

Hamlet Was a Law Student: A “Dramatic” Look at Emotion’s Effect on Analogical Reasoning

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“The law is reason, free from passion.”¹

“Give me that man
That is not passion’s slave, and I will wear him
In my heart’s core – ay, in my heart of heart. . . .”²

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1. ARISTOTLE, POLITICS (c. 322 B.C.).

2. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 2 (Ann Thompson & Neil Taylor eds., Arden Shakespeare 2006). All references to *Hamlet* will be to the Arden edition.

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INTRODUCTION

Hamlet’s beloved father has died. If you can sympathize with the profound grief Hamlet feels at that loss, you have gone a long way towards understanding his character. On top of that emotional trauma, Shakespeare layers further emotionally complicating circumstances: Hamlet is a prince; his father, Hamlet Sr., was the King and military leader of Denmark; and his mother, Gertrude, married his father’s brother Claudius within two months of his father’s death. The public and political aspects of these circumstances alone could compromise his ability to cope fully with his father’s loss. But to further complicate his psychological distress, Hamlet begins to see a ghost claiming to be his father. Is the Ghost really his father’s spirit or a demon from hell sent to torment him? The Ghost’s news brings no comfort: Hamlet is informed that Claudius, in addition to marrying Hamlet’s mother, murdered his father and stole the crown. If we weave in one further speculative thread to his emotional tapestry—that he learned of his father’s death while studying for his law finals—lawyers in particular will appreciate how a young man in Hamlet’s position might be driven to cry:

O that this too too [solid] flesh would melt,
Thaw and resolve itself into a dew,
Or that the Everlasting had not fixed
His canon ’gainst self-slaughter.³

As we shall see, suicide pervades Hamlet’s thoughts throughout the play. At the news of his father’s murder, however, Hamlet’s immediate emotional response is not toward “self-slaughter” but rather toward revenge.

Indeed, *Hamlet* is, in form, a revenger’s tragedy. This form was well known

3. SHAKESPEARE, *supra* note 2, at act 1, sc. 2. Note that Hamlet speaks this line before he actually sees the Ghost. I use this particular line because I believe it reflects the emotional baseline to which Hamlet returns and against which he struggles throughout the play. The proper timeline of events as I interpret it is: Hamlet studies for law finals, Hamlet’s father dies, Hamlet returns to Denmark, Gertrude marries Claudius, and Hamlet sees the Ghost. To be clear, Shakespeare never explicitly suggests that Hamlet studied law nor that he was familiar with Aristotle. This is my own interpretation of the character derived from an analysis of the text. Cf. A.C. BRADLEY, *SHAKESPEAREAN TRAGEDY* 369–73 (Penguin Books 1991) (1904) (agreeing with the proposition that Hamlet was a student at the time of his father’s death but noting textual difficulties this proposition creates).

to Elizabethan audiences,⁴ but Shakespeare used it to probe deeper psychological waters than had hitherto been explored. The most notable difference between Hamlet and other revenge heroes is that, rather than springing into action and beginning to plot the best time and place to kill Claudius and avenge his father's murder, Hamlet delays . . . and delays . . . and delays. Because his delay is arguably not the result of external obstacles, the reason for this delay may be the "central question of Hamlet's character."⁵

A.C. Bradley identifies and dismisses four prevailing answers to this question: (1) Hamlet delays because of external difficulties;⁶ (2) Hamlet delays because of his own morality and conscience;⁷ (3) Hamlet delays because he lacks "the strength of nerve which forms a hero";⁸ and (4) Hamlet delays because of irresolution.⁹ The premise of this Note is that Hamlet delays because he is a law student.¹⁰ Hamlet questions, equivocates, and demands proof before he ultimately achieves his ends. Most importantly, he delays because, like the law, Hamlet deeply distrusts his emotions¹¹ and works to suppress them.

4. See, e.g., GEORGE CHAPMAN, *THE REVENGE OF BUSSY D'AMBOIS* (1610); HENRY CHETTLE, *THE TRAGEDY OF HOFFMAN* (c. 1602); THOMAS KYD, *THE SPANISH TRAGEDY* (c. 1586); JOHN MARSTON, *ANTONIO'S REVENGE* (c. 1602); THOMAS MIDDLETON, *THE REVENGER'S TRAGEDIE* (c. 1607); WILLIAM SHAKESPEARE, *TITUS ANDRONICUS* (c. 1593–94).

5. BRADLEY, *supra* note 3, at 95.

6. *Id.* at 97. Under this view, Hamlet delays because the King was surrounded by a Swiss guard, because a public accusation of Claudius as a murderer would be difficult to prove, and so forth. Under this view, what Hamlet wanted was public revenge. *Id.*

7. *Id.* at 99. Under this view, Hamlet "could not satisfy himself that it was right to avenge his father." *Id.*

8. *Id.* at 103. Under this view, Hamlet is "the picture of a graceful youth, sweet and sensitive, full of delicate sympathies and yearning aspirations, shrinking from the touch of everything gross and earthly; but frail and weak . . ." *Id.*

9. *Id.* at 106. Under this view, Hamlet delays because of an "excess of the reflective or speculative habit of mind." *Id.* In other words, he thinks too much.

10. I should state at the outset that my conceit of Hamlet as a law student will proceed through a comparison to modern American legal forms without reference to the law of Shakespeare's day. The difficulty in writing anything about Shakespeare is that there exists a wealth of scholarship on such a vast range of issues that avoiding entanglements with other discussions is difficult. I therefore simply pause to note that a robust debate about the depth of Shakespeare's legal training has been ongoing for some time. For a good overview of the argument, see Mark Alexander, *Shakespeare's Knowledge of Law: A Journey Through the History of the Argument*, 4 *THE OXFORDIAN* (2001), available at <http://www.shakespearefellowship.org/virtualclassroom/Law/index.htm>. This Note does not purport to contribute to this discussion.

11. As an example of the law's distrust of emotions, the law of torts allows for recovery for negligent infliction of emotional distress only in a limited number of circumstances. See *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 547–48 (1994) (articulating the "zone of danger" test, the "physical impact test," and the "relative bystander test"); *Allen v. Walker*, 569 So.2d 350, 351 (Ala. 1990) (noting that Alabama does not allow recovery for negligent infliction of emotional distress). Similarly, recovery for emotional distress in a contracts case is equally circumscribed. See *RESTATEMENT (SECOND) OF CONTRACTS* § 353 (1981) ("Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."). The regulations interpreting the Military Claims Act go further and state that "[c]laims for either negligent or intentional infliction of emotional distress are excluded when they arise out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, or slander as defined in § 536.45(h)." 32 C.F.R. § 536.77(a)(3)(vii) (2007). For a look at

I am certainly not the first to recognize Hamlet's lawyerly tendencies.¹² However, I have found no critic who identifies Hamlet's lawyerly analysis as the explicit *cause* of his delay. Richard H. Weisberg notes Hamlet's need to have everything proven to him.¹³ Daniel J. Kornstein addresses Hamlet as a law student more directly and in greater depth, but he views the melancholy Dane chiefly as a reflection of the melancholy young law students from the Inns of Court.¹⁴ Kornstein, however, does note other lawyerly traits: Hamlet's fondness of wordplay; his lawyerly flexibility of mind; his self-restraint, similar to that which judges exhibit; his suspension of judgment; and his ability with narrative and logical analysis—that is, the way he “think[s] like a lawyer.”¹⁵ Having nearly completed law school now, and having felt my own wits frayed to the breaking point, I am surprised to have found no one linking law school with Hamlet's insanity, but I, too, will leave that inquiry for another day.¹⁶

As to the way Hamlet “think[s] like a lawyer,” Kornstein notes Hamlet's use of deductive logic and reasoning by analogy,¹⁷ yet his discussion does not explore the details of his reasoning as I propose to do. What Kornstein characterizes as lawyerly paralysis—“on the one hand . . . , on the other hand”¹⁸—I believe is not mere equivocation, but the essence of Hamlet's lawyerly analysis at work. Hamlet seeks an animating principle to guide his actions in the same way courts seek overarching principles to synthesize prior law and to serve as standards for future cases. To do this, Hamlet engages in a dispassionate judicial analysis of his circumstances. In other words, his analysis is not merely a function of his paralysis, but rather it is a deliberate effort to remove emotion from his judgment and think through his problem rationally.

Hamlet's and the law's struggle with legal reasoning and emotion will therefore be the focus of this Note. My thesis is that emotion substantially affects the process of analogical reasoning at all levels. In fact, emotion and logic operate together like conjoined twins in legal reasoning. Most importantly, emotion is what releases the legal imagination to see relevant similarities and

the roots of the law's historical distrust of emotion, see Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 248–62 (2005). Ryan notes that Aristotle actually attempted more synthesis of reason and emotion and that our modern bifurcation of the two owes itself more to Plato. *See id.* at 253. By adopting Aristotle's maxim, we have then apparently grafted Plato onto Aristotle. *Id.*

12. *See, e.g.*, DANIEL J. KORNSTEIN, KILL ALL THE LAWYERS? SHAKESPEARE'S LEGAL APPEAL 97 (1994); THE ELSINORE APPEAL: PEOPLE V. HAMLET 82 (David Stanford Butt ed., 1996); RICHARD H. WEISBERG, THE FAILURE OF THE WORD 8, 20, 35 (1984).

13. WEISBERG, *supra* note 12, at 8.

14. KORNSTEIN, *supra* note 12, at 97.

15. *See id.* at 97–102.

16. Note that whether Hamlet is actually insane is subject to debate and interpretation. Hamlet himself tells his friends that he intends to put on an “antic disposition” after seeing the Ghost. SHAKESPEARE, *supra* note 2, at act 1, sc. 5. Nonetheless, his behavior throughout the play might well give his friends cause to wonder how much of his subsequent disposition is really an act—especially his spurning of Ophelia and his murder of Polonius. *See id.* at act 3, sc. 1 & act 3, sc. 4.

17. KORNSTEIN, *supra* note 12, at 101–02.

18. *Id.* at 99.

therefore permits the final leap to judgment.¹⁹ We should therefore abandon the fiction (represented by Aristotle's epigram)²⁰ that reason and emotion are separate in decisionmaking²¹ in order to better determine the role we want emotion to play. To illustrate this thesis, I explore the way Hamlet reasons analogically for both the conscious and, more importantly, unconscious intersection of legal reasoning and emotion. Emotion influences the way Hamlet states his facts, presents his "legal questions," develops the rules he applies, sees relevant similarities, and reaches conclusions. As a byproduct of this illustration, I hope to uncover not only the source of Hamlet's delay, but also the essence of the drama.

Choosing *Hamlet* as a vehicle for an exploration of legal reasoning and emotion seems fitting because the Law and Literature movement has been a principal forum for such discussions. Indeed, by establishing the starting point for my analysis of Hamlet, two of this movement's champions, James Boyd White and Martha C. Nussbaum, haunt this Note like Hamlet's father's ghost. Let me, therefore, briefly place my argument in context. Law and Literature seeks, among other things, to demonstrate that literature helps to stimulate and develop a lawyer's imaginative and empathetic capacities, thereby incorporating

19. See *infra* section III.C. One could also argue that imagination releases emotion. However, my years as a professional actor persuade me that the progression runs from emotion to imagination. For an actor to enter imaginatively into the life of another, he or she must find an emotional analog in his or her own life. Once the appropriate analog is found, the imagination is released and more effectively fills out the character's inner life. Therefore, given the theatrical bent of this Note, I will proceed on this assumption.

20. To be clear, I am using Aristotle's epigram as *representative of* what I believe to be our contemporary commitment to judicial objectivity. In doing so, I vastly oversimplify Aristotle's actual understanding of the relationship between logic and emotion in the law and potentially expose myself to the charge that by challenging this commitment through Aristotle, I do him a great disservice. See, e.g., Ryan, *supra* note 11 and accompanying text. Though Aristotle recognized that emotion is deployed by lawyers when making arguments, see generally ARISTOTLE, BOOK ONE OF RHETORIC (W. Rhys Roberts trans., 2004), and generally had a more sophisticated understanding of the relationship between logic and emotion than his epigram suggests, time often erodes subtlety in distinctions. My belief is that the legal profession holds faith with his epigram more than the subtler understanding of his larger philosophy.

21. See, e.g., BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112–14 (1921) ("One of the most fundamental social interests is that law shall be uniform and impartial."); Richard A. Posner, *Emotion Versus Emotionalism in Law*, in THE PASSIONS OF LAW 309, 309 (Susan A. Bandes ed., 1999) ("The law itself is conventionally regarded as a bastion of 'reason' conceived of as the antithesis of emotion . . ."); Robert C. Solomon, *Justice v. Vengeance*, in THE PASSIONS OF LAW 123, 128 (Susan A. Bandes ed., 1999) ("The law is by definition dispassionate."). But see Solomon, *supra* ("I have argued at some length and for many years that the opposition between reason and emotion is insidious.").

The separation of intellect and emotion is not unique to legal thinking. One commentator suggests that this ancient legal notion is, in fact, continually reinforced from other modern directions: "[T]he idea that emotions derive from the 'animal' part of our nature, rather than from a specifically human part . . . has until recently been very influential, both in empiricist-derived philosophy and in cognitive psychology, and through both of these in fields such as law and public policy . . ." Martha Nussbaum, *Emotions as Judgments of Value and Importance*, in THINKING ABOUT FEELING: CONTEMPORARY PHILOSOPHERS ON EMOTIONS 183, 186 (Robert C. Solomon ed., 2004).

into the lawyer's craft more than pure logic and reason.²² In making these arguments, White and Nussbaum might be seen implicitly to suggest a separation between logic and emotion by suggesting that the law needs to synthesize better their respective values in order to minimize their respective failings.²³ In different ways, White and Nussbaum argue that literature is the means by which this synthesis can occur; in short, developing our literary imagination develops our legal imagination.²⁴ Although White and Nussbaum both acknowledge that imagination is a part of judicial decisionmaking (and assert that it should be), these acknowledgements exist against the backdrop of a normative baseline of judicial neutrality. My claim is that, in the context of reasoning by analogy, pure judicial objectivity is impossible. Emotion commingles substantially with reason, and in the context of analogical reasoning, the normative backdrop of neutrality is neither desirable nor realistic; neutrality as the norm distorts our understanding of the task with which lawyers, and especially judges, are engaged.

Part I of this Note addresses Hamlet's legal thought on the small scale by examining the interaction of legal analogical reasoning and emotion in ways that are recognizable to legal practitioners. Part II addresses Hamlet's legal thought on the large scale by focusing on analogical reasoning's role in the development of common-law principles over time. Part III examines the way Hamlet attempts to subjugate his emotion to reason and the reason why his failure to do so is relevant to legal reasoning. I conclude with a brief discussion of the role we might want emotion to play in judicial decisionmaking, and I point out the difficulties that discussion entails.

I. HAMLET'S ANALOGICAL REASONING: USING PRECEDENT TO DETERMINE WHAT OUTCOME THE LAW MANDATES

No other character in the Shakespearean canon—not even those who end up before a judge or a court²⁵—analyzes his situation or argues her case in forms quite as lawyer-like as those Hamlet uses. Once “the game's afoot,”²⁶ as it were, and he is charged with avenging his father's death, Hamlet, like a court, begins

22. See generally MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995); JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973).

23. See generally NUSSBAUM, *supra* note 22; WHITE, *supra* note 22.

24. See WHITE, *supra* note 22, at 758 (suggesting “that the activities which make up the professional life of the lawyer and judge constitute an enterprise of the imagination . . .”). White's effort is aimed at revealing the way the study of literature might help the law student release his “private self-expressions” within the constraints of the “public demands of the legal profession.” G. Edward White, *The Legal Imagination by James B. White*, 60 VA. L. REV. 374, 380 (1974) (book review). Nussbaum argues that reading literature is in fact training for our moral/empathetic capacities, which should play a prominent role in our conceptions of justice. See NUSSBAUM, *supra* note 22, at 12; see also Robin West, *Law and Fancy*, 95 MICH. L. REV. 1851, 1852 (1997) (reviewing NUSSBAUM, *supra* note 22).

25. Daniel J. Kornstein notes that two-thirds of the Shakespearean canon contains trial scenes. KORNSTEIN, *supra* note 12, at xii.

