

JUST FEELINGS: A TORT LAW THEORY OF EMOTION

*Zoë Sinel**

INTRODUCTION

These are emotional times. Increasingly, our emotional reactions to the world and its inhabitants are treated as unassailable barometers of authenticity. Since a feeling is that which the feeler feels, the feeler's felt experience is epistemically inaccessible to anyone aside from the feeler herself. Hence, the feeling's validity is immune from challenge and doubt. To speak colloquially, one's feelings are "one's truth." In this emotional zeitgeist, however, many go further than the claim of internal authenticity and purport that subjective felt experiences should ground claims against *others* to respond appropriately to the feeling through affirmation and action. The claim, "I feel; therefore, you ought," is perhaps becoming the modern individual's *cris de coeur*.¹

*Associate Professor, Faculty of Law, University of Western Ontario. Portions of the Introduction and Part I are drawn from Anne Schuurman and Zoë Sinel, "Matter over Mind: Tort Law's Treatment of Emotional Injury," in Kit Barker, Karen Fairweather, and Ross Grantham, eds, *Private Law in the 21st Century* (Oxford: Hart Publishing, 2017) and Sinel, "What's Your Damage? The Elimination of the Expert-Recognized Psychiatric Illness Requirement in the Canadian Law of Negligence: *Saadati v Moorhead*, [2017] 1 SCR 543" (2017) 24 *Torts Law Journal* 205.

¹ It is beyond the scope of this chapter to substantiate this admittedly subjective impression with much more than anecdotal evidence. For example, on the topic of racial tensions simmering on his university campus in the fall of 2015, one Yale student was quoted as saying, "I don't want to debate. I want to talk about my pain." [M. O'Rourke, "Yale's Unsafe Spaces" *The New Yorker* (November 13, 2015).] Also, consider section 3(f) of Florida Senate's 2022 Bill 148 – the ironically named, "Individual Freedom" bill – "The Legislature acknowledges the fundamental truth that all individuals are equal before the law and have inalienable rights. Accordingly, instruction on the topics enumerated in this section and supporting materials must be consistent with the following principles of individual

Scholarly interest in emotions has kept pace with this cultural shift,² and the emotional current has also embraced the law, generating ample scholarship in the burgeoning field of law and emotions.³ Jefferie Murphy

freedom: ... (f) An individual should not be made to feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race.” Although the bill never mentions critical race theory expressly, it is the intention of the bill to suppress the teaching of CRT in Florida’s classrooms.

² In humanities and social science scholarship, the so-called ‘affective turn’ of the late 1990s continues, thirty years on, to generate an abundance of research on the significance of affective experience and the emotions in politics, public discourse, and nationalist myth-making; in trauma, war, and immigration; in literary and artistic modes of representation; in education and psychoanalysis. See, e.g., Patricia Ticineto Clough, ed., *The Affective Turn: Theorizing the Social* (Durham, North Carolina: Duke University Press, 2007); Teresa Brennan, *The Transmission of Affect* (Ithaca, New York: Cornell University Press, 2004); Melissa Gregg and Gregory J Seigworth, eds., *The Affect Theory Reader* (Durham, North Carolina: Duke University Press, 2010). On politics and the affects, see Janet Steiger, Ann Cvetkovich, and Ann Reynolds, eds, *Political Emotions* (New York: Routledge, 2010). See also Lauren Berlant’s trilogy on American sentimentalism: *The Anatomy of National Fantasy* (Chicago: University of Chicago Press, 1991); *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham, North Carolina: Duke University Press, 1997); *The Female Complaint: On the Unfinished Business of Sentimentality in American Culture* (Durham, North Carolina: Duke University Press, 2008). For recent theoretical perspectives on trauma and affect, see Meera Atkinson and Michael Richardson, *Traumatic Affect* (Newcastle-upon-Tyne: Cambridge Scholars Publishing, 2013). Cf. Ruth Leys’ critique of the “affective turn” in trauma studies: *From Guilt to Shame: Auschwitz and After* (Princeton: Princeton University Press, 2007). Emotion has also taken center stage in the fields of cognitive science and philosophy of mind. See, for example, Antonio Damasio, *Descartes’ Error: Emotion, Reason, and the Human Brain* (New York: Penguin Books, 2005); Joseph LeDoux, “Emotion Circuits in the Brain” (2000) 23 Annual Review of Neuroscience 155; Joseph LeDoux, *The Emotional Brain: The Mysterious Underpinnings of Emotional Life* (1998); Lisa Feldman Barrett & James A Russell, eds., *The Psychological Construction of Emotion* (New York: The Guilford Press, 2015).

³ In particular, see SA Bandes, JL Madeira., KD Temple, and EK White, eds., *Research Handbook on Law and Emotion* (Cheltenham, UK: Edward Elgar Publishing Limited, 2021); K Abrams & H Keren, “Who’s Afraid of Law and the Emotions?” (2010) 94 Minn L Rev 1997; S Bandes, ed, *The Passions of Law* (New York: NYU Press, 1999); BH Borstein & RL Wiener, eds, *Emotion and the Law: Psychological Perspectives* (New York: Springer, 2010); H Conway & J Stannard, eds, *The Emotional Dynamics of Law and Legal Discourse* (Oxford: Hart Publishing, 2016); LE Little, “Negotiating the Tangle of Law and Emotion” (2001) 86 Cornell L Rev 974; TA Maroney, “Law and Emotion: A Proposed Taxonomy of an Emerging Field” (2006) 40 Law and Human Behavior 119; C Sanger, “The Role and Reality of Emotions in Law” (2001) 8:1 Wm & Mary J Women & L 107; C Guthrie, “Risk Realization, Emotion and Policy Making” (2004) 69:4 Mo L Rev 1039; E Posner, “Law and Emotions” (2001) 89:6 Geo LJ 1977; GL Clore, “The Law as Emotional Regulation” (2009) 16:2 Va J Soc Pol’y & L 334; H Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Liability* (Oxford: Hart Publishing, 2009); H Conway & J Stannard, eds, *The Emotional Dynamics of Law and Legal Discourse* (Oxford: Hart Publishing, 2016); H

and Jean Hampton have explored the role of anger, remorse, and revenge in criminal law;⁴ Martha Nussbaum has analyzed the role of disgust in the legal regulation of pornography and sexual relations;⁵ and other scholars have begun to look at the benefits of emotional intelligence, in particular, empathy and compassion, in the practice of adjudication.⁶ *Just Feelings*, of which this chapter is a part, fills a gap in this scholarship by turning our attention to the role emotions play in private law, specifically the rights, obligations, and remedies of the law of torts, the law of interpersonal wrongs and their redress.

At first glance, the law of torts might seem propitious ground for addressing and redressing interpersonal emotional wrongdoing. If tort law has something to do with preventing and ameliorating interpersonal harms and if we accept that emotional harms are no less real, no less painful, and no less damaging than physical harms, then tort law appears an appropriate vehicle for the legal regulation of emotions.⁷ Furthermore, if we think, as

Keren, “Valuing Emotions” (2018) 53:5 *Wake Forest L Rev* 829; J Schweppe & J Stannard, “What is so ‘Special’ About Law and Emotions?” (2013) 64:1 *N Ir Leg Q* 1; Julia JA Shaw, *Law and the Passions: Why Emotion Matters for Justice* (New York: Routledge, 2020); Julia JA Shaw & HJ Shaw, “From Fact to Feeling: An Explication of the Mimetic Relation Between Law and Emotion” (2014) 35 *Liverpool Law Rev* 43; MNS Sellers, ed, *Law, Emotion, and Reason* (Cambridge, UK: CUP, 2017); R Moran, “Law and Emotion, Love and Hate” (2001) 11:2 *J Contemp Leg Issues* 747; R Grossi, “Law, Emotion and the Objectivity Debate” (2019) 28:1 *Griffith L Rev* 23; SI Friedland, “Fire and Ice: Reframing Emotion and Cognition in the Law” (2019) 54:4 *Wake Forest L Rev* 1001; SA Bandes & J Blumenthal, “Emotion and the Law” (2012) 8 *Annual Rev Law Soc Sci* 161.

