Emotions and Culpability
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To our wives, Marilyn and Marian
Plura . . . multo homines iudicant odio aut amore aut cupiditate aut iracundia aut dolore aut laetitia aut spe aut timore aut errore aut aliqua permotione mentis, quam veritate aut prescripto aut iuris norma aliqua aut iudicii formula aut legibus.

Marcus Tullius Cicero, *De Oratore*, II, 178

[Men decide far more problems by hate, love, lust, rage, sorrow, joy, hope, fear, illusion, or some other inward emotion, than by reality, authority, any legal standard, judicial precedent, or statute.]
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Poor Lodovico! That Shakespearean character has witnessed an act—Othello striking Desdemona—that his mind cannot comprehend, for his constructs do not admit the possibility. To Lodovico, this assault no doubt results from heat of passion, but not for good reason; yet a conundrum arises because this Moor is a man whose reason is always in control, who is never shaken by emotion. Confused, Lodovico asks,

Is this the noble Moor whom our full senate
Call all-in-all sufficient?—Is this the nature
Whom passion could not shake? Whose solid virtue
The shot of accident, nor dart of chance,
Could neither graze nor pierce? (IV, I, 261–265)

Lodovico is like the Law, we submit, which reluctantly acknowledges that emotions can distort thinking, disable control, fuel motive, and drive action—but nonetheless gives it scant standing in the Law’s account of culpability. Rather, the Law’s story has been dominated by two determining elements, the so-called objective act (actus reus) and the so-called subjective intention (mens rea), which must conjoin at the moment-of-the-act for a judgment of culpability to result. With the dramatis personae reduced to two, with an evolving psychological motion picture reduced to a still-life snapshot, and with the entwined objective and subjective perspectives reduced to simplistic antagonists, the Law’s story ends up looking nothing like what Shakespeare presents on the stage. Moreover, it does not match with the jurors’ notions of commonsense justice, nor does it accord with the facts and theories of Psychology.

These disconnects are what prompted two psychologists—one with interests in commonsense justice and culpability, the other with an interest in emotion theory, and both with deep respect for that great psychologist of
emotions, William Shakespeare—to come together and write this book. When we began to examine the Law’s theories of emotion and its broader “psychology” across crimes, defenses, and doctrines, we, like Lodovico, were perplexed. But unlike Lodovico, we were perplexed because the Law’s theories neither fit the facts nor were internally consistent; in fact, in many places, the theories contradicted one another.

For example, when the Law tries to account for emotion in the crime category of manslaughter, we find the Law embracing inconsistent and incoherent theories in the common law and Model Penal Code (American Law Institute, 1962). Specifically, the common law’s focus on certain objective provocations that occur “of a sudden” leads to mechanistic and invariant conclusions that such provocations produce the necessary degree of “heat of passion” such that “reason cannot reassert control”—which lead to the normative conclusion that manslaughter’s mitigation is warranted; but the mechanistic conclusions result not from factual determinations, but by legal fiat.

The Code’s doctrine of “extreme emotional disturbance,” to the contrary, presents us with disembodied emotions roiling within the subjective psyche, disconnected from external provocations, with willful minds of their own; this portrayal is no theory at all, and it certainly does not comport with psychological facts regarding the complex interrelations between emotions and objective and subjective factors. The common law seems to mirror Othello’s account of himself—as an individual “not easily jealous, but who, being wrought/Perplext in the extreme” (V, ii, 345—347) by Iago’s provocations, loses control over his emotions and kills his faithful wife. The Code, to the contrary, seems to reflect Emilia’s view that jealousy is internal to the man, as “a monster/Begot upon itself, born on itself (III, iv, 159-160). Yet external versus internal or objective versus subjective views turn out to be simplistic dichotomies, particularly when compared with the complex theory of emotion and culpability that Shakespeare developed through the play, which his Elizabethan audience embraced, we submit, because it resonated with their understanding of human nature.

In this work, we examine the Law’s theories of emotions across some of the criminal law’s crimes, defenses, and doctrines and demonstrate that these turn out to be psychological theories, for they advance explanatory claims about the emotional nature of our human nature. We also show that these psychological folk theories are neither consistent nor comprehensive, failing, for example, to account for why emotions sometimes aggravate, mitigate, excuse, or justify when it comes to culpability. Through these “within-subject” analyses of the Law’s various theories, we show how and why the Law is at odds with itself, as our subtitle conveys.

