



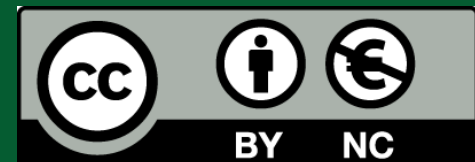
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# Law, Reason and Emotions – The Philosophical Underpinnings

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# The paradox: law and emotions

- Interactions between law and emotions:
  - law *reacts to emotions* (outside law);
  - law *manages emotions* (within law);
  - law *produces of elicits certain emotions* etc.
- Omnipresence of emotions within law.
- Silence.

# The place of emotions in criminal law

- Criminal law represents the major social effort to eliminate serious conflict, and to do so not arbitrarily, but in accordance with methods and directed toward ends that we are pleased to call "**rational**". Against the fervid tide of instinctual drives, of emotions that stir to the very innards, and the brunt of ungovernable circumstances that buffet this awkward creature, this would-be Prometheus, almost comic in his frailty, against these and all the other forces that cry out man's impotence and the limitations of his brute ancestry, rise irrepressible intelligence and indomitable will to achieve the vision of the good life.

(Jerome Hall, Prolegomena to a Science of Criminal Law,  
University of Pennsylvania Law Review and American Law  
Register 89 (1940-1941) 5, p. 550)

# The language of the law

- The style of good legal composition (for it has a style of its own) is **free from all colour, from all emotion, from all rhetoric**. It is impersonal, as if the voice, not of any man, but of the law, dealing with the necessary facts.

(A. E. J. G. Mackay, Introduction to an Essay on the Art of Legal Composition Commonly Called Drafting , Law Quarterly Review 3 (1887) 3, p. 326)

# The Standard Conception

- In the **conventional story**, emotion has a certain, **narrowly defined place in law**. [...] It is confined to those—like witnesses, the accused, the public—without legal training. In this story, there is a finite list of law-related emotions—anger, compassion, mercy, vengeance, hatred—and each emotion has a proper role and a fixed definition. And it is portrayed as crucially important to narrowly delineate that finite list and those proper roles, so that emotion doesn't encroach on the true preserve of law: which is reason.

(Susan Bandes, Introduction, in: *The Passions of Law* (1999), ed. S. Bandes, p. 2)

- A **core presumption** underlying modern legality is that **reason and emotion are different beasts entirely**: they belong to separate spheres of human existence; **the sphere of law admits only of reason**; and vigilant policing is required to keep emotion from creeping in where it does not belong.

(Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, *Law and Human Behavior* 30 (2006) 2, p. 120.

# The Standard Conception

- The law teacher must stress cognitive rationality along with "hard" facts and "cold" logic and "concrete" realities. Emotion, imagination, sentiments of affection and trust, a sense of wonder or awe at the inexplicable-these soft and mushy domains of the "tender minded" are off limits for law students and lawyers.

(Roger C. Cramton, *The Ordinary Religion* of the Law School Classroom, *Journal of Legal Education* 29 (1977-1978) 3, p. 250)

# Philosophical Roots of the Standard Conception

Section Sub-header



# Plato: the reign of reason in the ideal city

- [Socrates:] Or is the soul like the city? **The city was held together by three classes. commercial, auxiliary and decision-making. Does the soul also contain this third, spirited, element,** which is auxiliary to the rational element by nature, provided it is not corrupted by a poor upbringing?,  
[Glaucon:] 'Yes, it does contain a third element,' he said. 'It must do., (Republic, 440e-441a)
- [Socrates:] 'Yes, provided [the spirited element] can be shown to be something **distinct** from the rational element, just as it was shown to be something distinct from the desiring element.,  
[Glaucon:] 'That's easily shown,' he said. 'You can see it in **young children**. Right from the time they are born, they are full of spirit, though most of them, if you ask me, only achieve some degree of rationality late in life. And some never at all.' (Republic, 441a-b)
- [Socrates:] 'Isn't it appropriate for the rational element to rule, because it is wise and takes thought for the entire soul, and appropriate for the spirited element to be subordinate, the ally of the rational element?'  
[Glaucon:] 'Yes., (Republic, 441e, all translations by T. Griffith)

