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Introduction

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This book will consider the relationship between law, reason, and emotion. Law, reason, and emotion have a long, close, and complicated connection in the history of philosophy and justice. This is nothing new. Cicero famously observed that "law is the highest reason, inherent in nature,"[1] which neatly captures the mutual dependency between emotions and the law.[2] Law, according to this formulation, necessarily reflects who and what we are,[3] which is deeply social creatures, inspired by social emotions.[4] Eight learned authors representing different legal and philosophical traditions will argue in this volume that law gains legitimacy and effectiveness when it marries reason with emotion, and that reason and human emotion are not conflicting values in a well-constructed legal system, as is sometimes supposed, but rather the joint basis of all justice in the law.

One great difficulty to be faced at the outset is the problem of definition. Words can mean, as Humpty Dumpty rightly observed,[5] whatever we wish them to mean, but this leads to trouble when our definitions are not the same. We shall try to use the same vocabulary throughout this volume and in doing so to settle on the most *useful* meanings, which is to say the ones that best

[1] M. Tullius Cicero, *de legibus*, I.vi.18: "lex est summa ratio, insita in natura."

[2] Many authors have touched on the mutual dependence of reason and emotion, among them Aristotle, Cicero, Descartes, Spinoza, Malebranche, and Hume. More recent works on this topic include Robert C. Solomon, *The Passions: Emotions and the Meaning of Life* (2d ed., 1993); Susan Bandes, ed., *The Passions of Law* (1999); Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001) and *Political Emotions: Why Love Matters for Justice* (2013).

[3] Cicero, *de re publica* III.xxii.33: "est quidem vera lex recta ratio naturae congruens, diffusa in omnes."

[4] Id., *de legibus* I.xii.33: "sequitur igitur ad participandum alium alio communicandumque inter omnes ius nos natura esse factos."

[5] Lewis Carroll (Charles Lutwidge Dodgson), *Through the Looking Glass and What Alice Found There* (1871), 364.

capture distinct concepts, not better expressed by some other words or formulation. Such choices of meaning usually depend to a large extent on etymology and usage, the two processes through which words and ideas come alive in our discourse. Among the most important words at issue here will be "emotion," "reason," "law," "justice," "effectiveness," and "legitimacy." Simply to list these powerful concepts reveals the difficulty of capturing them with simple definitions. Nevertheless, in the interest of clarity, the attempt must be made. The authors will challenge and refine these terms in each of their various chapters.

The concepts of "reason" and "emotion" offer the best starting point for this discussion as the focus and main subject of our investigation. "Reason" and "emotion" are distinguished in this conversation, because reason begins with axioms, asserted as true, while emotions begin with feelings, accepted as real.[6] "Emotions" are those feelings and appetites that move us to action of their own accord (*ex* + *movere*), while reason implies correct assessments about the nature of things (*reor*, *reri*, *ratus*). Emotions are the foundation and purpose of human society. Reason supplies the superstructure that holds complex societies together. Both reason and emotion motivate action, and often concern the same questions, but reason purports to guide and evaluate the emotions,[7] by determining when they are useful or appropriate, and when they are not.[8] This in turns implies a standard or purpose, in the light of which to evaluate our emotions, and perhaps to bring human emotions into better harmony with one another, for the well-being of society as a whole.

Chapter 2, "Law, Reason, and Emotion," sets out to clarify the standard against which to evaluate reason and emotion in the law. The self-asserted value and purpose of law and therefore the standard against which to measure the legitimacy of law is justice, and legal systems are justified only when they serve justice in fact. All legal systems claim to be just, whether (or not) they are or seek to be just in practice. They must do so to capture the adherence of their subjects. Justice in its usual sense implies the best distribution of rights, duties, and benefits to serve the universal (and individual) welfare of all members of society, taking all into account, and disregarding no one. Emotion enters the discussion because emotions are the measure of human well-being. Laws serve, recognize, shape, and encourage or discourage human emotions in the

6 See, e.g., M. Tullius Cicero, *de officiis*, I.iv.11.

7 Cf. M. Tullius Cicero, *de officiis* 1. xxviii. 101: "Duplex est enim vis animorum atque natura; una pars in appetitu posita est, quae est ὁρμή Graece, quae hominem huc et illuc rapit; altera in ratione, quae docet et explanat, quid faciendum fugiendumve sit. Ita fit, ut ratio praesit, appetitus obtemperet."