26. WILLIAM SHAKESPEARE, *KING HENRY THE FIFTH* act 3, sc. 1.

a series of inquiries that demand action of one kind or another. The whole play revolves around Hamlet's delay, and at times he sounds like a legal advocate or prosecutor at his own trial, employing a mode of reasoning characteristic of legal thinking: analogical reasoning.²⁷

Analogical reasoning is "based on the argument 'that because the two examples are like in many ways they are also alike in one further specific way.'"²⁸ According to Cass Sunstein, analogical reasoning has four distinct legal features: "principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low . . . level of abstraction."²⁹ In law, the structure works as follows:

- (1) Some fact pattern A has . . . characteristics X, Y, and Z; (2) Fact pattern B differs from A in some respects but shares characteristics X, or characteristics X, Y, and Z; (3) The law treats A in a certain way; (4) Because B shares certain characteristics with A, the law should treat B the same way.³⁰

More specifically, the operation of analogical reasoning in a common-law case appears essentially deductive: A rule exists, and case comparisons help determine whether the similarities between the present facts and precedent cases outweigh the differences and therefore warrant application of the rule.³¹ We generally do not think of analogical reasoning as affecting the rule but as merely determining its application. Viewed over time, however, case comparisons serve to develop the courts' understanding of the larger context within which the rules exist. This understanding can ultimately lead to amending existing rules, jettisoning old rules in favor of new ones, and even developing entirely new rules for future application.³² As Edward H. Levi notes, the reasoning "is not simply deductive. In the long run a circular motion can be seen."³³

This circularity is especially evident in the course of Hamlet's reasoning: Comparisons shape the rules, and the rules, in turn, guide the comparisons. Among the aspects that make Hamlet's reasoning seem distinctly legal, instead

27. See Richard A. Posner, *Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 433 (1992) (referring to analogical reasoning as legal "reasoning from the bottom up"); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993) (referring to analogical reasoning as "an exceedingly prominent means by which both lawyers and nonlawyers think about legal and moral questions").

28. Mary Massaron Ross, *A Basis for Legal Reasoning: Logic on Appeal*, J. ASS'N LEGAL WRITING DIRECTORS, Fall 2006, at 179, 182 (quoting ANTHONY WESTON, *A RULEBOOK FOR ARGUMENTS* 19 (3d ed. 2000)).

29. Sunstein, *supra* note 27, at 746. Sunstein's article contains a thoughtful discussion of how these features produce both the "virtues and vices of analogical thinking" in law. *Id.* at 767–90.

30. *Id.* at 745. Discussing induction by example, Aristotle puts it this way: "[The example's] relation to the proposition it supports is not that of part to whole, nor whole to part, nor whole to whole, but of part to part, or like to like." ARISTOTLE, *supra* note 20, at 9.

31. See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 4 n.8, 6 (1949).

32. See *id.* at 1–19.

33. *Id.* at 6.

of like the everyday type of analogical reasoning in which we all engage,³⁴ are the commonality of theme over time, the use of case comparisons to guide his thinking, and the search for a principle to guide his future action. To come to grips with the legal nature of Hamlet's discourse, it will be helpful to consider three of his soliloquies like a memorandum, a brief, and an opinion.

A. HAMLET'S LEGAL MEMO: "TO BE OR NOT TO BE . . ."³⁵

This speech is possibly the most recognized in the entire world.³⁶ Part of the power of this soliloquy may lie in the artful confluence of a highly persuasive structure of reasoning, emotional content woven into the analysis, and universality of the subject. While Hamlet may not arrive at *the* truth, he arguably arrives at *a* truth.

To be, or not to be – that is the question;
 Whether 'tis nobler in the mind to suffer
 The slings and arrows of outrageous fortune
 Or to take arms against a sea of troubles
 And by opposing end them; to die: to sleep –
 No more, and by a sleep to say we end
 The heartache and the thousand natural shocks
 That flesh is heir to: 'tis a consummation
 Devoutly to be wished – to die: to sleep –
 To sleep, perchance to dream – ay, there's the rub,
 For in that sleep of death what dreams may come
 When we have shuffled off this mortal coil
 Must give us pause: there's the respect
 That makes calamity of so long life.
 For who would bear the whips and scorns of time,
 Th'oppressor's wrong, the proud man's contumely,
 The pangs of despised love, the law's delay,
 The insolence of office and the spurns

34. For example: "I've been bitten before by a sheep dog; that terrier is a dog; because they are both dogs, they are similar enough that I'm concerned that the terrier might bite me."

35. SHAKESPEARE, *supra* note 2, at act 3, sc.1.

36. Ann Thompson & Neil Taylor, *Introduction* to WILLIAM SHAKESPEARE, *HAMLET* 15 (Ann Thompson & Neil Taylor eds., Arden Shakespeare 2006). Note that I have reordered the speeches from the text as usually read to accord with the First Quarto. SHAKESPEARE, *supra* note 2, at act 2, sc. 2 n.164 (editors' note). The First Quarto places "To be or not to be . . ." in the equivalent of Act II, scene 2—prior to "O, what a rogue and peasant slave am I!" rather than in its traditional place in Act III, scene 1. In this, I serve my own ends, as I believe this reordering tells the better "legal" story. Interestingly, one theory of the three texts is that the First Quarto is a theatrical abridgement of the play specifically meant for performance. Thompson & Taylor, *supra*, at 85–86. The Arden editors note that, whatever its failings, the First Quarto is "of a performable length. It also makes good theatrical sense in respect of its cuts . . ." *Id.* at 86. Note that most editions of *Hamlet* publish some combination of the Second Quarto and First Folio, and the prevailing opinion is that these later two texts are more authoritative. *See id.* at 91. Neither space nor the scope of this Note permits an in-depth discussion, but suffice it to say that there probably is no such thing as an "authoritative" text of *Hamlet*. *See id.* at 74–94.

That patient merit of th'unworthy takes,
 When he himself might his quietus make
 With a bare bodkin. Who would fardels bear
 To grunt and sweat under a weary life
 But that the dread of something after death
 (The undiscovered country from whose bourn
 No traveller returns) puzzles the will
 And makes us rather bear those ills we have
 Than fly to others that we know not of.
 Thus conscience does make cowards [of us all] –
 And thus the native hue of resolution
 Is sicklied o'er with the pale cast of thought,
 And enterprises of great pitch and moment
 With this regard their currents turn awry
 And lose the name of action.³⁷

This speech is not only Hamlet's most famous rumination, it is also his most objective. Hamlet does not directly advocate any particular stance or ask the audience to join him in condemning his inaction as he does in subsequent soliloquies.³⁸ Rather, he seeks simply to understand his complex circumstances by presenting and evaluating the facts objectively. Adopting the framework of a legal memo reveals more clearly analogical reasoning's operation in Hamlet's analysis and helps identify emotion's influence therein. Like a good legal memo, the speech contains a statement of the issue, a statement of facts, a synthesized rule, a discussion section, and a conclusion.³⁹ Hamlet's question presented contains two inquiries. The large, overarching question Hamlet must address is expressed: "To be or not to be."⁴⁰ This question is too enormous (and, perhaps, too vague) to tackle all at once, so Hamlet disaggregates a smaller issue to be resolved:

Whether 'tis nobler in the mind to suffer
 The slings and arrows of outrageous fortune
 Or to take arms against a sea of troubles
 And by opposing end them⁴¹

The "legal" category Hamlet will explore is "nobility." Which course of action is "*nobler* in the mind": killing the king or suffering in silence? He characterizes the relevant facts within the framework of this question as "outrageous fortune"

37. SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

38. See, e.g., *infra* section I.B.

39. See INTRODUCTION TO ADVOCACY: RESEARCH, WRITING, AND ARGUMENT 42 (David Ware et al. eds., 7th ed. 2002) [hereinafter INTRODUCTION TO ADVOCACY].

40. SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

41. *Id.*

and “a sea of troubles.”⁴² To rephrase the issue, then, “Whether, in the face of a ‘sea of troubles,’ the noble man takes action, or bears his ills with equanimity.” Even more crudely rephrased: “Is it nobler to kill the King, kill myself, or do nothing?”

How Hamlet characterizes the issue becomes important when we consider that how the first court to address a legal issue frames (or does not frame) that issue influences all the decisions that follow in its wake.⁴³ Note that Hamlet never once directly asks the more contemporary legal question: “Is revenge itself a normative good?”⁴⁴ He approaches this question simply by asking what course of action is “nobler.” This is unsurprising given the time period. Nonetheless, it is worth noting that his imagination does not stretch quite far enough to question his society’s fundamental norms of violence⁴⁵ because this failure is attributable, in part, to his emotions. Hamlet’s anger and desire for revenge preclude this imaginative leap at the outset. As the flap of a butterfly’s wing in Australia may cause hurricanes in Florida, this emotional influence on Hamlet’s analysis contributes to the coming storm.⁴⁶

Hamlet’s factual situation is characterized as “outrageous fortune” or “a sea of troubles.”⁴⁷ Specifically, he refers to the pain and sorrow of losing his beloved father to murder; the hatred for the uncle/King who killed his father;

42. *Id.*

43. The role of precedent leads to this conclusion, though in the common law, judges have some freedom to reconsider the prior case law and alter the course the law takes. *See* LEVI, *supra* note 31, at 5. The point is more starkly illustrated by comparing statutory interpretation. In statutory law, the legislature has created the legal standards to be applied to the facts of any given case. *Id.* Because ambiguity is inevitable in statutory language, to interpret the ambiguity, courts must compare prior cases. *Id.* However, the way different judges frame the issue to be decided within the same statutory section can lead to different results. For example, in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the Court was called upon to decide whether sections 703(a) and (d) of the Civil Rights Act of 1964 (commonly known as “Title VII”), which prohibits employers from discriminating “because of . . . race” in hiring, allowed an affirmative action training program designed to remedy underrepresentation of minority workers. 443 U.S. at 193–94; *see also* 42 U.S.C. § 2000e-2(d) (2000)). Justice Rehnquist, writing in dissent, seemed to frame the question as whether Title VII “eliminates all racial categories from employment decisions.” *See id.* at 220–21. Justice Brennan, writing for the majority, framed the question as whether Title VII “left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories.” *Id.* at 197; *see also* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *LEGISLATION AND STATUTORY INTERPRETATION* 227 (2006). Eskridge and Frickey argue that the way these Justices viewed the issue influenced their final decision, *id.*, and rules of precedent require future courts to follow Justice Brennan’s majority construction. *See* ESKRIDGE & FRICKEY, *supra*.

44. *See, e.g.*, Solomon, *supra* note 21, at 127 (taking up the question of whether the law should satisfy our desire for revenge).

45. In this, *Hamlet* may be said to represent a transitional moment in legal development: the choice between violence and chaos on the one hand, and civilization on the other. KORNSTEIN, *supra* note 12, at 94–96.

46. In chaos theory, the technical name for the Butterfly Effect is “sensitive dependence on initial conditions.” *See* JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* 23 (1987) (describing how “a chain of events can have a point of crisis that could magnify small changes”). For a fuller discussion of the Butterfly Effect, *see id.* at 9–31.

47. SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

and the disgust for his mother, who has married the uncle.⁴⁸ Before the analogies even begin, emotion has affected Hamlet's reasoning: By focusing on "outrageous fortune" rather than on these factual specifics, Hamlet (1) moves from a lower level of abstraction to a higher one and (2) moves from particulars to generalities.⁴⁹ Emotion drives the need for higher abstraction.⁵⁰ Hamlet is so emotionally overwhelmed by his factual circumstances that he is unable to subject them to direct scrutiny. He finds the facts so painful that he cannot even bring himself to speak them out loud. On the one hand, this abstraction is good: abstracting to a level where his emotions allow him to think clearly allows Hamlet to consider the first steps towards unthinkable ends⁵¹—the murder of his uncle Claudius, the King. On the other hand, this sort of abstraction is likely to lead him to spurious classifications.⁵² Moreover, even at a higher level of abstraction, Hamlet is unable to eliminate emotion from his "objective" analysis: "outrageous fortune" and "a sea of troubles" are hardly neutral characterizations.

But perhaps the emotional cast Hamlet gives his analysis is not altogether inappropriate. Hamlet, after all, attempts to resolve a deeply emotional problem. Although a lawyer should generally avoid emotional language in an objective piece of writing,⁵³ Hamlet weighs policy considerations that make emotional arguments inevitable if not necessary. At the very least, the stakes involve the deaths of kings. Hamlet also recognizes that any action he takes might result in his own death (what could be a more emotional topic?) and he must determine to what degree that consideration should influence his action. Therefore, Hamlet must scrutinize his feelings about his own death, whether by suicide or otherwise. Just as his anger and outrage focused his analysis insofar as they prevented him from exploring the normative societal value of revenge, Hamlet's sorrow at his father's death focuses his analogical analysis on suicide.

He articulates the relevant policy considerations of suicide:

48. Throughout this Note, I will continually reduce Hamlet's emotions to love for his father, disgust for his mother, and hatred for Claudius. This grossly oversimplifies the complex emotional tapestry which Shakespeare has woven into Hamlet's character and with which any good actor or reader must come to grips. However, interests of economy render this "emotional shorthand" necessary.

49. See Sunstein, *supra* note 27, at 746–47 (describing analogical reasoning's focus on particulars).

50. Cf. BRADLEY, *supra* note 3, at 114, 121 (noting Hamlet's "passion for generalization" and arguing that his delay arose, in part, from contemplating specific action "repulsive to a man of honor and sensitive feeling . . .").

51. See LEVI, *supra* note 31, at 1 (describing facilitation of this step as one of legal reasoning's principal functions); see also *infra* section II.C.

52. See Sunstein, *supra* note 27, at 756–57 (noting that the higher the level of abstraction, the more likely the thinker is to ignore relevant differences). Aristotle characterizes this as a "Spurious Enthymeme" (an enthymeme is a rhetorical syllogism), which states a conclusion as though it were the result of a reasoning process without actually going through any such process. ARISTOTLE, *supra* note 20, at 101.

53. MARY BARNARD RAY & JILL J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 132 (4th ed. 2005).

[T]o die: to sleep –
 No more, and by a sleep to say we end
 The heartache and the thousand natural shocks
 That flesh is heir to: 'tis a consummation
 Devoutly to be wished – to die: to sleep⁵⁴

On the one hand, policy dictates that death is a release from life's pain—nothing more than a sleep for which we all should devoutly wish. To our modern Anglo-American sensibilities, wishing for death may seem morose, and one might jump to the conclusion that Hamlet's emotion once again negatively affects his analysis. On closer examination, however, the Elizabethan audience would have understood Hamlet's positive spin. As Shakespeare's contemporary John Donne put it: "One short sleep past, we wake eternally, / And death shall be no more" ⁵⁵ To the Elizabethan, death is the mere dividing line between life and life eternal.

Hamlet therefore determines that nobility would devoutly welcome death as a "consummation" and therefore would be unafraid to act. With this "rule" of nobility to guide him, Hamlet compares his case to other circumstances. He lists a catalogue of harms in which similarly situated people resist this consummation. Hamlet's harm is his father's murder, his uncle's treachery, and his mother's faithlessness. Similarly, others suffer

[T]he whips and scorns of time,
 Th'oppressor's wrong, the proud man's contumely,
 The pangs of despised love, the law's delay,
 The insolence of office and the spurns
 That patient merit of th'unworthy takes⁵⁶

yet none of these others make their "quietus"⁵⁷ with "a bare bodkin."⁵⁸

Here, the dangers of higher levels of abstraction used in analogical reasoning are revealed: A lack of focus on particulars leads to relevant differences being ignored.⁵⁹ Hamlet implicitly analogizes all the above examples to his own situation according to one criterion: they might (but ultimately do not) drive one

54. SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

55. JOHN DONNE, HOLY SONNETS X (c. 1610).

56. SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

57. "Quietus" here means to pay one's complete account—to end one's life. *Id.* at act 3, sc. 1 n.74 (editors' note).

58. "Bare bodkin" here refers to "an unsheathed, or perhaps puny" dagger. *Id.* at act 3, sc. 1 n.75 (editors' note). Because this is a list of examples, Hamlet may be engaging in inductive generalization. "Inductive generalization involves drawing a general conclusion from a number of particular instances." Ross, *supra* note 28.

59. See Sunstein, *supra* note 27, at 746 ("Ideas are developed from the details, rather than imposed on them from above."). Hamlet would therefore be open to the charge that he has committed the "fallacy of a false analogy." See Ross, *supra* note 28, at 184 (noting that false analogies ignore relevant differences). We might even say that based on the inadequacy of evidence, he has committed the

to suicide.⁶⁰ To Hamlet, one who bears “the pangs of despised love,” “the law’s delay,” or “the insolence of office” is relevantly similar to one whose father was murdered by his uncle. Despite the many differences these situations might entail, Hamlet’s higher level of abstraction ignores them because they all may be similarly considered “a sea of troubles.”

Although Hamlet has shifted to a more generalized level of analysis, he is nonetheless talking about himself in all these examples. He refers generally to “the pangs of despised love,” but he probably means “Ophelia isn’t talking to me anymore.”⁶¹ This accounts for his ability to see relevant similarity in his examples. The similarities that exist may be miniscule, yet Hamlet’s emotionally charged mind enlarges their relevance. For those who have experienced the heightened emotional states that result from a loved one’s death, the slightest touch can stimulate disproportionate reactions and sympathies. For example, a joke in which someone dies humorously might provoke wracking sobs of sympathy rather than laughter. Similarly, Hamlet’s emotional pain may be so intense that even the smallest injury is magnified, causing him to perceive relevance to his own situation.

For Hamlet, then, the similarities outweigh the differences (if he has considered them) and he begins his conclusion.⁶² First, Hamlet determines that, given these examples, the reason we do not nobly accept our mortal end is that

[T]he dread of something after death
 (The undiscovered country from whose bourn
 No traveler returns) puzzles the will
 And makes us rather bear those ills we have
 Than fly to others that we know not of.⁶³

Therefore, Hamlet concludes, “conscience does make cowards [of us all].”⁶⁴

“fallacy of faulty generalization.” See *id.* at 184–85 (noting that faulty generalization is based on inadequate evidence).

