

82. *Id.* at 989.

the construction of one's sphere of domestic life has an affective dimension that is not present in commercial building projects, the court applied the general rule and not the exception to the case.⁸³

Taken together, these instances suggest that the exception of highly emotional contracts is often read more narrowly than what its wording and spirit allow. All in all, despite some unfitting cases,⁸⁴ the general rule that excludes contractual recovery for emotional harms, combined with its two narrow and unyielding exceptions, leaves little room to allow for this type of damage. And so, it seems reasonably accurate to describe contract law's response to emotional harms as unsympathetic. Not surprisingly, as the coming Subpart describes, throughout the years many have criticized this approach and have suggested abandoning it and replacing it with the equal treatment of all harms resulting from a breach of contract.

B. *The Objections*

The legal reluctance to award recovery for emotional harms has always been subject to some criticism. Much of the criticism has been directed towards the creation of a dichotomy between economic and physical harms, on the one hand, and emotional harms, on the other.⁸⁵ Generally, jurists and scholars have argued that the justifications described in the previous Subpart (the "seven Fs"), fail to explain why some harms caused by a breach of contract are recoverable while others—namely those associated with the emotions—are not.⁸⁶ Accordingly, some critics have called for a liberalization of the rules concerning compensation for emotional harms and have favored a rule that would treat all harms equally.⁸⁷

One important broad critique of the exclusion of recovery for emotional harms is that the elimination of this component produces under-compensation and thus defeats the declared intention of contract law to award expectation damages.⁸⁸ Expectation damages are designed to put injured parties in the position that they would

83. *Id.*

84. For a discussion of these cases and their contribution to the arbitrary nature of the law on this point, see *infra* notes 116–21 and accompanying text.

85. Arguments of this type have been made both in the contractual context and in other legal contexts, and some are described below, see *infra* notes 111–15 and accompanying text. But see generally Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809 (2015) (defending the dichotomy).

86. See, e.g., Goldberg, *supra* note 85, at 813–14.

87. See, e.g., Cohen & O'Byrne, *supra* note 46, at 126 (recommending an approach that "asks the court to treat a claim for intangibles like any other breach of contract claim").

88. *Id.* at 143 ("A cornerstone of contracts law is the protection of the plaintiff's expectation interest. There has to be a strong reason, consonant with reality of *all* market participants—and not just in relation to what the imagined businessman would bargain for—to deny that expectation.").

have been had the contract been fully and appropriately performed.⁸⁹ However, without taking emotional harms into account, injured parties are deprived of a remedy for their injury.⁹⁰ Such deprivation can be very significant, especially given the fact that many times when the harm is emotional, mitigation of the damage is particularly difficult, if not impossible, because substitute transactions are rarely available. Examples include a photographer that lost wedding photos,⁹¹ a hospital that lost a patient,⁹² or a vacation that turned into a nightmare.⁹³ To make things worse, in some cases courts add insult to injury when they exclude the emotional distress and award only the repayment of the contract's monetary consideration. Such was the case, for example, when theatergoers were publicly humiliated by racial comments and got back only what they paid for their tickets—a sum that made the damages nominal at best.⁹⁴ Put differently, the failure to compensate for a significant injury too often amounts to a grave injustice.

Additionally, to the extent that injured parties are left uncompensated, their counterparts—the breaching parties—end up paying too little, or even nothing at all, for their breach.⁹⁵ Such a result clearly creates the wrong incentives, encouraging future contractual actors to breach their contracts knowing they will only have to pay for some of the harm they create.⁹⁶ As one scholar noted: “Contract breachers should not be able [to] make their victims shoulder their very real anguish alone.”⁹⁷ And, when the effects of the unfairness to the injured party and the reward to the breaching party are taken together, the under-compensation further undermines the general belief in contracts as a fair societal tool.

Beyond the general problem of under-compensation, critics have challenged more specifically the various justifications offered for leaving emotional harms uncompensated.⁹⁸ The fear of fabrication,

89. RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. LAW INST. 1981).

90. See Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 776 (1985).

91. See Whalen v. Villegas, 968 N.Y.S.2d 343, 345 (Dist. Ct. 2013).

92. See Johnson v. Jamaica Hosp., 467 N.E.2d 502, 502 (N.Y. 1984); see also Oresky v. Scharf, 510 N.Y.S.2d 897, 897 (N.Y. App. Div. 1987).

93. See Peluso v. Mark Travel Corp., No. MMXCV106003452S, 2011 WL 1468359, at *1 (Conn. Super. Ct. Mar. 25, 2011).

94. De La Ysla v. Publix Theatres Corp., 26 P.2d 818, 820 (Utah 1933).

95. See Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions*, 26 SUFFOLK U. L. REV. 935, 936 (1992).

96. The creation of a specific incentive to care less about harm to emotions will be discussed below. Existing literature only hints at this problem. See *id.* at 955 (stating that businesses have not insured themselves against liability because courts “have given them a free ride by excusing them from liability for foreseeable emotional distress”).

97. *Id.* at 957.

98. See, e.g., Goldberg, *supra* note 85, at 814.

for example, seems exaggerated in legal systems that routinely cope with this type of risk by adopting tools aimed at ensuring authenticity such as cross examinations and the use of experts.⁹⁹ The fabrication difficulty, as many have noted, is not at all unique to emotional harms.¹⁰⁰ Rather, many physical harms, such as back or head pains that are reported by an injured party but cannot be physically traced, are hard to prove yet are not subject to a special exclusionary rule.¹⁰¹ In all these cases, "skilled medical [experts] have developed a technique for distinguishing the real sufferer from the fraudulent imposter,"¹⁰² and there is no reason to doubt their ability to apply similar expertise to emotional injuries.¹⁰³ Moreover, fear of fabrication does not justify a special rule for emotional harms since injured parties must prove their claims with enough *certainty* under the general rule for damages—a limitation aimed at preventing compensation for speculative components of alleged harms.¹⁰⁴

The problem of fluidity and the difficulty of quantifying emotional harms were similarly undermined, further demonstrating jurists' efforts to refute the various justifications of the exclusionary rule.¹⁰⁵ Again, critics have stressed that the difficulty of putting a price tag on a nonpecuniary harm is hardly unique to emotional harms and—where nonemotional harms are concerned—this difficulty is usually well managed by the law.¹⁰⁶ One Canadian court has asked: "[W]hat is the logical difference between a scar on the flesh and a scar on the mind?"¹⁰⁷ And, to the extent that the quantifying undertaking is inherently inaccurate, critics have commented that "[a] judgment for money is a clumsy device, but it is the best the law has,"¹⁰⁸ adding that general damages rules only require certainty as to the occurrence of the a harm while foregoing "a mathematical precision" when "precision is unattainable."¹⁰⁹ Needless to say that the legal willingness to award recovery for *some* selected emotional

99. See Whaley, *supra* note 95, at 942–43.

100. Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 832 (2004).

101. See *id.* at 832–33.

102. Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 505 (1922).

103. See Rhee, *supra* note 100, at 831.

104. See Whaley, *supra* note 95, at 953 ("As for the rule that requires certainty, making sure that damages are not too speculative, let me say only that existing tests sufficiently furnish the necessary safeguards.").

105. *Mason v. Westside Cemeteries, Ltd.* (1996), 135 D.L.R. 4th 361, para. 58 (Can. Ont. Gen. Div.).

106. *Id.*; see also Cohen & O'Byrne, *supra* note 46, 107–09 (discussing the discrepancy between allowing recovery for emotional distress in tort claims but not in contract claims).

107. *McDermott v. Ramadanovic Estate* (1988) 27 B.C.L.R. (2d) 45 (SC).

108. Goodrich, *supra* note 102, at 509.

109. *Purcell v. Keegan*, 103 N.W.2d 494, 496 (Mich. 1960).

harms, such as in cases of breached agreements for funeral services, further disproves the fluidity justification.¹¹⁰

In addition to arguments against the justifications of the exclusionary rule, critics have also pursued the rule's exceptions. Focusing on the bodily harm exception, scholars,¹¹¹ as well as some courts,¹¹² have emphasized that such exceptions rest on outdated assumptions. Critics have reminded readers that the dichotomy between physical and emotional harm has very little scientific support.¹¹³ One legal author, writing almost a century ago, critiqued the insistence on supportive bodily injury stating that according to the cutting-edge research of his time, "an emotion as a purely mental thing does not exist. It always has a physical side."¹¹⁴ Decades later, when Alabama liberalized its laws to allow recovery for mental suffering even without accompanying physical injury, its courts expressed the same concern, explaining that "to continue to require physical injury . . . would be an adherence to procrustean principles which *have little or no resemblance to medical realities*."¹¹⁵

In examining the second exception that allows damages for emotional harm in *selected* categories of highly emotional contract, critics have stressed the problem of severe arbitrariness.¹¹⁶ Scholars have pointed out that the "categories approach is a 'hit and miss' effort, with conflicting decisions even within a given category."¹¹⁷ They have also argued that the law on this point is inconsistent and in a "hopeless tangle."¹¹⁸ For example, a delayed telegram and a delayed train may cause equal emotional harm to someone who had to miss the funeral of a beloved family member. And yet, for unclear reasons, only the first case would yield damages. Furthermore, because only relatives can be compensated for harm caused by a delayed death notice sent by telegram, it is possible that "Horatian heir who has been itching for the ancestral estates may recover on the strength of this mourning raiment, while a David who misses the last look upon the face of his Jonathan gets nothing for his bleeding heart."¹¹⁹ Similarly, when the law recognizes the emotional harm caused by losing the body of a dead family member but rejects the harm caused by permanently losing a family member who was still

110. See, e.g., *Mason*, D.L.R. 4th 361, para. 58 (Can.).

111. See, e.g., Goodrich, *supra* note 102, at 501.

112. See, e.g., *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 374 (Ala. 1981).

113. Goodrich, *supra* note 102, at 501.

114. *Id.*

115. *Taylor*, 400 So. 2d at 374 (emphasis added).

116. Cohen & O'Byrne, *supra* note 46, at 133–34.

117. *Id.*

118. Whaley, *supra* note 95, at 940.

119. *W. Union Tel. Co. v. Ferguson*, 60 N.E. 674, 678 (Ind. 1901).

alive, the outcome is, as some authors have put it, "illogical,"¹²⁰ and even "embarrassing."¹²¹

Contemporarily, feminist scholars—writing in the neighboring context of tort law—have argued that the law's parsimonious approach to emotional harms is both based on gender bias and perpetuates it.¹²² Historically, according to this critique, tort law was reluctant to recognize the importance of emotional distress injuries because these injuries were associated with women's world more than with men's reality and thus were marginalized and devalued in a manner that correlated with women's lower status in society.¹²³ For example, sexual betrayal of a wife was conceptualized as creating a material, property-like harm to her husband while sexual betrayal of a husband was framed as causing merely an emotional harm to his wife, a harm for which the law did not offer redress.¹²⁴

Even as the treatment of emotional harms under tort law became more liberal, demonstrating an increased willingness to offer *some* redress, the hierarchy between different harms kept emotional harms far below property or physical injuries.¹²⁵ The rules limiting recovery for emotional harms have yielded less liability and less compensation.¹²⁶ A vicious cycle has been created where emotional harms are undercompensated due to their association with women, and "feminine" injuries are in turn classified as emotional even when they have a salient physical aspect. For example, scholars have argued that tort law tends to regard as emotional rather than physical harms "to a woman's reproductive system or sexualized part of her body, like [her] breasts."¹²⁷ Accordingly, when breast reduction or enlargement surgeries ended in deformities, more often than not the harms have been legally treated as emotional.¹²⁸

Above and beyond the disparate impact on women suggested by this feminist critique of tort law, the argument begins to touch on a deeper problem. It suggests that the legal treatment of emotional harms is misguided for more than its immediate consequences, such as the failure to properly compensate injured parties. It inspires the thought that the way the law mistreats emotional harms has a greater impact on how humans are valued and the way they perceive their duties and rights toward each other even outside the legal

120. Cohen & O'Byrne, *supra* note 46, at 108.

121. Whaley, *supra* note 95, at 945.

122. See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 499 (1998) ("[L]egal claims for emotional distress have been devalued in part because they are associated with female plaintiffs.").

123. *Id.* at 469.

124. *Id.* at 525.

125. *Id.* at 490.

126. See Whaley, *supra* note 95, at 936, 955–57 (1992).

127. Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 860 (1997).

128. See *id.*

realm. It is this new idea that I will address in the coming Parts in the hope of adding an important layer missing from the current debate regarding contractual recovery for emotional harms.