8 See, e.g., Gabriele Taylor, "Justifying the Emotions," *Mind*, n.s. 84 (1975): 390–402.

interest of our individual and collective welfare. Reason is the process by which we develop and accede to this accommodation. The ultimate bases and justification for law are emotions, such as love, generosity, loyalty, and sympathy, that attach us to other human beings. Reason is the method through which we find harmony in human society.

Misapprehensions of the necessary and ubiquitous association between law, reason, justice, and emotion have led to the most prevalent and pernicious weaknesses in law and legal theory. Proponents of reason have disputed the role of emotion in law. Proponents of emotion have disputed the role of reason in law. Proponents of power have disputed the role of justice in law. And proponents of authority have challenged all three. These "technocratic," "romantic," "postmodern," and "totalitarian" fallacies of law encourage injustice and undermine the legitimacy and effectiveness of the legal systems in which they arise. Reviewing and rebutting these mistakes reveals the failures of much recent jurisprudence. The humanistic axiom of justice – valuing all human beings – provides the only principle through which law can make sense of the emotions that make our lives worth living and bring us together in a just and justified civil society.

Law, reason, and emotion are three related facets of the human desire for justice. Law claims to establish justice. Reason sets out to discover justice. Emotions constitute and recognize justice. The concept of law, at its heart, claims a concern for the welfare of all its subjects. Legislators and interpreters of law who want the law to be legitimate or effective must take these claims into account. This in turn requires the careful study and sympathetic understanding of human emotions. Chapter 2 proposes a return to human emotion as the basis and ultimate product of a just legal system. Law can only be understood and interpreted in the light of the emotions that law exists to serve.

Robin West develops this argument in Chapter 3, "Law's Emotions." West describes the emergence of a new interdisciplinary field, studying emotions as they relate to law and drawing on psychology, classics, economics, literature, and philosophy, as well as legal scholarship, to better understand the numerous interactions between emotion and the law. This return to the study of emotions corrects recent attempts to separate law and emotion in the interests of "rational" economic considerations, elaborate self-interested game theories, or the fruitless search for legal certainty. Such simplifying theories of law claim a spurious "rationalism" that becomes increasingly removed from reality as they try to separate emotion from legality. West prefers to notice not only our mutual fear (which is real), but also the hopes for community and love that drive our desires for law and society. Law and emotion scholars note not only that emotion has always played a large role in every aspect of the law, but also

that it ought to. Logic and experience in the law rest on underlying decision-prompting emotions, such as empathy or disgust, which reflect the real needs and interests of human beings and human society.

West adds that law not only reflects, but also *produces* emotions. Law's emotions can be beneficial, but this is not always or necessarily the case. She pays particular attention to law's less useful emotions, promoting authoritarian feelings, disempowerment, and undue deference to the status quo. Law creates the material and psychic conditions in which our emotions live, flower, and die. This process should be challenged and shaped, never taken as given or accepted without judgment. West's focus on the emotions that law itself generates draws attention to several areas of concern. For example, American constitutional law promotes unwarranted authoritarian emotions. America's culture of contract produces alienation from our subjective desires. America's legal individualism stunts our capacity for empathy. These failures could be alleviated by closer attention to the emotional influence of legal doctrine and how it could be altered to produce better results.

Law creates the material and psychic conditions within which healthy and life-sustaining emotions will take root, develop, or die. Law reflects emotion, is influenced by emotion, and regulates emotions, but it also produces emotions and should be held accountable for doing so in ways that are damaging. West advocates greater critical engagement with the emotional impact of bad laws and poorly thought out legal structures. Chapter 3 demonstrates the extent to which legal scholarship can and should challenge existing legal institutions when they threaten or undermine our emotional well-being. Students of the law consistently fail to make this inquiry. The new field of law and emotions scholarship will remedy the deficiency.

András Sajó suggests in Chapter 4, "The Constitutional Domestication of Emotions," that a descriptive theory of law should take into consideration the role of law in regulatory institutions, including constitutions. While there can be little doubt about the social regulatory function of emotions, their role in institution-building requires explanation. Sajó argues that the commonality of certain emotions in interactive, self-reinforcing emotional processes had a formative impact on the making of modern constitutional institutions. Thus the core elements of constitutionalism, and human rights in particular, find inspiration and an echo in fundamental moral sentiments. Emotional interaction between, and collective reflection upon, these emotions enables (or undermines) the sustainability of constitutional arrangements. Constitutions, especially the constitutional recognition of specific claims as fundamental rights, are a matter of emotion-driven social choice. The cognitive processes that shape constitutional

law and its application are deeply and intrinsically emotional. Yet moral emotions are not unconditionally good. They also have destructive potential.