But theories, even consistent and comprehensive theories, can be wrong. This is why we do two “between-subject” (or between-perspectives) analyses, comparing the Law’s theories with those offered by academic Psychology and by commonsense justice (those theories held by ordinary citizens who
serve on juries). Through these comparisons, our broad aim is to inform the Law, suggesting where, when, and how the Law may right its theories of emotion and culpability (as well as its understanding of psychology). This aim should not be confused with usurping the Law or proffering psychological surrogates that would undermine the Law’s normative judgments of culpability: in fact, nothing we recommend would replace normative judgments with psychological surrogates. Rather, to paraphrase law professor George Fletcher (1988, p. 154), our aim is not to defeat the law but to improve the law, to realize the law’s inherent values. We do bring the empirical is to the normative ought, because these two realms come together in the Law and in criminal trials. Our view is that the Law’s normative ought must rest on a human nature that is sound, and this can be done by taking men and women as they are, to paraphrase both Rousseau’s words from The Social Contract (1762/1950) and Rawls’s words from The Law of Peoples (1999).

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DEFINING THE GROUND
AND PROVIDING A
PSYCHOLOGICAL CONTEXT
FOR THE EMOTIONS
Emotions and culpability were linked “in the beginning”—with the first murder (Genesis 4: 1–16)—but not without ambiguity. As Stephen Mitchell translated the story in Genesis: A New Translation of the Classic Biblical Stories (1996, p. 9), “Cain was very troubled, and his face fell” when the Lord accepted Abel’s offering of “the fattest pieces of the firstlings from his flock” but did not accept Cain’s offering of “the first fruits of his harvest.” But in Genesis 1–11: A Commentary, Claus Westermann (1984) translated the passage as “Cain was very angry and his face fell,” (p. 281) and highlighted “burning envy” (p. 297) as the specific emotion in his commentary, though he noted other acceptable translations. And in The Five Books of Moses: A Translation With Commentary, Robert Alter’s translation was “Cain was very incensed, and his face fell,” although Alter noted that these two “locutions for dejection”—which God repeats (“Why are you incensed, and why is your face fallen?”)—are “particularly elliptic in the Hebrew, and thus any construction is no more than an educated guess” (Alter, 2004, p. 30).

However, we do not have to guess about what happens next, for the text is quite clear. Cain led his brother into the field, “And when they were
in the field, Cain rose against Abel his brother and killed him" (Alter, p. 30). And we know that a culpability judgment of guilty followed. For when the Lord puts His query ("Where is your brother Abel?") to Cain and first receives a lie, and then a smart-aleck question back ("I don't know. Am I my brother's keeper?"), His judgment is swift: "What have you done! Listen: your brother's blood is crying out to me from the ground. Now you are cursed . . .” (S. Mitchell, 1996, p. 9).

Yet the biblical and archetypical story of the first murder does not take us as far as we would like into Cain’s subjectivity—particularly into his emotions and thoughts, and their interaction—nor do we learn how these elements affected motive and intent, the act that followed, and the culpability judgment rendered. As to his emotions, we have only our inferences from the words troubled, angry, and incensed and from his fallen face. Inferences, though, leave us with doubts and questions. For example, (a) what particular emotions did Cain feel, (b) in regard to what, and (c) to whom (or Whom) were they directed? Was the specific emotion envy, jealousy, resentment, anger, or revengefulness—the emotions that fall within the cluster of vindictive passions that Nietzsche called reisentiment (Murphy, 2003, p. 14)—or did the emotions fall within the cluster of shame and embarrassment? Was his anger and dejection directed toward God the Father because, in Cain’s eyes, He had humiliated Cain by the public slight, or because He seemed to be playing favorites unfairly? Or were his emotions directed toward his brother, the “chosen one,” such that he was envious of Abel’s superior offering, jealous of God’s regard of Abel, and resentful that Abel made him look bad? Or were Cain’s emotions directed toward himself, such that he was embarrassed by his public failure, ashamed by his inferiority in the eyes of the Lord, or guilty about having withheld the best of his harvest for himself instead of offering the best to the Lord as his brother had done? Or were his emotions some combination of the above? Unfortunately, the text does not answer our queries.

We certainly sense that Cain’s emotions relate to, if not lead to, the killing, but what is meant by lead to? Were Cain’s emotions the cause, a significant correlate, or merely an incidental concomitant of the act? Did they play their part before the overt act, by driving his motive and distorting his thinking, or did they play their part during the act, by disabling his control? For example, when Cain said to Abel, "Let us go out to the field," what was Cain thinking? Had his emotions already led him to premeditate and deliberate about killing his brother, and was he now performing the first scene of the soon-to-be-executed fatal act? Or had his emotions led only to a “depraved heart,” in which state he may have thought about killing, but had not fully deliberated? Or was his invitation to walk to the field more innocent than those possibilities—merely a brother wanting to talk about his feelings? And if the latter, did Abel say or do something in the field that suddenly provoked Cain to a heat-of-passion killing that the Law would consider manslaughter, rather than murder? Once again, the biblical text falls silent about how Cain’s
emotions affected his subjective intentions (i.e., his thinking and malice) and how these subjective elements led to the overt act of killing.