III. NEW PERSPECTIVE: LAW AND EMOTIONS

Long decades of criticism have done little to alter the contractual special treatment of emotional harms. The stagnation of the debate raises a suspicion that something deeper and broader may explain the survival of the exclusionary approach to those harms. What is missing, I argue, is context—seeing the issue beyond the doctrinal puzzle that it has created within the boundaries of contract law. It is important to break away from the dynamics of harm and recovery because they limit us to framing the question as a search for an appropriate legal *response* to a given problem. Rather, it seems valuable to expand the scope of analysis and engage in an exploration of possible goals, interests, and motivations that may explain the concrete aversion of contract law to emotional harms.

To that end, the relatively new perspective of law and emotions¹²⁹ is invaluable. In the last two decades, legal scholars have established the field of law and the emotions, seeking to develop a better understanding of the interplay between law and emotions.¹³⁰ In general, works taking the law and emotions approach include the following intellectual steps: (1) an *illumination* of the affective aspects of a given legal issue, (2) a nonlegal *investigation* of the emotion(s) relevant to that issue, and (3) an *integration* of the first two steps into normative recommendations aimed at improving the legal treatment of the issue at hand.¹³¹ The current effort to examine and improve the legal treatment of contractual emotional harms belongs with this field of analysis.

129. See Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2003–11 (2010) (describing the rise of the field of law and emotion and defining the various themes in the works of law and emotions scholars); see also Terry A. Maroney, *A Field Evolves: Introduction to the Special Section on Law and Emotion*, 8 EMOTION REV. 3, 3 (2016) (describing how “[l]aw and emotion has evolved into a vibrant and diverse field, drawing in legal scholars and interdisciplinary partners from across the social sciences, hard sciences, and humanities”).

130. See generally Maroney, *supra* note 129.

131. This characterization of law and emotions work was first made in *Who's Afraid of Law and the Emotions?*, see Abrams & Keren, *supra* note 129. Since then, the characterization had been adopted by many scholars. See, e.g., Carlton J. Patrick, *A New Synthesis for Law and Emotions: Insights from the Behavioral Sciences*, 47 ARIZ. ST. L.J. 1239, 1249 (2015) (“Abrams and Keren (and later, Bandes and Blumenthal), for example, suggested that law and emotions seeks primarily to (1) illuminate the roles emotions play in legal problems, (2) investigate these roles through interdisciplinary analysis, and (3) integrate these findings into normative recommendations for the law.”).

In this Part, I primarily suggest that the contractual rule excluding recovery for emotional harms should be understood as a manifestation of the law's problematic relationship with emotions. Put differently, the resistance is less about the occurrence of the harm—a feature to which the law typically responds quite enthusiastically—and more about its affective, or emotion-laden, nature.¹³² The argument is twofold. First, it contends that the exclusionary rule is a *product* of a more general legal mistreatment of the emotions due to law's excessive aspiration to rationality.¹³³ Second, at the same time, it asserts that the enduring aversion to granting recovery for emotional harms also *produces* further marginalization of the emotions, to the detriment of both law and society.¹³⁴

A. *The Legal Resistance to Emotions*

Conventional law has a complex, perhaps even volatile, relationship with the emotions. 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.¹³⁵ Accordingly, the continuous and multidimensional project of “casting law as a bastion of pure reason,”¹³⁶ has included strong claims—made by prominent legal thinkers—regarding the law, legal doctrines, and the operation of the judiciary. Let me offer three short examples. Law is a “science,” announced the influential jurist Christopher Columbus Langdell,¹³⁷ equating law libraries to chemists' laboratories.¹³⁸ To Langdell, legal science was an intellectual process of deduction and induction resulting from textually based acts of reading and writing: the ultimate expression of abstract logic and

132. As explained in the introduction, I use the terms “emotion” and “affect” interchangeably to avoid the use of the term “emotional,” which too often carries a negative connotation. See *supra* Part I.

133. Using the classification of common moves in law and emotions scholarship, this aspect of the argument includes much illumination and some investigation work.

134. Using the classification of common moves in law and emotions scholarship, this aspect of the argument includes, for the most part, integration work.

135. See Maroney, *supra* note 129.

136. *Id.*

137. Christopher Columbus Langdell, *Professor Langdell's Address in A Record of the Commemoration, November Fifth to Eighth, 1886, on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College* 85 (1887), quoted in GRANT GILMORE, *THE DEATH OF CONTRACT* 109–10 (1974).

138. GILMORE *supra* note 137 at 13–14 (quoting Langdell, “The library is the proper workshop of professors and students alike; . . . it is to all of us all that the laboratories of the university are to the chemists and physicists . . .”).

reason.¹³⁹ “The law moved from ‘subjective’ to ‘objective’ from ‘internal’ to ‘external,’” stated the powerful Oliver Wendell Holmes, reconfiguring legal doctrines to fit his statement.¹⁴⁰ And, following his predecessors, Richard Posner, the famous judge and one of the founders of the economic analysis of law, observed that in making legal decisions, judges, unlike jurors or children, discipline themselves to respond to the problems before them with a careful and linear rationality.¹⁴¹

These examples and many other efforts to establish law-as-reason, have entailed a decisive rejection of the opposite end of the dichotomy, anything related to emotions and emotionalism. Following influential philosophers¹⁴² and long-standing sociocultural popular views—“an amalgam of religious beliefs, superstition, fear of the unknown and witchcraft”¹⁴³—emotions have been presumed to be the ultimate threat to legal rationality.¹⁴⁴ Conceived as springing internally, subjective, enigmatic, intense, and uncontrollable—emotions have been treated as standing to obstruct and disfigure legal doctrines and as positioned to overwhelm, distract, and sway legal actors.¹⁴⁵ And these threats have yielded, either intuitively or with deliberation, a variety of legal responses that operate to distance law from emotions in order to protect and fortify its apparent rationality.¹⁴⁶

This legal resistance to emotions—what Susan Bandes has called “law’s devotion to the myth of an emotionless, cognition driven

139. *See id.* at 107.

140. *Id.* at 46 (quoting Holmes).

141. Richard A. Posner, *Emotion Versus Emotionalism in Law*, in *THE PASSIONS OF LAW* 309, 310–12 (Susan A. Bandes ed., 1999).

142. Immanuel Kant, for example, famously advanced the argument that our emotions interrupt and limit our ability to engage in moral deliberation and make appropriate moral judgments. JESSE J. PRINZ, *THE EMOTIONAL CONSTRUCTION OF MORALS* 20 (2007) (discussing Kant’s argument that “in making successful moral judgments, we would generally do well to ignore our passions”). Of course, Kant was not the first. As described by Jonathan Haidt, former “high priests of reason,” including Plato and Aristotle, presented models of thought in which reason ruled over passions. *See* Jonathan Haidt, *The Moral Emotions*, in *HANDBOOK OF AFFECTIVE SCIENCES* 852, 852 (Richard J. Davidson et al. eds., 2003). Such models and thoughts most certainly influenced Kant and the other great philosophers.

143. HARVEY TEFF, *CAUSING PSYCHIATRIC AND EMOTIONAL HARM: RESHAPING THE BOUNDARIES OF LEGAL LIABILITY* 12 (2009).

144. *See id.*

145. *See* Robert C. Solomon, *Emotions and Choice*, in *WHAT IS AN EMOTION?* 224, 224 (Robert C. Solomon ed., 2d ed. 2003) (describing the view of emotions as “irrational and disruptive,” and the belief that “[c]ontrolling one’s emotion is . . . like the caging and taming of a wild beast”).

146. *See* Posner, *supra* note 141.

system”¹⁴⁷—infuses the law at all its levels. It includes, for example, the comprehension of the adjudicators’ role, the content of legal doctrines, and the characteristics of legal education.¹⁴⁸ Judges, for example, have been expected to suppress their own emotions lest their emotionalism would make them be and seem impartial and unprofessional.¹⁴⁹ Accordingly, when then-Judge Sotomayor was considered for appointment to the Supreme Court, many questioned her nomination because of the views she expressed favoring the use of empathy by the judiciary.¹⁵⁰

Similarly, fundamental doctrines draw a clear line between the spheres that adhere to rational thinking and domains controlled by emotions. For example, Langdell and later Holmes both turned the consideration doctrine into a gatekeeper.¹⁵¹ Under their formulation of the doctrine, “bargained-for” promises, which are more typically commercial in nature, are rational promises because the promisor, like any other rational player, gets something in return for her promise.¹⁵² For this reason, such promises are allowed into the closed club of enforceable contracts.¹⁵³ However, donative promises, in which the promisor seemingly does not get anything in return, are framed and handled differently. Because they are typically made between family members and friends for emotional reasons, these promises are deemed unenforceable under the same doctrine for lack of recognized consideration.¹⁵⁴

Likewise, traditional legal education has sought to teach students “to think like a lawyer,” which disciplines them to focus only

147. Susan Bandes, *Introduction*, in *THE PASSIONS OF LAW*, *supra* note 141, at 1, 6.

148. *See id.* at 6–9.

149. *See id.* at 6 (noting the “law’s insistence on neutral, emotionless judging”); Susan A. Bandes, *Taz and Empathy*, 58 *HOW. L.J.* 397, 399 (2015) (“The specter of judges feeling anything at all for the parties evokes a rather strong—some might say emotional—reaction in those who view emotion as the enemy of rational thought.”).

150. *See* Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 *OHIO N.U. L. REV.* 263, 263 (2010) (examining Senate critiques of Justice Sotomayor’s position on the role of empathy and experience in judging); *see also* Susan A. Bandes, *Empathic Judging and the Rule of Law*, 2009 *CARDOZO L. REV. DE NOVO* 133, 135–36 (defending the use of empathy in the judicial process).

151. Hila Keren, *Considering Affective Consideration*, 40 *GOLDEN GATE U.L. REV.* 165, 175, 178–80 (2010) (explaining the emergence of the consideration doctrine as a deliberate emphasis of law’s rationality and as a product of legal resistance to emotions).

152. *See id.* at 180–81.

153. *See id.*

154. *Id.* at 168, 176.

on “cold” analysis of the ‘facts.’”¹⁵⁵ This pedagogical method pressures students and their professors to set aside feelings that surface in response to cases and legal norms.¹⁵⁶ Therefore, “students who are able to dispassionately discuss both sides of the argument are the ones admired,”¹⁵⁷ as they have learned to disregard the emotions.

Because our focus is on American contract law, it is noteworthy that the reflection of the reason/emotion dichotomy within the law and the legal avoidance of anything linked to emotions has been particularly significant within the common law.¹⁵⁸ Historically, the common law was severely attacked by “royalists, civilians, university scholars, country gentry, merchants, and divines”¹⁵⁹ for being “unorganized,”¹⁶⁰ “primitive,”¹⁶¹ and even “barbarous.”¹⁶² Attempts by leading jurists to maintain authority in the face of such fierce condemnation have yielded defensive responses and a continuous effort to revise the law enough to demonstrate, albeit artificially, a strong commitment to the rule of reason.¹⁶³ A prime example can be found in Sir Edward Coke’s famous words: “Reason is the life of the law, nay, the common law itself is nothing else but reason.”¹⁶⁴

Going back to the treatment of harms under American contract law, it seems straightforward to see how closely it follows the pattern of adhering to concepts associated with reason while avoiding ideas relating to emotions. As Part II demonstrated, the rules pertaining to contractual damages embrace economic and physical harms by making them fully recoverable. At the same time, they reject emotional harms as principally undeserving of legal redress.

155. Angela P. Harris & Marjorie M. Shultz, “A(nother) Critique of Pure Reason”: *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773, 1773 (1993).

156. See, e.g., 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) (“Affect has no place in the academy. Dominated by Cartesian dualism, universities traditionally regarded themselves as centers of pure rationality, their purpose being the objective and dispassionate search for truth.”).

157. Harris & Shultz, *supra* note 155, at 1773–74.

158. Hila Keren, *Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule with Gender in Mind*, 13 AM. U.J. GENDER, SOC. POL’Y & L. 251, 306–09 (2005).

159. Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640*, 10 YALE J.L. & HUMAN. 229, 319 (1998).