⁴ JG Murphy & J Hampton, *Forgiveness and Mercy* (Cambridge: CUP, 1988); S Jakoby, *Wild Justice: The Evolution of Revenge* (New York: Harper & Row Publishers, 1983).

⁵ M Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004); M Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford: OUP, 2010).

⁶ EK White, “Till Human Voices Wake Us” (2014) 3 *JL Religion & St* 201; Robin West, “The Anti-Empathic Turn” (2013) 53 *Nomos* 243.

⁷ See, for example: Louise Bélanger-Hardy, “Thresholds of Actionable Mental Harm in Negligence: A Policy-Based Analysis” (2013) 36 *Dalhousie LJ* 103; Peter Bell, “The Bell Tolls: Toward Full Tort Recovery for Psychic Injury” (1984) 36 *University of Florida L Rev* 333; Betsy Grey, “The Future of Emotional Harm” (2015) 83 *Fordham L Rev* 2605; John J Kircher, “The Four Faces of Tort Law: Liability for Emotional Harm” (2006-2007) 90 *Marq*

increasingly many private law scholars tend to, that tort law should track interpersonal morality by helping us to conform better to the moral duties we already happen to owe to one another, then it seems to make sense to use tort law to address situations of interpersonal emotional harm.⁸ Moreover, tort law already seems to identify several emotional states of its participants as legally salient: the tort of assault protects plaintiffs from the reasonable apprehension (fear) of harmful physical contact; the torts of negligent and intentional infliction of emotional distress explicitly protect a plaintiff's interest in her emotional well-being; damages awards for wrongs to the person often include non-pecuniary damages for pain and suffering as well as aggravated damages for additional hurt to a plaintiff's feelings; whether a defendant has acted out of spite looks like a relevant consideration in determining the fact or extent of his liability in certain torts, while a defendant's anger may reduce his damages through the defense of provocation;⁹ a defendant's regret or lack thereof might also seem salient in the evaluation of a defendant's satisfaction of his remedial obligations following a tort.

Against both tort law's apparent promise and the emotional tenor of our popular culture, however, I argue that most emotional states understood *as emotions* are irrelevant for the determination of tort law's rights, obligations, and remedies. In other words, emotions do not play a role in determining what we owe each other as a matter of tort law. *Just Feelings* thus provides new arguments in support of tort law's indifference to emotions.

To make this case from a doctrinal perspective, in subsequent

L Rev 789; Nancy Levit, "Ethereal Torts" (1992) 61 *George Washington L Rev* 136.

⁸ See, in particular, here the scholarship of Nicolas Cornell: "Wrongs, Rights, and Third Parties" (2015) 43 *Phil & Pub Affairs* 75; "Competition Wrongs" (2020) *Yale LJ* 2030.

⁹ Provocation is actually not properly speaking not so much a defense as a defensive pleading for the mitigation of damages.

chapters I explore particular examples from tort law doctrine that seem to belie my claim regarding tort law's indifference to the emotional states of its participants. These include fear's relevance to the tort of assault (chapter 2), grief's role in bereavement damages (chapter 3), the role of negative emotions in the torts of intentional and negligent infliction of emotional distress, spite's role in nuisance (chapter 4), the role of pain in damages for pain and suffering (chapter 5), the role of happiness in hedonic damages (chapter 5), and the relevance of hurt feelings for aggravated damages (chapter 5). In each case I demonstrate either that what might appear to be an instance of an emotion grounding a claim is best understood as something quite different or I suggest that there is reason to doubt the coherence of the doctrine in question.

In this first chapter, my aim is more general. Here, I introduce three closely connected arguments to explain why tort law is, and indeed must be, indifferent to the emotional states of its participants.¹⁰ The first argument is structural. It posits that the nature of emotions makes them inapplicable to the relation that tort law concerns itself with, that is, the relation between two formally free and equal persons. Emotions, so this argument goes, involve irreducibly unilateral elements that, as such, cannot be the subject matter of the bilateral relations that constitute the law of torts. The second argument is substantive and concerns the content of the structural or formal relationship introduced by the first argument. Here the idea is that emotions cannot form the subject matter of tort law's rights or duties. Emotions, in other words, are not rightful entitlements and thus cannot function as

¹⁰ By participants I mean to include only the plaintiff and defendant, although the role of the court is an important consideration and will be addressed in chapter 4, "No Right Against Spite," with respect to why the court cannot be seen to endorse a defendant's spiteful motivation. I do not address, however, the emotional intelligence or lack thereof of the judiciary.

appropriate legal grounds for constraining the actions of another. My third and final argument concerns the role of the institution of tort law within our liberal democratic state. My position is that emotional entitlements or obligations cannot be part of the distinctive normativity expressed and constituted by the legal institution of torts. There are two sides to this third argument. First, if emotions were a potential subject matter for tort law, then the enforcement of the attendant rights and duties implicated by them would violate a core principle of political liberalism: that the state cannot force one individual to promote another individual's conception of the good, or, to put this point slightly differently, that one person cannot be made to be a means to serve another's end. Second, and more tentatively, I suggest that if tort law were sensitive to its participants' feelings, it could potentially cover too much ground in our interpersonal relations. Put simply, if tort law is telling you what you (legally) can and cannot feel or how you can and cannot affect others' affective states, it risks eliminating or drastically restricting the space where authentic moral emotional experience lives.

My thesis supports the orthodox position in torts scholarship and doctrine, according to which “[m]ental pain or anxiety the law cannot value, and does not pretend to address, when the unlawful act complained of causes that alone.”¹¹ My reasons, however, are importantly different from those often attributed to the traditional view, namely that emotions are insufficiently real, are easy to fake, and invite potentially limitless liability. Exemplifying this view, a leading Canadian torts casebook explains the common law's resistance to awarding compensation for mental suffering in the following way:

Judges were worried that, as compared with physical illness, psychiatric harm was easy to feign. X-rays can prove the

¹¹ *Lynch v Knight* (1861), 11 ER 854 at 863 (HL), per Lord Wensleydale.

existence of a broken bone, but there (still) is no similarly conclusive test for the existence of a psychiatric illness. ... And within the hierarchy of harms, there was a sense that damage to one's psyche was less worthy of protection than damage to one's body. ... Perhaps most significantly, however, the courts have always worried about opening the floodgates of liability. Whereas the agents of physical harm are usually limited in both time and space, the potential triggering mechanisms for psychiatric harm are much more far-ranging.¹²

In my view, none of these concerns is valid: emotional setbacks are equally as damaging as physical setbacks; there is little evidence to support the claim of psychological malingering; and, if emotional harms really are private law wrongs, then the fact that there are a lot of them is no reason to exclude them from tort law's ambit. Nonetheless, for the formal, substantive, and institutional reasons outlined here, I argue that tort law should remain indifferent to human emotions.

I. FORM: CORRELATIVITY AND EMOTIONS

My formal argument for tort law's indifference to emotions is as follows: Tort law's wrongs are relational—they involve one person violating a duty owed to another person. Likewise, tort law's remedy is relational: the wrongdoer owes a duty of repair to his victim. Reasons that ground liability and remedial determinations must also be relational. That is to say that they must be the kinds of considerations that can apply to both parties equally. Thus, if we understand emotions, as I will suggest we should, as ineluctably, although still only partially, determined by the subjective characteristics of the feeler, then emotions cannot apply to both parties equally and must be

¹² R Solomon et al., *Cases and Materials on the Law of Torts*, 10th ed (Toronto: Thomson Reuters Canada Ltd, 2019) at 449.

excluded from the potential justifications for tort law's determinations. In other words, if the form of tort law is inherently bilateral while the form of emotions is irreducibly one-sided, considerations based on the emotional reactions of tort law's participants cannot provide acceptable reasons for or against determinations of liability or remedial appropriateness.

A. The Form of Tort

A familiar way of thinking about tort liability and the reasons that can justify it is to focus on the distinctive structure of liability: liability in private law is always liability of one party (the defendant) to another (the plaintiff). This basic structure tells us almost everything we need to know about liability, at least at an abstract, formal level. It is another way of saying that the justice of tort law is that of corrective justice. When a defendant wrongs a plaintiff, he disrupts the status quo of equality that existed prior to his wrong. Before the wrong, the defendant and plaintiff were able to use what was theirs as theirs—they were equally free to act in the world. A wrong is the unjustified hindrance of this freedom.