The importance of the emotions was obvious to the eighteenth-century founders of modern constitutionalism. Reason and emotion have always operated interactively in human decision-making and in the actual process of legal institution-building. Sajó introduces the findings of contemporary neuroscience to support what practical lawyers have always known – higher cognitive function in the brain spans both the "rational" and the "emotional" domains. Emotions are present and often decisive even in those mental activities that are usually described as reason-based. Emotions contain social information, contribute to social coordination, and are culturally regulated. Emotions are central to social reasoning, such as reasoning about the law.

Sajó observes that the moral emotions that participate in the formation of a public or constitutional sentiment may be encapsulated in constitutional arrangements. Fundamental human rights, a core element in constitutionalism, find inspiration in and echo basic moral emotions. Liberal constitutionalism reflects a very long experience of fear, cruelty, and oppression. These emotional components of constitutionalism remain at the heart of the enterprise. The institutions of modern constitutionalism were created partly as deliberate tools of emotion management. Emotions and the frame that triggers emotions can be externally and socially influenced, with positive or negative consequences. Chapter 4 argues that the secret of good constitutional architecture is to serve and harness the emotions at the same time so that they support the common good of all members of society, rather than those whose voices are most easily heard or expressed.

In Chapter 5, "Neuroscience, Philosophy, and the Foundations of Legal Justice," Matthias Mahlmann sets out to explain the relationship between the neuroscience of human thought and widely shared conceptions of human rights and justice, as embodied in existing legal institutions. The purpose is to use advances in the theory of the mind to better understand ethics and the law. More specifically, human rights doctrine as it has developed since the Second World War provides a clear example of the insights that theory of the mind can bring to the understanding and improvement of legal doctrine. What Mahlmann calls the "mentalist" account of moral cognition proposes identifiable generative principles of moral judgment specific to human moral cognition and uniform across the species. The resulting values are derived from the practice and phenomenology of moral judgment. This yields principles of egalitarian justice, solidarity, and care that in turn support a concept of human rights that can provide a useful basis for intersubjective social order and justification for positive law.

Mahlmann proceeds through a series of related questions, beginning by asking what (if anything) theory of mind can offer to ethics and the law. Specifically, as regards the idea of human rights, one must clarify the concept of rights and their origin before considering their justification, role, and usefulness. The implications of neuroscience and empirical psychology for the understanding of ethics and law have already given rise to a large literature, including challenges to rights as cognitive illusions, actually experienced in the human mind, but false, without any basis in reality. Despite powerful ideologies, incited hatred, and the cultivation of moral parochialism in some intellectual quarters, Mahlmann insists that humans can come, through a process of reflection and cultural change, to understand that rights exist and are worth the care, passion, and sacrifice necessary to bring them alive.

The central conclusion – that human beings possess a fundamental and universal faculty for moral cognition that provides everyone with epistemic access to the idea of human rights – has significant implications for our understanding of law and what law can accomplish. Mahlmann accepts that emotions play a central part in moral evaluation. But one must distinguish emotions that are *consequences* of moral judgment from emotions that *constitute* moral judgment. Thus an empirically minded theory of moral psychology can be framed that does not take deontological principles as cognitive illusions, but as part of the make-up of the human mind that may be the precondition of the cultural development of moral systems and the law. Chapter 5 demonstrates that human rights in this light are as well justified as anything has ever been in the history of human thought about morality and law.

Daniel Mendonca Bonnet also considers "Rights, Reason, and Emotion" in Chapter 6, as these affect the conflicts and the balancing of rights. Law properly exists to create social harmony, by recognizing, serving, and encouraging those emotions most conducive to human felicity and social cooperation. Such emotions – even useful emotions – may not always cohere with each other and may even collide or be mutually incompatible, in certain circumstances. Few rights are absolute. Formally "fundamental" rights may clash. The problem is, as much as possible, to create reasonable algorithms for determining which classes of rights should prevail, in which sets of circumstances, to better advance justice and human well-being. Judges and others should identify the weight and influence of rights most suitable to different social circumstances, and apply or interpret the law to reconcile rights with each other and with reality and justice, in the light of human nature.

The catalogue of rights will always expand and evolve in the light of historic conditions, human interests, and the state of society at any given time.