160. *Id.*

161. *Id.*

162. RICHARD HELGERSON, *FORMS OF NATIONHOOD: THE ELIZABETHAN WRITING OF ENGLAND* 65 (1992).

163. For a demonstration of the process that produced the Parol Evidence Rule, see Keren, *supra* note 158, at 307–09.

164. SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 97 (1788).

Justifications attributed to the difficulty of quantifying harms cannot explain drawing the line in that manner.¹⁶⁵ Quantifying a harm to reputation that is classified as economic, or a harm caused by a disfigured body part that is classified as physical, for example, is not harder than quantifying humiliation or sadness that are classified as emotional.¹⁶⁶

What is different is that the economic and physical domains are associated with rationality and thus are close to images the law wants to project. The opposite is true for emotional harms: legal engagement with their protection carries the risk of contaminating the law with “animal-like” emotionalism. Richard Posner, for example, once wrote that, “Emotions, like sex, are something that we have in common with animals, who, having smaller cortexes than humans, rely more heavily than humans do on emotions to guide their actions.”¹⁶⁷ Along these lines, the exclusion of damages for emotional harms, just like the legal escape from the world of gifts mentioned earlier, reflects the legal aversion to emotions and the law’s avoidance of the affective world.

B. *Understanding Emotions*

While conventional law has been adhering to reason and ostracizing emotion, science has been going through what is called the “affect revolution.”¹⁶⁸ Equipped with new technologies that allow mapping out brain processes¹⁶⁹ and armed with better experimental methods,¹⁷⁰ researchers have proved that, despite popular belief, emotions reside in the same brain that was the shrine of reason.¹⁷¹ Furthermore, they have been able to confirm and explain what David Hume argued—contra Kant—so many years ago: that reason is by no

165. Grey, *supra* note 8, at 2607–08.

166. *See id.* at 2607, 2615, 2623–24.

167. Posner, *supra* note 141, at 311.

168. *See* Kurt W. Fischer & June Price Tangney, *Self-Conscious Emotions and the Affect Revolution: Framework and Overview*, in *SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE* 3, 3–4 (June Price Tangney & Kurt W. Fischer eds., 1995).

169. *TEXTBOOK OF BIOLOGICAL PSYCHIATRY* 35 (Jaak Panksepp ed., 2004) (“The possibility of imaging such processes in the human brain, using positron emission tomography (PET) and functional magnetic resonance imaging (fMRI) technologies, has helped trigger the ‘affect revolution’ that is currently sweeping across the mind sciences.”).

170. *Id.* at 44 (describing the results of two new experimental methods: “[T]here is now an abundance of evidence that emotional stimuli can have regionally specific effects on the brain. Regional effects have been shown for both emotions generated externally by viewing films or emotional scenes, as well as internally generated, memory-driven emotional reminiscences.”).

171. *See* Fischer & Tangney, *supra* note 168, at 3–6.

means superior to or threatened by emotion.¹⁷² As a whole, researchers have shown that reason and emotion are inseparable and are part of a complex, integrative process of considering alternatives and making choices.¹⁷³

A main aspect of the tight relationship between reason and emotion is the salient role that emotions play in the course of rational decision making.¹⁷⁴ By studying cases of people with brain damage that blocks their access to emotional cues, researchers have made a strong case for the notion that without input from the emotions there can be no true rationality.¹⁷⁵ Famed neuroscientist Antonio Damasio and his many colleagues have studied patients suffering from damage to their ventromedial prefrontal cortex (“vmPFC”) and have noticed a remarkable pattern.¹⁷⁶ Like the legendary Phineas Gage,¹⁷⁷ these patients succeed in standard cognitive tests and are fully functional intellectually.¹⁷⁸ However, they tend to make disastrous real-life decisions, a fact that the studies have linked to their emotional deficits.¹⁷⁹ In one experiment, for example, healthy participants and patients with vmPFC damage were asked to choose cards from four decks.¹⁸⁰ Of the decks, two were “bad,” delivering high gains but higher losses.¹⁸¹ Alerted by their emotions, healthy participants learned quickly to avoid the bad decks.¹⁸² Participants with vmPFC damage, on the other hand, continued to choose the bad decks as a result of not experiencing similar emotional signals.¹⁸³ As Joshua Greene summarizes: “This explains why people with VMPFC damage make disastrous real-life decisions, despite their good performance on

172. JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 137, 368 (2013) (“From a neural and evolutionary perspective, our reasoning systems are not independent logic machines. . . . In other words, Hume seems to have gotten it right.”).

173. Fischer & Tangney, *supra* note 168, at 6.

174. ANTONIO DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 192 (2005); Ronald De Sousa, *The Rationality of Emotion*, in *WHAT IS AN EMOTION?*, *supra* note 145, at 248–49.

175. *See* DAMASIO, *supra* note 174, at 221.

176. *See id.* at 61.

177. *Id.* at 3–5 (telling the story of Phineas Gage who was an American railroad construction foreman remembered for his improbable survival of an accident in which a large iron rod was driven completely through his head, destroying much of his brain’s left frontal lobe and describing the injury’s reported effects on Gage’s personality and behavior over the remaining twelve years of his life).

178. *See id.* at 49.

179. *See id.*

180. *Id.* at 212.

181. *See id.* at 213.

182. *Id.* at 213–14, 220–21.

183. *Id.* at 214.

standard laboratory reasoning tests. They ‘know,’ but they don’t ‘feel,’ *and feelings are very helpful.*”¹⁸⁴

Importantly, emotions are not only “very helpful” and essential to rationality but are also rational themselves.¹⁸⁵ Put another way, reason and emotion are far from being opposites, because in addition to *influencing* thoughts and judgments, emotions are also *shaped* by them. In that latter sense, there is something simplistic, if not wrong, in viewing emotions as static and direct products of given stimuli.¹⁸⁶ Fear or anger, for example, are not merely a burst of negative feeling accompanied by some visceral response. Rather, as many researchers of emotions now believe, our emotions are better understood as complex *processes* that involve highly *cognitive* features.¹⁸⁷ In fact, the recognition of the interplay of cognition and emotion is so widely accepted that at least one interdisciplinary scientific journal has been dedicated to the topic for many years.¹⁸⁸ As Antonio Damasio stated in *Descartes’ Error*: “[Emotions] are just as cognitive as other percepts.”¹⁸⁹

The cognitive theories of emotions present either a psychological or a philosophical explanation thereof that includes significant cognitive components.¹⁹⁰ The psychological explanation generally highlights a multidimensional appraisal process as dictating the affective results.¹⁹¹ One example that particularly relates to emotional harm caused by a breach of contract would be an employment contract that was breached by a wrongful termination of

184. Greene, *supra* note 172, at 142.

185. See De Sousa, *supra* note 145, at 249; Tobias Brosch & David Sander, *Comment: The Appraising Brain: Towards a Neuro-Cognitive Model of Appraisal Processes in Emotion*, 5 EMOTION REV. 163, 163–66 (2013).

186. De Sousa, *supra* note 145, at 256–57.

187. KEITH OATLEY ET AL., UNDERSTANDING EMOTIONS 21 (2d ed. 2006) (“[M]ost researchers now assume that emotions follow appraisals of an event, a view similar to Aristotle’s idea of emotions as evaluations.”).

188. See, e.g., Richard P. Bagozzi et al., *Goal-Directed Emotions*, 12 COGNITION & EMOTION 1, 1 (1998) (arguing that the authors’ experimental data shows how emotions serve as appraisals of consequences such that these appraising emotions informed goal-directed behavior in the experimental subjects); Xijia Luo et al., *Learning to Avoid Spiders: Fear Predicts Performance, Not Competence*, 32 COGNITION & EMOTION 1291, 1291 (2018) (arguing that experimental data gathered by generating a virtual environment shows that spider-fearful subjects will use experiential knowledge to avoid spiders, while non-spider-fearing subjects who have that knowledge will not use it).

189. See DAMASIO, *supra* note 174, at xix.

190. See generally Ronald Alan Nash, *Cognitive Theories of Emotion*, 23 NOÛS 481, 481 (1989) (discussing a philosophical theory of emotions that includes cognitive components); *Theories of Emotion*, INTERNET ENCYCLOPEDIA PHIL., <https://www.iep.utm.edu/emotion/#SSH4b.ii> (last visited Aug. 23, 2018) (explaining the cognitive components from a psychological explanation of emotions).

191. *Theories of Emotion*, *supra* note 190.

an employee. As frustrating as the triggering event may be, appraisal theorists point out that it will not always elicit the same emotion.¹⁹² Instead, they suggest, different employees may experience different emotions based on their appraisal of what happened to them: anger, shame, relief, hope, fear, or any other relevant emotion.¹⁹³ Such appraisal will depend on many variables that appraisal theorists describe with some variation.¹⁹⁴ What they all seem to agree about is that a complex cognitive process, which they call appraisal, is at work.¹⁹⁵ With or without awareness, employees in such situations calculate and evaluate the *meaning* of their termination in light of their goals, concerns, beliefs, former experiences, and so on.¹⁹⁶ For example, the employee's evaluation of matters such as her professional status, the state of the job market, her level of satisfaction while on the job, and sociocultural norms regarding termination, will determine the emotion(s) elicited by the breach, both in terms of direction (positive or negative) and intensity (e.g., level of anxiety).¹⁹⁷

The perception that emotions have distinct cognitive characteristics has gained meaningful support from leading philosophers. Martha Nussbaum's works have emphasized that emotions have a cognitive structure: they embody judgments about the objects to which they respond.¹⁹⁸ As she illustrates: "In order to have anger, I must have [a] complex set of beliefs: that some damage has occurred to me or to something or someone close to me; that the damage is not trivial but significant; that it was done by someone; probably, that it was done willingly."¹⁹⁹ Or, as Robert Solomon has put it: "An emotion is a basic judgment about our Selves and our place in our world, the projection of the values and ideals, structures and mythologies, according to which we live and through which we experience life."²⁰⁰ The key idea here is that feeling, or having a

192. *Id.*

193. *Id.*

194. See Agnes Moors et al., *Appraisal Theories of Emotion: State of the Art and Future Development*, 5 EMOTION REV. 119, 120 (2013) (noting that there is incomplete agreement "among appraisal theorists on the number and identity of [the] variables").

195. See *id.* at 119 ("The basic premise of appraisal theories is that emotions are adaptive responses which reflect appraisals of features of the environment that are significant for the organism's well-being."); Keith Oatley & P.N. Johnson-Laird, *Towards a Cognitive Theory of Emotions*, 1 COGNITION & EMOTION 29, 30–31 (1987).

196. *Theories of Emotion*, *supra* note 190.

197. See *id.*

198. See, e.g., MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 334 (2001).

199. *Id.* at 28–29.

200. ROBERT C. SOLOMON, THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE 125–26 (2d ed. 1993).

particular emotion, is not something that just happens to people. Rather, it depends heavily on people's cognitive agency and the evaluative processes in which they engage. This is not to say that the entire process leading to an effective response is necessarily deliberative or slow.²⁰¹ It does mean that in the affective process cognition matters and emotions have logical structure.

Moreover, outside of the legal arena, many scholars have stressed the fallacy of lumping all emotions together as if they were one homogenous human phenomenon.²⁰² Emotions differ greatly not only in the way we experience them but also in other ways. Depending on their field of study, scholars have demonstrated, for example, that each emotion has a special cultural script associated with it, a concrete area in the brain that it activates, a distinct evolutionary explanation, and typical physical manifestations.²⁰³ One effect of the uniqueness of each emotion that is particularly relevant to our discussion is that it undermines the common belief that emotions are totally subjective and thus can only be proved by relying on people's self-report.²⁰⁴

C. *Integrating Law and Emotions*

The above investigation of how emotions are understood outside of the law is admittedly almost as general as the law's rejection of the emotions. However, applying this information to the legal treatment of emotional harms yields several important conclusions. Most obviously, it is clear that there is no fundamental conflict between law and emotions and thus no *a priori* justification for separating the treatment of emotional harms from all other harms and then denying their basic fit to the remedy of damages. The investigation also clarifies that the legal choice to subordinate the emotions in this particular contractual context is itself irrational, mostly led by a combination of fear and disdain in response to a wrong perception of the nature of emotions. As we have seen, people who cannot process

201. See Robert C. Solomon, *The Logic of Emotion*, 11 NOÛS 41, 46 (1977).

202. See, e.g., Abrams & Keren, *supra* note 129, at 2035.

203. See, e.g., Robert S. Adler et al., *Emotions in Negotiation: How to Manage Fear and Anger*, 14 NEGOT. J. 161, 170, 174 (1998) (providing examples of the physical manifestations that arise through anger and fear); Joseph E. LeDoux, *Emotion Circuits in the Brain*, 23 ANN. REV. NEUROSCIENCE 155, 159 (2000) (noting scholarship that discusses how different areas of the brain are associated with different emotions); Robert Plutchik, *The Nature of Emotions*, 89 AM. SCIENTIST 344, 344 (explaining the theory that emotions have evolutionary roots); Charles D. Spielberger, *Cross-Cultural Assessment of Emotional States and Personality Traits*, 11 EUR. PSYCHOL. 297, 300 (2006) (iterating that cultural differences have a great influence on the assessment of emotions).