At this formal level, to say that something is a wrong is not to say that it is morally blameworthy, sinful, or even harmful, but more like saying that it is simply incorrect in the way that $2+2=5$ is incorrect. If I use your hand to wipe my nose or I eat your sandwich to feed my hunger, perhaps I have committed a moral transgression, but more basically I have done something that is wrong in the sense of incorrect: I have treated your body as if it were mine (which it is not) and I have treated your food as if it were mine (which it is not). Thus, the essence of a wrong consists of the defendant arrogating to himself the power to control something that he has no entitlement to control (the plaintiff's body or property). Corrective justice involves rectification. It redresses the wrong (the incorrect conduct). Thus, corrective

justice helps explain why liability in private law is liability of *this* defendant to *this* plaintiff. If our focus is on the unjust transaction between two and only two persons and our aim is to restore them to their pre-transactional equality, then it makes logical sense that the one who “gains” from the transaction (the wrongdoer, the defendant) must restore this gain to the one who has suffered the corresponding “loss” (the victim, the plaintiff).¹³

For the purposes of this chapter, the most significant contribution that corrective justice makes to our understanding of private law is that it tells us in a non-arbitrary way why certain characteristics of the plaintiff and defendant are irrelevant from the standpoint of private law liability. Corrective justice aims to restore the parties to their pre-transactional states. The equality it is concerned with is an equality of relation through a transaction. It is not concerned, in the way distributive justice is, with an equality of comparison. It does not take into account considerations that are comparative as opposed to correlative. Whether a party is nicer, taller, friendlier, braver, more attractive, richer, poorer, etc., is irrelevant as to whether he or she can be liable in private law or whether he or she can seek a remedy. This is because these features of virtue and need are not intrinsically relational – if I am brave, that does not mean you are necessarily cowardly or foolhardy, if I am full, this does not necessarily mean you are hungry. By contrast, if I wrong you, you are necessarily wronged by me. If I take your sandwich, I have gained a sandwich and you have lost a sandwich. By your breach of the norm against lunchtime thievery, you have gained my sandwich and I have lost my sandwich. The breach of the norm is the basis

¹³ See Ernest Weinrib, “The Gains and Losses of Corrective Justice” (1994) 44:2 *Duke Law Journal* 277 on how the relevant gain and loss are normative, not factual (material). The gain is the appropriation of more freedom of action than one is entitled to within the reciprocal limits set by another’s equal freedom, and the loss is the corresponding loss of this freedom.

for your gain and for my loss. What matters, from a corrective justice perspective, are considerations that connect the party through the same relation. From this perspective the position of one party can only be understood through the correlative position of the other. The reason that entitles me to demand that you return my sandwich or provide me with money to purchase an equivalent replacement sandwich is the same reason that could not take it in the first place: it is my sandwich, not yours.

In this way, corrective justice gives us a logical way to understand why private law excludes what we might otherwise think are salient features of the parties to a private law action: their relative needs and virtues. And, indeed, it tells us something more. It tells us that if we take into account such unilateral considerations, we treat the parties unequally. If I demand your sandwich on the basis of my comparatively greater hunger, this is no different, formally speaking, from my demanding your sandwich because I think it is tastier than my own or because I enjoy collecting sandwiches. In all of these cases, I am basing my claim to your sandwich on a reason that refers only to me and my particular circumstances, not to the reason that applies to us equally, that is, the norm that governs our interaction and its breach.

To recap, at a formal level, we can understand tort law as consisting entirely of correlative reasons. The reason that we find a defendant liable is the *same* reason that a plaintiff has standing to sue: the parties are two sides of the same wrongful transaction. Tort law's job is to undo or reverse this wrongful transaction and it does this by making the wrongdoer subject to a reparative obligation owed to the sufferer of his wrong. Our next question is whether the apparent infliction and experience of emotional states by one party on another is correlative in the sense required by tort law. I will argue that, on a proper understanding of emotion, it is not.

B. *What is an Emotion?*

According to a leading account of the nature of human emotions, emotions are the products of cognitive evaluation of feelings and sensations. For the Stoics, the “first movements,” such as shuddering or changes in heart rate or blood flow were not emotions, but rather were the first signs that the body was reacting to external stimuli felt to be either good or bad.¹⁴ It is then up to us to determine, to evaluate, whether to accept the bodily reaction. The physiological response to external stimuli is uncontrollable and autonomic, but these first movements do not become full-fledged emotions until we exercise our judgment and assent to them. Stoicism thus seizes on the gap, as it were, between autonomic response and cognitive assessment as the space that distinguishes human beings from animals (and, for some, men from women and children), and that makes it possible to pursue the ideal human condition, the state of *apatheia*, in which the truly wise and moral man remains unswayed by emotion.¹⁵ For the Stoics, in other words, the physiological component of emotion does not entail a biological fate, but rather is a challenge to be overcome through the exercise of discipline and reason. And because emotions result from mistaken judgements about the world, the process of overcoming emotion is itself morally and intellectually edifying.

This control-focused account of emotions has, not surprisingly, been endorsed by leading tort theorists in their attempts to offer an explanation

¹⁴ See, e.g., Seneca, *De Ira* 2.4.1. See also M. Nussbaum’s commentary in *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton, NJ: Princeton University Press, 1994) 316-438; and R Sorabji, *Emotion and Peace of Mind: From Stoic Agitation to Christian Temptation* (Oxford: OUP, 2010).

¹⁵ S Knuuttila, *Emotions in Ancient and Medieval Philosophy* (Oxford: OUP, 2004) at 63-67.

for tort law's different treatment of emotional and physical injuries. Tort law doctrine appears to have a higher *de minimis* threshold for psychological and emotional harm as compared with a low threshold for physical harm. As well, while for physical injuries, a defendant must take his plaintiff as he finds her, thin skull and all, for psychological damage, a defendant is entitled to a plaintiff of ordinary mental fortitude—that is, thin-skinned plaintiffs are apparently out of luck. To explain these differences, several legal scholars have embraced a neo-Stoical account of emotions to argue that emotional harm is different from physical harm and therefore its different treatment is justified. Significantly, all of these explanations essentially arrive at the same justification: tort law treats emotional harms differently from physical harms because we have *control* over our emotional reactions in a way we do not over our physical reactions to external stimuli.

According to Erica Goldberg, “[u]ltimately, we are the keepers of our own minds, and the law should reflect a morality where individuals cannot be compensated for harms over which they have relatively more control,” and which “are bound up in notions of identity, voluntariness, and consent.”¹⁶ For this reason, she concludes that potential plaintiffs have emotional duties to control their own reactions to potentially distressing behavior. Similarly, John Goldberg and Benjamin Zipursky argue that the law's requirement of reasonable fortitude is the equivalent to a parent telling his or her child not to make a mountain out of a molehill.¹⁷ We are, in this view, responsible to a certain extent for our emotional reactions to the external world:

In a nutshell, then, the idea is that a plaintiff's emotional response to

¹⁶ Erica Goldberg, “Emotional Duties” (2015) 47:3 Connecticut Law Review 809, 814-15.

¹⁷ John CP Goldberg and Benjamin C Zipursky, “Unrealized Torts” (2002) 88 Virginia Law Review 1625, 1680-1.

a state of affairs is a matter for which she herself can sometimes, indeed often, be held responsible. Emotional distress is not simply an uncontrolled or uncontrollable reflex, as is the bodily response to a blow or a toxin. It is a response mediated by the mind of the plaintiff.¹⁸

Along the same lines, Greg Keating has urged that

Emotional distress differs from physical harm in a fundamental and categorical way. Our emotional reactions are mediated by our minds. Emotional injury may thus be the product—not the negation—of our agency. Often emotional reactions are much more subject than physical responses to our minds, our wills and our control. We can teach ourselves to toughen up and not be so sensitive, and we can steel ourselves against even exceedingly unpleasant experiences. Our sensibilities are subject to shaping by our wills. The way that we *do* react can be made responsive to our considered judgments about how we *should* react. Up to a point, we can and do learn to protect ourselves against emotional harm by mastering our emotions. We can learn to treat even the most exasperating events of ordinary life with relative calm, and we usually do. We learn to cope, not complain.¹⁹

All of these examples emphasize the individual's capacity for cognitive control over her emotional reactions as well as her moral responsibility to exercise such control.