And what role did Cain’s emotions play in the Lord’s culpability judgment, His initial sentence of Cain, and His revision of that sentence following Cain’s plea? We know the Lord judged him guilty, but to what degree was the judgment based on Cain’s emotions, intentions, and act of killing, and to what degree was it based on his lie to the Lord, his failure to own up to what he had done, and his failure to show remorse? We know that the Lord does not kill him, but He offers no explanation for His sentence: “And so, cursed shall you be by the soil that gaped with its mouth to take your brother’s blood from your hand. If you till the soil, it will no longer give you its strength. A restless wanderer shall you be on the earth” (Alter, p. 31). And when Cain said to the Lord—“My punishment is too great to bear. Now that You have driven me this day from the soil and I must hide from Your presence, I shall be a restless wanderer on the earth and whoever finds me will kill me” (p. 31)—we are not provided with God’s reasons for revising the sentence by putting a mitigating and merciful mark on him instead “so that whoever found him would not slay him” (p. 31). Once again, we get no answers to our questions, this time about how Cain’s emotions and intentions affected the culpability and sentencing decisions.

In this book, our focus is not on how and why the Omniscient One makes culpability judgments, but on how and why ordinary human beings do so. By setting our sights earthward and by focusing on the Law and Psychology, we examine where, when, how, and why that most animating psychological concept—emotion—influences culpability. Our primary interest is the emotions of the accused, and our particular focus is on American criminal law and its theories of culpability, which are embedded in statutes, in the reasons and dicta judges give for their decisions, and in the works of legal theorists. We ask why, for example, emotions sometimes aggravate a murder, making it so vile and heinous that it warrants the death penalty, whereas at other times emotions mitigate a murder to manslaughter, or excuse a killing (e.g., insanity) or even justify it (e.g., self-defense). By moving our focus from heaven to earth we do get answers, but not without considerable work, because the Law’s earthly theories of emotion and culpability are neither straightforward nor coherent.

INCONSISTENCIES, CONTRADICTIONS, AND INCOHERENCE

We now briefly illustrate some of the inconsistencies, contradictions, and incoherence among modern criminal Law’s theories of emotion, as seen

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1 When speaking of Law and Psychology as a discipline with a collective consciousness, with aims and intentions to produce, for example, cohesion and coherence among its laws, or achieve valid theories, then we use capital letters. When speaking about particular laws, parts or areas of law, or particular practices or research within psychology, we use the lowercase.
through different crimes, defenses, and doctrines (Dressler, 2001; Fletcher, 1978). Conflicting theories occur within the same crime category (e.g., between premeditated murder and felony murder, within first-degree murder), between abutting crime areas (e.g., first-degree murder and second-degree murder), and among the theories that relate a crime and a defense to one another (e.g., murder and the insanity defense, or murder and self-defense). For an example of conflicting theories within the same crime category, consider murder, beginning with first-degree murder, for herein the law presents the “cold blooded” premeditated murderer who kills without emotion, purposefully and intentionally. But this image conflicts with the facts about many serial killers, the worst of the worst, some of whom receive the death penalty, who at the time of the act often display strong, hot, and unwholesome emotions that oftentimes drive the act, aggravate the offense, and pose grave risks of future violence.

The incoherence grows again when we include the other murder verdicts. When we drop down to second-degree murder, we find the depraved-heart murderer, where emotions clearly come into play; when we drop down yet another notch, there is heat-of-passion manslaughter, where emotions are more significantly involved; and within the insanity defense—whether it be in the 18th- to 19th-century “wild beast” test, or the 19th-to 20th-century “irresistible impulse” tests, emotions are again strongly implicated. What is puzzling is why emotions can (a) aggravate and add to culpability (i.e., enough to warrant a death penalty) for some first-degree murderers; (b) mitigate intent and subtract slightly from culpability, for second-degree murderers; (c) mitigate culpability significantly, as in manslaughter, and negate the possibility of malice; (d) exculpate entirely in insanity, where we hold the actor blameless; or (e) justify the act, as in self-defense.

Such inconsistencies, contradictions, and incoherence strongly suggest that there is no unifying theory beneath these disparate laws, rules, and distinctions. Moreover, when we examine the Law’s folk theories of emotion we find many based on outdated notions of psychology and human nature; these findings challenge the validity of the laws that rest on these folk theories. With the validity of many of these legal theories in doubt, and with inconsistencies and contradictions between theories and a general incoherence overall, we are left with disturbing questions about whether such laws will be respected and obeyed. It is time, we believe, to take a different tack, and use some different navigational lights.

**SETTING A NEW COURSE**

As we have pointed out, the Law has multiple theories about how emotions relate to culpability, and these theories can be found in common law case decisions, treatise writings, appellate decisions, statutes, penal codes, and law review articles and books. It is our contention that the vast majority
of these legal theories, when closely analyzed, turn out to be psychological theories—for they advance explanatory claims about the emotional side of our human nature as they relate to culpability. We illustrate our view later in this chapter and in Part II of this volume, in which we focus on specific areas of the criminal law (e.g., murder, manslaughter, insanity, self-defense, mistake), but now, we offer a few words on theory.