204. See *supra* text accompanying notes 148–49 (illustrating how the law avoids self-reporting by using legal responses that distance law from emotions).

emotions suffer from impaired rationality.²⁰⁵ If that is true, why should healthy people, let alone an entire legal system, strive to be able to ignore emotions in order to be considered rational? By now, have we not all read Daniel Goleman's popular best seller *Emotional Intelligence*?²⁰⁶

The legal rule, moreover, wrongly lumps together *all* emotional harms and presumes with no scientific support that they are—without differentiation—subjective, internal, and thus unprovable.²⁰⁷ However, it is precisely this inaccurate treatment of emotions that supports the false impression that emotions are disprovable. Given the accumulating knowledge regarding concrete emotions, we should reject this “one size fits all” negative treatment and pay attention to the injured party's concrete claims and evidence. If the law would attend to concrete claims instead of adhering to sweeping exclusion, much could be gained from drawing on basic common sense. For example, fear-based claims sound reasonable in the case of a breached promise to keep the identity of a girl who reported a dangerous criminal to the police a secret.²⁰⁸ Humiliation-based claims do not. Similarly, humiliation figures in when an employment contract was breached due to racial discrimination, while sadness is credible in a situation where a photographer loses all of a customer's wedding photos. And, once one verifies the rationality of the alleged emotional harm, there are more concrete tools to make sure the claim matches the knowledge about the specific emotion.

Accordingly, a claim for enduring anxiety caused by a breach of contract, for example, may or may not fit with the specific profile of anxiety developed in studies from a variety of disciplines.²⁰⁹ Such knowledge allows parties litigating damages for this specific emotional harm to either prove or disprove the claim that the breach caused significant anxiety that calls for recovery. Since anxiety has been shown to correlate with insomnia,²¹⁰ for example, a medical diagnosis and treatment for insomnia may support the injured party's anxiety-based claim. In one case, for example, a court attentive rather than hostile to emotion-based claims had little difficulty appreciating the fact that symptoms of insomnia, among others,

205. See *supra* text accompanying notes 177–87.

206. See generally DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (2005) (discussing the importance of emotion and the ways in which emotions shape human life).

207. See RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. LAW INST. 1981).

208. See *Keltner v. Washington Cty.*, 800 P.2d 752, 753 (Or. 1990).

209. See Aaron T. Beck et al., *An Inventory for Measuring Clinical Anxiety: Psychometric Properties*, 56 J. CONSULTING & CLINICAL PSYCHOL. 893, 893 (1988).

210. Thomas W. Uhde & Bernadette M. Cortese, *Anxiety and Insomnia: Theoretical Relationship and Future Research*, in ANXIETY IN HEALTH BEHAVIORS AND PHYSICAL ILLNESS 105, 105 (Michael J. Zvolensky & Jasper A.J. Smits eds., 2008).

support a claim of "a high degree of mental pain and distress" and justify a correlating award of damages.²¹¹ And, while I do not suggest here that every injured party arguing emotional harm should undergo fMRI examination, using available technology is certainly an additional, useful measure of proof in appropriate cases. In short, we should treat the matter on equal footing with other claims—themselves not tangible—such as a claim for ongoing headaches or even a lasting harm to reputation, keeping in mind that some of these claims may be credible while others may not.

Overall, a novel argument for abandoning the special treatment of emotional harms under our current law of contracts emerges from integrating the lack of compelling justification for the existing rule with what is increasingly known in other disciplines about emotions. This argument independently calls for a reform along the lines suggested by others before: handling emotional harms just like all other possible harms resulting from a breach and subjecting them to the same general rules of damages.²¹²

A reform that follows these lines²¹³ would have several salient advantages. Most significantly it would benefit injured parties by offering them a recovery much closer to what their situation was prior to the breach. It would also better deter breaching parties from causing emotional harms. Moreover, such reform would make American contract law less outdated, bringing it closer to other Western legal systems that are going through different degrees of liberalization of their treatment of emotional harms.²¹⁴ Finally, since the current state of things is so evidently based on questionable assumptions about the true nature of both emotions and law, a reform would contribute immensely to a more authentic representation of both. The opposite is also true: without a reform the law will continue to send misleading loud and clear signals regarding law, emotions, and their interactions. I turn to this last risk in the coming Subpart.

D. *Devaluing Emotions*

Normatively, it is much more important to end the exclusion of contractual damages for emotional harms than what has been suggested thus far by the rule's opponents.²¹⁵ Taking the law and

211. *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 617–18 (Tex. Ct. App. 2000).

212. See John F. Chmiel, *Damages Recovery for Mental Suffering from Breach of Contract*, 32 NOTRE DAME L. REV. 482, 492 (1957).

213. See *infra* Part V.

214. See, e.g., THE RECOVERY OF NON-PECUNIARY LOSS IN EUROPEAN CONTRACT LAW 1819 (Vernon Valentine Palmer ed., 2015) (describing "increasing acceptance" of the idea of recovery for emotional harms in European law, while also acknowledging "significant national differences" between the twelve European systems investigated).

215. See Cohen & O'Byrne, *supra* note 46, at 98–101.

emotions approach allows us to see how the rule itself is not only shaped by wrong conceptions, motivations, aspirations, and concerns; it is also *actively producing* them.²¹⁶ To recognize this extremely harmful effect,²¹⁷ a shift of focus is indispensable. To answer the question of why the law insists on ostracizing emotional harms, we need to add an investigation of the consequences in the long run. The main difference is between thinking about law as an object, a reflection of external ideas, as opposed to considering the law as a subject, a meaning-producing social institution. Seeing law as an active social agent introduces other new and significant reasons for reform. These reasons, I argue, extend beyond the harm to injured parties, beyond contractual relationship, and even beyond the legal sphere.

By loudly declaring, again and again, that damages for emotional harms are unrecoverable in principle and excluded from the domain of contractual remedies, the law sends out a strong negative message: emotions are insignificant, do not deserve legal attention, and are unreliable; so much so that they should be ignored.²¹⁸ The impact of the message both *within and outside* the legal domain is immense and is rooted in the expressive power of the law.²¹⁹ With its mighty authority and prominence, law has the ability to make individuals internalize the values embodied in the legal message, or at least adjust their behavior in accordance with those values to avoid conflicts.²²⁰ In fact, some legal thinkers have explicitly declared their intention to utilize the law as an educational tool that would teach common people how to become more rational and less emotional.²²¹ At any rate, with or without such deliberation, the exclusionary rule operates to marginalize the emotions far beyond the contractual arena. If contract law chooses to pay no heed to the emotions why should others—from institutions to individuals—treat them differently?

Relatedly, but focusing more on the harm element, the legal message works to minimize the immoral nature of causing others emotional harm. To grasp this effect, it is important to take into account that moral norms, and what counts as a wrongful behavior in

216. See *id.* at 97–98, 104.

217. See *id.* at 100–01.

218. See RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. LAW INST. 1981).

219. Cohen & O'Byrne, *supra* note 46, at 142.

220. See, e.g., Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 607–08 (1998); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

221. Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 301 (1994) (describing Justice Holmes' view that citizens "should be educated" to exercise "rational" behavior).

a given society, are not fixed but rather dynamic and moving. According to the moralization theory introduced by psychologist Paul Rozin, people internalize the changing norms around them and revise their sense of morality accordingly.²²² Rozin's theory defines moralization as "the transformation of a morally neutral activity into one with significant moral weight,"²²³ suggesting that such transformation depends on many social cues.

A leading example of moralization is the case of smoking in public, an activity that used to be a morally neutral activity that was even considered glamorous. Over time, however, accumulating social cues—such as the design of cigarette packages and hotels with smoke-free floors—have given smoking in public a moral meaning.²²⁴ Currently, this activity has turned into something that has the power to elicit moral emotions such as disgust, shame, and guilt—a clear mark of becoming a moral-laden activity, hence a product of moralization.²²⁵ Significantly, Rozin also describes the inverse process which he calls "amoralization": when social cues work to *disassociate* an activity from its former immoral meaning.²²⁶ A leading example of such amoralization is the increasing social acceptance of homosexuality, a process influenced by a variety of social cues including books, movies, toys, and even wedding cakes.²²⁷

Most pertinent to the current discussion, law plays an important role in processes of moralization and amoralization.²²⁸ With its unique ability to articulate norms, publish them, enforce them broadly, and, most importantly, change them over time, the law is a forceful supplier of social cues that influence the meaning we attach to activities and behaviors. In the moralization of public smoking, for example, legal regulations limiting and sanctioning the activity, as well as the taxation of cigarettes, have played a major role in making the activity morally objectionable.²²⁹ Similarly, in the amoralization of homosexuality, legally forbidding discrimination on the basis of

222. Paul Rozin, *The Process of Moralization*, 10 PSYCHOL. SCI. 218, 218 (1999).

223. Allan M. Brandt & Paul Rozin, *Introduction*, in MORALITY AND HEALTH 1, 10 (Allan M. Brandt & Paul Rozin eds., 1997).

224. See *id.* at 219–20.

225. For a fuller description, see Hila Keren, *Guilt Free Market? Unconscionability, Conscience, and Emotions*, 2016 BYU L. REV. 426, 473.

226. Steve Pinker, *The Moral Instinct*, N.Y. TIMES MAG. (Jan. 13, 2008), <https://www.nytimes.com/2008/01/13/magazine/13Psychology-t.html>.

227. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018).

228. See Cass R. Sunstein, *Some Effects of Moral Indignation on Law*, 33 VT. L. REV. 405, 405–06 (2008).

229. See Paul Rozin & Leher Singh, *The Moralization of Cigarette Smoking in the United States*, 8 J. CONSUMER PSYCHOL. 321, 321, 323 (1999).

sexual orientation²³⁰ and recognizing same-sex marriage²³¹ have been highly influential. In both the moralization and amoralization processes, the updated legal norms are not only acts that reflect and formalize an earlier change of the social norms. Rather, they are influential tools that participate in *creating* and *shaping* modifications of the social norms.

Accordingly, the rule that awards damages for all contractual harms but not for emotional harms contributes to the amoralization of behaviors that cause the latter harms. If harming others is generally immoral and typically elicits moral emotions such as regret in the harming party and indignation in the injured party, then the law's unwillingness to award recovery for emotional harms signals that "nothing happened." Or, as suggested by Seana Shiffrin, the lack of recovery is one of the hallmarks of contract law's divergence from morality.²³² Consider, for example, a car accident in which the drivers step out of their respective cars, examine them, and if they see no visible harm, quickly report to each other and to their family and friends that luckily "nothing happened." In this common example shock, fear, and lingering anxieties are disregarded. Even if one of the drivers clearly and admittedly caused the accident, say by driving too fast, this driver can walk away feeling that no real harm was done, a feeling fostered by the fact that without more no duty to compensate follows.

In this way, the lack of remedy for causing an emotional harm makes the behavior morally-neutral and thus more acceptable not only legally but also socially.²³³ In a gradual process, this moral neutrality is being internalized by individuals, perhaps explaining the lack of pressure to revise the law. This last point is comparable to the amoralization of homosexuality where the legal changes have proven as influential in swaying the opinions of potential opponents, thereby decreasing the likelihood of a counter-reform. And, as this example shows, not all processes of amoralization are problematic or undermining the importance of our emotions.²³⁴ However, the

230. See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 351–52 (7th Cir. 2017).

231. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

232. Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722–23 (2007).

233. See Keren, *supra* note 225, at 474–75.

234. Neither are all processes of moralization positive. See, e.g., Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 352–59 (2008) (describing uses of law to make abortion decisions immoral, for example by eliciting emotions towards the embryo via obligatory ultra sound exam prior to the performance of the procedure).

amoralization of breaching contracts while causing emotional harms creates such effect.²³⁵

Finally, in concert with the process of amoralization, the lack of remedy for emotional harms also impedes the working of important moral emotions such as empathy and guilt.²³⁶ In projecting the unimportance of emotional harms, the legal rule makes it harder for people to *feel* and thus to *think* (as we have seen the processes are intertwined) empathy toward parties who suffer emotional harms. It also impairs much of the guilt²³⁷ that breaching parties might feel. Such guilt naturally arises from both causing harm to others and realizing that a moral norm has been transgressed but a legal release from liability counters the processes.²³⁸

The danger here is twofold. First, the law operates at the affective level to encourage rather than discourage the contractual infliction of emotional harms.²³⁹ This is because moral emotions highly influence behavioral decisions to act or refrain from acting.²⁴⁰ Consequentially, without considering the other party's emotions empathetically and without anticipating the unpleasantness of guilt more parties would engage in breaches that cause emotional harm.²⁴¹ Second, and more broadly, lowering the levels of empathy and guilt carries very negative social consequences.²⁴² As many emotion theorists from a variety of disciplines have explained, empathy and guilt, like other moral emotions, work "in the service of socialization"²⁴³ and are designed to keep humans together by preventing antisocial behaviors motivated by short-term selfishness.²⁴⁴ Therefore, a rule of law that interrupts the prosocial operation of key moral emotions has troubling outcomes.