While I agree with these eminent tort scholars that there is something distinctive about emotional harm that renders tort law's differential treatment of it justifiable, I disagree that this difference lies in our ability to *control* our emotional reactions. Indeed, recent advances in neuroscience support a theory of the nature of emotions according to which the distinction between emotional and physical injury is illusory, as is any idea that we somehow have more control over our emotional reactions than our physical reactions.

¹⁸ Goldberg and Zipursky, *ibid.* at 1681.

¹⁹ Gregory Keating, "When is Emotional Distress Harm?" in Stephen GA Pitel, Jason W Neyers, and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, Oxford 2013) 300.

Neuroscientists are now able to measure the effects of certain kinds of emotional harm through imaging techniques developed out of PET (positron emission tomography), CT (cranial computed tomography), and MRI (magnetic resonance imaging) scans.²⁰ A variation on the latter, the functional MRI technique (fMRI), developed in the 1990s, is like a traditional MRI in that it provides “detailed structural images of the brain” through strong magnet and radio waves, but it also measures blood flow to areas of the brain with fine precision, and so can be used “to observe the activation of brain structures in response to almost any kind of brief stimulation, ranging from sounds to visual images to gentle touching of the skin.”²¹ fMRI techniques have enabled scientists to show “invisible injuries,” for example differentiating between patients who report chronic pain from those who report no pain.²² The use of data from fMRI and similar emerging technologies as evidence in tort law cases, and the implications of this

²⁰ E Goldberg, *supra* note ___ at 826. See Laurence R Tancredi and Jonathan D Brodie, “The Brain and Behavior: Limitations in the Legal Use of Functional Magnetic Resonance Imaging” (2007) 33 *American Journal of Law and Medicine* 271, 271-72 (discussing how fMRI can be used to study the effect of emotional harm on the brain). See also: Betsy J Grey, “The Future of Emotional Harm” (2015) 83 *Fordham Law Rev* 101; Stacey A Tovino, “Functional Neuroimaging and the Law: Trends and Direction for Future Scholarship” (2007) 7(9) *The American Journal of Bioethics* 44; Adam J Kolber, “The Experiential Future of the Law” (2011) 60 *Emory LJ* 585.

²¹ J Eggen and E Laury, “Toward a Neuroscience Model of Tort Law: How Functional Neuroimaging Will Transform Tort Doctrine” (2012) 13 *Columbia Science and Technology Law Review* 235, 242.

²² Looking at the effects of post-traumatic stress disorder on the brain, Betsy Grey explains,

Extensive and replicated research has revealed brain regions that are associated with emotional trauma. In particular, structural and functional neuroimaging results implicate specific subregions of the medial prefrontal cortex (MPFC), orbitofrontal cortex (OFC), anterior cingulate (ACC), and insular cortices, the amygdala, and the hippocampus in the processing of emotional information. Research suggests that dysfunction in this circuitry triggers and maintains emotional disorders. (B Grey, “The Future of Emotional Harm,” *supra* note ___ at 827.)

See also Betsy Grey, “Neuroscience and Emotional Harm in Tort Law: Rethinking the American Approach to Free-Standing Emotional Distress Claims” (2010) 13 *Law and Neuroscience: Current Legal Issues* 212, 213. For a summary of how fMRI technology has been used in legal contexts, see Eggen and Laury, *supra* note ___.

neuroscientific research for tort law theory, are anything but straightforward, but they do point to the need for a more nuanced, detailed, and explicit conceptualization of emotion. As Eggen and Laury note, “fMRI images are not snapshots; rather, their meaning turns on sophisticated interpretational techniques. . . . the images do not have an inherent meaning independent of the interpreting expert and the interpretive context.”²³ On a conceptual level, however, the practical challenges of using neuroscientific data as evidence do not mitigate the fact that the availability of such data all but seems to undermine the distinction between emotional and physical harm.

Neuroscientists’ ability to locate and even measure the physiology of emotion suggests that we have much less control over our emotional responses to events and stimuli than the current consensus in tort law theory would suggest. In this light, tort law’s implicit adherence to neo-Stoic ideals of control and autonomy is problematic, or at the very least requires a closer look. The “involuntary triggering” of emotional responses does not, in itself, dictate how tort law ought to define a legally cognizable emotional injury, but it does demand that tort law root this definition in a clearer and more nuanced conception of emotion.²⁴ Because neuroscientific data needs interpretation, we require an understanding of emotion that does not, as the neuroscientific model does, reduce emotions to physical facts.²⁵ But also, because of what some of this data reveals, our model must not, as the Stoic account does, render emotions unhappy epiphenomena that are matters for our control and extirpation.²⁶

²³ Eggen and Laury, *supra* note ____ at 243.

²⁴ Paul E Griffiths, *What Emotions Really Are: The Problem of Psychological Categories* (Chicago University Press, Chicago 1997) 243.

²⁵ For a trenchant criticism of this kind of reductionism, see Michael S Pardo & Dennis Patterson, *Minds, Brains, and the Law: The Conceptual Foundations of Law and Neuroscience* (Oxford: OUP, 2013).

²⁶ Notably, Martha Nussbaum has defended what she calls a neo-Stoic conception of

In *How Emotions Are Made: The Secret Life of the Brain*, leading psychologist and neuroscientist Lisa Feldman Barrett provides us with precisely this non-reductionist account in her theory of constructed emotion.²⁷ First, through four significant meta-analyses – analyses of all the relevant scientific papers over the last twenty years – Barrett and her team demonstrated that there are no “consistent and specific emotion fingerprints in the body.”²⁸ These meta-analyses unseat the dominant view in neuroscience according to which emotions have unique biological fingerprints.²⁹ In Barrett’s own words, “[y]ou can experience anger without a

what emotions are and what role they should play in social and political life. She agrees with the Greek and Roman Stoics that emotions are “appraisals or value judgments, which ascribe to things and persons outside the person’s own control great importance for that person’s own flourishing,” but she rejects the Stoic normative position that these judgments are mistaken and thus that emotions must be extirpated in the pursuit of wisdom and happiness. (Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: CUP, 2001) at 90.) Instead, she champions emotions as crucial judgments of value, as “eudaemonic,” insofar as they “provide the animal [and the human animal] with a sense of how the world relates to its own set of goals and projects.” (Nussbaum, *Upheavals of Thought*, at 117.)

Interestingly, Nussbaum’s redirection of the Stoic model of emotion places the question of control front and center but reverses its aim: rather than considering the extent to which we are able to control our emotional reactions, Nussbaum argues that our emotions are evaluative responses to a *world* that is beyond our control. Anger, grief, and resentment are indices of our vulnerability to the inevitable slings and arrows; love, joy, compassion are, likewise, expressions of our shared need for human bonds and belonging. Surely, she is right. But Nussbaum skirts the implications of rejecting the Stoic imperative of *self*-control by focusing only on the public goods gained by a politics of love and compassion. Tort law, by contrast, cannot ignore the dark side of human emotion: even if we agree with Nussbaum that emotions involve judgments as well as involuntary physical reactions, we must also agree that emotions, qua human, are highly fallible judgments, liable to irrationality, failure, and self-interest. What is needed here is a non-reductive conception of emotion, one that recognizes both the physiological and evaluative aspects of emotional experience.

²⁷ (Boston: Houghton Mifflin Harcourt, 2017).

²⁸ *Ibid.* at 14. For details on these meta-analyses, see: heam.info/meta-analysis-1. The largest of these meta-analyses looked at over 220 physiological studies and approximately 22,000 test subjects.

