

## Chapter 2: Law, Reason, and Emotion

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Reason and emotion provide the best starting point for any serious conversation about law because together they supply the basis for the law's justice, law's legitimacy, and law's effectiveness -- the three most important attributes of any successful legal system. This chapter will consider law, reason, emotion, justice, legitimacy and effectiveness as they relate to one another, and to the purposes of law.<sup>1</sup> This discussion will reveal that law gains legitimacy and effectiveness when it marries reason with emotion, that reason and human emotion are the guiding values of any just legal system, that all legal systems claim to be just, and that all legal systems and all legal scholars make use of these insights whether they acknowledge them or not. This chapter will also describe and dismiss the "technocratic", "romantic", "postmodern", and "totalitarian" fallacies of law, as examples of how mistaken perceptions of reason and emotion produce unfortunate results.

### 1. Definition

Clarity in argument requires definitions, and definitions reveal both the purpose and the underlying assumptions behind the questions at hand. In this case our subject is law, and law or similar concepts is present in all societies and all languages, with slight, but revealing differences in nuance and connotation. This discussion will be in English, but in the English language all the primary concepts to be considered here, except "law," have Latin origins, which is useful,

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<sup>1</sup> This chapter grows out of my remarks on "Law, Reason, and Emotion", which were delivered as a plenary lecture of the XXVI World Congress on the Philosophy of Law and Social Philosophy in Belo Horizonte, Brazil in July, 2013. A less developed version of these thoughts can be found in 101 *Archiv für Rechts-und Sozialphilosophie* at p. 71 (2015).

because Roman and civil law still provide the most fully elaborated system of law the world has yet seen, and have had a profound influence on legal usage everywhere. The practice of law and the meaning of legal vocabulary has also been influenced by the subsequent speculation of scholars. This investigation will reveal some of their most misleading mistakes.

The best known and longest established definition of law (“*lex*”) in the world’s most developed legal tradition was well-framed by Cicero: “Law is the highest reason, embedded in the nature of the world, requiring what must be done and prohibiting what must not be done.”<sup>2</sup> Note the implicit distinction between law and morality: law is what *must* be done, morality is what *ought* to be done. More important for our purposes: law claims to be the expression of reason applied to human society.<sup>3</sup> This conception of law is also the basis of the common-law tradition, in which Sir Edward Coke similarly defined law as “*summa ratio*,” the “artificial perfection of reason, gotten by long study, observation, and experience.”<sup>4</sup> There is some difference here about procedure -- how we discover what reason and the law require of us -- but none about purpose. The essence of law in these and all other legal traditions is its claim to discover and to implement right reason for the benefit of society as a whole.<sup>5</sup>

“Reason” and “emotions” are treated as distinct in this context, because reason begins with axioms, asserted as true, while emotions begin with feelings, accepted as real.<sup>6</sup> “*Emotions*” are those feelings and appetites that move us to action of their own accord (*ex + movere*), while

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<sup>2</sup> M. Tullius Cicero, *de legibus*, I. vi. 18: “lex est ratio summa insita in natura quae jubet ea, quae facienda sunt, prohibetque contraria.” Cf. *de re publica* III. 22.

<sup>3</sup> M. Tullius Cicero, *de legibus*, I.v. 16.

<sup>4</sup> Sir Edward Coke, *The First Part of the Institutes of the Laws of England; or; a Commentary Upon Littleton* (1628), p. 97b.

<sup>5</sup> “Lex...est recta ratio in iubendo et vetando,” M Tullius Cicero, *de legibus*, I.xii.33.

<sup>6</sup> See e.g. M. Tullius Cicero, *de officiis*, I. iv.11.

“reason” implies correct assessments about the nature of things (*reor, reri, ratus*). Both motivate action, and often concern the same questions, but reason purports to guide and regulate the emotions,<sup>7</sup> by determining when they are useful or appropriate, and when they are not.<sup>8</sup> This in turn implies a standard, or purpose, in the light of which to evaluate emotions, and perhaps to bring emotional responses into better accord with reason and reality.