235. See Keren, *supra* note 225, at 457 (arguing that by only considering the financial consequences of breaching a contract, courts encourage selfish behavior).

236. See *id.* at 465–66.

237. Other moral emotions that may be involved include shame and regret. See, e.g., *id.* at 462 (explaining that shame, regret, and guilt impact an individual's decisions of legal consequence).

238. See, e.g., *id.* at 476–80 (discussing how a court's failure to remedy fraudulent actions by a bank "hinders the emergence of the type of guilt that may arise from the clash between such behavior and the pertaining social norms").

239. See *id.* at 457.

240. See *id.* at 469.

241. To a similar effect caused by legal enforcement of predatory contracts, see *id.* at 470–71.

242. See *id.* at 476–80.

243. See, e.g., Paul Rozin, *Moralization, in MORALITY AND HEALTH*, *supra* note 223, at 379, 384 (Allan M. Brandt & Paul Rozin eds., 1997).

244. See *id.* at 384–85.

E. Summary

The contractual rule that generally excludes recovery for emotional harms is premised on an ongoing resistance to emotions. Such resistance is motivated by attempts to establish, maintain, and restore legal authority by strengthening the apparent association between law and rationality. However, to accomplish this image, the law has erroneously described the emotions as one homogeneous body of responses that are irrational.²⁴⁵ The resulting legal rule is therefore erroneous enough, I argue, to add to the debate regarding the justification of the rule the one dimension that should tip the scales in favor of a reform. But I also argue more than that.

The same contractual rule is not only irrational and harmful to injured parties who remain undercompensated, but it is also *causing* broader harms that spread outside of law.²⁴⁶ With significant authoritative power, such a rule portrays the emotions negatively and marginalizes their individual and social importance. It also operates to legitimize the behavior of causing emotional harms to others by strongly signaling that there is nothing immoral about it. Even if more abstract, these far-reaching problems augment the previous emotion-based new analysis of the rule and its justifications. Together, I believe, the arguments offer a fresh and meaningful support for including, rather than excluding, recovery for emotional harms.

And yet, while I hope that adding the perspective of law and emotions would be forceful enough to offer sufficient support for a change, I fear that it still does not convey how *urgent* such change is. To clarify why a reform is not only imperative but also especially pressing, I turn now to an unmapped territory. In what comes next, I argue that while the exclusionary rule remained untouched and the debate has stood in place a new common sense has emerged: *neoliberalism*. Critically, this recent dominance of neoliberal logic has brought about radical changes in the conceptualization of emotions. Identifying and accounting for this shift should elucidate why regularly allowing damages for emotional harms is a particularly burning issue.

IV. HOW NEOLIBERALISM ESCALATES THE PROBLEM

The rise of *neoliberalism* in the last few decades turns contract law's lack of redress for most emotional harms into an acute problem. Neoliberal rationality, further explained below, adds significant economic and social dimensions to any harms to the emotions that, to the best of my knowledge, have not been accounted for by legal

245. See Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in *THE PASSIONS OF LAW*, *supra* note 140, at 123, 129.

246. See Keren, *supra* note 225 at 474–75.

scholars. The escalation of the problem is grounded in a major ideological reconfiguration of what emotions are and why they matter for *individuals' success*. In a nutshell, neoliberalism treats emotions as a new type of personal property that represents a significant part of people's human capital.²⁴⁷ Consequently, in today's hypercompetitive neoliberal world, emotions are considered an integral part of what is necessary to be a winner rather than a loser.²⁴⁸ This, I argue, makes the exclusionary rule regarding emotional harms much more devastating than before, thereby less tolerable and more in need of amendment. Further, I argue that neoliberalism's negative impact on a special group of emotions, namely the moral emotions, adds a new, important reason for the law to make breaching parties responsible for the emotional harms they cause their contractual partners.

A. *The Economization of Emotions*

Before exploring how neoliberalism has changed the conceptualization of emotions, let me briefly introduce it, because although many seem to know that we live in the midst of the neoliberal age, the meaning of the term continues to be vague. Neoliberalism is a worldview, a political project, an ideology, or a method of governmentality that sophisticatedly gains much of its power from escaping easy definition that grasps all its practices.²⁴⁹ That may explain why the neoliberal impact remains for the most part out of sight and out of mind.²⁵⁰ What is important to appreciate for the purposes of the current discussion is that the neoliberal project is relatively new—much newer than the debate concerning damages for emotional harms.²⁵¹ Intellectually, neoliberalism may have been founded in Europe by Friedrich Hayek about seventy-five years ago,²⁵² but its *practical* rise in the Anglo-American world is associated more with the 1980s, under the leadership and policies of Margaret Thatcher and Ronald Reagan.²⁵³

Despite its name, neoliberalism is not appropriately comprehended as merely an updated version of liberalism's belief in *laissez-faire* and free markets. Although market-oriented policies (i.e., privatization, trade and financial liberalization, deregulation)

247. See Sugarman, *supra* note 6.

248. See *id.*

249. See DAMIEN CAHILL & MARTIJN KONINGS, NEOLIBERALISM 13–14 (2017) (discussing the various definitions of and approaches to neoliberalism).

250. See *id.*

251. MANFRED B. STEGER & RAVI K. ROY, NEOLIBERALISM: A VERY SHORT INTRODUCTION, at viii–ix (2010) (describing the relatively recent development of scholarship dedicated to neoliberalism).

252. See DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS 2–3 (2012).

253. STEGER & ROY, *supra* note 251, at ix.

are certainly a part of any neoliberal agenda,²⁵⁴ the neoliberal project is much more ambitious. To see that, it is important to emphasize that neoliberalism's intentional promotion of market logic and its relentless belief in the power of competition is not limited to the *economic* arena.²⁵⁵ Rather, the neoliberal project deliberately relates to every single aspect of our existence, attributing to all fields of life market metaphors, metrics, and practices.²⁵⁶ As Wendy Brown explains, neoliberalism's effect on "governance and the social is not merely the result of leakage from the economic to other spheres but rather of the explicit imposition of a particular form of market rationality on these spheres."²⁵⁷ Or, as Margaret Thatcher famously declared, under neoliberalism "[e]conomics are the method; the object is to change *the heart and soul*."²⁵⁸

But how can an ideology, or a political project, do that? In brief, neoliberalism's ability to "change the soul" is based on making economic-thinking the new "common sense"—a rationality that applies to all people in all contexts.²⁵⁹ Accordingly, under neoliberalism, previously nonmarket environments are reconfigured to fit market logic, a process branded as "economization."²⁶⁰ Take human flourishing for example. While liberalism is relatively agnostic about what constitutes good human life and respects individual autonomy enough to leave it to people to figure that out, neoliberalism dictates a particular path to human flourishing that is based on an economic model.

The neoliberal economization of everything includes the subjects of neoliberalism; thus people are framed as *human capital* and their goals and means are defined accordingly.²⁶¹ On this view, personal thriving hinges on one's ability to maximize her or his value.²⁶² Furthermore, the maximization process requires an ongoing entrepreneurial behavior that mimics the financial markets.²⁶³ Consequentially, subjects are required to perform series of

254. See Filippo Belloc & Antonio Nicita, *Neo-liberalism, Partisanship, and Public Policies*, 49 *SOC'Y* 444, 444 (2012).

255. See *id.* at 445–46 (describing neoliberalism within the context of politics and policy).

256. See Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 *POL. THEORY* 690, 693–94 (2006).

257. *Id.* at 693.

258. Ronald Butt, *Mrs. Thatcher: The First Two Years*, Interview for the Sunday Times, May 3, 1981. Available at <https://www.margaretthatcher.org/document/104475>.

259. See WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION* 35 (2011).

260. See *id.* at 30–31.

261. *Id.* at 31–32, 34.

262. *Id.*

263. See *id.*

“investments” and “transactions” in all areas of life to achieve “appreciation” of their personal worth.²⁶⁴

Importantly, neoliberalism is not, or not only, a top-down project. Throughout the last decades, people have *internalized* the neoliberal logic until it became their own. To use one simple example, many think and say that they need to “invest” more in themselves, their health, and their relationship with others, accepting the economic dynamics of investments and returns *outside* of their financial life. In that way, the neoliberal worldview disseminates itself not only by endless external cues, but also by working from within. It ends up influencing *everything* we do, including not only big decisions such as what to study and where, but also things such as the way we talk,²⁶⁵ what we post on social media, and the way we structure and monitor our diet or workout.

In this multidimensional process of economization emotions are no exception. In direct conflict with the legal rejection of emotional harms specifically because they are *not economic*, neoliberalism has economized the affective domain. The process is multilayered and involves simultaneous reconfiguration of the emotions themselves, their role in our lives, our ability to control them, the relative value of different emotions and more. Tracing the economization of the emotions can therefore shed a new light on the legal refusal to award redress for emotional harms due to their noneconomic nature. In this respect, the following features seem salient.

1. *Framing Emotions as Assets*

Like virtually anything else, emotions are understood under neoliberalism as appreciating or depreciating individuals’ human capital. In this projection of the economic to the emotional, emotions are akin to traditional property: they are assets with fluctuating value. Happiness and hope, for example, have been listed as important “psychological capital,” next to money, education, and professional contracts.²⁶⁶ A recent book, *Affect and American Literature in the Age of Neoliberalism*,²⁶⁷ provides a vivid example of this perception using Jonathan Franzen’s novel, *The Corrections*.²⁶⁸ The novel depicts Gary, a vice president in a local bank, who “manages his emotional life as if it were his stock portfolio: tracking

264. See *id.* at 70–71.

265. Just the other day I asked a student how his weekend was, to which he immediately and proudly answered, “Productive!,” perfectly articulating neoliberal rationality.

266. See FRED LUTHANS ET AL., PSYCHOLOGICAL CAPITAL: DEVELOPING THE HUMAN COMPETITIVE EDGE 3 (2007).

267. See generally RACHEL GREENWALD SMITH, AFFECT AND AMERICAN LITERATURE IN THE AGE OF NEOLIBERALISM (2015).

268. See *id.* at 6–8.

gains in his neurochemistry, keeping a watchful eye on the 'key indices' of his responses to those around him, and warding off any existential musings that might challenge the 'robustness of his *mental economy*.'"²⁶⁹ Framing emotions in a property-like fashion strongly disaffirms the legal refusal to compensate for harming them. From this perspective, harm to the emotions is in no way different than harm, say, to one's car, body, or reputation.

2. *Requiring Affective Labor*

Because in a competitive, neoliberal world individuals are held responsible for maximizing their value using entrepreneurial methods, much effort is expected regarding the management of emotions. As noted by Sam Binkley, neoliberalism demands emotional self-optimization.²⁷⁰ Individuals are required to continuously work to increase their valuable emotions and decrease those that interrupt productivity by engaging in affective self-care, self-investment, and self-transformation.²⁷¹ In this view, emotions are vehicles or tools that can (and should) be used correctly to maximize human capital. Unsurprisingly, and significant to the cost of emotional harms, the requirement of affective labor involves an immense investment of time, energy, focus, and money. For example, to minimize anger, people are called to meditate daily after learning (for a fee) how to do that. Thus, the expectation that subjects would engage in affective labor entails a significant burden on subjects who actually engage in it (as well as a severe toll on those who do not do enough of it).

Moreover, the expected affective labor is seldom short-range and often necessitates creating or changing habits and attitudes in a long-term project by routine work done over a long time. Borrowing from positive psychology practices, people are strongly encouraged, for example, to retrain their brain to acquire *habits* of happiness,²⁷² to commit to a regime of "emotional fitness,"²⁷³ to join a program to

269. *Id.* at 7 (emphasis added).

270. SAM BINKLEY, *HAPPINESS AS ENTERPRISE: AN ESSAY ON NEOLIBERAL LIFE* 59 (2014).

271. Kenny Kline, *Want More Productive Employees? Encourage Self-Care*, HUFFPOST (Feb. 14, 2017, 4:28 PM), https://www.huffingtonpost.com/entry/want-more-productive-employees-encourage-self-care_us_58a3763be4b0e172783aa19e.