As theories go, one theory may cover a narrow topic whereas another may be more comprehensive; one theory may seem to cohere whereas another does not; one may show internal consistency among its parts whereas another may reveal contradictoriness. There is clearly a need to evaluate and compare theories (both within and across areas of the criminal law) in regard to their comprehensiveness, coherence, consistency, and contradictoriness, and this sort of analysis, which we undertake in this volume, takes us inward, into the Law itself.

But as scientists well know, a theory can be comprehensive, coherent, and consistent and still be wrong. This possibility leads us to a different set of questions, and in a different direction. For example, we can ask, on what psychological facts or assumptions does a particular legal theory rest, and are these facts and assumptions valid? Does a theory rest on an antiquated folk-psychology, long ago proven wrong and discarded? Does it rest on a psychology that was fancifully conjured by some judge or treatise writer without any regard for the empirical reality at all? These questions about validity require us to look outward, beyond the Law to the empirical reality. We perform this sort of analysis as well, using two types of sources.

First, we turn to academic psychologists who have accumulated hard facts derived from their empirical investigations of emotion, and who have built their emotion theories from those substantive facts. Second, we turn to the facts and theories ordinary citizens hold about emotions. Although the choice of this second source may seem surprising, we will defend our choice. Citizens have facts—drawn from their own experiences and from what they hear from others, see on television and the movie screen, and read in newspapers, magazines, and books. Although these anecdotal sources, stereotypes, and prototypes are less representative and solid than the scientists' hard facts, nonetheless their folk theories of emotion and commonsense justice (CSJ) theories of culpability turn out to be powerfully determinative of how jurors frame a case, understand the legal instructions, and reach their verdict (Finkel, 1995b). These two outside-the-Law perspectives, one from CSJ and the other from academic Psychology, are critical for informing the Law, we submit, but critical in different ways.

Commonsense Justice Informing the Law

When a judge instructs the jury at the end of a trial, the criminal law's theory and the jurors' CSJ theories meet. This meeting may lead to a meld-
ing, when these theories accord, but a clash may result if jurors hold to a
significantly different theory. If a clash occurs, jurors may nullify the law
outright or, more likely, they may reconstrue the instructions to fit their own
CSJ theories (Finkel, 1995b; R. M. James, 1959), although the Law wants
neither of these outcomes. The Law has a vested interest in seeing that its
law is comprehended and followed. However, considerable empirical research
shows that jury instructions oftentimes fail to instruct (e.g., Finkel, 200Gb;
Lieberman & Sales, 1997), whereas other research shows that even when the
instructions are comprehended, jurors still may reconstrue or nullify (e.g.,
Finkel, 1995b).

This fact leads to an empirical point, and then to a theoretical one. If
jurors do comprehend the instructions but still reconstrue or nullify, the ju-
rors could be sending the Law a message—one the Law ought to at least
fathom, though not necessarily follow. Through empirical work on such cases,
researchers can diagnostically determine jurors’ reasons for their verdicts (i.e.,
what constructs, principles, and theories they are invoking), comparing
whether CSJ theories make better sense than do the Law’s theories. If the
jurors’ reasons for their decisions do appear to be principled, coherent, and
comprehensive, even more so than the Law’s, then this situation raises the
remedial issue of whether the Law ought to consider a revision of the law
along commonsense lines. There are also pragmatic reasons to consider re-
vising the law: if the law departs significantly from community sentiment,
then citizens may lose respect for the law and disobey it—outcomes that
some legal and social science scholars have predicted (Holmes, 1881/1963;
Pound, 1907; Tyler, 1994).

Psychology Informing the Law

The reasons for using academic Psychology to inform the Law are more
complex, but we start with the obvious: validity. Psychology’s knowledge of
emotions derives from systematic studies and controlled experimentation,
and this knowledge can inform the Law about the validity of the facts and
assumptions that underlie its theories, and about the validity and
generalizability of those theories per se. Put simply, solid substance allows
the Law to develop sounder theories.

Our second point is not so obvious. From our perspective, the disci-
plines of Law and Psychology have much in common. It is not surprising that
the Law’s theories of emotion and culpability turn out to be psychological
theories, for the Law is not, nor can it be, an exclusively normative disci-
pline: in significant part, it is a descriptive discipline, dealing with the com-
plexities of human behavior, in both applied and theoretical ways, much as
does psychology. Moreover, the Law’s analysis of human behavior is neither
superficial nor confined to surface acts alone; to the contrary, the Law’s analysis
plunges into subjectivity, making assumptions and attributions about the mind,