²⁹ Antonio Damasio calls them “somatic markers.” (A Damasio, *Descartes’ Error: Emotion, Reason, and the Human Brain* (New York: Penguin Books, 1994.) According to Barrett, this idea regarding biological fingerprints of emotion stems from a misunderstanding of William James’ seminal article, “What is an Emotion?” (1884) 9 *Mind* 188. Contrary to what many think, James never said that each type of emotion had a distinct fingerprint in the body. Rather, he said that each “instance” of emotion, not each category of emotion, comes from a unique bodily state. See Barrett, *How Emotions are Made* at 61.

spike in blood pressure. You can experience fear without an amygdala, the brain region historically tagged as “the home of fear.”³⁰ Thus, in support of tort theorists’ claims about emotional harm, it is just not right to say that physical damage to the body is the same thing as emotional damage at the level of biology. You are not, as physical reductionist theories might have you believe, “governed by internal forces beyond your control ... buffeted by the world and respond[ing] on impulse, like an erupting volcano or a boiling pot.”³¹ Emotions, in other words, are not hard-wired. They do not “light up” particular regions of the brain for neuro-detectives to identify, validate, and use as evidence in a lawsuit. A broken heart is not really the same kind of phenomenon as a broken leg.³²

Most important for the position I defend here, however, is not Barrett’s critique of reductive physicalist accounts of emotions, but rather her positive account of emotions. As her book title suggests and as her critique of physicalism highlights, emotions are *made*, not found:

Emotions don’t shine forth from the face nor from the maelstrom of your body’s inner core. They don’t issue from a specific part of the brain. No scientific innovation will miraculously reveal a biological fingerprint of emotion. That’s because our emotions aren’t built-in, waiting to be revealed. They are *made*. By *us*. We don’t *recognize* emotions or *identify* emotions: we *construct* our own emotional experiences, and our perceptions of others’ emotions, on the spot, as needed, through a complex interplay of systems. Human beings are not at the mercy of mythical emotion circuits buried deep within animalistic parts of our highly evolved brain: we are architects of our

³⁰ Barrett, *How Emotions are Made* at xii.

³¹ Barrett, *How Emotions are Made* at 164.

³² But see: Nancy Eisenberger, “Broken Hearts and Broken Bones: A Neural Perspective on the Similarities Between Social and Physical Pain” (2012) 21:1 *Current Directions in Psychological Science* 42. In this fascinating study involving the dispensing of Tylenol to individuals participating in a game with the potential for social exclusion, Eisenberger provides evidence that social pain (negative feelings that we have following social rejection or loss) may rely on pain-related neural circuitry.

own experience.³³

To see how this is so, consider how our brains work. The brain is a complex organ, and its primary purpose is to regulate the other systems of our body, to keep all of these systems in the range of good health. This state is called homeostasis and involves the brain releasing energy as needed and conserving it when possible to keep our “body budget” within sustainable and optimal parameters.³⁴ Through perception (sight, smell, touch, hearing), the brain receives information from the outside world and, through interoception, the brain receives feedback from the body. A common sense understanding of the way this works would be something like this: I see a snake, I feel fear, I run! But, in fact, this cannot be and is not how the brain actually works, for, if it did, our brain would be too slow to keep us safe from snakes and the like. If it did, we would be like newborns, who can at first see only disorganized shapes and colors and are unable to process their perceptions of the external world. Rather, the brain works through prediction:

Simply put: I did not see a snake and categorize it. I did not feel my heart pounding and categorize it. I categorized sensations in order to see the snake, to feel my heart pounding, and to run. I correctly predicted these sensations, and in so doing, explained them with an instance of the concept ‘Fear’. This is how emotions are made.³⁵

Language allows us to move beyond perceived statistical regularities and moreover allows us to create and build emotions with other brains.³⁶ The concept of a particular emotion in fact precedes the ability to experience that emotion. Much of parenting involves the teaching of emotion concepts to

³³ Barrett, *How Emotions are Made* at 40.

³⁴ Barrett, *How Emotions are Made* at 69.

³⁵ Barrett, *How Emotions are Made* at 109-10

³⁶ Barrett, *How Emotions are Made* at 110.

our children. Our child cries because while she was drawing a crown on her princess picture, she has inadvertently obliterated the princess' nose. We tell her, "Yes, that is frustrating." Her mind now constructs the concept of frustration from this experience and will use this concept to embrace other similar instances. Indeed, this is just what emotional intelligence is according to some accounts. Studies have shown that the more finely grained our emotional vocabularies are—the more nuanced emotional words we have—the more diverse emotions we are capable of experiencing.³⁷ Without the word *Schadenfreude*, do we really experience that particularly delicious kind of joy in another's misery? Emotion concepts and hence the emotional reactions that they organize and constitute are not built-in but learned.

Thus, in support of the cognitivist accounts of emotions, on Barrett's theory, we *are* partly responsible for our emotional reactions and have a limited ability to change them. However, insofar as we are responsible for our emotion concepts, these concepts can be challenged and hence our reactions adjusted. But, unlike the stoical program of control and repression that conceives of the individual as external to his or her emotions and thus always, theoretically at least, capable of purifying him or herself of these irrational sentiments through their extirpation, Barrett's account is sensitive to the cultural and situational embeddedness of the individual and the constructed nature of emotions. In her theory, emotion concepts are products of the families we are raised in, the cultures we inhabit, the languages we speak, and the words we know. While emotions are not given in the sense of hardwired into our grey matter, they are still not wholly matters of our autonomous creation. Thus, control over our emotional reactions is more attenuated on Barrett's account than on the stoical account.

³⁷ Barrett at ____ .

If we want to change our emotional reactions to the world, then we must learn to challenge the deep-seated emotional concepts that generate them. And, only insofar as these concepts can be changed—through education and practice – can we alter our emotional states.

More significant for my purposes, however, is not the question of control and responsibility, but the fact of prediction and construction. If Barrett is right and our brains are predicting, not reacting, when we experience emotions, then this is evidence of the non-correlativity of emotional suffering. According to the theory of constructed emotion, emotional “reactions” are within us; they are caused and made by us; and, significantly, they are not (at least not directly) responses to the world or to its inhabitants. Thus, emotional responses are not like physical responses to an external stimulus. As Barrett explains,

a virus is egalitarian towards its victims. It brings discomfort, but it’s nothing personal. All humans who haven’t slept enough, with a nice wet set of lungs, can apply for the job of host.

Affect, on the other hand, transforms interoceptive sensation into something about you, with your particular strengths and faults. Now the sensations are personal—they reside inside your affective niche.³⁸

Barrett’s theory of construction and prediction helps to explain why individuals can respond so differently to identical emotional stimuli, not to mention why people in different cultures deem different emotional reactions appropriate to similar events in the world.³⁹

We are thus left with a complex conception of emotion as bodily, non-volitional reactions that are also indices of our enmeshment in particular cultures, relationships, and value systems. How we respond to a given affect

³⁸ Barrett, *How Emotions are Made* at 188.

³⁹

depends crucially on concepts that we have created through our particular lived experiences. If I aim a gun at you and shoot you, you will be shot. But if I say something to offend you, you may or may not be offended, you may be very offended or just a little bit. While physical responses (being shot) are not open for our interpretation—they are not creations of our interpretation or matters for our prediction—this is essentially what emotions are: emotions are the products of our own making, our own interpretations and predictions of the world as our world is taught to us and shaped for us by our families, communities, culture, and language. As such, emotions, by definition, cannot apply equally to both parties.⁴⁰ To the extent that we define emotional

⁴⁰ Barrett's explanation for how we experience emotions and what this says about us, interestingly, is nicely echoed by a much older account of emotions, Aristotle's. Aristotle, first in *Nicomachean Ethics*, and more fully in *Rhetoric* and *De anima*, considers the passions neither as purely physical nor as purely cognitive phenomena, but as constituting a crucial link between the soul, the body, and the socio-political world that calls for virtuous action. Virtue is, Aristotle writes, 'concerned with passions and actions' (Aristotle, *Ethics*, Bk 2, Ch 6.), while the affections are those feelings in which the soul is 'conjoined with the body,' (*De anima* Bk 1, Ch 10.) feelings that happen in the body when something affects the soul, or in the soul when something affects the body, or both, in a multi-directional flow of affect and response. (TK Johansen, *The Powers of Aristotle's Soul* (Oxford: OUP, 2012) 148-151.) In Book II of the *Rhetoric*, Aristotle turns to a thorough discussion of the emotions, for, as he explains, rhetoric depends for its success upon eliciting certain emotional responses. It is the practical aim of teaching persuasive oratory that leads him to map the emotions in the social and political sphere. He writes:

The emotions are all those feelings that so change men as to affect their judgments, and that are also attended by pain or pleasure. Such are anger, pity, fear, and the like, with their opposites. We must arrange what we have to say about each of them under three headings. Take for instance the emotion of anger: here we must discover (1) what the state of mind of angry people is, (2) who the people are with whom they usually get angry, and (3) on what grounds they angry with them. It is not enough to know one or even two of these points unless we know all three we shall be unable to arouse anger in anyone. The same is true of the other emotions. (*Rhetoric*, Book II, ____ .)