The usual standard for reason in the law is *justice*<sup>9</sup> and the usual standard for justice is the universal (and individual) welfare of all members of society, taking all into account and disregarding no one.<sup>10</sup> For the sake of simplicity, I have taken these definitions from Cicero, because they are so widely known, but also because they are useful. Cicero identified the basis of law and justice in the universal society of all humanity,<sup>11</sup> and the innate human sympathy for other human beings.<sup>12</sup> This takes us back to human emotions: the feelings of generosity (“*liberalitas*”), love (“*caritas*”), and loyalty (“*pietas*”), that animate the widely shared desire to be fair and useful to others, which supports the institutions of human society.<sup>13</sup> Justice can also exist *within* smaller groups, excluding non-members. Such local or parochial communities of justice may be appropriate for some purposes, but I will take it as axiomatic that all human beings deserve justice, and that no one should be oppressed.<sup>14</sup>

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<sup>7</sup> Cf. M. Tullius Cicero, *de officiis* 1. xxviii. 101: “Duplex est enim vis animorum atque naturae; 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 fugiendumque sit. Ita fit, ut ratio praesit, appetitus obtemperet.”

<sup>8</sup> See e.g. Gabriele Taylor, “Justifying the Emotions,” in: *Mind*, New Series, Vol. 84, pp. 390-402 (1975).

<sup>9</sup> See e.g. M. Tullius Cicero, *de legibus*, I. vi. 19.

<sup>10</sup> See e.g. Plato, *Politeia*, I. xv. 342 E; *Nomoi* IV. 715 B; Aristotle, *Politica*, III. iv. 7; XII. ii. 10. See also M. Tullius Cicero, *de officiis*, I. xxv. 85.

<sup>11</sup> M. Tullius Cicero, *de legibus*, I.v.16: “fons legum et iuris.”

<sup>12</sup> *Ibid.* I. xv. 43: “quia natura propensi sumus ad diligendos homines, quod fundamentum iuris est.”

<sup>13</sup> *Ibid.* See also. I. v. 16.

<sup>14</sup> See M.N.S. Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundations of International Law* (2012).

When proposed rules of law meet the standard properly set for them (justice), or proposed canons of justice meet the standard properly set for them (the common good), then they achieve “*legitimacy*,” which signifies a practice’s conformity with the appropriate rule. Legal systems claim to embody justice or right reason about what ought to be required or forbidden by public authority, because if they did so in fact they would be serving their proper purpose, *sub specie aeternitatis*, and therefore be legitimate, according to the appropriate standard of legitimacy. All legal authorities rely on the claim (implicit and often explicit) to serve right reason and justice, whether they actually do so (or even care to do so) or not. Even corrupt or ill-intentioned legal authorities make this claim, because the legitimacy conferred by being believed to serve right reason and justice vastly increases the willing obedience of subjects of the law. We are more likely to respect and obey laws that we believe to be legitimate (which is to say just), because justice is the ultimate standard of value in the law.

Law and legal systems that are perceived to be legitimate are usually also more *effective* than would otherwise be the case. “Effective” here signifies that the laws make a difference in practice, and have an actual effect (*ex + facere*). Would-be lawmakers wish their laws to be effective and secure this effectiveness in part by claiming that their laws are just. Laws will also be more effective when they are more-or-less in keeping with other human emotions, which may not always coincide exactly with justice. Thus, legal systems can be effective without being just in fact, and just in fact without being entirely effective. But effectiveness itself remains a significant component of justice. Legal systems must have an effect to be useful, and to be effective must respect the reality of human emotion. Thus, effectiveness requires attention not only to the pro-social emotions, but also to emotions less directly supportive of society.