60. Sunstein refers to this type of classification as a “sham.” See Sunstein, *supra* note 27, at 756. Aristotle might frame this argument as concluding without an actual reasoning process. See ARISTOTLE, *supra* note 20, at 101.

61. Ophelia’s silence is the result of a prohibition imposed by her father:

POLONIUS: I would not in plain terms from this time forth
 Have you so slander any moment leisure
 As to give words or talk with the Lord Hamlet . . .
 OPHELIA: I shall obey, my lord.

SHAKESPEARE, *supra* note 2, at act 1, sc. 3.

62. “The conclusion [of a memo] brings together the analysis in an answer that demonstrates the culmination of reasoning . . . In its simplest form, a conclusion is the final section of a syllogism . . .” RAY & RAMSFIELD, *supra* note 53, at 98.

63. SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

64. The Arden Shakespeare, proceeding largely from the Second Quarto here, cuts the phrase “of us all,” but the First Folio includes it, and, for the sake of clarity and my argument, so do I. See *id.* at act 3, sc. 1 n.82 (editors’ note); see also *supra* note 36.

Note that some commentators argue that “conscience,” to the Elizabethan, meant introspection rather than a moral sense of right and wrong.⁶⁵ In Hamlet’s case, this introspection amounts to thinking about death and its consequences. Thus, by exploring the “legal” category “nobility,” Hamlet arrives at and announces a second, perhaps more emotionally potent, category: “cowardice.” We might even now be led to believe that “cowardice” is the category that implicitly drove the analysis from the outset. Due to his delay, he *feels* himself more a coward than a noble man. As a result, though he wants to understand “nobility,” his personal feelings lead him inexorably down the antithetical path and ultimately create the category that, once fixed, dominates his future thinking. In this regard, we may begin to perceive how Hamlet’s emotion drives his thinking rather than vice versa. Does Hamlet simply fail to temper his passion with reason, or is this synthesis of emotion and reason unavoidable? When judicial decisionmakers at common law create new categories, one might similarly question to what extent their feelings about the parties in dispute, the subject matter at issue, and other “non-essentials”⁶⁶ drive the creation.

Although one might take issue with how successfully or how precisely he goes about it, Hamlet uses analogy to other circumstances and arrives at a deductive syllogism.⁶⁷ Let us then restate the whole of Hamlet’s syllogism. Major premise: Fear prevents noble action. Minor premise: Thinking about death (here, “conscience”) causes fear. Conclusion: conscience prevents noble action, or “conscience does make cowards of us all.”⁶⁸ Hamlet sets up cowardice as equal to fear and, therefore, the antithesis of noble action. I take up the evolution of Hamlet’s two “legal” categories—“cowardice” and “nobility”—in Part II. For now, let us explore how the categories Hamlet has created serve to shape his first case comparison in “O, what a rogue and peasant slave am I!”

B. HAMLET’S LEGAL BRIEF: “O, WHAT A ROGUE AND PEASANT SLAVE AM I!”⁶⁹

In this speech, Hamlet reveals some of the more recognized roles emotion plays in legal thinking because he adopts a posture similar to that of a legal advocate: His effort is to persuade. Hamlet indicts himself, both for lack of action and, ironically, for repressing his emotions. As we will see later, Hamlet’s emotional nature is itself the

65. See SHAKESPEARE, *supra* note 2, at act 3, sc. 1 n.82 (editors’ note).

66. For Aristotle, a “non-essential” in a courtroom is anything other than a fact that might affect the outcome, including “[t]he arousing of prejudice, pity, anger, and similar emotions.” ARISTOTLE, *supra* note 20, at 1–2.

67. For a rich discussion of the variety of influences that might affect decisionmaking more than the underlying logical structure, see Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 937–51 (2006). Rachlinski notes that context, the “availability heuristic” (those emotional sympathies aroused in individual cases that distort the interests of those who are not parties to the controversy), and the backward-looking nature of the judicial examination all have results in adjudication that can lead to questionable outcomes. *Id.* In one way or another, each of Hamlet’s arguments implicates an emotional distortion of the decisionmaking process.

68. See SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

69. *Id.* at act 2, sc. 2.

source of his great conflict. On the one hand, Hamlet, like the law, distrusts emotion. He knows his emotion might drive him to ill-considered action, and he therefore seeks to remove emotion from his analysis. On the other hand, the normative social forces crying out for vengeance cause Hamlet to rebuke himself bitterly for adopting an analytical posture:

O, what a rogue and peasant slave am I!
 Is it not monstrous that this player here,
 But in a fiction, in a dream of passion,
 Could force his soul so to his own conceit
 That from her working all his visage wanned
 – Tears in his eyes, distraction in his aspect,
 A broken voice, and his whole function suiting
 With forms to his conceit – and all for nothing –
 For Hecuba?
 What's Hecuba to him, or he to her,
 That he should weep for her? What would he do
 Had he the motive and [the cue] for passion
 That I have? He would drown the stage with tears
 And cleave the general ear with horrid speech,
 Make mad the guilty and appal the free,
 Confound the ignorant and amaze indeed
 The very faculties of eyes and ears. Yet I,
 A dull and muddy-mettled rascal, peak
 Like John-a-dreams, unpregnant of my cause,
 And can say nothing. No, not for a king
 Upon whose property and most dear life
 A damned defeat was made. Am I a coward?
 Who calls me villain, breaks my pate across,
 Plucks off my beard and blows it in my face,
 Tweaks me by the nose, gives me the lie i'th' throat
 As deep as to the lungs? Who does me this,
 Ha? 'Swounds, I should take it. For it cannot be
 But I am pigeon-livered and lack gall
 To make oppression bitter, or ere this
 I should ha' fatted all the region kites
 With this slave's offal – bloody, bawdy villain,
 Remorseless, treacherous, lecherous, kindless villain.
 [O, vengeance!]
 Why, what an ass am I: this is most brave,
 That I, the son of a dear [father] murdered,
 Prompted to my revenge by heaven and hell,
 Must like a whore unpack my heart with words
 And fall a-cursing like a very drab,
 A stallion! Fie upon't, foh! About, my brains!⁷⁰

70. *Id.*

Absent here is even the appearance of objectivity. This absence is consistent with the purpose of a legal brief because “a brief is a persuasive piece of writing; and every element of it should be geared toward convincing the court to decide in your favor.”⁷¹ Appropriately, then, Hamlet subjectively shades the facts and the case comparison to lead the audience to the conclusion he wishes us to reach. Present are all the elements of a legal brief: a question presented; a statement of facts; an argument in which the “legal” category—now part of a rule—shapes a case analogy; and a conclusion.⁷²

Hamlet now presents the question he only hinted at earlier in “To be or not to be . . .”.⁷³ “Am I a coward?”⁷⁴ If emotion worked to shape Hamlet’s thinking in his objective analysis above, emotion continues to do its work in this advocacy piece. Like a legal advocate, his framing of the question presented shapes the listener’s impression.⁷⁵ The word “coward” is emotionally charged and implicitly suggests the answer to its own question. Further, the stated question’s terseness is arresting: with one word, Hamlet challenges us to listen and agree.

Hamlet then shapes the relevant facts “into a narrative that interests the reader and favors the author’s position.”⁷⁶ Advocating his own indictment, Hamlet allows emotion to shape the narrative’s every nuance. Hamlet’s emotion, given reign, produces a torrent of expressive feeling:

I [am] the son of a dear [father] murdered,
 . . . a king
 Upon whose property and most dear life
 A damned defeat was made . . .
 [I am] [p]rompted to my revenge by heaven and hell,
 [And] like a whore unpack my heart with words
 And fall a-cursing like a very drab,
 A stallion!⁷⁷

Hamlet, Sr. is not just a dead father, but “a *dear* father *murdered*.”⁷⁸ Nor is Hamlet content with the emotional charge of the word “murder,” but he further loads that emotional cannon by calling it a “damned defeat” upon his “property and most dear life.”⁷⁹ Easy for a contemporary audience to overlook is the word “damned.” Hamlet first suggests that the murder is condemned by heaven as

71. INTRODUCTION TO ADVOCACY, *supra* note 39, at 50. This lack of objectivity also places Hamlet now firmly in the Aristotelian world of rhetoric, defined as “the faculty of observing in any given case the available means of persuasion.” ARISTOTLE, *supra* note 20, at 4.

72. See INTRODUCTION TO ADVOCACY, *supra* note 39, at 52.

73. See SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

74. See *id.* at act 2, sc. 2.

75. See INTRODUCTION TO ADVOCACY, *supra* note 39, at 52–53 (noting that “the Question[] Presented in the brief aim[s] to persuade”).

76. *Id.* at 57 (describing the purpose of the legal brief’s statement of facts).

77. This text is adapted from SHAKESPEARE, *supra* note 2, at act 2, sc. 2.

78. See *id.* (emphasis added).

79. See *id.*

regicide, and then he explicitly says so in the very next line, proclaiming that he is “prompted to [his] revenge by heaven and hell.”⁸⁰ Hamlet’s language telescopes from microcosm to macrocosm: from Hamlet’s personal grief at his father’s death to the forces gathered from heaven’s highest pinnacle to hell’s lowest depths crying out for revenge. Then, contrasting his thoughtful deliberation with the action the gods themselves demand, Hamlet characterizes himself as “a whore,” a “drab,” and a “stallion” (all variations on “prostitute”).⁸¹

One might argue that by stating his facts on such a grand scale, Hamlet obfuscates those particulars on which the judge or jury should focus; that emotion distorts the particulars of the facts themselves. However, although Hamlet’s characterization of his facts is more metaphysical than one might expect from a more modern legal advocate, the facts of his case are extraordinary enough that perhaps, for an audience to grasp them fully, they must be cast on a grand scale. Hamlet’s factual circumstance involves the supernatural. Given what the Ghost implies concerning the torments of purgatory,⁸² Hamlet’s consideration of what the gods might require cannot be considered merely irrelevant to the question of the demands of nobility.

Against this factual backdrop, Hamlet argues his case. The categories that exist to shape his inquiry now include “nobility” and “cowardice.” The “rules” he implicitly applies are “nobility acts without fear of death” and “thinking too much makes us cowards.” To determine the question, “Am I a coward?” Hamlet turns to the precedent of an actor performing a part. Hamlet has persuaded an actor to perform a speech narrating Priam’s slaughter.⁸³ At the end of the speech, the player, like any good actor, is so moved by the story that his audience could actually believe he had some personal connection to the events. Polonius, who is also present,⁸⁴ exclaims in astonishment, “Look where he has

80. *See id.*

81. *See id.* at act 2, sc. 2 nn.521, 522 (editors’ notes).

82. GHOST:

I am thy father’s spirit,
Doomed for a certain term to walk the night
And for the day confined to fast in fires
Till the foul crimes done in my days of nature
Are burnt and purged away. But that I am forbid
To tell the secrets of my prison-house
I could a tale unfold whose lightest word
Would harrow up thy soul, freeze thy young blood,
Make thy two eyes like stars start from their spheres,
Thy knotted and combined locks to part
And each particular hair to stand on end
Like quills upon the fearful porpentine –
But this eternal blazon must not be
To ears of flesh and blood.

Id. at act 1, sc. 5

83. Priam was a King of Troy. *Id.* at act 2, sc. 2 n.385 (editors’ notes).

84. Polonius is a counselor to Claudius and is working on his behalf to determine the cause of Hamlet’s apparent madness. *See id.* at act 2, sc. 2.

not turned his colour and has tears [in his] eyes.”⁸⁵ With the actor’s performance as his analogical “precedent,” Hamlet compares his case.

[T]his player here,
 . . . in a fiction, in a dream of passion,
 [Can] force his soul so to his own conceit
 That from her working all [his] visage wan[es]
 – Tears in his eyes, distraction in his aspect,
 A broken voice, and his whole function suiting
 With forms to his conceit – and all for nothing –
 For Hecuba?
 What’s Hecuba to him, or he to her,
 That he should weep for her?⁸⁶

The actor performs in a fiction. The actor himself has no personal cause for grief at the destruction of Priam, yet he weeps. Hamlet then contrasts his circumstances.

. . . I, the son of a dear [father] murdered,
 . . . [p]eak
 Like John-a-dreams,⁸⁷ unpregnant of my cause,
 And can say nothing.⁸⁸

The actor’s and Hamlet’s cases are similar insofar as both men are provoked to passion. The actor (Case A) is provoked by a “dream of passion”—a mere idea that stirs his soul. Similarly, Hamlet (Case B) is provoked by his father’s murder. Hamlet the advocate argues that, because both men are provoked, Case B is like Case A. Therefore, if Case A provokes a man to passion, so should Case B. Note a difference: rather than saying we should treat Case B like Case A, Hamlet says “the person who finds himself in Case B’s situation should be expected to act similarly to the person in Case A.” Indeed, the way Hamlet sets up the comparison, he suggests that if, in Case A, we see a certain behavior, we should therefore expect, with substantial certainty, to see the same behavior in Case B.⁸⁹ Hamlet punctuates this suggestion by placing the person in Case A in

85. *Id.*

86. *Id.*

87. “John-a-dreams” is “a stereotype of a dreamy, inactive man.” *Id.* at act 2, sc. 2 n.503 (editors’ note). Interestingly, the Arden edition notes that this is “comparable to the use of ‘John-a-nokes’ and ‘John-a-stiles’ as fictitious names for parties in a legal action.” *Id.*

88. This text is adapted from *id.* at act 2, sc. 2.

89. In this regard, Aristotle would call much of Hamlet’s reasoning an *a fortiori* line of proof: “[I]f it is true where it is less likely, it is true where it is more likely.” ARISTOTLE, *supra* note 20, at 93. Note, however, that this line of proof is also susceptible to emotion. Perhaps the most famous example of this is Justice Holmes’s argument for compulsory sterilization of the feeble-minded. “We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . The

the shoes of the person in Case B and speculating that:

Had [the actor] the motive and [the cue] for passion
That I have[,] [h]e would drown the stage with tears
And cleave the general ear with horrid speech,
Make mad the guilty and appal the free,
Confound the ignorant and amaze indeed
The very faculties of eyes and ears.⁹⁰

Hamlet's analogy is complete and it leads him to his conclusion:

[I]t cannot be
But I am pigeon-livered and lack gall
To make oppression bitter, or ere this
I should ha' fatt'd all the region kites⁹¹
With this slave's offal⁹²

Let us restate Hamlet's conclusion in analogical reasoning terms. Major premise: one provoked to noble passion responds accordingly. *See* Case A (actor performing a fiction). Minor premise: I, Hamlet, am provoked to passion just as (or even greater than) the actor was. Conclusion: I should respond accordingly. Because I do not, I must be a coward.

Once again, Hamlet is open to the charge that his emotion has caused a higher level of abstraction. On the face of it, an actor performing a part and the son of a murdered king would seem to share only the most tenuous similarities, and at least one vital difference: Surely Hamlet of all people appreciates the difference between real and imagined loss. Why should an actor's ability to cry on stage have any impact on Hamlet's revenge? Once again, similarities appear only at the more general, abstract level of "provocation," rather than at the level of detail. On the one hand, we might say that, in this instance, Hamlet's passions get the better of him. He has an emotional flash where his hatred for Claudius, his love for his father, and his disgust for his mother surge in his being. In that flash, his mind is tuned for revenge and "all occasions inform against him"⁹³ to the point that even an actor's speech illustrates the necessity for revenge.

However, looked at another way, Hamlet seeks the answer to whether he is a

principle that sustains compulsory vaccination is broad enough to cover cutting Fallopian tubes. *Three generations of imbeciles are enough.*" *Buck v. Bell*, 274 U.S. 200, 207 (1927) (emphasis added) (citations omitted).

90. SHAKESPEARE, *supra* note 2, at act 2, sc. 2.

91. "Kites" are birds of prey. *Id.* at act. 2, sc. 2 n.514 (editors' note).

92. "Offal" here refers to a dead animal's entrails. *Id.* at act 2, sc. 2 n.515 (editors' note). Hamlet argues that if he were not pigeon-livered, he long ago would have killed Claudius and discarded the body for scavengers to feed upon.