272. *See generally* LORETTA GRAZIANO BREUNING, *HABITS OF A HAPPY BRAIN: RETRAIN YOUR BRAIN TO BOOST YOUR SEROTONIN, DOPAMINE, OXYTOCIN, & ENDORPHIN LEVELS* (2016) (teaching habits to boost the release of chemicals in the brain related to happiness).

273. *See generally* ERIC LANGSHUR & NATE KLEMP, *START HERE: A GROUNDBREAKING SCIENCE BASED PROGRAM FOR EMOTIONAL FITNESS* (2016) (providing self-help tips to improve "emotional fitness").

“conquer anxiety,”²⁷⁴ or to develop “the emotional habits that drive success.”²⁷⁵ Evidently, on this point neoliberalism joins science in rejecting common beliefs—adopted by the law—that emotions are transient and thus easily recoverable.

All in all, the magnitude of the affective labor required for self-optimization should be taken into account in the context of the contractual debate regarding emotional harms. We must recognize that when breaching parties cause emotional harms to their counterparties in neoliberal times, these harms are much more significant than before: they inflict on the injured party the duty to invest affective labor in healing themselves from the harm—not only a demanding task but also, as we shall now see, a very expensive one.

3. *Developing an Affective Market*

To manage their emotions in an entrepreneurial and value-maximizing way, people need to consume products and services now offered by a lucrative and rapidly growing *affective market*.²⁷⁶ Consumers and suppliers exchange money for self-help books,²⁷⁷ online and onsite courses,²⁷⁸ emotion coaching series,²⁷⁹ training sessions,²⁸⁰ mindfulness classes,²⁸¹ happiness and gratitude journals,²⁸² and even smartphone apps designed to improve the mood

274. See generally DANIEL G. AMEN, *CHANGE YOUR BRAIN, CHANGE YOUR LIFE: THE BREAKTHROUGH PROGRAM FOR CONQUERING ANXIETY, DEPRESSION, OBSESSIVENESS, ANGER, AND IMPULSIVENESS* (1998) (teaching habits to lessen negative emotions, including anxiety).

275. See generally STEVE WILLIAMS, *GRIT, DISCIPLINE, PERSEVERANCE: THE EMOTIONAL HABITS THAT DRIVE SUCCESS* (2016) (providing self-help, mental tips to improve personal success).

276. See Deborah Weinswig, *Wellness Is the New Luxury: Is Healthy the Future of Retail?*, FORBES (June 30, 2017, 4:09 PM), <https://www.forbes.com/sites/deborahweinswig/2017/06/30/wellness-is-the-new-luxury-is-healthy-and-happy-the-future-of-retail/#1fd65e938323>.

277. Amanda Pena, *11 of the Most Popular Self-Help Books on Amazon Right Now*, HUFFPOST (Aug. 18, 2017, 12:09 PM), https://www.huffingtonpost.com/entry/most-popular-self-help-books-on-amazon_us_599679c4e4b01f6e801dba60.

278. See Anne Kadet, *Meditation Without the Gurus at Inscape's High-Tech Studio*, WALL ST. J. (Nov. 7, 2017, 10:00 AM), <https://www.wsj.com/articles/meditation-without-the-gurus-at-inscapes-high-tech-studio-1510066800>.

279. See Christine Comaford, *The Secret to Controlling Your Emotions—Before They Control You*, FORBES (Oct. 15, 2017, 9:01 AM), <https://www.forbes.com/sites/christinecomaford/2017/10/15/the-secret-to-controlling-your-emotions-before-they-control-you/#5bd5928c37de>.

280. Kadet, *supra* note 278.

281. See, e.g., Sophia Hollander, *Schools Rethink Health Class, Incorporate Mindfulness Training*, WALL ST. J. (May 10, 2015, 9:09 PM), <https://www.wsj.com/articles/schools-rethink-health-class-incorporate-mindfulness-training-1431306596>.

282. See Jane E. Brody, *A Positive Outlook May Be Good for Your Health*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/well/live/positive-thinking-may-improve-health-and-extend-life.html>.

on-the-go.²⁸³ This affective market is enlarged and supported by leading corporations that consume affective products and services to enhance the productivity of their workers.²⁸⁴ Google, for example, has appointed an in-house “jolly good fellow” to spread mindfulness and empathy.²⁸⁵ In this market, emotions and emotional skills are for purchase and sale. Furthermore, some of the affective products are designed to facilitate additional affective labor, such as a book offering buyers “A 21-Day Program for Creating Emotional Prosperity.”²⁸⁶ Significant to the debate regarding contractual damages, no one active in this market has a problem quantifying in dollars and dimes the worth of products and services designed to improve one’s emotional state.

4. *Prioritizing Positive Emotions*

Restructuring emotions as part of human capital together with expecting maximization of affective value via entrepreneurial approach, affective labor, and consumption of emotion-related products, all create or enhance a sharp distinction between positive and negative emotions. The distinction is not neutral, but rather is heavily biased towards the positive emotions. Positive emotions are celebrated as a key to success while negative emotions are presented as standing in the way. While neoliberalism is of course not the first to notice the value of the positive emotions, it strategically uses the knowledge accumulated in the field of positive psychology to promote its own goals, often supplementing this strategy with tools “colonized” from Buddhist mindfulness.²⁸⁷

Recall that Thatcher announced that neoliberalism’s goal is to change the heart and soul.²⁸⁸ To this Binkley adds the affective method used by neoliberalism, a method that heavily relies on the positive emotions.²⁸⁹ He explains how coaches, advisors, and

283. Sumathi Reddy, *From Meditation to Medication: Headspace has a Prescription Strategy*, WALL ST. J. (June 25, 2018, 9:57 AM), <https://www.wsj.com/articles/from-meditation-to-medication-headspace-has-a-prescription-strategy-1529935032>.

284. Dacher Keltner, *Don’t Let Power Corrupt You*, HARV. BUS. REV., Oct. 2016, at 108, 109 (“Studies show that spending just a few minutes a day on [mindfulness practices] gives people greater focus and calm, and for that reason techniques for them are now taught in training programs at companies like Google, Facebook, Aetna, General Mills, Ford, and Goldman Sachs.”).

285. WILLIAM DAVIES, *THE HAPPINESS INDUSTRY: HOW THE GOVERNMENT AND BIG BUSINESS SOLD US WELL-BEING* 3 (2015).

286. ROBERT A. EMMONS, *GRATITUDE WORKS!: A 21-DAY PROGRAM FOR CREATING EMOTIONAL PROSPERITY* (2013).

287. Joanna Cook, *Mindful in Westminster: The Politics of Meditation and the Limits of Neoliberal Critique*, 6 HAU: J. ETHNOGRAPHIC THEORY 141, 143 (2016).

288. Butt, *supra* note 258.

289. See BINKLEY, *supra* note 270, at 4–5 (examining happiness, “the very leitmotif of neoliberal life itself,” through the lens of positive psychology).

consultants “have turned to the positive psychology brand as the elixir for all that ails the modern organizational soul.”²⁹⁰ Similarly, in her book *Bright Sided: How the Relentless Promotion of Positive Thinking Is Undermining America*, Barbara Ehrenreich links the compulsory optimism implicit within the happiness discourse fostered by neoliberalism to the ideology of capitalist growth.²⁹¹

Importantly, the neoliberal prioritization of the positive emotions actively seeks to ostracize the negative emotions. To this end, the affective market offers, for example, books that celebrate the many advantages of happiness,²⁹² and promise joy on demand,²⁹³ alongside books that promise emotional freedom via liberation from negative emotions,²⁹⁴ and call for people to escape toxic guilt.²⁹⁵ The relentless neoliberal pressure to seek and retain positive emotions while deflecting negative emotions accentuates the hierarchy and enlarges the gap between positive and negative emotions. Notably, the neoliberal charge to get rid of negative emotions and restore a positive mindset operates to enhance any emotional harm caused by a breach of contract beyond its original magnitude. In other words, this too makes emotional harms significantly more harmful than before.

5. Summary

Taken together, the neoliberal reconfigurations in the affective domain create a deep metamorphosis that repudiates all the assumptions underlying the denial of contractual recovery in the case of emotional harms. Under neoliberalism, emotions are *the opposite of* economically worthless, impulsive, transient, uncontrollable, impossible to quantify, trivial, or incompatible with market logic in any other way. They are also not all the same. From the individualized and economized position of neoliberalism, negative emotions of the kinds typically caused by breach of contract, including anxiety, fear, frustration, sadness, depression, or humiliation, are major obstacles to success. More than ever before, then, emotional harms are harms to one’s capital that may be severe and need to be compensated. By this conclusion, I do not mean to embrace neoliberalism’s framing of the affective domain but only to reveal and

290. *Id.* at 29.

291. See BARBARA EHRENRICH, *BRIGHT SIDED: HOW THE RELENTLESS PROMOTION OF POSITIVE THINKING IS UNDERMINING AMERICA* 8 (2009) (observing how positive thinking drives society’s capitalistic hunger for consistent growth).

292. See SHAWN ACHOR, *THE HAPPINESS ADVANTAGE: THE SEVEN PRINCIPLES OF POSITIVE PSYCHOLOGY THAT FUEL SUCCESS AND PERFORMANCE AT WORK* (2010).

293. See CHADE-MENG TAN, *JOY ON DEMAND: THE ART OF DISCOVERING THE HAPPINESS WITHIN* (2017).

294. See JUDITH ORLOFF, *EMOTIONAL FREEDOM: LIBERATE YOURSELF FROM NEGATIVE EMOTIONS AND TRANSFORM YOUR LIFE* (2010).

295. See SUSAN CARRELL, *ESCAPING TOXIC GUILT: FIVE PROVEN STEPS TO FREE YOURSELF FROM GUILT FOR GOOD!* (2007).

introduce its salient impact on our discussion. The following Subpart offers some critical thoughts about this dramatic shift but nevertheless contends that they too support a reform that regularly allows contractual damages for emotional harms.

B. *Impeding the Moral Emotions*

In all capitalist societies the market is a site of competition, but under neoliberalism, life in general is a fierce competition between individuals.²⁹⁶ For that reason, people have to instrumentally use *all* of their assets—*affective* assets included—to get ahead of others and keep their place with the winners. This intense pressure has many negative consequences that are beyond the scope of this discussion, but one is particularly relevant here: an *antisocial* reorientation of the emotions. Let me explain.

Neoliberalism articulates the ultimate goal of engaging in affective labor and consumption of affective market in a strategic way.²⁹⁷ Being relieved from personal suffering or experiencing joy and happiness are not goals in and of themselves but rather they are reordered as *means*.²⁹⁸ The claim is that with affective labor and affective consumerism, one can gain better productivity, increased focus, and more resilience—all needed for achieving success.²⁹⁹ Following this approach, even emotions that formerly were explained as valuable because of their pro-social effects are converted into *self-promoting tools*. Misappropriating messages coming from positive psychology and the mindfulness movement, neoliberalism demands individuals to be positive and present to optimize themselves.³⁰⁰ Neoliberalism also fosters the opposite idea, attributing falling behind in the competition of life to failing to utilize the emotions efficiently towards the goal of personal success. This is, in fact, a part of a general signature practice of neoliberalism called “responsibilization,” an imposed process under which, as Margaret Thatcher famously stated, “there is no such thing as society,”³⁰¹ and instead responsibility is imposed solely on individuals.³⁰² A recent example of such responsibilization in the affective domain that

296. See BINKLEY, *supra* note 270, at 23 (noting that neoliberalism transforms society into the “image of the market” and emphasizes individual competition).

297. See Cook, *supra* note 287, at 142–43.

298. See, e.g., BINKLEY, *supra* note 270, at 103 (identifying exuberant happiness as a “resource for further success”).

299. See *id.* at 21–22.

300. *Id.* at 59.

301. *Interview with Margaret Thatcher for Woman’s Own*, MARGARET THATCHER FOUND., <https://www.margareththatcher.org/document/106689> (last visited Sept. 15, 2018).

302. BROWN, *supra* note 256, at 133 (explaining how people are being “responsibilized” because neoliberalism, for its own political goals, “solicits the individual as the only relevant and wholly accountable actor”).

received much attention was the statement of the current Secretary of Housing and Urban Development, Ben Carson, according to whom poverty is “a state of mind.”³⁰³

Reoriented as self-regarding tools that either promote or inhibit personal success, many emotions that so far have been explained by their ability to encourage pro-social behavior are losing the content that made them socially effective. For example, gratitude is no longer perceived as an enhancer of reciprocal social giving and receiving, but rather as a mechanism to shift our personal focus from the frustrating parts to the better segments of our reality. This emotion is worthwhile because it serves individual goals efficiently and the entire market of gratitude products, from self-help guides to journals and coloring books, is based on *self-centered incentives*.³⁰⁴ Without a doubt, when it comes to gratitude, the current focus is no longer to keep us closer to each other.