The study of law in its broadest sense concerns the question what is or is not, or ought or ought not be required in any setting. Applied more narrowly, to the structure of human associations, the province of law becomes the proper distribution of rights and duties and benefits and burdens in society (“justice”) – or some authority’s assertion of what justice requires in prohibition and permission as “law.” The *sense of justice* is itself an emotion, widely felt, that responds to perceived oppression or corruption or unfairness in society. Justice can be both an inarticulate sense, informed by our social proclivities, and a reasoned judgment that comes to the same (or different) conclusions. There will be gaps and differences between the emotional and the rational perception of justice and the same is true of all human emotions. One can both feel an emotion and consider whether one has a rational basis for feeling as one does. This invites two parallel inquiries for students of law and emotion: 1) What emotions do people actually feel? (The sense of justice may not always coincide with justice itself.) 2) When and how are or should these emotions be guided or shaped by law? (Educated emotions conform to the purposes of a just society.)

Suppose that the foundational axiom posited for *rational justice* is that every human being has value and that all deserve support and encouragement in living worthwhile and fulfilling lives in society with other human beings. This formula (which also approximates our emotional sense of justice) would validate certain emotions actually experienced by members of society and disapprove others. Such judgments would vary in time and place in the light of historical and other circumstances. What counts as “worthwhile” and “fulfilling” according to this standard would depend both on the range of emotions available to real human beings and on the

actual state and circumstances of the societies in which they find themselves. Nevertheless, this formula gives us a standard for determining when a legal system or society is just, and when it is not.

Philosophers since Aristotle and Cicero have posited the *rule of law* (“*legum imperium*”) as the ultimate guarantor of practical justice. The “rule of law and not of men” (as it is more fulsomely described) requires a standard outside and beyond human will to protect the subjects of law and society from the arbitrary control of any other person. Cicero’s standard of right reason draws the traditional line between the “rule of law,” which respects this external standard of legitimacy, and the “rule of man,” which does not. This does not mean that law should disregard emotion, but rather that law should incorporate and direct human emotions toward their proper purposes, which include the construction and maintenance of justice in society. The rule of law, as praised by Aristotle, Cicero, and the founders of modern constitutional government, requires the constant guidance of emotion, reason and justice in all legislation, and in the interpretation and enforcement of the law.

The best legislation and the most interesting and persuasive philosophy and interpretation of law will take our human emotions into account, as they relate to the possibility of a good life and the rules of a just society. The central concepts to be discussed in this context, in order to better understand law and its place in society, are the ones already mentioned in introducing this discussion: *law, reason, emotion, justice, legitimacy, and effectiveness*. These will be addressed in the order in which they are listed here. Emotions are malleable and should be cultivated or not according to their value and likely effects, in the light of reason and justice. We cannot and

should not deny law its claim of reason in support of society, but emotions remain the first and final basis of justice, and ultimate foundation of the law.

## 1. Law

The usual and ubiquitous associations made between law, reason, justice and emotion have been challenged on four main fronts. Proponents of reason have disputed the role of emotion in law. Proponents of emotion have disputed the role of reason in the law. Proponents of power have disputed the role of justice in the law. And proponents of authority have challenged all three. Let us call these the technocratic, the romantic, the postmodern and the totalitarian fallacies of law, listed here in rising order of the damage they do to a proper understanding of law and society, with the totalitarian fallacy being the worst, because it is the most pervasive, both in the scope of its assertions and the influence it has had on legal discourse.

The *locus classicus* of what I have called the “totalitarian” fallacy of law is in the works of Thomas Hobbes. Hobbes set out specifically to attack the traditional belief that legitimate law and legal systems must seek to reflect right reason in permission and prohibition, for the benefit of society as a whole.<sup>15</sup> Hobbes claimed that, “Law properly is the word of him, that ... hath command over others.”<sup>16</sup> and that “The notions of Right and Wrong, Justice and Injustice have ... no place” where there is no “Power” to tell us what they are.<sup>17</sup> “Law is ... not Counsell, but Command; nor a Command of any man to any man; but only of him, whose Command is addressed to one formerly obliged to obey him.”<sup>18</sup>

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<sup>15</sup> See Thomas Hobbes, *Leviathan* (1651) at 21.111 for his attack on “Greek and Latine Authors.”