93. *See id.* at act 4, sc. 4 ("How all occasions do inform against me . . .").

coward. Arguably, one will not earn that label in the absence of some provocation to action. Hamlet is spurred by the deepest provocation. His delay has thus far been unproductive. Even if he intends a reasoned analysis to discover what is “nobler in the mind,” he reasonably must wonder if perhaps he should be doing more. Seen this way, the relevant similarity (or in this case, dissimilarity) between the actor and Hamlet *is* the degree of provocation and the appropriate response. If the actor can move himself to passion with the provocation of a “dream,” surely the man whose father was murdered should be moved to at least equal passion. Significantly, after this first section of the soliloquy, Hamlet resolves to the first real action he takes since seeing the Ghost in Act I: to present the play that he hopes will “catch the conscience of the King.”⁹⁴ Assuming then that Hamlet does experience a flash of passion in this soliloquy, one could argue that the emotional flash is more akin to illuminating lightning than to blinding sunlight.⁹⁵

II. HAMLET’S ANALOGICAL REASONING: THE JUDICIAL SEARCH FOR CASE SYNTHESIS

Analogies are a microcosm of the common-law process. Memo and brief writing involve comparing similarly situated actors in different cases as a means of resolving specific legal questions—for example, did A breach his contract when he failed to do X, Y, and Z? To resolve the question, we examine the cases of similarly situated B, C, and D and decide whether to treat A similarly or differently.⁹⁶ The development of principles at common law involves comparing a broad range of similar cases *over time* as a means of testing the outer limits of a broad legal question—for example, under what circumstances should liability be extended to manufacturers to cover third parties harmed by the manufacturers’ products? Classes in Torts, Contracts, and Property all involve, to one degree or another, studying the evolution of such principles. A student learns the history of a legal principle (or doctrine) and the principle as it is currently articulated, and she seeks to understand the elements and policies that will shape the future evolution of that principle. The law student therefore is exposed to the analogical process at both the micro- and macrocosmic levels. We have thus far seen Hamlet’s analogical reason operate at the microcosmic level.

94. *Id.* at act 2, sc. 2. Hamlet has the actors who arrive in Elsinore act out a scene for Claudius that Hamlet has written and that he hopes will look exactly like Claudius’s murder of Hamlet, Sr. Hamlet intends to watch Claudius as Claudius watches the play. If Claudius looks as though his conscience is troubled when watching the play, Hamlet will interpret that as proof of Claudius’s guilt, and Hamlet will know that revenge is justified and that the Ghost is not simply a spirit from hell sent to torment him. *See id.*

95. *See* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1577 (1987) (arguing that “empathic knowledge has enormous explanatory power”); *cf.* Sunstein, *supra* note 27, at 751 n.37 (“[I]t may be that anger, indignation, and other emotions sometimes reflect better thinking rather than distorting influence.”).

96. *See supra* text accompanying notes 30–31.

On the macrocosmic level, Hamlet develops such a “legal” principle—one that reconciles or harmonizes prior “case law” and animates the course of his future action. We will see the evolution of Hamlet’s yet-to-be-articulated principle parallel a court’s development of a new principle of common law. Tracking this evolution reveals how the earlier influences of emotion now shape Hamlet’s final outcome. One difference is worth noting at the outset: Although courts are constantly seeking rules or principles to inform their decisions, a court takes action once it announces a rule. The case is decided and the parties are bound. By contrast, Hamlet announces rules or conclusions but cannot act because he lacks a synthesized principle.

Much like the evolution of a common-law principle, Hamlet’s principle evolves over the course of the play in three major steps. Edward H. Levi’s illustration of the rule of precedent and the three-stage evolution of a legal principle serves as a parallel model for Hamlet’s progress. At stage one, a legal concept or rule is created; at stage two, the legal rule is applied and expanded; and at stage three, the legal rule is abandoned or subsumed within a larger legal principle that encompasses the prior cases.⁹⁷ Hamlet moves through these stages in three major soliloquies: “To be or not to be . . .”;⁹⁸ “O what a rogue and peasant slave am I!”;⁹⁹ and “How all occasions do inform against me . . .”¹⁰⁰

A. STAGE ONE: HAMLET CREATES “LEGAL” CATEGORIES AND RULES TO GUIDE HIS ANALYSIS

The law—especially the common law—like Hamlet, seeks principles to guide its actions.¹⁰¹ According to Levi: “The first stage [in the development of a legal principle] is the creation of the legal concept which is built up as cases are compared.”¹⁰² To use Levi’s example, early U.S. courts struggled with the question of what liability should extend to a manufacturer in the case of an injured third party.¹⁰³ As they did, they struggled to define rules and categories within those rules to guide their decisions. Levi describes the evolution of the legal concept “inherently dangerous” within this inquiry.¹⁰⁴ By the end of stage one, court cases had distinguished between two categories of dangerous products: “things in their nature dangerous” and “things which became so by an unknown latent defect.”¹⁰⁵ These two categories operated on opposite sides of a dividing line as a way to take the first steps towards resolving the larger issue.

97. See LEVI, *supra* note 31, at 6–7.

98. SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

99. *Id.* at act 2, sc. 2.

100. *Id.* at act 4, sc. 4.

101. See Posner, *supra* note 27, at 435–36 (arguing that even in bottom-up reasoning “there must be a theory [ensuring that outcomes are logically consistent]. You can’t just go from case to case, not responsibly anyway.”).

102. LEVI, *supra* note 31, at 6.

103. See *id.* at 7.

104. *Id.* at 7–19.

105. *Id.* at 10 (referencing *Longmeid v. Holliday*, (1851) 155 Eng. Rep. 752, 755 (Exch. Div.)).

Liability *would* extend to “things in their nature dangerous,” like improperly labeled poison, but *not* to “things which became so by an unknown latent defect,” like a defective wagon.¹⁰⁶

As we have seen, Hamlet struggles with the question, “What to do?” (or even more broadly, “Who am I?”)¹⁰⁷ just as the courts struggled with the larger question of product liability and third-party harm. In both cases, the issue’s size and complexity defies immediate understanding. Too many considerations affect the analysis, and announcing an overarching principle in the absence of experience might have led Hamlet and the court to state a principle that was either too broad or too narrow. Just as the courts created categories to help them understand how to assign liability to manufacturers, we saw Hamlet begin his analysis by implicitly creating one category—“nobility”—which led him to a second—“cowardice.”¹⁰⁸ In this, we saw Hamlet create his (value-laden) dividing line: that which is “cowardice” is *not* “noble in the mind.”

Hamlet’s emotionally charged characterizations of the facts are broad generalizations that affect his analytical thinking. Rather than stating specific instances of wrong or insolence, he speaks generally of “[t]h’oppressor’s wrong,” and “the proud man’s contumely.”¹⁰⁹ However, viewed in the context of a court approaching an unmanageably large question with a view towards incremental evolution over time, another possibility arises. Hamlet frames his circumstances generally in terms common to all humanity in a “judicial” effort to gain a preliminary understanding of the action he should take.¹¹⁰ He therefore refers to a specific influence that affects mankind generally—“[t]he pangs of despised love”¹¹¹—rather than referring to a specific influence that affects him only—“Ophelia won’t talk to me anymore.”¹¹² Through what we might paradoxically call “general specificity,” Hamlet aims for universal truths that he hopes will lead to rules or principles of “nobility” that might be accepted by the community at large.

This is the first stepping stone in the path of the common law. A principle may still be far off, but Hamlet’s “legal” analysis allows him to take the first crucial steps towards arriving at one. By investigating general categories through a specific fact pattern, Hamlet arrives at a greater understanding of the issue and the action he might take. Stated another way, Hamlet’s abstraction to a higher level of generality from his specific circumstances provides a glimpse into the motivations and incentives that drive human behavior. The categories he an-

106. *See id.* at 10–11.

107. The play’s first line, “Who’s there?” demonstrates the centrality of the theme of identity in the play. *See SHAKESPEARE, supra* note 2, at act 1, sc. 1.

108. *See supra* section I.A.

109. *See SHAKESPEARE, supra* note 2, at act 3, sc. 1.

110. This motivation for abstracting his factual analysis is congruent with Kornstein’s view that Hamlet struggles against his passion for revenge in an attempt to repudiate existing norms of violence. *See KORNSTEIN, supra* note 12, at 94–96; *see also supra* note 45 and accompanying text.

111. *See SHAKESPEARE, supra* note 2, at act 3, sc. 1.

112. *See supra* note 61 and accompanying text.

nounces, as in the common law, are thus borne of the broader understanding gleaned from inquiry into a specific case and provide a context and framework for the future inquiry.

Hamlet's choice of categories also parallels the way courts choose categories insofar as reasoning by analogy is the process of drawing distinctions as well as similarities. In Levi's analysis, a court announces a concept, and "[i]n subsequent cases, the [concept] is given further definition and is tied to other [concepts]"¹¹³ To illustrate, by the end of the first stage in the evolution of the legal concept "inherently dangerous," the courts had established and begun filling two categories: "things in their nature dangerous" included a loaded gun; "things which became so by an unknown latent defect" included a lamp and a carriage.¹¹⁴ Similarly, using the implicitly stated category "nobility," Hamlet establishes a second, arguably more compelling "legal" category: "coward." Within this category, Hamlet places the introspective man. Creating categories that operate at different ends of a spectrum (or that at least draw lines excluding one from the other) makes sense as a way to begin to come to grips with complicated inquiries.¹¹⁵ At the very least, we now know that "he who is a coward" cannot be "he who is noble," and a continuum has been established. Note that emotion, which helped shape these categories,¹¹⁶ has now also shaped the precedent, to which Hamlet, as judge, must accord deference.¹¹⁷

B. STAGE TWO: HAMLET APPLIES HIS "LEGAL" RULES TO A CASE AND EXPANDS THE CATEGORIES

Having established categories of "nobility" and "cowardice," Hamlet must now fill them in order further to clarify ambiguities inherent in the continuum and to establish the outer boundaries of the larger issue "What to do?" or "Who am I?" As Levi puts it: "The second stage [in a legal principle's evolution] is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside and outside of the concept."¹¹⁸ During stage two in the evolution of the legal concept "inherently dangerous," the courts had

113. LEVI, *supra* note 31, at 4.

114. *Id.* at 10 (referencing *Longmeid v. Holliday*, (1851) 155 Eng. Rep. 752, 755 (Exch. Div.)).

115. Note that Aristotle did this obsessively in his observations of all life. *See generally* ARISTOTLE, *supra* note 20. I am grateful to Professor Kristen K. Tiscione, Georgetown University Law Center, for this observation and for all her efforts at keeping my comments on Aristotle and analogical reasoning as accurate and precise as possible.

116. *See supra* section I.A.

117. Note that economists are beginning to take seriously the role emotion plays in "rational" decisionmaking and that literature now exists supporting the view that emotions that influence one decision continue to have resonance in future decisions. *See, e.g.*, Benjamin E. Hermalin & Alice M. Isen, *The Effect of Affect on Economic and Strategic Decisionmaking* 2–3 (John M. Olin Foundation, Research Paper No. C01-5, 2000), available at <http://ssrn.com/abstract=200295>. For instance, "a guilty person will behave differently from a person who doesn't feel guilty." *Id.* at 3. This insight, in conjunction with the role of precedent in judicial decisionmaking, reverberates uncomfortably with the notion of the law as created by dispassionate, reasoned analysis.

118. LEVI, *supra* note 31, at 6.

applied and expanded the category “things in their nature dangerous” to include poisons, dynamite, defective hair wash, scaffolds, a defective coffee urn, gunpowder, torpedoes, and bottles of water under gas pressure.¹¹⁹ Manufacturers who produced these items would be liable to third parties harmed by their products unless they had exercised reasonable care in their manufacture. Items explicitly excluded from the category included “tables, chairs, pictures or mirrors hung on the wall, defective carriages, a bursting lamp, a defective balance wheel for a circular saw, and a defective boiler.”¹²⁰

The overarching question for the courts to resolve was the broad question of products liability’s outer boundaries; courts then decided that, to determine the extent of this concept, a “satellite concept” was needed for use in case comparisons.¹²¹ The courts therefore announced the category “things in their nature dangerous” and proceeded to determine whether or not any given product was included in or excluded from that category. If a product fell within the category, liability was extended to cover third-party harm. Thus, the category’s boundaries expanded or contracted.

Similarly, in setting out to explore the overarching question of “self,” Hamlet creates the satellite concept “coward” (and by implication, “nobility”) that informs his analysis. Therefore, in the second stage of his inquiry, Hamlet applies the now more-or-less fixed category “coward” to his specific case.

Essentially, Hamlet now asks: “Should I include myself in the coward category?” Seeing the actor “in a dream of passion” conjuring “tears in his eyes” and “distraction in his aspect,” Hamlet implicitly concludes that this player’s actions hint of nobility.¹²² The actor himself has no cause whatsoever for grief at the destruction of Priam, yet he weeps. Hamlet, by comparison, has great cause for grief and passion, yet he mopes about “like John-a-dreams,”¹²³ saying and doing nothing. Hamlet therefore places himself and his inaction into the “coward” category.¹²⁴

Thus Hamlet expands his categories: The “coward” category now includes one who engages in over-introspection and one whose passions fail to respond to the provocation of a murdered father and a stained mother; the “nobility” category now includes action that displays proper reverence for death as a divine consummation, as well as one whose passions are aroused at mere fictional provocation. Hamlet has concluded that those items in the same category are relevantly similar, and expanding the categories through analogy

119. *Id.* at 13–14.

120. *Id.* In the interests of economy, I do not here explain in any depth the courts’ reasoning behind these classifications. To a certain degree, the question of why a defective coffee urn, but not a defective boiler, is a “thing dangerous in its nature” is the implicit subject of section III.C.

121. *See id.* at 5–6. Levi uses the term “satellite concept” with reference to constitutional interpretation, but the similarity to common law lies in the use of reasoning by example to interpret areas of ambiguity. *See id.*

122. *See* SHAKESPEARE, *supra* note 2, at act 2, sc. 2.

123. *See supra* note 87.

124. *See supra* section I.B.

brings the answer to Hamlet's larger question "who am I?" into sharper focus.

However, he is still unwilling to take the larger step of articulating a legal principle that will synthesize the cases and animate his future action. Several possible emotional reasons for this unwillingness emerge. One might be that he simply does not see it. Christopher J. Anderson notes that "most (broad) decision avoidance would include the fact that people do not recognize important, valuable decisions they could make to benefit themselves and others in the first place."¹²⁵ Worth noting in this regard is that if Hamlet had acted immediately, the many deaths his indecision causes might have been avoided. However, given his emotional involvement in the complex circumstances in which he finds himself, Hamlet may be unable to perceive clearly the benefit of any specific decisive action.

Another possibility is that he consciously avoids decisive action. Anderson points out that an "emotional route to indecision can come through perceiving chronic discrepancies between the ideal self and the self one is becoming."¹²⁶ Hamlet's emotionally created legal categories reflect such a discrepancy: "nobility" represents Hamlet's ideal self; "coward" is the self Hamlet fears he is becoming. Further, in addition to prompting avoidance of a large-scale decision, this perceived discrepancy ironically drives his decisions at the small scale. At this point in his thinking, he is unable to see revenge as noble, but at the same time he is increasingly uncomfortable with the cowardice he fears his delay displays. That Hamlet decides to include himself in the "coward" category is therefore unsurprising.

Finally, it may simply be that, like a well-trained law student, Hamlet has learned the value of proceeding incrementally. Whatever the reason, he remains unsatisfied and determines that he needs more evidence before killing Claudius.¹²⁷

C. STAGE THREE: HAMLET'S "LEGAL" RULES ARE SUBSUMED BY AN OVERARCHING PRINCIPLE

As Levi explains, as legal categories expand and fill up, legal boundaries begin to establish themselves. Courts become less concerned with deciding *what* goes into the respective categories and more concerned with articulating the principles that define the boundaries that the categories represent. As Levi puts it:

125. Christopher J. Anderson, *The Functions of Emotion in Decisionmaking and Decision Avoidance*, in *DO EMOTIONS HELP OR HURT DECISIONS?* (Roy Baumeister, George Loewenstein & Kathleen Vohs eds., forthcoming 2008) (manuscript at 13), available at <http://ssrn.com/abstract=895781>.

126. *Id.* (manuscript at 10).

127. Note that Hamlet, after chastising himself for his emotional outburst—or as he would say, "[u]npacking his heart with words"—pulls himself together and says, "About, my brains!" or, "Think, Hamlet, think!" See SHAKESPEARE, *supra* note 2, at act 2, sc. 2. This moment of rational intellect warring with passion supports Kornstein's view of the play as a turning point in the evolution from barbarism to civilization. See KORNSTEIN, *supra* note 12, at 94–96. This moment also supports Kornstein's assertion that "in lawyerly fashion, [Hamlet] wants hard evidence of his uncle's guilt before he acts." *Id.* at 97.

The third stage is the break down of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the [category] is no longer desired.