Similarly, empathy and compassion (defined as “empathy in action”³⁰⁵) are no longer engendered by the suffering of others or directed to alleviate that suffering. Rather, neoliberal rationality and its marketing efforts have made empathy and compassion much more inward-looking, rearticulated as self-compassion and understood as a call to treat the self and its suffering with kindness. Under neoliberal demand, the affective market is now supplying, for example, books titled *Self-Compassion: The Proven Power of Being Kind to Yourself*,³⁰⁶ or *The Mindful Path to Self-Compassion: Freeing Yourself from Destructive Thoughts and Emotions*,³⁰⁷ and even a workbook offering *A 14-Day Plan to Transform Your Relationship with Yourself*.³⁰⁸

To further illustrate, my review of academic work included in the database of Google Scholar reveals an enormous increase in the amount of scholarly publications that include the term “self-compassion.” During the three decades before neoliberalism’s popular effect—around the mid-1980s—the term appeared in 6 to 25 publications per decade.³⁰⁹ Next, it appeared in 111 publications

303. Yamiche Alcindor, *Ben Carson Calls Poverty a ‘State of Mind,’ Igniting a Backlash*, N.Y. TIMES (May 25, 2017), https://www.nytimes.com/2017/05/25/us/politics/ben-carson-poverty-hud-state-of-mind.html?_r=0.

304. See, e.g., EMMONS, *supra* note 286 (teaching emotion-centric habits to increase success and personal happiness).

305. For the purposes of this Article, “empathy in action” is the working definition of the term “compassion.”

306. KRISTIN NEFF, *SELF-COMPASSION: THE PROVEN POWER OF BEING KIND TO YOURSELF* (2015).

307. CHRISTOPHER K. GERMER, *THE MINDFUL PATH TO SELF-COMPASSION: FREEING YOURSELF FROM DESTRUCTIVE THOUGHTS AND EMOTIONS* (2009).

308. TIM DESMOND, *THE SELF-COMPASSION SKILLS WORKBOOK: A 14-DAY PLAN TO TRANSFORM YOUR RELATIONSHIP WITH YOURSELF* (2017).

309. 1951 to 1965: 6 publications, 1966 to 1975: 16 publications, 1976 to 1985: 25 publications. It is possible of course that the results reflect not only the

between 1986 and 1995, and 410 publications between 1996 and 2005. Then, in the years between 2006 and 2015, the number of publications that include the term “self-compassion” reached a pinnacle of 9,230 and it seems to continue to rapidly rise.³¹⁰ Interestingly, and also particularly relevant to the challenge of quantifying emotions, an American researcher has developed the “Self-Compassion Scale” to measure self-compassion, a scale that now has many national variations around the globe.³¹¹

Importantly, the same self-centered approach applies to the negative emotions. For example, under neoliberalism, feelings of guilt are to be suppressed and avoided as suggested by another set of affective products such as books entitled *Escaping Toxic Guilt*³¹² or *No Regrets*.³¹³ Under such framing, negative emotions are a burden and obstacles to success. In a fiercely competitive world it is “normal,” if not necessary, to do whatever it takes to succeed, even at the cost of ignoring the needs of fellow humans or even harming them.³¹⁴

As may be evident by now, recognizing that moral emotions such as empathy and guilt are losing their prosocial content under the dominance of neoliberalism is of great relevance to our discussion. I

increasing popularity of the term “self-compassion” but also other differences relating to the availability of technology and its impact on the structure and coverage of Google Scholar’s database. To offset some of these other causes, I also searched the amount of publications using the word compassion for the same decades. Here are the results: 1931 to 1940: 2,350 publications, 1941 to 1950: 3,270 publications, 1951 to 1960: 6,380 publications, 1961 to 1970: 15,700 publications, 1971 to 1980: 18,300 publications, 1981 to 1990: 36,000 publications, 1991 to 2000: 185,000 publications, 2011 to 2017 (only 6.5 years): 126,000 publications. The results for “compassion” alone therefore show a much more moderate increase than the increase of use of “self-compassion.” I additionally calculated the percentage of the publications that used “self-compassion” out of those that used “compassion.” Notably, the ratio remained under 1% along all periods until the last period. A pick percentage of 9% of the publications using compassion used “self-compassion” in between 2011 and 2017. Search for inclusion of term “self-compassion” in scholarly publications, GOOGLE SCHOLAR, https://scholar.google.com/scholar?as_q=&as_epq=self-compassion&as_oq=&as_eq=&as_occt=any&as_sauthors=&as_publication=&as_ylo=&as_yhi=&hl=en&as_sdt=0%2C34 (last visited Sept. 15, 2018).

310. The number of publications seems to grow much faster in the last few years, with 8,750 publications since 2013. *Id.*

311. Kristin D. Neff, *The Self-Compassion Scale is a Valid and Theoretically Coherent Measure of Self-Compassion*, 7 MINDFULNESS 264, 264 (2016) (reviewing the development of the Self-Compassion Scale and discussing applications of the Scale in Japan, Iran, China, Spain, Germany, Korea, Greek, and Italy); see also Kristen D. Neff, *The Development and Validation of a Scale to Measure Self-Compassion*, 2 SELF & IDENTITY 223, 228 (2003) (explaining the operation of the Self-Compassion Scale).

312. CARRELL, *supra* note 295.

313. HAMILTON BEAZLEY, NO REGRETS: A TEN-STEP PROGRAM FOR LIVING IN THE PRESENT AND LEAVING THE PAST BEHIND (2004).

314. BROWN, *supra* note 256, at 9–10.

earlier discussed the negative impact of the exclusionary rule on the moral emotions, arguing that the lack of remedy for emotional harms legitimizes causing them and more broadly weakens the known ability of moral emotions to protect society from highly destructive acts of selfishness.³¹⁵ To that it is important to add the effect of neoliberalism and the way in which it exacerbates these problems.

Neoliberal responsabilization stages injured parties who have suffered emotional harms as responsible to heal themselves via affective labor and with the help of affective products, making them even less deserving of empathy from others. Similarly, the neoliberal pressure to “escape toxic guilt” and have “no regrets” liberates breaching parties to pursue their interests regardless of any consequential emotional harms to others. In short, in this neoliberal version of the Darwinian survival of the fittest, causing emotional harms to others may seem even more acceptable than before. However, in the long run, the egocentric turn of the emotions is threatening our social survival. Indeed, as part of his profound criticism of neoliberalism, the British writer George Monbiot claimed that we are “falling apart” because “we have destroyed the essence of humanity: our connectedness.”³¹⁶ Realizing how the impact of neoliberalism in the affective arena threatens to fray our social fabric is of the utmost importance to the debate over whether or not contractual remedies should include damages for emotional harms. A law that releases contractual partners from reciprocal responsibility for each other’s emotions allows and encourages breaching parties to act selfishly and be careless about others’ emotions at times when, more than ever, our joint interest is to cultivate connectedness. How to do this in the context of contractual remedies is discussed next.

V. VALUING EMOTIONS: AN URGENT REFORM

If neoliberalism is distancing people from each other, pressuring them to compete with others and impeding the prosocial operation of key emotions, then the law should be utilized *to counter* the process. When the maximization of human capital puts us in an individualized survival mode that requires that our emotions be used as competitive tools at the risk of losing our connectedness, the law cannot continue to disregard the consequences and leave the harms with the injured parties. Under these circumstances, a reform becomes more crucial than ever. A good place to start such a reform is in defining goals. A revision of the law pertaining to contractual recovery for emotional harms should not only aim to satisfy the expectation interest of

315. See *supra* notes 88–97 and accompanying text.

316. George Monbiot, *Falling Apart*, GUARDIAN (Oct. 14, 2014), <https://www.monbiot.com/2014/10/14/falling-apart/>.

injured parties, although this would certainly be a welcome change.³¹⁷ Rather, in light of the negative impact of the current rule on the emotions and on social interconnectedness, the goal should be broader.

Going back to Hobbes' social contract might help. Under this social contract "a band of otherwise warring brothers turns power over to a political sovereign, so as to better the chances of their own survival and to better protect their wealth from the aggression of each other."³¹⁸ In other words, under this contract the political sovereign, and hence the state, via its laws, has an obligation to increase the chances of society's survival by protecting it from overly aggressive behavior. Generally, framing the law as an important guard of social survival makes it clearer that in order to perform its obligations under the social contract, the law must carefully attend to all selfishly motivated aggressions.³¹⁹ This broad goal should include the affective domain due to the central role of emotions, and particularly the moral emotions, in keeping human societies together.

The difference between defining goals narrowly and broadly is that only the broad definition demands attention to the *message* of the law and to the way the message might be understood by the law's subjects. For merely doing a better job in protecting the interests of injured parties it may be enough to argue, for example, that the exception to the exclusionary rule should be considerably expanded to include all cases in which the emotional "result"—such as pleasure or peace of mind—was bargained between the parties. Indeed, this is the trajectory of processes of liberalization of contractual damages reported in some other legal systems.³²⁰ However, where the problem is deeper—as I have argued here both by focusing on the status of emotions and by recognizing changes brought about by neoliberalism—then the reform should go further. Much further.

First, emotions should not be singled out because, in our world, separate tends to be unequal. All harms caused by a breach should be treated under the same set of rules. One of the pragmatic difficulties is of course that the common law itself is scattered between jurisdictions and by its own structure resists change. However, the *Restatement (Second)*—drafted and redrafted from time to time—can and should be rewritten. Although it is true that courts around the country too often refuse to award emotional damages, it is

317. William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L. J. 629, 664 (1999) (explaining that "the fact that nonbreaching parties typically may not recover for emotional distress" is part of the reason that "expectation damages generally fail to compensate the nonbreaching party fully").

318. Robin West, *Law's Emotions*, 19 RICH. J.L. & PUB. INT. 339, 347 (2016).

319. *See id.*

320. THE RECOVERY OF NON-PECUNIARY LOSS IN EUROPEAN CONTRACT LAW, *supra* note 214, at 18–19.

also a fact that exceptions are so diverse and arbitrary that there is no need, and in fact no justification, to generalize and "restate" the resulting maze in a way that is so bluntly hostile to emotions.³²¹ Indeed, some opponents of the exclusionary rule have argued that, in reality, it is doubtful whether such a rule even exists.³²² Moreover, many of the cases denying damages can be explained and sometimes are explained by the usual rules pertaining to all other harms.³²³

Second, treating emotional harms equally to other harms requires not only abandoning the exclusionary rule but also carefulness in applying what is called the general rules of damages. Opponents of the exclusionary rule have suggested applying the *Hadley v. Baxendale* rule, but some nuanced analysis is needed if we are to avoid going back to the traditionalist hostility to emotions. Although my argument here may sound doctrinal or even technical, my goal is not at all that. Rather, I would propose that a deep reform should recognize that many times—and especially in our neoliberal age—people make emotions part of their bargain. This inclination should be taken into account before we follow the previously made recommendation to apply *Hadley v. Baxendale* to emotional harms.

The rule coming out of *Hadley v. Baxendale* operates to *limit* damages that are specific to the complaining injured party and follow from this party's unique situation.³²⁴ Although the case *mentions* the right for recovery for harms flowing "naturally" and "usually" from the breach,³²⁵ it only does so to explain that there are two—not one—bases for awarding damages and that the case itself does *not* belong with the first kind ("usual" harm) but rather to a concrete vulnerability of the injured party that the court called "special circumstances."³²⁶ Now, those two arms of *Hadley v. Baxendale* are sometimes confused by its followers.³²⁷ The problem is that in the context of emotional harms the confusion often ends up preventing recovery because of an inclination to see emotional harms as a

321. See RESTATEMENT (SECOND) OF CONTRACTS § 353 (AM. LAW INST. 1981).

322. See Whaley, *supra* note 95, at 946.

323. See, e.g., *Sullivan v. O'Connor*, 296 N.E.2d 183, 189 (Mass. 1973) (explaining that in the case of the disfigured nose, recovery for emotional damages were allowed under the bodily harm exception to the exclusionary rule or as an application of the usual rule of *Hadley v. Baxendale*).

324. Andrew Tettenborn, *Consequential Damages in Contract—The Poor Relation?*, 42 LOY. L.A. L. REV. 177, 179, 182 (2008).