In Book I of *de Anima*, Aristotle lays out his psychology of emotion, which is a materialist account, but not a reductive one. His opening query concerns whether "all affections [are] of the complex of body and soul, or is there any one among them peculiar to the soul by itself?" And he concludes that "all the affections of soul involve a body-passion. Gentleness, fear, pity, courage, joy, loving, and hating: in all these there is a concurrent affection of the body." It is important to note that Aristotle's discussion of "body-passions" involves non-volitional reactions. Thus, anger is both an "appetite for returning pain for pain"

responses as our own perceptions of external and internal stimuli—that is, to the extent that they are constructed through concepts that we ourselves have made—one person’s experience of an emotion cannot be the passive pole of another person’s infliction of that emotion.⁴¹

II. SUBSTANCE: WELL-BEING VS. MEANS

The preceding analysis posits that the form of tort law could not accommodate emotion as a ground for a defendant’s obligation or a plaintiff’s entitlement. To treat the parties as equals in accordance with corrective justice’s formal sense of equality, considerations like emotions that do not apply equally to both parties must be excluded from determinations of liability and remedies. Corrective justice’s claim that tort law is committed to equality will no doubt ring hollow to scholars with explicitly egalitarian aims. While I am also in favor of just redistribution, I do not see tort law as

and, materially, a “boiling of the blood around the heart.”

If we combine this psychological-material account with the social-psychological account provided in the *Rhetoric*, we find a complex conception of emotions as both bodily, non-volitional reactions and as indices of our enmeshment in particular cultures, relationships, and value systems. This complex, non-reductive account finds contemporary, scientific support in Damasio’s hypothesis that emotions form an integral part of the brain’s reasoning processes. According to Damasio, moreover, “mental phenomena,” including emotions, “can be fully understood only in the context of an organisms interacting in an environment. That the environment is, in part, a product of the organism’s activity itself, merely underscores the complexity of interactions we must take into account.” (A Damasio, *Descartes’ Error* at p. xvi.) If a hiker sees a bear in the woods, her body will respond, via thalamus, amygdala, and endocrine system, with the affect of fear; but whether that experience of fear results in long-term trauma or a good campfire story depends upon an indeterminate number of subjective factors, including, in this case, biographical ones—say, for instance, whether the hiker is a park warden trained to deal with bear encounters.

⁴¹ In subsequent chapters I suggest that for emotion to be a legal concept it must apply to both parties equally and one way in which it can do this is by invoking an objective reasonable person standard for emotional reactions. We will ask what would an appropriately emotionally educated person feel in this particular situation. This standard is objective with respect to emotional reactions in the same way that negligence’s standard of the reasonably prudent person is objective with respect to epistemic considerations of risk and whether it is reasonable to run one. The question is whether the emotional response is apt or inapt, not whether one truly experienced a particular emotion or not. Thank you to Manish Oza for clarifying my thoughts on this point.

the appropriate means to achieve it. Tort law does not require, promote, or concern itself with the substantive equality of its participants. Whether a plaintiff or defendant is relatively poorer or richer, in the corrective justice paradigm, has no bearing on tort law's awards or findings of liability.⁴²

Thus, the key question is, in what respect are tort law's participants equal? The answer is that they are equal with respect to their capacity for purposiveness. Human beings are equal in their freedom to pursue their conceptions of the good provided that in doing so they do not wrongfully interfere with another human being's equal capacity for setting his means to ends. I am free to use my body or my property for whatever purpose I choose insofar as I do not thereby interfere with your equal ability to do the same. If I were free to use my body for whatever purpose I wanted and I chose to use it to hit you on the nose with my fist, then by my very action I deny your equal freedom to use your body (your nose) for whatever purpose you so choose (smelling roses, for example). In breaking your nose, I assert a level of freedom that is not compatible with the equal recognition of yours. If we are to treat one another as equals in this sense, the only constraints we can have on one another's behavior must be reciprocal: I cannot demand that you sacrifice your capacity for purposiveness so that I can exercise greater freedom and vice versa. The only limit we can place on the conduct of others is to limit (constrain) their domination of us. In other words, I can constrain your actions when they wrongfully interfere with my ability to exercise my capacity to set and pursue my ends by turning my capacity into a means for your pursuit of your ends. Significantly, this is not an entitlement against others to guarantee my success in my purposive activities, that I achieve the

⁴² Note exception with respect punitive damages where the "sting" of them must be calibrated to defendant's wealth or lack thereof. Punitive damages themselves, however, on many accounts of tort law, including mine, are irreconcilable with tort law's correlative logic.

ends I set out to achieve; rather, it is an entitlement that others not wrongfully interfere with me or the means I take up in pursuit of these chosen ends.

Every private law right amounts to a ground to constrain the freedom of another. I am entitled to constrain your freedom with respect to the use of my body and my property. Only *I* am permitted to use my person and property as means to my ends; you may not. Moreover, if you interfere with my body or my property, I may choose to harness the legal machinery of the state to coerce you (on my behalf) to correct your wrong and its effects. Your (incorrect) assertion of your normative capacity to use me or my means as means to your own end is thus negated by the law that then reasserts my rightful (correct) entitlement to be the one who makes these choices.⁴³ Thus, rights in tort law are rights to control the conduct of another. So, the question is, what kind of subject matter can be the proper object of this constraint? What kinds of objects amount to means that I am entitled to use to pursue my ends and, moreover, are the kinds of things with which you cannot interfere? The central argument of this present section is that our emotional states are not entitlements we have that can constrain the freedom of others. In short, emotions do not amount to means and thus cannot be the subject matter of a private law entitlement or the object of a private law duty.

What does it mean for something to be a means? Traditional examples of means are one's body and property. These are external aspects of the world that persons can use to pursue the ends they choose for whatever reasons that motivate them to choose these ends as opposed to others. They are "the conditions of a person's ongoing capacity to set and pursue purposes, rather than ... aspects of a person's well-being."⁴⁴ Means

⁴³ Significantly, the end you choose in your use of me or my means could be my own good. However, because it is not an end that I have chosen or authorized you to choose for me, it does not count as my end, but yours.

⁴⁴ Arthur Ripstein, "Civil Recourse and Separation of Wrongs and Remedies" (2011) 39

are thus things that are available for us to use in the world to achieve ultimate or intermediate goals. In *Private Wrongs*, Ripstein offers the following helpful analysis:

I mean ‘means’ to be construed in a specific way: Your means are just those things about which you are entitled to decide the ends for which they will be used. The means that you have, then, are whatever it is that you are entitled to use for setting and pursuing purposes. . . . The means that you have, in the first instance, are just your body—your ability to decide what to do and to manipulate objects in space—and your property, that is, the things outside your body that you are entitled to use for pursuing your purposes.⁴⁵

Rightful means—those things in the world that we are entitled to constrain other’s freedom with respect to—are simply things over which we have power to determine their use and the ends they can be set out to achieve. Examples of such means are our body and our property.⁴⁶ To see how emotional states cannot be the sort of thing that is a means, let’s look a bit more closely at why bodies and property are. What is it about our bodies and property that makes them proper bases of entitlements against interference by others? Both one’s body and one’s property are particular instantiations of our abstract capacity to set purposes.⁴⁷ Without our body, we could not

Florida State University Law Review 163, 170.