. . . [A]s matters of kind vanish into matters of degree . . . there will be the attempt to escape to some overall rule which can be said to have always operated and which will make the reasoning look deductive.¹²⁸

For example, in the development of the court's struggle with products liability, the categories were amply filled and the categorizations began breaking down in favor of larger principles. Levi marks the beginning of this new phase with *MacPherson v. Buick Motor Co.*¹²⁹ In allowing recovery for serious injury due to a car that had, because of a faulty wheel, collapsed on the road, then-Judge Cardozo noted that the law's foundations in this area had been laid by the use of categories. He now rejected these categories' formalistic application, however, believing rather that the principle was what was important.¹³⁰ Therefore, instead of relying on the previous categories of "inherently dangerous" or "imminently dangerous," Cardozo announced a new principle. Levi quotes:

"If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent." The rule was: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril, when negligently made, it is a thing of danger." But "there must be a knowledge of a danger not merely possible, but probable."¹³¹

Thus the principle of foreseeability had emerged. The need to determine liability to third parties had not disappeared, but the construct within which individual cases were to be understood had changed. Indeed, cases that had at one time been resolved one way would now be susceptible to different outcomes. From a world in which manufacturers had no duty to third parties harmed by their products, a category emerged from analysis of individual cases to create an exception to the rule. As the category expanded, new categories emerged, and slowly "matters of kind vanish[ed] into matters of degree."¹³² In other words, as the categories filled up, deciding individual cases became more a matter of deciding where along a continuum they fell rather than whether they belonged to a given category. Finally, the exception gained the same force and certainty of the prior rule, and the exception itself became a general liability principle.¹³³

128. LEVI, *supra* note 31, at 6-7.

129. 111 N.E. 1050 (N.Y. 1916), *cited in* LEVI, *supra* note 31, at 14.

130. *See* LEVI, *supra* note 31, at 15.

131. *Id.* at 16 (quoting *MacPherson*, 111 N.E. at 1053, 1055).

132. *See id.* at 7.

133. *See id.* at 17-18.

Hamlet's "How all occasions" soliloquy similarly rejects a formalistic application of preexisting categories, and, at last, articulates a new principle to guide his action. As we read the previous soliloquies as a memo and brief, we may read this one as Hamlet's judicial opinion. Just before Hamlet speaks, he sees Fortinbras (Hamlet's shadow in the play)¹³⁴ preparing his army for war.

How all occasions do inform against me
 And spur my dull revenge. What is a man
 If his chief good and market of his time
 Be but to sleep and feed? A beast – no more.
 Sure he that made us with such large discourse,
 Looking before and after, gave us not
 That capability and godlike reason
 To fust in us unused. Now whether it be
 Bestial oblivion or some craven scruple
 Of thinking too precisely on th'event
 (A thought which quartered hath but one part wisdom
 And ever three parts coward) I do not know
 Why yet I live to say this thing's to do,
 Sith I have cause and will and strength and means
 To do't. Examples gross as earth exhort me –
 Witness this army of such mass and charge,
 Led by a delicate and tender prince
 Whose spirit with divine ambition puffed
 Makes mouths at the invisible event
 Exposing what is mortal and unsure
 To all that fortune, death and danger dare
 Even for an eggshell. Rightly to be great
 Is not to stir without great argument
 But greatly to find quarrel in a straw
 When honour's at the stake. How stand I then
 That have a father killed, a mother stained,
 Excitements of my reason and my blood,
 And let all sleep; while to my shame I see
 The imminent death of twenty thousand men
 That for a fantasy and trick of fame
 Go to their graves like beds, fight for a plot
 Whereon the numbers cannot try the cause,
 Which is not tomb enough and continent

134. We learn in Act I that Fortinbras has also recently lost his father (at Hamlet's father's hands!) and that Fortinbras's uncle, not he, now wears Norway's crown. SHAKESPEARE, *supra* note 2, at act 1, sc. 1. His situation mirrors Hamlet's, yet rather than suffering an existential crisis, Fortinbras has taken up arms and begun an invasion of Poland with an eye to recovering the lands his father lost to Denmark. In fact, as Kornstein notes, three separate revenge stories are taking place in the play against which Hamlet's actions can be judged: Hamlet against Claudius, Laertes against Hamlet, and Fortinbras against Denmark. See KORNSTEIN, *supra* note 12, at 91.

To hide the slain? O, from this time forth
My thoughts be bloody or be nothing worth.¹³⁵

Hamlet the judge uses emotionally charged language to point us towards the conclusion he wishes us to reach. Hamlet's statement of facts is rearranged here for convenience:

I have cause and will and strength and means
To [kill my father's murderer],
[Y]et I live to say this thing's to do.
[My] capability and godlike reason,
[Given by God] that made [me],
. . . fust in [me] unused
[Either by] Bestial oblivion, or some craven scruple
Of thinking too precisely on th' event,
(A thought which quartered hath but one part wisdom
And ever three parts coward).¹³⁶

Note that, although the category "coward" is invoked, it is no longer the guiding force of the analysis.¹³⁷ In this, Hamlet sounds similar to Cardozo in *MacPherson v. Buick Motor Co.*, summing up the prior case law to prepare us for the announcement of the synthesizing principle.¹³⁸ Like Cardozo referencing the categories used to determine liability in products-liability cases, Hamlet references his prior category of "cowardice" and one of the items that he determined fell in the category: "thinking too precisely on th'event," or, as he had phrased it previously, "conscience."¹³⁹ Noting that he has the power to kill Claudius and has not yet done so, he also references his analysis in "O what a rogue and peasant slave . . ." by invoking the other subject included in the category: one who does not respond properly to noble passion.¹⁴⁰ Hamlet, like Cardozo, realizes that the audience must understand where the law has been in order to understand where it is going.

Hamlet's question presented in this opinion also rejects prior categories and, for the first time, addresses the overarching question with which he has struggled the entire play. Hitherto, Hamlet's questions have been "Am I a coward?" and "[W]hether 'tis nobler in the mind to suffer / The slings and arrows of outrageous fortune . . ."¹⁴¹ Having analyzed the question in two smaller, more

135. SHAKESPEARE, *supra* note 2, at act 4, sc. 4.

136. This text is adapted from *id.*

137. A contradiction also worth noting is that Hamlet elevates reason (as opposed to passion) as "godlike" on the one hand and, on the other hand, connects cowardice with "thinking too precisely on th'event." See *id.*

138. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051–53 (N.Y. 1916).

139. See *supra* section I.A.

140. See *supra* section I.B.

141. See SHAKESPEARE, *supra* note 2, at act 2, sc. 2 & act 3, sc. 1 (emphasis added).

manageable iterations, he is now better prepared to tackle the bigger question; he no longer asks the abstract question “To be or not to be,” but he asks more specifically, “What is a man . . . ?” Note the advocate’s slant in the way the question and accompanying facts are framed: Hamlet does not just ask, “What is a man?” but rather leads the audience to his conclusion by asking:

What is a man
 If his chief good and market of his time
 Be but to sleep and feed?¹⁴²

In “To be or not to be,” Hamlet objectively questioned inaction in the face of insufferable wrongs. Now Hamlet implicitly speaks pejoratively of inaction, thereby helping lead us to the conclusion he wishes us to reach.¹⁴³ Rather than speaking of “peak[ing] like John-a-dreams” or a puzzled will, he characterizes inaction generally as a life composed of nothing more than sleeping and feeding. The word “feed” is particularly emotionally charged and effective because the barnyard imagery invoked echoes in the answer: “A beast – no more.”¹⁴⁴ Hamlet’s question therefore compares inaction to the life of livestock. The similarity between the evolution of the common law and that of Hamlet’s broader inquiry is revealed simply by looking at the progression of the questions asked. The common law progressed from the general (What should a manufacturer’s liability be regarding products that harm third parties?) to the specific (Should liability extend to *this product*?) and back again to the general (What is the general theory of product liability and third-party harm?). Similarly, Hamlet’s questions progress from the general (“Whether ’tis nobler in the mind”) as he struggles to understand the issue before him, to the specific (“Am I a coward?”) as he performs a case comparison to fill out his categories, and back again to the general (“What is a man?”) as he prepares to synthesize an animating principle.

Hamlet then performs his analogy. Importantly, for this opinion, Hamlet now has a longer line of precedent behind him. As Hamlet sees Fortinbras begin his military march on Poland to recover an insignificant piece of ground, Hamlet holds up Fortinbras for our consideration:

Witness this army of such mass and charge,
 Led by a delicate and tender prince
 Whose spirit with divine ambition puffed
 Makes mouths at the invisible event
 Exposing what is mortal and unsure
 To all that fortune, death and danger dare
 Even for an eggshell . . . a plot [of land]

142. See *id.* at act 4, sc. 4.

143. See INTRODUCTION TO ADVOCACY, *supra* note 39, at 52–53.

144. See SHAKESPEARE, *supra* note 2, at act 4, sc. 4.

Whereon the numbers cannot try the cause,
 Which is not tomb enough and continent
 To hide the slain? [Here we see] . . .
 The imminent death of twenty thousand men
 That for a fantasy and trick of fame
 Go to their graves like beds¹⁴⁵

Fortinbras is prepared to go to war and die over an insignificant piece of land. Hamlet then compares himself:

I . . .
 [H]ave a father killed, a mother stained, . . .
 And let all sleep¹⁴⁶

Fortinbras is similar to the actor referred to in “O, what a rogue and peasant slave am I!”:¹⁴⁷ Someone provoked with miniscule or nonexistent incitement takes large and mighty action. Once again, by analogy, Hamlet reasons that if a person in Case A is justified in a certain action due to small provocation (see, for example, Fortinbras and the actor), then the person in Case B (Hamlet), whose provocation is exponentially higher than that of the person in Case A, should take similar (if not greater) action.

At long last, he can now announce an overarching principle to guide his future actions:

Rightly to be great
 Is not to stir without great argument
 But greatly to find quarrel in a straw
 When honour's at the stake.¹⁴⁸

This now becomes his guide for judging human action. In this principle, Hamlet synthesizes all the elements with which he has hitherto struggled: nobility, honor, action. Imagine a spectrum of provocation which might demand great action. At one end, place the murder of a father, and at the other, “a straw.” Until now, Hamlet has not been sure whether action would be noble or whether inaction made him a coward. Though he has explored the categories, until now, without enough precedent to examine, Hamlet could not determine what the most important consideration compelling his action should be. He has not, however, explicitly equated this inquiry with what “honor” demands. Though he has been investigating “nobility,” the idea of “honor” has somehow eluded him. Yet honor proves to be the unifying element. In this speech, he concludes that

145. *Id.* at act 4, sc. 4.

146. *Id.*

147. *Id.* at act 2, sc. 2.

148. *Id.* at act 4, sc. 4.

when honor is “at the stake,” the spectrum of provocation is recast and great action is demanded at the smallest push. Previously, he questioned why the murder of his father did not provoke him to action by seeking his impetus in the murder itself, as though his implicit proposition were “if great provocation, then great action.” Yet the enormity of this circumstance “puzzles [his] will,”¹⁴⁹ or as contemporary psychology might have it, leaves him in shock, or again, as Hamlet himself might put it, “natural shock[.]”¹⁵⁰ Only by separating himself from the personal aspect of the circumstance can he come to the conclusion that honor demands action at the slightest provocation.

Thus does his “if, then” proposition progress from “if great provocation, then great action” to “if *any* provocation against honor, then great action.” This reformulation is perhaps what Levi meant when he wrote that “[o]n serious controversial questions, [the mechanism of legal reasoning] makes it possible to take the first step in the direction of what otherwise would be forbidden ends.”¹⁵¹ In Hamlet’s case, these “forbidden ends” are finally articulated:

O, from this time forth
My thoughts be bloody or be nothing worth.¹⁵²

Significantly, after this speech, Hamlet never addresses the audience in a soliloquy again, and we see the ultimate result of emotion’s influence on Hamlet’s initial categories. A principle emerges that animates action, which, in this case, is rather horrifying. Subsequent to this final speech, Rosencrantz, Guildenstern, Ophelia, Gertrude, Laertes, Hamlet, and finally Claudius all meet their ends either at Hamlet’s own hands or as a result of Hamlet’s actions.¹⁵³

Hamlet, through lawyerly reasoning, has come full circle to his first instinctual position after the Ghost disappeared in Act I. Note the parallels between his above resolution and this statement from Act I:

Yea, from the table of my memory
I’ll wipe away all trivial fond records . . .

149. *See id.* at act 3, sc. 1 (“To be or not to be . . .”).

150. *Id.*

151. LEVI, *supra* note 31, at 1.

152. SHAKESPEARE, *supra* note 2, at act 4, sc. 4.

153. Hamlet arranges to have Rosencrantz and Guildenstern killed by the King of England. *See id.* at act 5, sc. 2. Ophelia goes mad and drowns herself as a result of Hamlet’s murder of her father, Polonius. *See id.* at act 4, sc. 7. Gertrude accidentally drinks poisoned wine intended for Hamlet. *See id.* at act 4, sc. 7 & act 5, sc. 2. Laertes, bent on revenge for his father Polonius’s murder and the death of his sister, Ophelia, for whose death he blames Hamlet, plots with Claudius to engage Hamlet in swordplay with a poisoned-tipped sword. *See id.* at act 4, sc. 7. Swords are crossed, and both Hamlet and Laertes are fatally scratched by the poisoned sword. *Id.* at act 5, sc. 2. Finally, before the poison overtakes him completely, Hamlet runs Claudius through. *Id.* Not only do all these characters die, but Denmark falls to the powers of Norway when Fortinbras arrives on the scene with his army and fills the power vacuum left by all these deaths. *Id.* The consequences of Hamlet’s principle are thus enormous and world-altering.

And thy commandment [that is, revenge] all alone shall live
 Within the book and volume of my brain
 Unmixed with baser matter.¹⁵⁴

Though he returns to his original instinctual position, Hamlet arrives at a principled, defensible (even if horrifying) reason to exact revenge that transcends mere reflex or animal instinct. Unlike other dramatic revenge heroes, Hamlet's conclusion is critical to the play and his character. To revenge is not enough: Hamlet, like the law, must articulate *why* revenge is required.

III. HAMLET'S ANALOGICAL REASONING: ATTEMPTING TO FREE HIS REASON FROM PASSION

In the face of "outrageous fortune," Aristotle's epigram that "[I]aw is reason free from passion"¹⁵⁵ is the candle Hamlet lights in the darkness; that is, to solve a problem that provokes overwhelming and paralyzing emotions, Hamlet attempts to separate his reason from his passion. This separation enables Hamlet to take Levi's first step toward forbidden ends. The law, like Hamlet, maintains an uneasy relationship with emotion.¹⁵⁶ Judges, in particular, are criticized for showing emotion,¹⁵⁷ and the need to protect against their susceptibility to emotional influences has been argued for centuries.¹⁵⁸ As *Hamlet* illustrates, such caution is not unjustified because as emotion shapes the first steps of legal analysis, it thereby helps chart the law's future course.

Hamlet's attempt to separate himself from his emotion is not merely the imposition of an artificial legal gloss on his character but is, in fact, an action central to Hamlet's delay and essential to the drama.

A. HAMLET'S ATTEMPTED SUPPRESSION OF EMOTION IS CRUCIAL TO THE DRAMA

Hamlet's lawyerly struggle against emotion is also his struggle against Fate.

154. *Id.* at act 1, sc. 5.

155. ARISTOTLE, *supra* note 1.

156. *See supra* note 11. The Comments to the Restatement of Contracts articulate the reasons often given for the law's distrust of emotion in the context of emotional harms: "Even if [emotional harms] are foreseeable, they are often particularly difficult to establish and to measure." RESTATEMENT (SECOND) OF CONTRACTS § 353, cmt. a (1981); *see also* Saffle v. Parks, 494 U.S. 484, 493 (1990) (noting that "capital sentencing must be reliable, accurate, and nonarbitrary," and equating emotion with "whims [and] caprice").

157. *See, e.g.*, Editorial, *Tragedy as Farce: The Legal System Is a Loser in the Anna Nicole Story*, PITTSBURGH POST-GAZETTE, Feb. 27, 2007, at B6 (criticizing the judge in the Anna Nicole Smith case for crying while delivering his verdict); Matt Sedensky, *Judge's Crying Game Draws Critics: Attorney Says Seidlin Performance Gives Circuses a Bad Name*, THE STAR-LEDGER (N.J.), Feb. 25, 2007, at 13 (same).

158. *See, e.g.*, ARISTOTLE, *supra* note 20, at 2. Aristotle notes several reasons why judges should "be allowed to decide as few things as possible," including the potential for being "influenced by feelings of friendship or hatred or self-interest"—presumably toward those who are party to suit. *Id.*

Subjugating his emotion is, in fact, at the very core of the drama.¹⁵⁹ Despite the necessity and even inevitability of revenge, Hamlet will not be compelled to act according to any will but his own. For Hamlet, exerting his will necessitates subjugating his emotion to reason because he equates his lack of control over his emotions with his lack of control over his life, which makes him susceptible to Fate's whims. This precipitates his reasoned search for an animating principle to guide his action: the principle is the expression of Hamlet's will and, he thinks, frees him in some measure from Fate's controlling hand.¹⁶⁰

With what specific emotions does Hamlet wrestle and try to keep at bay as he attempts his "legal" analysis? Although one might be tempted to say vengeance, vengeance is not strictly an emotion.¹⁶¹ Robert C. Solomon states: "In anger and outrage, one may well feel one's temperature rising, one's skin flushing, one's fists tightening and teeth gnashing, but vengeance is cool and calculating, devoid of the neurological fireworks that render these other emotions so often distracting and counterproductive."¹⁶² Although Hamlet sets himself on a course for vengeance, the effects of vengeance do not concern him.