<sup>16</sup> *Ibid.* at 15.80.

<sup>17</sup> *Ibid.* at 13.63.

<sup>18</sup> *Ibid.* at 26.137.

Hobbes' totalitarian conception of law is a fallacy, first because it fails to capture the actual usage of the word "law," even in totalitarian states, but also because Hobbes' new usage would not be useful even if it were accepted as true, and would undermine the purposes of the law even for those seeking to establish their own totalitarian rule. If law and justice were, as philosophical totalitarians sometimes suggest they are, simply "the will and appetite of the state,"<sup>19</sup> then there would be no impetus to obedience, beyond constant coercion, which could not be sustained. Hobbes is the most lucid of the totalitarians, but he too falls back in the end on arguments from reason and the common good. To be at all persuasive, totalitarians must argue (as Hobbes himself did) that society is *better off* on the whole when subjects enslave themselves to their rulers.<sup>20</sup> Thus Hobbes argues from the dangers of anarchy, from the terrible consequences of contests for power, and from the ultimate benefits of order, at almost any cost.<sup>21</sup> To justify totalitarianism, totalitarians must make arguments from reason and justice. This reduces the dispute from a conflict over first principles to easier questions of authority and procedure. Whose reason or what procedures of reasoning will prevail? James I asserted that "he had reason as well as judges."<sup>22</sup> His subjects were not convinced.

The postmodern fallacy of law is less pernicious than the totalitarian fallacy, because better intentioned, but falls prey to the same incoherence in the end. Where the totalitarian fallacy of law denies the possibility of any independent standard of justice, and gives all authority to the

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<sup>19</sup> *Ibid.* at 46.376.

<sup>20</sup> *Ibid.*, Chapter 18.

<sup>21</sup> *Ibid.* at 21.111.

<sup>22</sup> See, *Prohibitions del Roy* in Sir Edward Coke, *Reports*, volume 12, p. 63 (1607).

sovereign in order to secure peace,<sup>23</sup> the postmodern fallacy denies the possibility of balanced reason about justice, and challenges *all* legal authority, as resting on pretense or the exercise of raw despotic power, for the benefit of those in authority.<sup>24</sup> The postmodern sensibility at its best challenges the obfuscations of orthodoxy and false claims advanced by unjust legal systems that they implement reason and justice, but in doing so the postmodern fallacy denies the possibility of reason itself, and precludes the best argument for reform.

By denying the possibility of discoverable standards of right reason in law, the postmodern fallacy leaves itself no response to the totalitarian tendency it purportedly exists to oppose. Law needs some basis to become effective and critics of unjust enactments need some standard for their criticisms. While the postmodern critics of existing legal systems perform a useful service by challenging the legitimacy of force and fraud in law, they have nothing to offer in its place. Or they recur to arguments from social or distributive justice, which vitiates their original claim against reason. The very practice of criticism and argument about law in itself implies the possibility of intersubjective consensus about legal questions, and in doing so destroys the postmodern challenge to reason in the law. The postmodern denial of law's claim of reason collapses in much the same way as the totalitarian fallacy it opposes.

The romantic fallacy of law attempts to solve the self-refutation of post- (or pre-) modern legal scepticism by offering emotion in place of reason as the basis of intersubjective reality. There is considerable truth in this, but not in the way that romantics suppose. While cross-cultural studies reveal consistency in the moral and other emotions across the barriers of time

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<sup>23</sup> Cf. *Digest* I.3.31: "princeps legibus solutus est."