⁴⁵ Arthur Ripstein, *Private Wrongs* (Cambridge, Mass.: Harvard University Press, 2016) at 9.

⁴⁶ We can also view contractual entitlements as a further type of means.

⁴⁷ Without physical bodies and external objects of choice, all we would be would be radically disembodied, boundless wills. We could will only things in general and nothing in particular. In this state, a person can say, “I am not my desires; I am neither this nor that; I am I.” Freedom here means freedom *from* the world. The world does not determine the individual because the individual rejects the world. The self, however, is nonetheless dependent on its desires because it defines itself by their negation. In other words, the self needs the desire in order to say, “I am not that desire.” For a person to exercise his or her capacity for purposiveness – this abstract capacity to will as described here – he or she must actually will *something*. And this something, initially, will be the movements of his or her body and subsequently the external objects that exist in the world in which he or she finds him or herself. (See GWF Hegel, *Philosophy of Right* (1821), trans by T.M. Knox (Oxford: OUP, 1967.)

act in the world at all. And, although this point is more contentious, it is at least arguable that without the ability to possess (with some measure of exclusivity) material things, we also could not set or pursue purposes.⁴⁸ We might derive happiness or pleasure from our bodies and our property, but these hedonic aspects are irrelevant from the perspective of tort law. If I sue you for misappropriating my golf clubs, it does not matter whether I loved to golf, was sentimentally attached to the nine-iron, despised them because of my sub-par performances on the course, or did not even know that I had them.⁴⁹ You wrong me regardless of how they feature into considerations of my well-being.⁵⁰

Emotions are not external objects of choice, like property, nor are they the physical substance through which we effectuate our wills, like our bodies. The reason for this is not just because emotions, *pace* Seneca, are not under our control, but because they are not substances that can be put to use to achieve external ends. Emotional states are no doubt useful in a social sense. Indeed, many neuroscientists and biologists have played up to great effect the evolutionary functionality of emotions in human beings.⁵¹ Yet, they are not states that we can *put to use*.⁵² Although gym t-shirts proclaim, “No

⁴⁸ For a powerful and insightful analysis of the necessity of the institution of private property, see: Christopher Essert, “Property and Homelessness” (2016) 44 *Philosophy & Public Affairs* 266. See also: Essert, *Yours and Mine* (unpublished manuscript).

⁴⁹ Full disclosure: I have never golfed in my entire life, save a few rounds of mini golf.

⁵⁰ Note that it might appear that sentimental attachment could figure into questions of damages, specifically whether a contractual remedy can be one of specific performance rather than monetary damages. I have a few thoughts on this, but they are quite tentative and fall outside the topic of this chapter.

⁵¹ See: Patricia Churchland, *Braintrust: What Neuroscience Tells Us about Morality* (Princeton: Princeton University Press, 2011); Patricia Churchland, *Neurophilosophy: Toward a Unified Science of the Mind-Brain* (Cambridge, Mass.: The MIT Press, 1986); Joseph LeDoux, *The Emotional Brain: The Mysterious Underpinnings of Emotional Life* (New York: Simon & Schuster, 1996).

⁵² Jason Neyers suggested to me that in fact professional basketball players often use emotions to ratchet up their game, for example, using perceived (or manufactured) slights to get one fired up to prove one’s critics wrong. (See *The Last Dance*.) I am not sure what I

Pain, No Gain!” it is not the case that we are using the pain to achieve the gain. The pain is a by-product of the gain, but it is not, in the way that those ubiquitous protein shakes are, an actual means to the end of gain.

Emotions are not means to achieve our ends; rather, they are aspects of our well-being (or ill-being).⁵³ To see how this is so, let us reflect on the difference between happiness, on the one hand, and money, on the other. Happiness or pleasure are, for many of us, ultimate ends. Actions are considered rational to the extent that they are happy-making and irrational to the extent that they are not. Note as well that what is considered to be happy-making or pleasurable is intimately tied to the particular desires, make-up, and beliefs of the individual chooser. You might get a great deal of joy from hurtling around on what I find to be a terrifying and nausea-inducing fairground ride. To me a single malt scotch offers moments of peaty pleasure while for you it brings nothing but throat-burning toxicity. I could go on about the relativity of pleasure, but the point is that happiness and other emotional states are as multifarious and relative as are aspects of our well-being (what we perceive to be good for us, the ends which we choose), and this is because happiness is not a means to achieve an end, but rather an end in itself. By contrast, money, the universal means, is the same for all of us unless we have an eccentric relationship to money like Scrooge McDuck or those who have taken extreme vows of poverty. Money is there to be used to pursue our self-chosen ends. If we make it an end in itself, *à la* Mr. McDuck, we are not treating it as money, but as a fetish; our relationship to it can be considered pathological.

For reasons I will explore more in Part III, it is because emotional

think about this, but I don't think it's the same thing as using an external object of choice to achieve an end. It is more akin to an actor who attempts to get into the role by going method.

⁵³ As Ripstein explains, “[y]our happiness, considered as such, is not among the means that you use to set and pursue your purposes.” Ripstein, *Private Wrongs* at 252.

states are more like ends than means, that the law cannot either order one person to make another happy (or provide means to meet that person's particular conception of happiness) or compel any emotional state in those subject to it. For present purposes, the fact that emotions are not means entails that to the extent that Person A claims his emotional states ground a coercive claim against the conduct of Person B, A wrongs B by compelling B to act in a particular way in order to promote A's particular chosen end. In this way, A claims the right to use B as a means to achieve his end. Just like claiming an entitlement to my sandwich, this is not a claim that can be rightfully made. This is why you have no right to happiness.⁵⁴ No other person has an obligation to ensure that you are happy.

One could, however, concede this point—that no one has an obligation to make another happy—but still argue that surely one must have a right not to be made miserable. My response is that while we have a right not to be touched physically, we do not have an equivalent right not to be touched emotionally. A world in which we are not free from physical contact without our consent is an unimaginable one. But equally unimaginable is a world in which we are entitled to be free from emotional contact without our consent. The types of beings we are, social beings, necessitates spontaneous, occasionally even unwanted social and emotional contact. The intention to affect another person emotionally and the capacity to be affected by another are part of what it means to be human. To forgo emotional contact, we might say, is to forgo humanity.

I would like to end this section with a small caveat. Sometimes interferences with our emotional well-being can amount to a disruption of

⁵⁴ Contra "Everybody's Got the Right" in Sondheim's musical *Assassins* (thanks to Jo Langille for this reference), but in line with the Declaration of Independence, according to which it is the "pursuit of Happiness," and not happiness itself, that is declared an inalienable right.

our means, but only insofar as they are not understood as interferences with well-being, but rather as interferences with our psychological integrity. We can see this in the torts of intentional and negligent infliction of nervous shock (emotional distress). Here, when one person disrupts another's very ability to set means to ends, this counts as damage to one's means. Recent Supreme Court of Canada jurisprudence offers a helpful analysis of the right at the core of the tort of negligent infliction of emotional distress:

That right is grounded in the simple truth that a person's mental health—like a person's physical integrity or property, injury to which is also compensable in negligence law—is an essential means by which that person chooses to live life and pursue goals. ... And, where mental injury is negligently inflicted, a person's autonomy to make those choices is undeniably impaired[.]⁵⁵

If means are how we realize our projects, then both physical integrity and security in our external holdings seem necessary. Both our body and property are the necessary means through which we achieve our external projects. We might wonder, though, how it is that mental health could be a means. If it is, mental health must be something akin to physical health in that whatever it is that is “me” requires mental competency to set and pursue ends. This seems right, but is there a me that can take up the means that is my mental health? It seems difficult to imagine a division between myself and my mind. Yet, perhaps, this proves the point. If my mind is severely damaged, then there is no me that can take up means, that is, I lose my capacity to take up means, full stop. I lose my ultimate means: my mind.⁵⁶ Thus, to the extent we recognize rights to emotional or psychological integrity, only

⁵⁵ *Saadati v Moorhead* [2017] SCC 28, para. 23, per Brown J.