159. In this regard, compare Hamlet with Macbeth. Macbeth is informed (although cryptically) of the specific means by which he will die. Among other prophesies, he is told that "none of woman born / Shall harm Macbeth." WILLIAM SHAKESPEARE, *MACBETH* act. 4, sc. 1. Yet when Macduff reveals he was from his mother's womb "[u]ntimely ripped," Macbeth does not surrender to his inevitable end but says, rather:

I will try the last. Before my body
I throw my warlike shield. Lay on, Macduff,
And damned be him that first cries "Hold, enough!"

Id. at act 5, sc. 10. The rebellion and struggle against Fate are often what give a character his or her tragic stature—watching a character deliberately resist the irresistible is often what inspires the fear and awe associated with tragedy's catharsis.

160. Of course, Fate wins. Hamlet kills Claudius. If not freeing him from the hand of Fate, then the process Hamlet engages in may be said at least to reconcile him to his fate. Compare Hamlet's refusal to be "a pipe for Fortune's finger" earlier in the play, SHAKESPEARE, *supra* note 2, at act 3, sc. 2, with his philosophy following the announcement of his principle: "There's a divinity that shapes our ends, / Rough-hew them how we will," *id.* at act 5, sc. 2, and "There is a special providence in the fall of a sparrow. If it be, 'tis not to come. If it be not to come, it will be now. If it be not now, yet it will come. The readiness is all . . ." *Id.*

To the degree that unquestioning acceptance of rules adopted by "reasoned analysis" may be likened to acquiescence to Fate, *Hamlet* provides an interesting meditation on what meaning we derive from a law's or rule's formalistic, mechanical application. On the one hand, Hamlet's refusal to be a pipe for Fortune's finger is to be applauded in that he will not take a life unthinkingly as simply the necessary requirement of existing norms. His doubt therefore leaves open the possibility for new understandings of what justice might also require. On the other hand, as a result of Hamlet's struggle against Fate, many Danes die beyond the just object of his revenge. One meaning we might derive from the acceptance of rules is society's continuation: at the end of *Hamlet*, Denmark falls to Norway. *See supra* note 153.

161. *See* Solomon, *supra* note 21, at 124 ("'[V]engeance' is not the name of an emotion as such, nor is there any single emotion name that corresponds to vengeance. The archaic wrath is perhaps the best we have. Its kin are anger and outrage, though pointed resentment is, perhaps the emotion closest to vengeance."). Solomon does, however, acknowledge that "[v]engeance displays all of those traits of intensity, intractability, adamancy, and single-mindedness that are typical of powerful emotions." *Id.* at 130.

162. *Id.* at 130.

Hamlet is instead concerned with those heart-gripping emotions that *provoke* vengeance: rage and hatred for Claudius; love and pity for his father; disgust and revulsion with his mother.¹⁶³ These emotions seize him with such force that he feels that they are beyond his control. Martha Nussbaum movingly articulates the interaction of her feelings upon the death of her mother and, in so doing, she could well be describing Hamlet's feelings upon the death of his father: "[Emotions have] close connections with one another . . . [A] single event transforms hope into grief . . . grief, looking for a cause, expresses itself as anger . . . [and] all of these can be the vehicles of an underlying love."¹⁶⁴ Given the size and number of confusing emotions to which he is subject in the play, viewed in this light, it seems perfectly understandable that Hamlet should see his emotions as something outside his intellect, intruding upon his thoughts like "invading currents of some ocean."¹⁶⁵

Additionally, Hamlet's overall "melancholic" nature, with which he is too familiar, accords with this description. Note that Hamlet is not melancholy in the way modern sensibilities understand the word. As the Elizabethans understood the word, "melancholy" does not refer to some vague, generalized sadness.¹⁶⁶ A.C. Bradley argues:

[B]y temperament [Hamlet] was inclined to nervous instability, to rapid and perhaps extreme changes of feeling and mood, and that he was disposed to be, for the time, absorbed in the feeling or mood that possessed him, whether it were joyous or depressed. This temperament the Elizabethans would have called melancholic.¹⁶⁷

163. All these emotions play prominent roles in the law. Martha Nussbaum notes that disgust, in particular, is a powerfully motivating emotion in the law. Disgust may be "the primary or even the sole justification for making some acts illegal," for example, sodomy, obscenity, and so forth. Martha Nussbaum, *Secret Sewers of Vice: Disgust, Bodies, and the Law*, in *THE PASSIONS OF LAW* 19, 20 (Susan A. Bandes ed., 1999); see also Solomon, *supra* note 21, at 127 (arguing that vengeance is "a good thing [for the law] to satisfy").

164. Nussbaum, *supra* note 21, at 185.

165. *Id.* at 187. Nussbaum herself concedes that this image "does appear to capture at least some of what went on" after her own mother's death. *Id.* However, her article makes a stirring case that viewing emotions and intellect as completely separate is "grossly inadequate." *Id.* at 186.

166. For example, one modern dictionary defines "melancholy" as an adjective to mean sad, depressed, pensive, or thoughtful. *THE AMERICAN HERITAGE DICTIONARY* 783 (2d Coll. ed. 1985). Similarly, "melancholia" is defined as "[a] mental disorder characterized by feelings of dejection and usually by withdrawal." *Id.*

167. BRADLEY, *supra* note 3, at 111. Compare this with the American Heritage Dictionary, which does give one definition of "melancholy" as "[a]n emotional state characterized by sullenness and outbreaks of violent anger." *THE AMERICAN HERITAGE DICTIONARY*, *supra* note 166. Note that Bradley oversimplifies the Elizabethan view of melancholy and of humours in general. Lily Bess Campbell provides a more sophisticated take on the Elizabethan view of melancholy in *LILY BESS CAMPBELL, SHAKESPEARE'S TRAGIC HEROES, SLAVES OF PASSION* 74–78, 82 (Barnes & Noble, Inc. 1970) (1930). Indeed, Campbell questions the presumption that Hamlet was melancholic at all, *id.* at 110–15, and concludes that if he was, it was melancholy induced by passion, *id.* at 113, which has different characteristics than natural melancholy. *Id.* at 74–78.

If Hamlet is so changed by whatever emotional currents happen to possess him, we can begin to understand that Hamlet might not feel in total command of his own metaphorical ship and thus might distrust the directions these currents steer him. Of Hamlet's melancholic character, Bradley further asserts:

[H]e must have been quick and impetuous in action; for it is downright impossible that the man we see rushing after the Ghost, killing Polonius, dealing with the King's commission on the ship, boarding the pirate, leaping into the grave, executing his final vengeance, could *ever* have been shrinking or slow in an emergency.¹⁶⁸

In other words, Hamlet, under ordinary circumstances, is the perfect candidate for a revenger: He has a fiery disposition given to sudden bursts of passion.¹⁶⁹ He is capable of purposeful single-mindedness and fearlessness in emergencies.

Indeed, after seeing the Ghost, Hamlet initially commits himself to the standard revenger's method of operation—that is, he determines to allow revenge to live in the “book and volume of [his] brain,” undistracted and alone.¹⁷⁰ In other words, he commits himself to murderous obsession. But in contrast to other great literary revengers,¹⁷¹ once his initial passion has cooled, other thoughts quickly dominate the volume of Hamlet's brain. Doubt, in particular, intrudes on revenge's solitude. Doubt acquires particular strength because Hamlet perceives his emotional or melancholic nature as a significant weakness. He therefore does not trust the passion that led him to his initial commitment.

Familiar with his nature, Hamlet therefore struggles to suppress his passion in order to understand his situation rationally.¹⁷² Hamlet's internalization of Aristo-

168. BRADLEY, *supra* note 3, at 110. Bradley's view is that under other circumstances, Hamlet would have been perfectly suited to the task of revenge. The cause of his paralysis “was a state of mind quite abnormal and induced by special circumstances—a state of profound melancholy.” *Id.* at 109. Thus the tragedy is not that Hamlet's character was unsuited to the task, but that in “any *other* time and in any *other* circumstance,” Hamlet's tragedy would have been avoided. *Id.* Campbell's view is not entirely inconsistent with Bradley's insofar as Campbell argues Hamlet is naturally of the sanguine humor and is changed at the beginning of the play through excessive grief. See CAMPBELL, *supra* note 167, at 112–13.

169. See BRADLEY, *supra* note 3, at 123 (“[Hamlet's] . . . savage irritability . . . [,] his self-absorption, his callousness, his insensibility to the fates of those whom he despises, and to the feelings even of those whom he loves . . . sometimes alternate . . . with bursts of transitory, almost hysterical, and quite fruitless emotion.”).

170. See SHAKESPEARE, *supra* note 2, at act 1, sc. 5.

171. One example from Shakespeare's own canon is *Titus Andronicus*. See generally WILLIAM SHAKESPEARE, *TITUS ANDRONICUS*.

172. Note that this view is almost directly opposite that of Campbell. Campbell describes the play as illustrating the way men cope with sorrow through the reactions of the three young men who lose fathers in the play. Campbell argues persuasively that “Fortinbras is . . . presented as a grief dominated by reason” whereas “the grief of Hamlet and Laertes is excessive grief leading to destruction.” See CAMPBELL, *supra* note 167, at 110. For another interesting view on the role of passion and reason in *Hamlet*, see Eric Levy, *The Problematic Relation Between Reason and Emotion in Hamlet*, 53 RENAISSANCE: ESSAYS ON VALUES IN LITERATURE 83, 83 (2001). A critical distinction between my position

tle's epigram is revealed when he says to Horatio:¹⁷³

[B]lest are those
Whose blood and judgment are so well co-meddled,
That they are not a pipe for Fortune's finger
To sound what stop she please. *Give me that man
That is not passion's slave and I will wear him
In my heart's core—ay, in my heart of heart . . .*¹⁷⁴

Hamlet believes his “blood and judgment” are not by nature “well co-meddled.” He believes himself to be “passion's slave” and therefore easily manipulated by the strings of Fate.

Therefore, even more than revenge, Hamlet is obsessed with resisting the puppet-master Fate.¹⁷⁵ Compare his characterization of one who is passion's slave as a “pipe for Fortune's finger,” with Act One's concluding couplet: “The time is out of joint; O cursed spite / That ever I was born to set it right!”¹⁷⁶ From the outset, Hamlet rebels against fated predestination. And later in the play, as Rosencrantz and Guildenstern try to finesse information from Hamlet, Hamlet suddenly asks Guildenstern to play the recorder for him. Confused, Guildenstern protests that he “know[s] no touch of it.”¹⁷⁷ Hamlet rebukes him:

Why, look you now how unworthy a thing you make of me: you would play upon me! You would seem to know my stops, you would pluck out the heart of my mystery, you would sound me from my lowest note to my compass . . . *Do you think I am easier to be played on than a pipe?*¹⁷⁸

Hamlet equates his emotional, passionate nature with the strings or stops that allow men and Fortune to easily manipulate or “play” him.

His attempt to remove himself from emotion and passion in order to analyze his situation rationally is thus not just *a* cause of delay, but *the* cause—Hamlet is beating back the inevitable tide of Fate. A vivid example of this battle occurs halfway through “O what a rogue and peasant slave” When Hamlet cries

and Levy's is that Levy discusses reason as either controlling emotion, provoking emotion, *id.* at 83–86, or transforming emotion, *id.* at 91–94. My position is more closely aligned with that of Anderson, who argues that the traditional idea of emotions interfering with cognition and therefore requiring moderation or transformation is “substantially incomplete.” See Anderson, *supra* note 125, at 2; see also *infra* section III.B.

173. Horatio is Hamlet's closest friend in the play and a fellow student at Wittenburg. See SHAKESPEARE, *supra* note 2, at act 1, sc. 2 & n.164 (editors' notes); see also BRADLEY, *supra* note 3, at 369–73.

174. SHAKESPEARE, *supra* note 2, at act 3, sc. 2 (emphasis added).

175. I do not suggest that Hamlet is necessarily conscious of this action. Yet the fact that several times he uses similar imagery to express contempt for the easily manipulated is striking.

176. SHAKESPEARE, *supra* note 2, at act 1, sc. 5.

177. *Id.* at act 3, sc. 2.

178. *Id.* (emphasis added).

out, “[B]loody, bawdy villain, / Remorseless, treacherous, lecherous, kindless villain. [Oh Vengeance!],” he immediately rebukes himself for such an outburst—“Why, what an ass am I . . . !”¹⁷⁹ He then suppresses his emotion and summons his intellect to take back control: “About, my brains!”¹⁸⁰ Immediately afterwards, his intellect hatches the plan to “catch the conscience of the King”¹⁸¹ with the play within a play.

Yet Hamlet’s attempt to remove emotion from his deliberation is doomed to fail. One might argue that in cases that are not so emotional, separating intellect from emotion might be an easier task, and the judge will not necessarily be emotionally influenced. I raise two possible answers to this objection that I take up in the next two subsections: (1) Hamlet’s analysis of an enormously emotional circumstance provides a vivid illustration of how difficult removing emotion from our cognitive processes is; and (2) any case brought before a court will involve emotions, and the judge will necessarily extend his own emotions into the final decision.

B. HAMLET’S FAILURE TO SUPPRESS HIS EMOTION

Martha Nussbaum makes an eloquent argument that emotions are judgments—specifically, “judgments about important things.”¹⁸² Her argument’s starting point is her experience with her mother’s death.¹⁸³ Her article therefore focuses on a particularly powerful emotional experience similar to the one Hamlet has undergone, and her argument that emotion is judgment might be seen to be limited only to emotionally powerful upheavals. However, emotion and cognition’s subtle link is merely amplified by the use of an extreme example.

Emotion inescapably informs Hamlet’s analysis. As we have seen, Hamlet’s grief at his father’s death, his rage at Claudius, and his disgust with his mother color his imagery, shape the direction of his thought, set his normative baselines, and at times take over altogether. Yet rather than indicating that emotions *intrude* on his cognition, Nussbaum would argue that emotion and cognition inescapably commingle.

First of all, [emotions] are *about* something; they have an object. My fear, my hope, my ultimate grief, all are about my mother and directed at her and her life. . . .

Second, the object is an *intentional* object: that is, it figures in the emotion as it is seen or interpreted by the person whose emotion it is. . . . My fear perceived my mother both as tremendously important and as threatened; my

179. *Id.* at act 2, sc. 2.

180. *Id.* “About, my brains!” here means, “Get to work, my brains!” *Id.* at act 2, sc. 2 n.522 (editors’ notes); *see also supra* note 127.

181. *Id.* at act 2, sc. 2.

182. Nussbaum, *supra* note 21, at 184.

183. *Id.* at 184–85. Because Nussbaum deals with a similarly powerful emotional event in her argument connecting cognition and emotion, her article is particularly useful to my discussion.

grief saw her as valuable and as irrevocably cut off from me. . . . What distinguishes fear from hope, fear from grief, love from hate—is not so much the identity of the object . . . but the way the object is perceived

Third, these emotions embody not simply ways of seeing an object, but beliefs—often very complex—about the object. . . . In order to have fear . . . I must believe that bad events are impending; that they are . . . seriously bad; [and] that I am not in a position to ward them off¹⁸⁴

For Nussbaum, our emotions' "aboutness, their intentionality, their basis in beliefs, their connection with evaluation . . . make[] them look very much like thoughts."¹⁸⁵ Nussbaum illustrates that even if emotion and thought are not inextricably intertwined, the current between emotion and thought flows in both directions.¹⁸⁶ Certainly for Hamlet, this current flows from thought to emotion: He thinks, therefore he feels. He cannot undertake a dispassionate analysis of his situation because he cannot *think* of his father, of Claudius, or of his mother—in short, he cannot think about the overall problem without all his concomitant feelings about the players involved surging to the fore, coloring and shaping his cognitive process.

However, it may also be that Hamlet thinks *because* he feels. The traditional understanding of emotion's interaction with decisionmaking is that "cognition . . . is seen as construing goals and decisions, and emotion is seen as playing a secondary role, perturbing the processes of reason."¹⁸⁷ By contrast, Christopher J. Anderson argues that emotions "*constitute* decisions," "affect the decision process once it is begun," and "are involved in the implementation of decisions."¹⁸⁸

Emotions constitute Hamlet's decision. His inquiry into nobility and cowardice is driven by the disconnect between his feelings about the need for revenge and his delay, or that between his ideal self and the self he is becoming.¹⁸⁹ Hamlet is unable to free himself from the feeling that his delay brands him a coward. As a result, he probes into the demands of "nobility" rather than "justice" or any number of other possibilities. Once the decisionmaking process has begun, emotion continues to affect it. Hamlet's thought is saturated with emotion. His characterization of wrongs as "[t]he slings and arrows of outrageous fortune," or of "long life" as a "calamity," or of a "weary life" in general

184. *Id.* at 187–88.

185. *Id.* at 190.

186. *See id.* at 194 ("It was my thought that was receiving, and being shaken by, the knowledge of [my mother's] death. . . . The recognizing and the upheaval belong to one and the same part of me, the part with which I make sense of the world.").

187. Anderson, *supra* note 125, at 2.

188. *Id.* at 3 (emphasis added). Anderson argues that potential decisions get sorted into categories relative to the resources available to make them; this sorting is the product of a decisionmaker's unconscious priorities. "These priorities which arguably drive attention and action to particular decisions are always fundamentally emotional . . ." *Id.* at 6–7.