<sup>24</sup> See e.g. Roberto Unger, *The Critical Legal Studies Movement* (1983).

and place, as reflected in physical expressions of emotion and similarities in human behavior,<sup>25</sup> these emotions are often mutually contradictory and in any case deeply embedded in social practice, which may vary from place to place. People experience anger, disgust, contempt, shame, guilt, gratitude and so forth in much the same way everywhere, but not always for the same reasons, unless they coordinate their response. Coordination requires a standard, beyond the immediate experience of the emotion itself. The unstated emotional rules of human interaction do in fact supply a very useful basis for human society, but a basis that can be very much improved by applying human reason to questions of justice.

Law cannot depend on unmediated emotion because emotions arise differently in each person, according to her or his own interests, situation, and circumstances. People develop their emotions through education, and educations differ, can be faulty or incomplete, and in any case require a purpose or standard beyond the isolated emotion itself. Not all emotions have equal bearing on questions of justice (and therefore law) and many emotions, such as lust, greed, and envy, can be antithetical to justice. The difference between emotions mediated by reason and unmediated emotions in legal and moral judgment is easily perceived by distinguishing the questions “What do I want?” from “What would it be right for me to have?” Legislators and judges must ask themselves: “What law is right in this circumstance?”, not “What would I wish the law to be?” (which would often yield a different answer.) At best, the romantic fallacy falls back on interest-group pluralism or simple majority rule. More often it succumbs to nationalism, racism, or other emotionally rich but socially pernicious expressions of dangerous human desires.

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<sup>25</sup> See e.g. Jonathan Haidt, “The Moral Emotions,” in: R.J. Davidson, K.R. Scherer, H.H. Goldsmith (eds.), *Handbook of Affective Sciences* (2003), p.p. 852-870.

The technocratic fallacy of law is the mirror image of romanticism. Where romantics embrace shared emotion in place of reason in the law, technocrats seek to remove emotion from the law altogether by redefining legal reasoning as mere logic or deduction. Technocrats, like post-modernists and romantics, perceive that although all legal systems claim to serve justice, not all legal systems serve justice in fact. This leads them, like totalitarians, to try to remove justice from the law. Technocrats do not deny the possibility of justice, but see justice as a question entirely separate from law. Technocrats sometimes concede that justice is what the law *ought* to be advancing, in an ideal world, but the law *is* (for them) whatever the legal system says it is -- and often unjust. Technocrats claim to be able to separate law from emotion to implement a more rigorous “science” of the law.

Many self-styled legal positivists fall prey to this technocratic fallacy. Their fundamental insight is correct: not all legal systems are just. Many technocrats even agree that the primary purpose of legal scholarship should be to correct and identify these injustices. But the technocratic fallacy fails like the others, according to its own terms, because it cannot accurately describe how any existing legal system operates in fact. By claiming justice, all legal systems incorporate standards of justice and right reason at numerous points into their administration of the law. Whether they fully achieve justice or not (none do), all legal systems make constant reference to its requirements. The claim to justice is the essence of law – it is what gives law its interest and force -- and justice rests ultimately on human emotion. Technocrats miss the point of the enterprise.

The technocratic fallacy of law is the least pernicious of the four discussed here because although it narrows the definition of law too far in the futile pursuit of clarity and legal certainty, it remains compatible with justice -- or almost so. Totalitarians, postmodernists, and romantics all in different ways deny the possibility of reason in the law. Technocrats embrace reason, which is preferable, but in doing so they narrow its definition so far that reason loses much of its virtue. By setting the axioms of justice on which the law rests outside the province of law and reason (as they define them), technocrats miss the most interesting and important questions in the study of law.

## 2. Reason

Reason differs from emotion as a motive to action, because reason begins with axioms, asserted as true, while emotion begins with feelings, accepted as real. Emotions express a personal condition. Reason seeks an external reality -- or rather reason seeks to approximate reality, because the axioms of reason are undemonstrable, and subject to revision, if they prove false. Reason differs from emotion in that it seeks truth, claims to approximate truth as closely as is possible (given the current state of knowledge), and accepts that it must be modified if shown to be untrue. Because all legal systems claim to realize the truth about justice, and therefore to deserve our obedience, they also claim to act in accordance with reason -- as is made explicit in the traditional definitions of law. To the extent that the law is not reasonable, it is not legitimate, and therefore not worthy of our obedience or attention.