⁵⁶ In “As If It Had Never Happened” (2007) 48 *William & Mary Law Review* 1957, 1984, Arthur Ripstein explains why you can regain the expense of counselling after injury: “because the wrong deprived you of your most important power, the ability to decide how to use your other powers.”

interferences that constitute a deprivation of this fundamental capacity should count as wrongs, as entitlements to control the conduct of others. I will return to this argument in chapter 4 in which I focus on the torts of intentional and negligent infliction of emotional distress (psychological harm).

III. TORT LAW'S INSTITUTIONAL LIMITS

My final argument for tort law's exclusion of emotions concerns tort's status as a legal institution. The arguments here are the most suggestive and tentative of the chapter, but my hope is that they will resonate with those with broadly liberal-democratic commitments. Tort law is the legal means through which private individuals can harness the state to act on their behalf and coerce another individual to perform a court-determined reparative obligation. Thus, more than the preceding two sections, this section looks at the issue of the salience of emotions in torts from the point of view of the law. As such, it implicates serious questions about the limits of and justifications for legal authority and coercion. I clearly cannot tackle these fundamental questions of political theory in this chapter, so I will instead simply propose what I take to be a plausible story about the nature of legal authority and show how it works to preclude tort law's recognition of emotions. This part puts forward two main arguments. First, if tort law remedies emotional wrongdoing and treats emotions as legal entitlements, then it is enforcing a conception of one individual's good onto another to endorse or promote. Second, to the extent that legal coercion is attached to our emotional experiences, the less room we will have for the expression and experience of authentic emotions.

At its essence, the question of political or legal authority is a question

of when and how is it justified or even permissible, if I am the boss of me (I am my own master), that someone else can tell me what to do and use coercive means to ensure my compliance. Recall that the definition of a wrong is someone's assertion of control over something (my body, my sandwich) that they have no entitlement to exercise control over. If the fundamental starting point is that no one is my master, how is the exercise of coercive legal authority not the same thing as a wrong? How can it be that when the law tells us what to do – imposes an external restraint on our behavior – this imposition is not a further wrong? What is the normative difference between another person telling me what to do and using external means (manipulation, force) to get me to do it and the state using its considerable power to control my conduct? We can begin to see the difference between the gunman and the state by considering the requirement that the law's justification must be public. Legal coercive authority must be grounded in reasons that are available to all. Another way to put this is that the law's justification cannot be private. One way this plays out is that the officials who occupy legal offices can only act for public, not private, purposes. In the famous Canadian constitutional law case of *Roncarelli v Duplessis*,⁵⁷ Maurice Duplessis, the Premier and Attorney General of Québec, revoked Frank Roncarelli's liquor license out of animus. This action was considered to lie outside the mandate of the public official – it was considered *ultra vires* and therefore of no legal effect.⁵⁸

By the same token, when judges determine disputes about rights between private persons, not only can they not act for their own private purposes, but they also cannot act for the private purposes of either of the

⁵⁷ [1959] SCR 121.

⁵⁸ For a thorough review of the tort of misfeasance in public office in Canada, see Erika Chamberlain, *Misfeasance in a Public Office* (Toronto: Thomson Reuters, 2016).

litigants before them. Legal standards must be objective, not subjective. I do not get to determine how things go for both of us and neither do you; we need an impartial third to decide how things are between us.⁵⁹ As Arthur Ripstein explains,

Equal private freedom presupposes objective standards of interaction. I do not merely need to do my best in avoiding injuring you; I need to exercise the reasonable care of an ordinary person. The meaning of the terms of a contract between two persons is not based on what one or the other of them thinks; nor is it created by some accidental overlap between the thoughts of each of them. Instead, the meaning is given by what a reasonable person would take it to be. Objective standards are required because a subjective standard would entitle one person to unilaterally determine the limits of another person's rights. If I could avoid liability by trying my best, your right to my forbearance would depend on my abilities and judgments, and so be inconsistent with a system of equal freedom. If my contractual obligations reached only as far as I thought they did, your rights would depend on my judgment in a similar way. ... [O]bjective standards of conduct are required by a system of equal freedom, in which no person's entitlements are dependent on the choices of others.⁶⁰

A subjective standard instantiates the private purpose and ends of one of the parties. Only objective standards can treat the parties as equal by providing a general – that is, a non-particularized – norm of equal treatment before the law. If tort law were to treat as salient one of the participant's emotional states, this would amount to the law's adoption of a private, subjective purpose. If it were the case that defendants were liable for the well-being of their plaintiffs, that plaintiffs had an entitlement against their defendants to ensure their happiness, then, when a court ordered the defendant to pay damages to the plaintiff, the court would be forcing the defendant to pay for the plaintiff's particular conception of the good: whatever is happy making

⁵⁹ Alexandre Kojève, *Outlining of a Phenomenology of Right*.

⁶⁰ Ripstein, *Force and Freedom* at 171.

for the plaintiff.

The second argument against the legal salience of emotions is more suggestive. The idea here again relates to the question of justified legal authority, but its focus is slightly different. Here, the question is not whether legal coercion to promote the well-being (happiness) of another can be justified on public grounds, but whether particular emotional states can be the subject of legal attention. My answer is that they cannot, first because any such law would necessarily be ineffective if we are hoping for an authentic emotional state, and second, because, in so doing, the law would restrict significantly the space for these authentic emotional reactions.

The object of legal authority is necessarily an action of a person. Your thoughts, beliefs, wishes, desires, and motives are irrelevant from the standpoint of the law unless and until they are unequivocally made manifest in an act. This is so for two reasons. First, internal mental states cannot affect the rights of others, their capacity for purposiveness. I can lie awake every night praying for and perhaps even planning out in gruesome detail your death, but until and unless my dark desires manifest themselves unequivocally in an action that sets about to achieve this end, the law cannot touch me. Second, external coercion of an internal state poses some serious difficulties. To illustrate this point, imagine the following situation: one of my children begins to use her sibling's toothbrush to brush her own teeth every night. She does this because she is a stinker, not because she does not have her own toothbrush and not because she likes her sister's toothbrush more. I discover this transgression and order her, on threat of giving away all of her beloved toys, to stop this behavior, to buy her sister a new toothbrush, to apologize, and to feel contrite. Out of fear of being dispossessed of the material objects she loves, she obeys. She never again uses her sister's toothbrush, she buys her a replacement, and she apologizes. But we can

plainly see that she cannot comply with my final order of enforced contrition. Remember that she is a stinker, so she really does not feel bad about her behavior at all. Indeed, she might still look back on it and giggle. Her reparative actions, even her apology, were performed out of fear of external sanction, not from the internal motivation of regret or remorse. Now, imagine the following similar situation, but this time I am a better parent and give her a quick but somehow effective lesson on Kantian ethics. She realizes her wrong and takes the reparative step and makes the apology without my threatening an external sanction should she not comply. Here, we would say she has acted from under her own free will permitted this moral act and its concomitant moral emotions. When law steps in and mandates an emotional reaction, we can see that it not only counterproductive but also potentially corrosive of the space in which interpersonal emotions can exist.

CONCLUSION

In this chapter, I have introduced three core arguments to support tort law's indifference to the emotional states of its participants. The first argument maintains that the structure of tort law is inimical to the structure of emotions; the second posits that the kind of subject matter tort law concerns itself with cannot be emotions *qua* emotions; and the third suggests that a legal institution like the law of torts is an inappropriate and potentially self-defeating means to elicit, promote, or protect emotional states. In the chapters to follow, these three arguments will be developed through the lens of different tort doctrines that appear, at first glance, to belie the thesis regarding the irrelevance of emotions for torts. We will see how fear has nothing to do with liability in the tort of assault, how grief is beside the point for bereavement damages, that spite is immaterial for private nuisance and the unlawful means tort, that a defendant's regret is of no consequence for

the fulfilment of his remedial obligation, and that we might have reason to reconsider the coherence and legitimacy of damages for pain and suffering, aggravated damages, and so-called hedonic damages. None of this is to say that these emotional states are not socially, personally, medically, or even morally significant. My claims are limited to their relevance for law, specifically, the law of torts, a body of law that allows one individual to constrain, through the power of the state, the conduct of another individual.

* * *