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# Reason as a master, not as a slave

- Now the rest of the world are of opinion that knowledge is not a powerful, lordly, commanding thing; they do not think of it as actually being anything of that sort at all, but their notion is that a man may have knowledge, and yet that the knowledge which is in him may be overmastered by anger, or pleasure, or pain, or love, or perhaps by fear—just as if knowledge were nothing but a slave and might be dragged about by all these other things. Now is that your view? Or do you think that knowledge is a noble thing and fit to command in man, which cannot be overcome and will not allow a man, if he only knows the good and the evil, to do anything which is contrary to what his knowledge bids him do, but that wisdom will have strength to help him?

(Plato, Protagoras 352c-d, trans. Benjamin Jowett and Martin Ostwald)

# Aristotle on the soul

- Tripartite division of the soul:
  - nutritive (or vegetative) soul,
  - sensitive (appetitive) soul and
  - rational soul.

(Aristotle, On the soul 414a sqq.)

- The potencies we spoke of were the nutritive, the perceptive, the desiring, mobility with respect to place, and the power of thought. In **plants** the **nutritive** alone is present, in other things the **perceptive** as well. [...] all animals have at least one of the senses, touch; and if perception is present in something, so is pleasure and pain and the pleasant and painful things; and if these are present to something **so is appetite**. [...]. and to others the power of thought and an **intellect** as well, namely to human beings (and anything else there may be that is similar or more worthy of honor)

(On the Soul, 414a 30 – 414b10, trans. M. Shiffman)

# The predominance of reason

- It is impossible that there be something superior ruling the soul, and this is even more impossible in relation to the intellect. **It is in accord with reason that the latter be by nature the most original and decisive thing [...]**

(On the Soul 410b10, trans. trans. M. Shiffman)

- **[...] reason and intelligence are the end to which our nature tends.** Thus it is to these that our training of our habits, as well as our coming into being, must be directed. Next, as soul and body are two, so also we note **two parts of the soul, the reasoning and the unreasoning**; and each of these has its own condition, of intelligence [...] in the former case, of appetite [...] in the later. And just as the body comes into being earlier than the soul, so also the unreasoning is prior to that which possesses reason. This is shown by the fact that, while passion and will as well as desire are to be found in children even right from birth, reasoning and intelligence come into possession as they grow older.

(Politics 1334b12, trans. T. A. Sinclair)

# Cicero and „disturbances of soul“

- ‘Emotional disturbances, which make the lives of the unwise a harsh misery (the Greeks call such disturbances *pathê*, and I could have literally translated the word as “illnesses”, but it would not suit all cases. [...] So let our term be “disturbance” – the very name seems indicative of vice.) [...] There is nothing natural about the force that arouses these disturbances; they are all mere beliefs and frivolous judgements. The wise person will always be free of them.

(On Moral Ends III, 35, trans. R. Woolf)

- So minds can have a proclivity to one fault or another in much the same way that each person can appear to be naturally prone to some sickness of body even while the actual health is excellent. Others are said to have certain faults not by nature but culpably. Faults of this kind consist in false beliefs about what things are good or bad, so that different people are prone to different emotional movements.

(Tusculan Disputations IV, 81, trans. M. R. Graver)

# Augustin: emotions as a result of stupidity or wretchedness

- For 'disturbance' represents the Greek *pathos* (passion), and that is what Apuleius means by calling the demons 'subject to passions' (*pathos* in Greek) signifies an irrational motion of the soul. [...] In men these disturbances are possible as a result of either stupidity or wretchedness. For we are not yet in that happy condition of perfect wisdom [*sapientia*] which is promised to us in the end. The gods are said to be exempt from those disturbances just because they are not only immortal but also happy. We know that the gods themselves are said to have rational souls; but these are souls completely pure from all taint or infection.

(City of God VIII, 17, trans. H. Bettenson)

# The domination of reason, again

- [Augustine:] That by which **humans are ranked above animals**, whatever it is, be it more correctly called “**mind**” [*mens*] or “**spirit**” [*spiritus*] or both [...] if it **dominates and commands** the rest of what a human consists in, then that human being is completely in order.