325. *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145; 9 Ex. Ch. 341.

326. *Id.* The injured party ran a mill without having a spare crank shaft, which was required in order for the mill to operate. *Id.* The crank shaft broke and had to be sent for repair which resulted in the extend closure of the entire mill. *Id.* This closure was not a natural result because, apparently, other mills often owned a spare shaft. *Id.* Thus, the court's decision relates to specific damages and sets the rule that those damages must be foreseeable to deserve legal redress. *Id.*

327. See Tettenborn, *supra* note 324, at 182.

product of personal, hence specific, damage.³²⁸ By now it should be clearer why such inclination has more to do with misguided beliefs regarding emotions than anything else.

Admittedly, emotional harms are *sometimes*—but importantly not always—specific, or as they are frequently called “consequential.”³²⁹ If this is the case, then recovery for such specific emotional harms should indeed be limited under the principle set in *Hadley v. Baxendale*, namely foreseeability. In building contracts for commercial purposes, for example, the breach may or may not result in emotional harm depending on the injured party’s specific circumstances. Recovery, then, should hinge justifiably on a specific foreseeability of this type of damage. However, there is no justification to apply the same limitation to emotional harms that are, to use *Hadley v. Baxendale* language, “usual.”³³⁰ Negative results that typically follow from a given breach regardless of any circumstances specific to the injured party, also called “direct” or “general” losses,³³¹ are by nature foreseeable and thus should not depend on special awareness of the breaching party. Therefore, in our context, when an affective result was part of the bargain the damages should not be limited by special foreseeability because the emotional harm caused by nonperformance is, by definition, foreseeable.³³²

To return to cases introduced earlier, when a hospital breaches its obligation to care for vulnerable family members—a young child³³³ or an aging mother³³⁴—the respective long-term emotional harms of anxiety or sadness to the family members who contracted with the hospital are not consequential but rather general. Similarly, relatives who paid for funeral and burial services of their deceased loved ones would generally and directly suffer emotional harms in cases of visible damage to the corpse.³³⁵ The same goes for building contracts of residential homes where the injured party ends up living in the defective house.³³⁶ The fact that severe defects can cause emotional harms to those living inside the house is general and does not depend on any particular circumstances.³³⁷

328. *Id.* at 182–83.

329. *Id.*

330. *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145; 9 Ex. Ch. 341.

331. Tettenborn, *supra* note 324, at 183.

332. *Id.* at 183–84 (explaining that “foreseeability does not form a serious barrier to claims for direct, as compared to consequential, loss”).

333. *Johnson v. Jamaica Hosp.*, 467 N.E.2d 502, 502 (N.Y. 1984).

334. *Oresky v. Scharf*, 510 N.Y.S.2d 897, 897 (N.Y. App. Div. 1987).

335. *Christensen v. Super. Ct.*, 820 P.2d 181, 183 (Cal. 1991).

336. *Erlich v. Menezes*, 981 P.2d 978, 987 (Cal. 1999).

337. *Id.*; see also *Farley v. Skinner* [2001] 2 AC 732 (HL) (appeal taken from Eng.) (purchasing a house near the Gatwick airport caused distress but did not cause diminution of value).

To clarify again, my point is more than doctrinal. The assumption that emotional harms are specific has expressive consequences that go beyond the practical results of cases. Consider, for example, the rhetoric of the following Canadian decision, while particularly noting the underlined words:

My conclusion is that the determination of a claim for mental suffering or distress in a breach of contract suit must begin with the application of the rule in *Hadley v. Baxendale*. The rule has within it the means to test and limit liability where the claim arises through special circumstances, which will be the usual case with mental suffering or distress. The contract must be made on the basis of those special circumstances being known to the parties and the plaintiff having communicated them to the defendant.³³⁸

In the above decision, emotional harms are presumed to be a matter of special circumstances and thus are subject to the special foreseeability limitation set in *Hadley v. Baxendale*. Now, even if some injured parties can recover by “climbing through the window,” namely by making the extra effort of proving special foreseeability, depriving them an entrance through the “front door,” as general damages that carry no special burden, is inappropriate. Such misclassification of the nature of the claim continues to mark emotional harms as “contractual misfits.”³³⁹

In short, to avoid the issue I raise here, a reform should include the understanding that like all other harms, emotional harms may be general rather than specific, direct rather than consequential. This is particularly true in our neoliberal age when affective states are things we are supposed to achieve or overcome through heavy reliance on the market.

Third, and still as part of thinking about the issue broadly, it is important to remember the importance of life in the shadow of the law. The proposed reform should be appreciated not only by trying to estimate how it might change courts' decisions. A reform that formally recognizes and normalizes recovery for emotional harms has the potential to encourage parties to privately negotiate and settle the issue of compensation. Bearing in mind the goal of utilizing law to promote social survival,³⁴⁰ this prospect has several advantages. Most importantly, private negotiation of damages for emotional harms entails *communication* between the parties and thus fosters interconnectedness.³⁴¹ To appreciate this, note how the current

338. *Kempling v. Hearthstone Manor Corp.* (1996), 137 D.L.R. 4th 12 (Can. Alta. C.A.).

339. See Cohen & O'Byrne, *supra* note 46, at 134.

340. Monbiot, *supra* note 316.

341. *Id.*

exclusionary rule discourages communication and causes social alienation. Under this rule, and especially with the influence of neoliberalism, injured parties are expected to show “mental fortitude,”³⁴² while their breaching counterparts are liberated from any concern regarding the affective results of their breach. Conversely, setting potential liability on the breaching party has the power to produce a dialog between the parties. And, following Daphna Lewinsohn-Zamir, in such a dialog an authentic apology may be offered instead or in addition to monetary damages, further supporting interconnectedness.³⁴³

Facilitating privately negotiated damages can also lower resistance coming from two of the “seven Fs” discussed earlier as possible justification for the exclusionary rule: fluidity and flooding. The difficulty in finding the amount of money that will fully but not overly compensate for emotional harms disappears if the process is left in the hands of the parties themselves. Similarly, the possibility of negotiating the damages *outside* of court, either before litigation or in order to end it, certainly works to alleviate any fear that opening the gates for damages of this type would flood the courts. Surely, negotiated damages may divide the loss between the parties, leaving the injured party undercompensated. And yet, the notion of sharing the responsibility for what transpired is far better socially than the alternative. Even *some* compensation of the injured party is valuable to counter neoliberalism’s responsibilization of subjects and the blame it casts on people who encountered misfortunes too hard to cope with.³⁴⁴

However, despite these considerable advantages, one may argue that the proposed reform contributes to the commodification of emotions by the very willingness to put a price tag on them.³⁴⁵ In response, it is worth emphasizing again the broader goal and especially the wish to counter some of the antisocial effect of neoliberalism. In reality, and for the most part due to neoliberalism, emotions are already commodified.³⁴⁶ A willingness to compensate those who were emotionally harmed and assigning responsibility to those who caused the harm is in this respect a response to commodification rather than an act of commodification.

342. “Mental fortitude” is a repeating phrase in judicial decisions rejecting claims for emotional harms. See Cohen & O’Byrne, *supra* note 46, at 126 (“[C]ourts generally will not concern themselves with emotional loss, maintaining that a breach of contract is to be met with ‘mental fortitude.’”).

343. Daphna Lewinsohn-Zamir, *Do the Right Thing: Indirect Remedies in Private Law*, 94 B.U. L. REV. 55, 102 (2014).

344. For this reason, I disagree with the suggestion to demand emotional fortitude, see Goldberg, *supra* note 85, at 814.

345. ARLIE HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELINGS* 92–94 (2012).

346. *Id.* at 125–26.

More importantly, I believe that the meaning of putting a price tag on emotional harms is radically different than putting a price tag on emotions. Indeed, in some contexts it is the lack of material recognition that can lead to a denial of a central aspect of our humanity. For example, when sociologist Arlie Hochschild famously described the commercialization of human feelings,³⁴⁷ it was not to suggest that emotional work—of the kind performed by flight attendants who are required to smile—should not be paid for due to the risk of commercialization. Instead, it was to argue that such affective labor comes with significant cost that should be recognized and not exploited.³⁴⁸ Accordingly, my call to include emotional harms within the domain of ordinarily recoverable contractual damages is motivated by appreciation of the emotions and their centrality to the existence of individuals and society. In this view, to pay damages for harming the emotions of another person is to acknowledge and express the importance of the other's emotions.

Similarly, my reliance on the economization of emotions under neoliberalism is not intended to accept this instrumental positioning of emotions. The existing exclusionary rule reflects and evokes no compassion towards injured parties who suffer emotional harm. In keeping with neoliberalism's rationality, injured parties should expect nothing and shoulder their losses. By recognizing injured parties' right to be compensated for emotional harms the proposed reform takes these harms out of their "lawlessness" and makes them more visible and significant. As a clear expression of care to the suffering of others this should be seen as a step towards *cultivating compassion* via the law. In this way, I seek to turn neoliberalism's instrumental use of the emotions against itself and to *resist* the antisocial impact of neoliberalism. This legal effort to cultivate rather than impede compassion is justified by the pressing need to disrupt the neoliberal project of making emotions self-centered tools. To cite no one else than the Dalai Lama: "The cultivation of compassion is no longer a luxury, but a necessity, if our species is to survive."³⁴⁹ And while the cultivation of some more compassion within contract law undeniably has partial influence on our world, it can illustrate how law can deliberately shape emotions to link individuals and protect society.

VI. CONCLUSION

So, to return to the beginning: "Should remedies for a breach of contract include damages for harms to the emotions?" As I have argued here, there are many important reasons to answer this question affirmatively. Surely, I am not the first to call for a change

347. *Id.* at 92–94.

348. *Id.* at 27–29.

349. D.B. WRIGHT, *SIDE EFFECTS: A JOURNEY THROUGH SECONDARY TRAUMATIC STRESS* 51 (2016).

of the rule excluding damages for emotional harms. Others have argued over the years and around the globe that emotional harms are not different than other harms in a way that is relevant to the idea of remedies, and that for all harms the key question should be “whether harm has occurred for which legal redress is both appropriate and feasible.”³⁵⁰

However, the fresh arguments offered here consider the underlying reasons for which former calls for reform had little impact. The legal resistance to emotions combined with a misunderstanding of the nature, operation, and impact of emotion, all lead to a misguided legal rationality that is generally emotion-averse. This yields consequences that go far beyond contract law and remedies and are exacerbated in a world reframed by neoliberalism. These consequences motivate my argument that we should urgently engage in “*Valuing Emotions*,” a title that is aimed to highlight both the issue of emotional value and the value of emotions.

The “emotional value” prong relates to *individuals*. In a regime that underappreciates the affective domain in general and emotional harms in particular, individuals’ emotions matter less and accordingly are less respected by others. Note that when I say “matter,” I do not refer only to economic value. Neoliberalism exacerbates the problem by measuring individuals in part by their affective performance, and as a result when individuals suffer emotional harms that remain uncompensated, their “capital” or “value” (here used more economically) decreases. Therefore, for the sake of individuals, the law ought to generally recognize the affective aspects of legal problems. Accordingly, in the specific context of offering redress to emotional harms, where the affective aspects are palpable, this requires true recovery. Such recognition of individuals’ emotional value would have not only economic worth but also, and perhaps more importantly, an expressive and educational value.

Then, the “value of emotions” prong relates to *society*. A regime that underappreciates the affective domain in general and emotional harms in particular marginalizes the emotions. Most critically, this marginalization leads to hindering, or even thwarting, the operation of the moral emotions that are necessary for our social survival. And as it works at the individual level, here too neoliberalism makes things worse. In a highly individualized age, where moral emotions are losing their original meaning and instead are marketed as self-promoting tools, society is at risk of “falling apart.”³⁵¹ Therefore, for the sake of society, there should be an effort to use law to foster rather than discourage the pro-social working of the moral emotions. In other words, law should enhance the social value of emotions.

Combining the two prongs together, my overall objective is to create a path to a new legal rationality—one that embraces emotions

350. TEFF, *supra* note 143.

351. Here again I am echoing George Monbiot, see *supra*, note 316.

as a key component in both individual *and* institutional decision-making. Under such new legal rationality, which is particularly necessary to counter neoliberalism, an important role of the law would be to purposefully seek to utilize emotions in support of prosocial processes.³⁵²

352. See Kathryn Abrams, *Seeking Emotional Ends with Legal Means*, 103 CALIF. L. REV. 1657, 1657–58 (2015); Abrams & Keren, *supra* note 129, at 2000. For a concrete example, see Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319, 319–20 (2007).