Inevitably, these rights will conflict in ways that cannot be solved simply by asserting the universal priority of one right over another. Their relative importance will vary according to the circumstances. Yet simply to assert the possession of a "right" has an emotional power that may make the resolution of such conflicts difficult. Mendonca suggests that the metaphor of "balance" is unhelpful, but that there is a real value in contemplating the circumstances in which specific rights should prevail. Rather than pretending to excessive generality, or giving way to arbitrary decision-making, we should try to articulate the standards that should circumscribe judges and others in preferring certain rights over others in specific sets of circumstance.

Mendonca makes an appeal for the possibility of reason in the midst of changing circumstances and a complicated world. Scholars and judges should encourage careful drafting and a greater specificity, where such specificity is possible. First, the holders of rights should be identified and described. Next, the rights themselves should be delimited in general terms. Then there should be a protocol for exceptions, including in cases of conflict. Finally, the scope of rights should be addressed. None of this will prevent the conflict of rights, but it will simplify the framework and circumscribe the discretion within which conflicts of rights are resolved. By establishing standards of rationality and justice, societies can reconcile the emotional needs of their members. Not all conflicts will be easily resolved, but many seeming difficulties can be overcome by establishing principled algorithms for prioritizing certain rights over others, in various sets of circumstances.

Kwame Anthony Appiah examines "The Law of Honor" in Chapter 7. Honor and the sentiments that surround it present a constant challenge to law and legal regulation, because honor maintains its own standards, outside the law. Honor also challenges reason, to the extent that reason entails fair treatment and consideration for others. Honor is self-regarding, self-aggrandizing, and self-elevating, often at the expense of law, truth, and justice. Yet honor can also be mobilized in support of legal values. Appiah recognizes the power and even the value of honor in motivating human behavior. Illegal or antisocial behavior that comes to be viewed as dishonorable quickly loses currency and fades away. People deserve to have and should be allowed to enjoy a sense of honor that does not depend on debasing or diminishing others.

Many cultures maintain "honor" as a standard of legitimacy outside or even above the law. Appiah gives numerous shocking and dispiriting examples of rapes and murders justified by those who commit them as being supported or even required by the dictates of family or tribal "honor," despite strong legal prohibitions to the contrary. Entrenched conceptions of "honor" easily

overcome more formal legal standards by imposing a surer and more permanent sanction – the disrespect of those whose opinions one values the most. Appiah points out that the best response in such circumstances is seldom purely legal, requiring instead eventual changes to the guiding conceptions of honor itself. Honor is a right to respect that turns on social identity. Dueling and foot binding, for example, died out not when they became illegal, but when they became shameful. Law wins greater justice and equality not by challenging honor, but by shaping and co-opting it.

Honor, like law, guides social conduct and can strengthen solidarity by turning private social sentiments into public norms. Honor secures a right to respect, and respect is an extremely valuable commodity. Because honor defines and reflects a person's social identity, loss of honor obliterates this status. This is not just a matter of gaining the respect of others. Honor also entails the feeling that one *deserves* respect. No wonder then that honor so often trumps the more oblique and other-regarding values of the law. Honor in such circumstances poses a significant problem for legal values. But it also offers a solution. Students of law and emotion should understand the role that honor plays in maintaining social norms, and strive to construct more useful conceptions of honor, in concert with the law. Chapter 7 illustrates the extent to which such sentiments matter. "Honor" killings and rapes will only end when they come to be seen as dishonorable.

Ko Hasegawa proposes the thesis in Chapter 8, "Interactive Reason in Law," that human reason in law should work *interactively*, which is to say, through the constant mediation of moral and emotional values. Such values are seldom wholly compatible or even widely shared, leading to a multidimensional exchange that modifies all players. The necessary pluralism of legal values, legal history, legal theories, and legal emotions requires the constant and active *construction* of legal coherence. This makes procedural norms at least as significant as the substantive standards that they yield. The point is to bring all perspectives into the dialogue and make sure that they participate to some extent in the final resolution of the operative legal norm.

Hasegawa finds a model in conflicts-of-law doctrine. We must first understand our own standpoint, then recognize the conflicting standpoint that produces uncertainty, and finally search for an overarching measure that reconciles them both. The process here is almost as important as the result. Comparability, commensurability, and feasibility are the operative values in this procedure. Comparability seeks to identify the commonality or difference in play. Commensurability raises the evaluative standard that connects the two viewpoints. Feasibility concerns the move to implementation. Of these, commensurability poses the most difficult problem because it is the first step away

from subjectivity, requiring consideration of the other's perspective. Closer examination of apparently conflicting values may reveal that seemingly basic values are in fact often further divisible and therefore reconcilable, at least in part.