189. *See supra* text accompanying note 126.

as a normative baseline indicate the degree to which emotion affects his thought and his analysis.¹⁹⁰ His emotions cry out for expression and Hamlet has no choice but to give them words.¹⁹¹

Indeed, all of Hamlet's imagery in the soliloquy is similarly colored. When he speaks of what life has to offer, he speaks of:

Th'oppressor's wrong, the proud man's contumely,
The pangs of despised love, the law's delay,
The insolence of office and the spurns
That patient merit of th'unworthy takes.¹⁹²

Nowhere is there a suggestion that life might in any way be positive. In other words, his analysis of life is infused with the emotional images expressed at the beginning of the play:

How weary, stale, flat and unprofitable
Seem to me all the uses of this world!
Fie on't, ah, fie, 'tis an unweeded garden
That grows to seed, things rank and gross in nature
Possess it merely;¹⁹³

and later:

[T]his goodly frame the earth seems to me a sterile promontory, this most excellent canopy the air . . . this brave o'erhanging firmament, this majestical roof fretted with golden fire, why it appeareth nothing to me but a foul and pestilent congregation of vapours.¹⁹⁴

His grief about his father, his belief in his father as important in his life,¹⁹⁵ and his belief in the irrevocable loss of that object commingle with his thought and color his ultimate evaluations.

Hamlet's emotional dynamic is similarly inextricable from his logical analysis in "O, what a rogue and peasant slave am I!"¹⁹⁶ Although Hamlet consciously uses emotion like an advocate might in this speech, his emotional arguments are not the product of objective, dispassionate choice. Indeed, all his feelings about his perceived cowardly delay come flooding out, even to the point that they get the better of him. He begins with an instant value judgment

190. See SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

191. See Nussbaum, *supra* note 21, at 187.

192. SHAKESPEARE, *supra* note 2, at act 3, sc. 1.

193. *Id.* at act 1, sc. 2.

194. *Id.* at act 2, sc. 2.

195. See BRADLEY, *supra* note 3, at 112 ("Where else in Shakespeare is there anything like Hamlet's adoration of his father?").

196. SHAKESPEARE, *supra* note 2, at act 2, sc. 2.

of himself—he is “a rogue and peasant slave.” When he tries to answer the question “Am I a coward?” he refers to himself as “[a] dull and muddy-mettled rascal,” “a whore,” “a very drab” (read “prostitute” again), “[a] stallion” (read “male prostitute”),¹⁹⁷ and concludes that he is “pigeon-livered.”¹⁹⁸ This conclusion proves too much to bear, and Hamlet unleashes a torrent of invective against Claudius.¹⁹⁹

Emotions are equally involved in the implementation of Hamlet’s decisions. They prevent him from taking action on the one hand,²⁰⁰ and they lead to rash impulsive action on the other. After Hamlet believes he has caught “the conscience of the King,”²⁰¹ Hamlet’s anger burns so hotly²⁰² that, upon hearing a noise behind a curtain while talking to his mother in her bedchamber, he immediately believes it to be Claudius, and he strikes.²⁰³ Alas, it is not Claudius, but Polonius, his ex-girlfriend’s father.²⁰⁴ Further, the principle Hamlet ultimately announces is one that implicitly involves emotional slight: One should take immediate action at the smallest provocation of honor.

However, one might argue that an inquiry into the requirements of nobility demands such an emotionally driven analysis. Leaving aside the emotional effect of personal loss on Hamlet’s normative baseline, one could say that discussing “Th’oppressor’s wrong, the proud man’s contumely,”²⁰⁵ and so forth are exactly the sorts of emotional incidents with which nobility must learn to reckon. Indeed, Hamlet finally reaches this exact conclusion. His final pronouncement that “Rightly to be great / Is not to stir without great argument / But greatly to find quarrel in a straw / When honour’s at the stake,”²⁰⁶ is a statement of the noble man’s proper emotional response to the “sea of troubles”²⁰⁷ that will attend any person of high standing. It may be, then, that Hamlet’s attempt to sever emotion from his analysis is doomed simply because he is attempting to discover what his emotions should be—an effort that arguably cannot be undertaken without at least some reference to how one actually feels.

C. EMOTION AS THE LINK BETWEEN REASON AND JUDGMENT

Just as Hamlet’s father’s ghost reappears in Gertrude’s bedchamber to remind Hamlet of his purpose,²⁰⁸ Nussbaum reappeared in the last Subpart to remind us

197. *Supra* note 81 and accompanying text.

198. *See* SHAKESPEARE, *supra* note 2, at act 2, sc. 2.

199. *See id.*

200. *See supra* section II.B.

201. SHAKESPEARE, *supra* note 2, at act 2, sc. 2.

202. *Id.* at act 3, sc. 2 (“Now could I drink hot blood / And do such business as the bitter day / Would quake to look on.”).

203. *Id.* at act 3, sc. 4 (“How now! A rat! Dead for a ducat, dead!”).

204. *See id.*

205. *Id.* at act 3, sc. 1.

206. *Id.* at act 4, sc. 4.

207. *Id.* at act 3, sc. 1.

208. *Id.* at act 3, sc. 4 (“Do not forget! This visitation / Is but to whet thy almost blunted purpose.”).

of ours. Now both White and Nussbaum must once again reappear, and their arguments will help frame the discussion to come. White poses the question: “[I]s there anything more . . . beyond rationality that you demand of a judge and his opinion?”²⁰⁹ Implicitly, White’s answer is “yes.” Nussbaum suggests that one thing more we might require of those who dispense justice is a developed moral sense, and she asserts that literature is a means by which this moral sense may be properly developed.²¹⁰ Literature develops our capacity to empathize.²¹¹ By bringing us into contact with worlds, lives, and people that may be wholly unfamiliar yet just down the street from us, and by inviting us to partake of their experiences as though they were our own, literature enables us imaginatively to step into the emotional shoes of those who walk into the courtroom. Consequently, we are able more effectively to do justice.²¹² Taken a step further, our moral sense is greater the better we are able to see underlying relevant similarity in apparent dissimilarity, which, in turn, is the defining feature of legal reasoning by analogy.

White and Nussbaum argue for something beyond rationality in judgment. I

209. WHITE, *supra* note 22, at 687.

210. *See generally* NUSSBAUM, *supra* note 22.

211. *Id.* at 9–11. Nussbaum argues that the analogical function works on the reader of novels to see the similarities between herself and the character she reads at universal and specific levels, thus making the process of novel reading a particularly valuable form of public reasoning. However, Nussbaum finds classical tragic drama deficient in comparison. *See id.* at 8. I take issue with this, but a full discussion is beyond the scope of the Note. Instead, I will simply pause to note that *all* drama—and especially classical drama—requires the viewer imaginatively to enter the worlds of unfamiliar people and, if well done, fosters the necessary imaginative leap potentially far more effectively than does novel reading, particularly for those who may not read well. The actors, director, and designer have already done much of the text’s interpretation for the viewer, which will invite contemplation; simply interacting with a live actor fully engaged in her part is likely to stir one’s emotional capacities or empathy; and to the degree that the actors fail to stir the imagination, the viewer may help fill the gaps by suspending her disbelief.

I also pause to note that analogical thinking is relevant to theater in a myriad of ways not only associated with the audience. For instance, the actor playing Hamlet must operate through metaphor and simile. A technique actors use to help themselves imaginatively enter the world of the character is called the magic “as if.” For example, the actor playing Hamlet is likely not the Prince of Denmark. He (or she) might have been born in Kansas to a Professor of Victorian Literature. His mother is likely not a queen. His father may still be alive, his parents still married, and the chances are that his father’s sibling has never tried to kill his father. Yet if that actor is going to play Hamlet, he must find a way to identify with Hamlet’s situation. A way to begin is for the actor to say to himself: “it’s *as if* I learned a dead friend whom I loved was actually murdered by my best friend, whom I’ve known since I was three years old and trusted like a brother.” The analogy is not perfect (Hamlet may not have ever cared much for Claudius, in which case, the actor looks for a more appropriate substitute), yet this process of identification should begin to stir his emotions to the disbelief, the shock, the anger, and the pain that Hamlet feels. This “as if” is the imaginative leap he requires to begin to connect to the emotional landscape of a character whose normative baselines are very different than his own. The more the actor works on the character, the more refined his analogy will become until finally, he is sufficiently immersed in Hamlet’s story that he no longer requires the imaginative case comparison to act the scene effectively. Thus, to the degree that Nussbaum argues that the novel’s very form contains insights into the role of imagination in politics, I say that the theatrical form stands on at least equal footing as novel reading.

212. *See West, supra* note 24, at 1854.

argue that something beyond rationality already exists. Emotions are critical to and play a significant role in all judgment. Witness how Hamlet's emotions influence and often spur his evaluations—not only what he chooses to compare himself to, but also the judgments he reaches regarding those comparisons. Perhaps, then, our moral sense would be equally well served by trying to understand better the present interaction between emotion and reason. I thus argue for a reconception of our normative background: To say reason and logic are the defining features of legal thought does not complete the picture. Certainly they are pervasive, distinct, and substantial in legal justice. But they are only tools, and like all tools, they have their limitations. To complete the picture, if reason and logic are the defining features of legal *thought*, emotion is the defining feature of the legal *imagination*.

Emotion is imagination's catalyst.²¹³ *Hamlet* reveals the degree to which the imaginative ability to see similarities between two dissimilar things is released by emotion. Reasoning by analogy in the context of law does not proceed by comparing two identical subjects but rather by comparing similarity between parts.²¹⁴ A and B may be substantially different, but aspects of A are relevantly similar to aspects of B, and therefore we may conclude that B is enough like A to warrant similar treatment. Likewise, on the face of it, the similarities might not be readily apparent between an actor performing a part and a son charged with revenging his father's murder, or between that son and an army marching to fight a battle over an "eggshell" of land. However, Hamlet's emotions have so tuned his imagination that "all occasions inform" his circumstances and similarity is perceived.

Drawing such emotional-imaginative connections between apparently dissimilar things is among the functions of art. Indeed, one of the more thrilling aspects of Hamlet's reasoning is the way he draws connections between two seemingly unrelated circumstances and illustrates their connections convincingly. We might say, then, that as we travel along a continuum from similar to dissimilar comparisons, the more dissimilar the subjects being compared, the more we enter the realm of "legal" art, where emotionally released imagination and reason mingle with increasing substantiality. The extreme dissimilarity between Hamlet's subjects highlights this interaction.

213. I assert that in the context of legal reasoning by analogy, emotion is necessary to imagination. An objection might be raised that, in other contexts, imagination might exist independently of emotion. The development of a mathematical proof might be proffered as an example. Because I am not a mathematician, I do not know the degree to which highly complex mathematical proofs are dictated entirely by logic. Assuming they are, imagination is surely needed to see the connections others have not seen that lead inescapably to new results. One might argue that imagination in this context has nothing to do with emotion. The best answer I can make to that objection is that mathematicians often feel very emotional about numbers, as evidenced by a mathematician who asserts with absolute conviction and seriousness that the numbers have color. Interview with Steven Goldberg, Professor of Law, Georgetown Univ. Law Ctr., in Wash., D.C. (Summer 2006) (describing this mathematician's views). Even in this realm, then, perhaps emotion is what releases the imagination.

214. See *supra* note 30 and accompanying text.

However, if we accept that emotionally released imagination commingles with reason at this extreme end of the continuum, surely even the smallest dissimilarity in a comparison steps into the realm of legal art. In a great many cases, logic and reason are sufficient to drive the analysis independent from emotion.²¹⁵ As a hypothetical, anyone who drives over 25 miles per hour (mph) in a school zone has broken the law and is subject to double fines. A, B, C, D, E, and F all drove over 25 mph in a school zone. A–F therefore broke the law and were subject to double fines. G also drove over 25 mph in a school zone. Therefore, G has also broken the law and also should be subject to double fines. The analogy here involves a one-to-one correlation that necessitates the result.

Once we move away from a one-to-one correlation, however, necessity vanishes and something else takes its place. If, in the above example, we determine that G drove over 25 mph in a school zone, but there was a circumstance that leads us to believe that we should create an exception to the normal rule, we must decide upon what we will base that exception. If G was driving too fast because his brake fluid gave out on him, and if, in the cases of A–F, each was held not to be subject to double fines because varying mechanical failures in their cars made slowing down impossible, then this seems like a one-to-one fit. However, if we add the fact that A–F had all had their cars serviced immediately prior to the incident and that the mechanical failures were therefore not foreseeable, whereas G had not had his car serviced in over a year, we must decide: *is that difference relevant?*²¹⁶ In other words, the answer is no longer necessitated by logic or precedent.²¹⁷ An exercise of imagination—and therefore emotion—is necessary to evaluate the relevance and bridge the gap.²¹⁸

Because nothing logically dictates the step between identifying similarities

215. Judge Posner puts it this way: “Most people can add two and two correctly whatever their emotional state, but when the intellectual challenge is greater, the danger that the response will be ‘swayed’ by emotion is greater too.” Posner, *supra* note 21, at 321.

216. See Sunstein, *supra* note 27, at 773–74 (noting that to answer such questions, one needs a “theory of relevant similarities and differences” but that analogical reasoning supplies none). Sunstein defends analogical reasoning as a form of “moral reasoning” and argues that “[t]he process of reasoning by analogy is not science, and it cannot be anchored in anything other than what human beings actually believe. But surely this does not disqualify it as a mode of reasoning.” *Id.* at 780–81. I certainly do not mean to disqualify analogical reasoning as a mode of reasoning. I mean simply to amplify the notion that morality, and as I assert, emotion are central to analogical reasoning and that commitment to the background principle of “reason free from passion” distorts our sense of what judges actually do. I believe that Sunstein’s characterization of analogical reasoning as a form of moral reasoning and his call for a theory of relevant similarities and differences is compatible with my argument. For other explorations regarding the problem of deciding what similarities are important and what differences are not, see, for example, OLIVER WENDELL HOLMES, *THE COMMON LAW* 147–63 (Dover Publications 1991) (1881) (asserting that experience decides whether circumstances warrant the application of the law in many instances); Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509 (1988) (exploring judicial choice in the context of formalism).

217. Sunstein uses almost the exact same driving example. See Sunstein, *supra* note 27, at 755–56.

218. See CARDOZO, *supra* note 21. Ronald de Sousa poses the hypothetical of an emotionless angel for whom all action is determined by principles of reason. When confronted by two options equally loved by God, the angel faces a dilemma of free will:

and determining their ultimate relevance, the “gaps” in the law are, in fact, much more pervasive and therefore more influential than Cardozo suggests.²¹⁹ Cardozo spoke of gaps in the context of judgment on the large scale, where the judge resolves the overall outcome of a case. Comparing the task of the legislator to that of the judge, Cardozo referred to the judge “fill[ing] the open spaces in the law,” where a judge must decide which of several forces—logic, history, custom, utility, and accepted standards of right conduct—should be the deciding factor in a case.²²⁰ To make that decision, the judge gets his knowledge “from experience and study and reflection.”²²¹ However, reflective, experiential “knowledge” must be brought to bear at the smaller scale of reasoning by analogy as we make judgments about relevant similarity.

Nussbaum illustrates judgment this way:

[A] judgment is an assent to an appearance. In other words, it is a process that has two stages. First, it occurs to me or strikes me that such and such is the case. . . . It looks to me that way, I see things that way—but so far I haven’t really accepted it. Now there are three possibilities. I can accept or embrace the appearance, take it into me as the way things are: in this case it has become my judgment and that act of acceptance is what judging is. I can repudiate it as not the way things are: in that case I am judging the contradictory. Or I can let it be there without committing myself to it one way or another. In that case I have no belief or judgment about the matter one way or the other.²²²

Nussbaum refers here to a proposition like “my mother is dead.” Upon seeing her mother’s body, she either accepts that appearance or not. Nussbaum goes on to note that if she feels grief upon viewing the body, “[t]he neo-Stoic claims that [the] grief is identical with the acceptance of [the proposition that my mother is dead, which] is both evaluative and eudaimonistic, that is, concerned with one

[E]ither (1) the free decision is determined by something, or (2) it is determined by absolutely nothing. In case (2) it is simply a form of irrationality. But in case (1) then either (a) it is determined by non-rational principles, which contravenes the assumption that we are dealing with a perfectly rational being, or (b) it is determined by rational principles, which contravenes the assumption that free will escapes the determination of reason.

RONALD DE SOUSA, *THE RATIONALITY OF EMOTION* 14–15 (1987). For de Sousa, emotion resolves the dilemma: “When faced with two competing arguments, between which neither reason nor determinism can relevantly decide, emotion can endow one set of supporting considerations with more salience than the other. We need emotion . . . to break a tie when reason is stuck.” *Id.* at 16.

219. Though my argument is limited to emotion’s role in legal reasoning, I would hazard a guess that there may exist a substantial number of these gaps that Cardozo suggests need filling by judicial “legislation.” See CARDOZO, *supra* note 21. Indeed, Judge Posner notes that, “in discussing the emotional basis of moral offenses, it is often difficult to give a persuasive *rational* account of a moral rule, including a moral rule to which the law has annexed a sanction for violation.” Posner, *supra* note 21, at 322.