(On the Free Choice of the Will I, 8, trans. P. King)

- [Augustine:] Thus a human being should be called “in order” when **these selfsame impulses of the soul are dominated by reason**. For it should not be called the right order, or even “order” at all, when the better are controlled by the worse.

(On the Free Choice of the Will I, 8, trans. P. King)



# Thomas Aquinas

- The **emotions** therefore belong rather to the **functioning of the sensory orexis** than to that of the intellectual [...]

(Summa Theologiae Ia IIae, qu. 22, 3, trans. E. D 'Arcy)

- For the root of all human goodness lies in the reason; **human excellence will therefore be the greater, the greater the number of human elements under rational control**. Accordingly, no one questions the fact that one requirement of moral goodness is that the actions of our bodily members be dictated by reason; but we have shown that the sensory orexis can be obedient to reason; therefore **another element of moral goodness will be the control of our emotions by reason**.

(Summa Theologiae Ia IIae, qu. 24, 3, trans. E. D 'Arcy)

# Descartes

- [...] the immediate cause of passions of the soul in nothing other than the **vibration** imparted by the **animal spirits** to the little gland in the middle of the brain.

(The Passions of the Soul II, §51, trans. M. Moriarty)

- [...] **the utility of all the passions** consists purely in this: that they fortify and preserve thoughts in the soul **that are good for it to retain, and which otherwise could be easily effaced**. Likewise, the only harm they can do is when they fortify and preserve these thoughts for longer than necessary, or fortify and preserve other thoughts on which one should not linger.

(The Passions of the Soul II, §75, trans. M. Moriarty)

# Descartes: virtue and ... reason

- [...] inasmuch as these internal emotions touch us more closely, and thus have much more power over us, than the passions, from which they differ, that affect us concurrently, it is certain that, **provided our soul has the wherewithal [i.e. ability] to be contented in itself**, all the troubles that come from elsewhere have no power to harm it, but rather serve to increase its joy [...] And in order to have this wherewithal to be content, **our soul needs only to pursue virtue** [...]

(The Passions of the Soul II, §148, trans. M. Moriarty)

But nonetheless, because when it is not enlightened by the understanding, **virtue can be false** (I mean that willpower and the resolution to do the right thing can induce us to do the wrong thing, in the belief that it is right), the resultant contentment is not solid; and because this kind of virtue is normally set against pleasures, appetites, and passions, it is very difficult to put it into practice. **Whereas the proper use of reason gives us a true knowledge of the good, and prevents virtue from being false** [...]

(Letter to Princess Elisabeth 4 August 1645, trans. M. Moriarty)

# Hobbes

- **Emotions or perturbations of the mind** are species of appetite and aversion, their differences having been taken from the diversity and circumstances of the objects that we desire or shun. They are called perturbations because **they frequently obstruct right reasoning**. They obstruct right reasoning in this, that they militate against the real good and in favor of the apparent and most immediate good, which turns out frequently to be evil when everything associated with it hath been considered. For though judgment originates from appetite out of a union of mind and body, it must proceed from reason. Therefore, although the real good must be sought in the long term, which is the job of reason, appetite seizeth upon a present good without foreseeing the greater evils that necessarily attach to it. Therefore **appetite perturbs and impedes the operation of reason**; whence it is rightly called a perturbation.

(De cive XII, 1, trans. B. Gert)

- [...] for the natural state hath the same proportion to the civil (I mean, liberty to subjection), which **passion hath to reason**, or a **beast to a man**.

(De cive VII, 18, trans. B. Gert)

# Reason leads the way

- The passions that incline men to peace are fear of death, desire of such things as are necessary to commodious living, and a hope by their industry to obtain them. And reason suggesteth convenient articles of peace, upon which men may be drawn to agreement. These articles are they which otherwise are called the Laws of Nature.

(Leviathan, I, 13, 14, trans. E. Curley)

# Locke

- That which most commonly causes this, is **the prevalency of some present Pleasure or Pain, heightned by our feeble passionate Nature, most strongly wrought on by what is present.** To check this Precipitancy, our **Understanding and Reason** was given us, if we will make a right use of it, to search, and see, and then judge thereupon.