This process of gradual commensuration seeks background concepts, such as autonomy, that span seemingly conflicting values, such as liberty and equality. Often the overlap is not complete, but partial commensuration provides a starting point for accommodation, making interaction easier. Hasegawa endorses compassion or sympathy as a motive toward interactive reason in the law. As law and legal systems extend their jurisdiction over a broader geographical area and more diverse traditions and cultures, the need for techniques of constructive legal reconciliation becomes more important. Interactive reason reconciles divergent and often conflicting traditions and emotions by giving all participants a voice and influence in the common project. Chapter 8 suggests that solving the conflicts of the passions offers a model for resolving other conflicts of laws, through interactive reason.

In Chapter 9, "The Wrath of Reason," Patricia Mindus examines existing theories of law and emotion and challenges conceptions of the law that try to separate the two. Mindus confronts what she calls "the wrath of reason" to "the grace of sentiment." Some rationalists see reason as the master of moral sentiments and irrational appetites alike, guiding the soul to truth against our animal natures. Others see emotion as a form of knowledge or an instrument of information. Mindus develops both themes into a broader map of the main ways in which jurisprudence has understood emotion, contrasting irrationalist with cognitivist approaches and criticizing both as incomplete.

The standard model of jurisprudence presents emotions as obstacles to intelligent action, but in fact passions are present everywhere in the law, and rightly so. Neuroscience increasingly clarifies their role, both in human judgment and in human felicity. The shop-worn opposition between the impartial umpire and the empathetic equity magistrate misses emotion's critical role in reflecting and enabling reason – and reason's role in shaping and enabling emotion. Evolutionary psychology and anthropology have long been engaged in proving that emotions constitute a universal language, pancultural among humans, and shared with nonhuman animals. This makes emotion a valuable basis for intersubjective and intelligent action, rather than an obstacle.

By offering a map of the ways in which jurisprudence understands emotion, Patricia Mindus illuminates some unarticulated assumptions about emotion in the standard model. Neither the irrationalist nor the cognitivist approach recognizes the mutual dependence of reason and emotion. Much more could

be done to inform the reciprocal interaction between emotion and institutional design and explain how these arrangements shape the display of social emotions. Chapter 9 illustrates the ways in which legal effectiveness depends on the interiorization of norms – the marriage of law and emotion.

The common thread in all nine chapters of this book is the mutual penetration and constant interdependence of reason and emotion in the law. Despite their differing national origins, academic training, and variation in the disciplines in which they work and write, all eight authors find emotion everywhere in the law, and always in a dialogue with reason, making sense of social reality. Law is the backbone of society, but emotion is its body and soul. Law's purpose arises in the emotions, and law will not be legitimate, effective, or useful unless it understands, embraces, and serves the emotions that give life meaning and value. Reasoning about the law begins with emotion, and emotions become products of the law.

If law claims to establish justice, and reason sets out to discover and construct justice, then emotions constitute and recognize justice and human felicity in the common humanity of society as a whole. Thus Robin West demonstrates how law creates emotions, András Sajó shows how constitutions domesticate emotions, and Matthias Mahlmann explains how the mind develops both emotions and the law. Daniel Mendonca Bonnet offers algorithms for reconciling emotions in law, Kwame Anthony Appiah for capturing and reforming emotions in law, and Ko Hasegawa for comparing and commensurating them. Patricia Mindus describes and deconstructs emotion's existing role and function in contemporary legal science, and all eight authors demonstrate the mutual dependence of reason and emotion in the law.

This mutual dependence between reason and emotion is the source and foundation of all law. Human beings are social creatures, many of whose emotions encourage cooperation and social solidarity. Most human well-being arises through the exercise and enjoyment of these prosocial emotions, including the sense of justice, which animates the concept of law. The existence and usefulness of these emotions is a reality, accessible to reason, and just laws are the reasoned expression of the same values of inclusion, equality, and fairness that arise in all human societies, because of our humanity – and human emotion. This volume reviews some of the many ways in which emotion and reason together determine the nature and purpose of the law. Theories that try to separate reason from emotion, or to remove either from the law, miss the point of the enterprise and threaten both the justice and the happiness of humankind.