220. See CARDOZO, *supra* note 21, at 112–13.

221. *Id.* at 113.

222. Nussbaum, *supra* note 21, at 191.

or more of the person's most important goals and ends."²²³

Whereas Nussbaum argues that strong emotion is a judgment about importance, I argue that in the context of legal reasoning by analogy, judgment reveals emotion, albeit not necessarily strong emotion. Let me extend Nussbaum's illustration of judgment. Consider now the possibility that when we compare two different things, in deciding that they are the same or different, we are similarly either accepting or rejecting an appearance. In the case of products liability, for the purposes of deciding if a car is "inherently dangerous," it appears that a car is like a knife in respects A, B, C, D, and E but not like a knife in respects F, G, and H. The court then decides that one of these groups of characteristics is more relevant than the other. Similarly, Hamlet decides that an actor performing a speech is like the son of a murdered father in respects X, Y, and Z, and then, in his mind, he decides that these respects are sufficiently relevant to illustrate his conclusion.

How do the court and Hamlet make this leap? Nussbaum refers to emotional judgment with respect to goals and ends regarding what one considers most important to one's life (that is, her mother is an important part of what makes her life enjoyable and good; therefore her emotion—grief—is connected to that thought and belief). It may be that a judge's goals and ends (that is, justice, fairness, utility, economic rationality, and so forth) may be sufficiently important to her to make judgments about relevant similarity or difference equivalent to an emotional acceptance or rejection of a proposition. A judge's predisposition to or dedication to certain judicial principles is therefore imbued with emotion sufficient to inform decisionmaking.

Hamlet illustrates this idea of judgment nicely. What in him accepts the proposition that an actor performing a part is relevantly similar to, instead of different from, a murdered son? The answer is, the extension of his imagination spurred by his emotions. Seeing the actor performing the speech or the army marching off to war stirs Hamlet's emotions. These emotions, in turn, recall events in his life that make him *feel* similar. These two dissimilar events become emotionally linked and therefore emotionally similar. One might argue that because Hamlet is dealing with a highly emotional situation, his emotion is easily stirred; thus, a judge deciding whether a knife is like a car is situated differently from Hamlet. My response is that seeing Hamlet at work in an emotionally charged situation is like training a microscope on the judge's emotions in the products liability case. The products liability judge's emotions may be so subtle as to escape notice, but they exist. Seeing Hamlet's magnified emotions influencing his reason helps us to see more clearly how emotion might affect reason on the smaller scale. What else but subtle vibrations of emotions linking the two at perhaps unconscious levels can explain the otherwise absurd statement "a knife is like a car"?

223. *Id.* at 193.

CONCLUSION

Emotion and logic are the conjoined twins of legal reasoning. Hamlet's time in law school has given him a structure for problem solving that seemingly is grounded in reason. However, his emotions—a critical aspect of his humanity—refuse to be subjugated. Despite his best efforts, emotion influences his analytical process at every turn. Hamlet therefore reveals how attempts to sever the connection between reason and emotion unmoor our proper understanding of how legal reasoning actually operates. Commitment to the background principle of “reason free from passion” distorts our sense of what judges actually do. If we acknowledge that emotion does in fact play a significant role in legal reasoning, we may be better able to take what Levi might call the first steps towards this heretofore forbidden end.²²⁴ I therefore conclude by noting some of the difficulties entailed in asking what I believe should be the proper question: “What role do we want emotion to play?”²²⁵

Answering that question is not easy. Given that emotion has a role in legal analysis, determining what role we want it to play is a steep mountain to scale. Acknowledging emotion's presence in legal analysis is also potentially troubling. Hamlet, like the law, struggles with his emotion for this very reason: Something in him recognizes that giving in to his rage and passion might not be the path of wisdom. His impulse is therefore to wrestle his emotion away and subject his circumstances to pure rational analysis.

In one regard, Hamlet is wise to try to remove emotion from his reasoning process for many of the same reasons the law argues that emotion should be separate from legal analysis.²²⁶ One argument concerns justice and fairness at

224. See LEVI, *supra* note 31, at 1. As Anderson puts it, “[t]he questions we ought to be asking . . . [are] which emotions are helpful or harmful and in which contexts they play that role. . . . [And] that in evaluating emotions, we need to consider how they structure the perception of decisions to be made at the outset, and how they can influence both toward action and inhibition.” Anderson, *supra* note 125, at 23.

225. For example, one commentator, writing in the context of negotiations, puts it this way: “When negotiators better understand the way in which emotional knowing informs their practice, they can more effectively channel it—harvesting insight where emotional wisdom is most strong and containing judgment distortion where emotional wisdom is weakest” Ryan, *supra* note 11, at 236.

226. Judge Posner notes the “many rules designed to limit a judge's emotional involvement in a case, such as the rule that forbids him to sit in a case in which a relative is a party or a lawyer, or in which he has a financial interest.” Posner, *supra* note 21, at 321. In light of this, it is worth noting that from a strictly formalist legal point of view, Hamlet's analysis is necessarily emotionally tainted in ways the law attempts to avoid.

From the broader perspective, it is also worth noting Anderson's observations about the ways emotions can fail as guides to decisionmaking.

[T]hey can focus individuals on too narrow a set of priorities. Emotions tend to be present-bound Many decisions that can improve a person's well-being far into the future will not be made or even considered because the stakes will seem much lower than for more current, but actually less trivial matters. Likewise, emotions are too narrow . . . in that they are relatively egocentric

Anderson, *supra* note 125, at 13.

the trial level. We do not want a judgment to be the result of the judge's personal preferences. We want to believe that the judge weighs the relevant interests and evidence without improperly tipping the scales with personal feelings. Allowing a judge's personal feelings into this "disinterested" analysis would undermine this belief and make the law passion's slave.²²⁷ On the other hand, the analysis must be not entirely "disinterested." We might feel equally that justice had not been done if the judge mechanically applied formalistic rules. If subtleties in circumstances did not affect the analysis, parties would not feel they had been "heard." Nussbaum therefore asserts that the judge must have empathy.²²⁸

But what exactly might we mean when we say we want the judge to have "empathy?" Do we mean we want her to be more sensitive to the parties before her, or do we mean something larger? For example, Posner notes the distorting effects of the "availability heuristic" in which "too much weight [is given] to vivid immediate impressions such as sight over narrative, and hence . . . too much attention [is paid] to the feelings, the interests, and the humanity of the parties in the courtroom and too little to absent persons likely to be affected by the decision."²²⁹ In this regard, Posner argues that the economic approach to law is deeply empathetic because it considers the interests of broad classes of people who are not parties to the individual suit.²³⁰ Therefore, simply arguing that empathy should play a larger role in judicial decisionmaking does not appropriately focus the conversation.

Another argument concerns the proper role of the judiciary. Some argue that there is a whole category of policy-based cases with which the judiciary should have nothing to do.²³¹ We do not want an approach that would "unleash judges

227. Relevantly, Posner notes four emotions as particularly interfering with the problem solving process: "anger, disgust, indignation, and love . . ." Posner, *supra* note 21, at 321.

228. *See id.* at 323. *See generally* NUSSBAUM, *supra* note 22. Posner also notes that "wonder, delight, and pride" may be necessary to solve the most difficult logical problems. Posner, *supra* note 21, at 321.

229. Posner, *supra* note 21, at 323. According to Posner, the availability heuristic "leads to shortsighted adjudication—whether excessive lenity for the murderer who makes an eloquent plea for mercy, the victim being unable to enter a counterplea by reason of being dead; or an excessive tilt in favor of the rights of tenants, oblivious to the effect on the rental rates to other tenants . . ." *Id.*; *see also* West, *supra* note 24, at 1858 ("[A]n overly sympathetic response to the dilemma or situation of one individual may cloud rather than crystallize a moral decision, where the actor must balance the interests of an individual against those of a group.").

230. Posner, *supra* note 21, at 324. Posner calls this "detachment empathy." *Id.*

231. This is the rationale for equal-protection rational-basis review. *See* N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 594 (1979) ("[T]he Constitution does not authorize a federal court to interfere in . . . [certain] policy decision[s]."). Indeed, the Supreme Court is often taken to task for "policymaking." *See* Plyler v. Doe, 457 U.S. 202, 244 (1982) (Burger, C.J., dissenting) (accusing the majority of a "result-oriented approach" in invalidating a Texas statute authorizing local school districts to deny free education to children of illegal immigrants). Interestingly, when courts do engage in "policymaking," they are often sharply criticized in exactly the terms of this Note. *See, e.g.,* Romer v. Evans, 517 U.S. 620, 639 (1996) (Scalia, J., dissenting) ("[T]he Court's opinion is . . . long on *emotive* utterance and . . . short on relevant legal citation.") (emphasis added).

to do whatever they wish.”²³² For those areas in which judges must fill in the law’s gaps, analogical reasoning imposes an essentially backward-looking, conservative, and incremental posture.²³³ This is good. That the law should progress incrementally is desirable when all the pieces of a tricky social puzzle are not at hand.²³⁴ In the context of products liability for third-party harm, a court is institutionally incompetent to solve so large a puzzle on the facts of a single case. Leaping right away to a broad policy position with sweeping social implications would be unwise.²³⁵ Therefore, a reasoned, conservative, dispassionate analysis of only those interests presented seems appropriate.

On the other hand, in the realm of some of law’s biggest policy questions, arguing for our empathetic capacity’s development has considerable force. For example, *Brown v. Board of Education*²³⁶ can be seen as a triumph of judicial empathy and imagination. The statement, “[t]o separate [children] from others of a similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,”²³⁷ represents a high-water mark of judicial empathy. However, because racial equality does not yet exist, *Brown* and its subsequent judicial history could equally be criticized for a failure to imagine empathetically the steps necessary to realize true equal treatment of races.²³⁸ Like Hamlet looking to precedent for the foundations and premises of his “legal question,” legal reasoning is far more likely to reinforce the status quo than it is to break through to any new imaginative ground.²³⁹ Note that Hamlet never once asks what *justice* requires.²⁴⁰ Nor does he ever question whether killing Claudius is the right thing to do.²⁴¹ We might well

232. Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2237 (2006) (arguing in the context of theories of constitutional interpretation).

233. See Sunstein, *supra* note 27, at 768.

234. See *id.* at 782 (noting that one of analogical reasoning’s distinct advantages is that it “may be especially desirable in contexts in which we seek moral evolution over time”).

235. It would also be potentially unworkable. After *Brown v. Board of Education*, 347 U.S. 483 (1954), was handed down, it was by no means certain that schools would comply with the Supreme Court’s injunction to integrate. See generally Robert B. McKay, *With All Deliberate Speed*, 31 N.Y.U. L. REV. 991 (1956) (detailing the efforts of schools to resist or circumvent integration).

236. 347 U.S. 483 (1954).

237. *Id.* at 494.

238. See generally McKay, *supra* note 235. But see Henderson, *supra* note 95, at 1577 (arguing that cases like *Brown* and *Roe v. Wade*, 410 U.S. 113 (1973), “manifest breakthroughs of empathetic understanding”).

239. See Sunstein, *supra* note 27, at 768 (“[I]nsofar as analogical reasoning takes current legal materials as the basis for reasoning, it can indeed be an obstacle to justified change through law.”); see also Anderson, *supra* note 125, at 5.

240. The word “justice” occurs in the play only once, and Hamlet does not speak it. Ironically, the word is uttered by Claudius: “In the corrupted currents of this world / Offence’s gilded hand may shove by justice, / And oft ’tis seen the wicked prize itself / Buys out the law . . .” SHAKESPEARE, *supra* note 2, at act 3, sc. 3.

241. See BRADLEY, *supra* note 3, at 100–03 (finding a great deal of textual support for Hamlet’s certainty of duty).

criticize Hamlet for failing to question his society's cultural norms.²⁴² Conservatism is therefore part of the court's problem when facing questions that implicate a reconception of societal norms—that is, when an exercise of real legal imagination would be useful.

So perhaps empathy is not enough. A more complete understanding of emotion intertwined with reason could be the corrective that frees legal reasoning from its backward-looking bonds in ways that more properly account for the limitations of both reason and emotion. Certainly we want decisions to be based on sound legal and logical principles. However, in this context, as with Hamlet, legal/logical analysis is but a tool that allows us to step back from those aspects of emotion that might lead us to arbitrary or capricious decisions. Reasoning allows us to take those first necessary analytical steps that get the decisionmaking started. The final step, however, is made possible by imagination, which is made possible by emotion: It is the bridge that lies between logic and judgment. From another angle, emotion is the force that drives the engine of logic, for indeed, legal reasoning is often not the path *to* the conclusion, but rather the demonstration *of* the conclusion.²⁴³ If the ultimate goal of the legal process is justice, then in cases concerning broad social policy, we should desire the most sensitive understanding of the intersection of emotion and reason in order to maximize the breadth and depth of a judge's imagination in conceiving justice. Further, the better we understand why we make the decisions we make, the more transparency the law will have.

I emphasize that I do not suggest that legal reasoning is an invalid mode of analysis for judicial decisionmaking.²⁴⁴ Nor do I suggest that the role of emotion in judicial decisionmaking is wholly unacknowledged. Emotion is, however, interestingly obfuscated by legal reasoning. The entire structure of a legal argument is an attempt to create the appearance of rationality—maybe even inevitability. This serves valuable judicial purposes. Believing that a judgment handed down is not the result of an arbitrary process keeps the engine of society running. Process can be a proxy for justice.²⁴⁵ There are good reasons to try to limit the role of emotion in judicial decisionmaking, and it may be that

242. See John Denvir, *William Shakespeare and the Jurisprudence of Comedy*, 39 STAN. L. REV. 825, 827 (1987) (noting the precarious balance between the legal method that brings “regenerative order to an otherwise chaotic world” and that which “merely accelerates the social cycle of violence and repression”).

243. “An analogy is a way of stating a conclusion, not a way of reaching one . . .” Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 371 (1997), *quoted in* Cass R. Sunstein, *Of Artificial Intelligence and Legal Reasoning*, 8 U. CHI. L. SCH. ROUNDTABLE 29, 32 (2001). *But see* Sunstein, *supra* (finding this view simplistic: “[A]n analogy is partly a way of reaching a conclusion, because it helps people to understand and to assess the principles to which they are actually committed.”).

244. For a good discussion of the particular strengths and weaknesses of analogical reasoning, see generally Sunstein, *supra* note 27.

245. For a good discussion of procedure as a proxy for justice, see TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH & YVEN J. HUO, *SOCIAL JUSTICE IN A DIVERSE SOCIETY* ch. 4 (1997). *But see* JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 17 (1986) (“It cannot be repeated often enough that procedurally ‘correct’ repression is perfectly compatible with legalism.”).

some judicial emotions are more appropriate than others. However, saying that the law requires judicial empathy is incomplete; holding up emotionless decision-making as an ideal for which the law should strive is a distortion of the process and of who judges are as human beings.²⁴⁶

Consider how our conception of the law changes if we modify Aristotle only slightly by saying, for instance, that what is meant by “passion” is strong, powerful, impulsive emotion, as distinct from all emotion in general.²⁴⁷ By doing this, we have already changed the background conversation of what the law is.²⁴⁸ Similarly, if we modify Aristotle to “law is *not* reason free from compassion,” we have also changed our fundamental understanding.

I have attempted to demonstrate that the “gaps” in legal reasoning are wider than is generally acknowledged, and I have argued that those wide gaps are filled, if not with passion, then with emotionally released imagination. I have also attempted to illustrate the influence of emotion on analogical reasoning from the very moment the need for a decision is perceived right through to the moment the decision itself is made. Saying that a judicial result was reached by using logic and reason is like saying that Shakespeare wrote *Hamlet* using words and imagery. Words and imagery contribute to the result, but in accepting broad strokes, we ignore Shakespeare’s use of character, plot, action, choice of subject—in short, the full range of dramatic tools and the subtleties of each that led to the result, and we thereby distort our understanding of what Shakespeare actually accomplished. Legal reasoning is likewise complex. This complexity is disserved by arguments that assume a rational ideal that is “free from passion.” It is time to lay this Aristotelian epigram to rest.

246. See Anderson, *supra* note 125, at 8 (arguing that comparing “a hypothetical emotion-mediated decision”—that is, one where emotion interferes with cognition—with “a hypothetical emotion-free decision . . . is a fallacy”). Anderson also notes that “[i]ndividuals with normally functioning emotion systems can attempt to suppress their emotions, but this often impairs their thinking in multiple ways.” *Id.* at 9.

247. It may be that strong emotion is, in fact, what Aristotle meant by “passion” and that time and the legal profession itself have distorted his meaning.

248. Nussbaum notes a study performed in 1993 showing that “students exposed to [utilitarianism] in economics courses actually become more focused on self-interest and less given to altruism than they were before.” NUSSBAUM, *supra* note 22, at 17 n.8. If this is true, this would suggest a powerful reason to change our underlying assumption about the law as dispassionate.