(An Essay Concerning Human Understanding, II, 21, 67)

- **Reason** must be **our last Judge and Guide in every Thing** (*sic!*)

(An Essay concerning Human Understanding IV, 19, 14)

# Hume: the deification of passions

- I shall endeavour to prove *first*, that **reason alone can never be a motive to any action of the will**; and *second*, that **it can never oppose passion in the direction of the will**.

(Hume, A Treatise of Human Nature II, 3, 3)

- **Reason is, and ought to be the slave of the passions**, and can never pretend to any office then to serve and obey them.

(Hume, A Treatise of Human Nature II, 3, 3)

# Kant: back to reason

- All objects of the inclinations [*Neigungen*] have only a conditional worth; for, if there were not inclinations and the needs based on them, their object would be without worth. But **the inclinations themselves**, as sources of needs, are so far from having an absolute worth [...] **that it must instead be the universal wish of every rational being to be altogether free from them.**

(Groundwork for the Methaphysics of Morals 4:428 , trans. M. Gregor)

- [Human] actions also need no recommendation from any subjective disposition or taste, so as to be looked upon with immediate favor and delight, nor do they need any immediate propensity or feeling for them; they present the will that practices them as the object of an immediate respect, and **nothing but reason is required to impose them upon the will**, not to *coax* them from it [...]

(Groundwork for the Methaphysics of Morals 4: 435, trans. M. Gregor)



# Final end: rationally discovered universal law

- The practical necessity of acting in accordance with this principle, that is, duty, **does not rest at all on feelings, impulses, and inclinations** but **merely on the relation of rational beings to one another**, in which the will of a rational being must always be regarded as at the same time *lawgiving*, since otherwise it could not be thought as *an end in itself*. **Reason** accordingly refers every maxim of the will as giving **universal law** to every other will and also to every action toward oneself, and does so not for the sake of any other practical motive or any future advantage but from the idea of the dignity of a rational being, who obeys no law other than that which he himself at the same time gives.

(Groundwork for the Metaphysics of Morals 4: 434, trans. M. Gregor)



# Two Contents Slide

# Comparison Slide

Title Comparator 1

Title Comparator 2

# Title Only Slide



# Content with Caption

Text content

# Picture with Caption

Description



# Plato: the divine and the base

- The **head** is the **most divine part of us** and the **ruler** of all the rest of our parts ...

(Timaeus 44e, trans. Robin Waterfield)

- They also housed within the body **another type of soul, a mortal kind, which is liable to terrible, but inevitable, experiences**. Chief among these is **pleasure, evil's most potent lure; then pain, fugitive from good; and then those mindless advisers confidence and fear, and obdurate passion, and gullible hope**. Into the mix they added unreasoning sensation and ever-adventurous desire, and so, constrained by necessity, they constructed **the mortal soul**. Piety kept them from **polluting** the divine soul with these things, short of the direst emergency, and so they lodged the mortal soul in separate quarters, elsewhere in the body; and they built an isthmus to distinguish the region of the head from that of the chest, by placing the neck between them, to keep them apart. So they bound the mortal soul within the chest — the thorax, as it is called.

(Timaeus 69d-e), trans. Robin Waterfield)

# Aristotle

- Tripartite division of the soul
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(Aristotle, On the soul 414a sqq.)

- The potencies we spoke of were the nutritive, the perceptive, the desiring, mobility with respect to place, and the power of thought. In plants the nutritive alone is present, in other things the perceptive as well. But if the perceptive is present, so is the desiring. For desire includes appetite (as well as spiritedness and wishing); all animals have at least one of the senses, touch; and if perception is present in something, so is pleasure and pain and the pleasant and painful things; and if these are present to something so is appetite. [...]. In addition to these things, mobility with respect to place also belongs to some animals, and to others the power of thought and an intellect as well, namely to human beings (and anything else there may be that is similar or more worthy of honor) (On the Soul, 414a 30 – 414b10)

# Aristotle on law

- [...] he who asks law to rule is asking God and intelligence to rule and no others to rule; while he who asks for the rule of a human being is importing a wild beast too; for desire is like a wild beast, and anger perverts rulers and the very best of men. Hence law is intelligence without appetite. (Politics 1287a23, trans. T. A. Sinclair)