The standard of reason is truth, but not all truths are easily evident, or perhaps ever evident, despite the most persistent inquiry. This leaves open the possibility of a narrower conception of

reason, as consisting in arguments that are true according to their own premisses, but not universally or objectively true. Applied to law, this conceptions of reason (which I have called the “technocratic fallacy”) would disregard all references in law to what is “reasonable” or “just”, except as referring to formerly articulated conception of what will count as “reasonable” or “just” in a particular set of circumstances. The determination of such questions could then be understood as an unconstrained power in the hands of identifiable public authorities. This technocratic way of looking at things exaggerates the scope of arbitrary authority, by taking the fundamental axioms of reason outside the authority of law, but it captures a fundamental truth, which is that every legal system must have some way of specifying what the law requires in particular circumstances.

Recall the difference between common law and civil law conceptions of reason in the law. This distinction is more historical than current, and an oversimplification in any case, but will do by way of illustration. Both the civil law and the common law understand law to be “*summa ratio*” (the highest perfection of reason), but the common law finds this reason in the work of precedent, “fined and refined by an infinite number of grave and learned men,”<sup>26</sup> mostly judges, while the civil law finds reason in the *responsa* sometimes even of law professors, which would be unheard of in the common law world. The point here is not to prefer one system of law to the other, but simply to illustrate a difference. Different systems will have different ways of finding and implementing the requirements of reason in the law.

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<sup>26</sup> Edward Coke, *Commentary Upon Littleton* (1628), 97 b (also known as First Part of the Institutes of the Laws of England).

One of the most interesting questions of legal science will always be which processes work best to specify what reason requires in the law. This question arises at two levels: first, at the constitutional level, which creates the public structures that will specify the content of the law in particular circumstances; and second at the individual level, as authorities exercise their duties of interpretation and deliberate within themselves. Constitutional structure is beyond the scope of today's inquiry, so we must set it aside, except to observe that the rise of constitutionalism with legal modernity is itself the expression of a heightened attention to the roles of reason and legitimacy in the law. Constitutionalism arose to solve the first problem of practical legislation: "What combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that the citizens may constantly enjoy the benefit of them, and be sure of their continuance."<sup>27</sup>

Totalitarians, technocrats, postmodernists, and romantics all mistake the central purpose of law when they minimize reason as the measure of legal legitimacy. Constitutionalist rightly recognize good procedures as the secret of legal rationality, but even constitutionalists must also concede the role of judgment in finding and maintaining the law. This constitutes the second and more direct response of reason to emotion, at the personal level of interpretation, which must always complement the broader processes of systemic rationality. Designers of constitutions and the framers of the laws must consider the harmony of human society, the axioms of human reason, and the channels of human emotion to maximize justice. But those who interpret, implement, enforce, and obey the law will also need to apply their reason in order to understand their duty.

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<sup>27</sup> John Adams, *A Defence of the Constitutions of Government of the United States of America* (London, 1787) at I. 128.

Reason in both instances requires more merely than the mechanical application of rules, predetermined by others. Reason, in its best and usual role as the *summa ratio* of law or any other discipline, requires a correct apprehension of the nature of the enterprise, understanding the constraints within which it must operate -- in this case, human emotion. This means getting the axioms of reason right, and accepting their necessary implications.<sup>28</sup> Since human beings share reason and human emotion, they also share justice, which is the application of reason to human emotion in pursuit of the common good.<sup>29</sup> Philosophers since Cicero and Aristotle have identified this highest reason with the harmony of the universe as a whole,<sup>30</sup> but most domestic legal systems can get by at a much more parochial standard of justice.

The subject matter of reason is reality, and the most important reality in law is the architecture of human emotion. If the object of law is justice, and the object of justice is the common good, then reason must consider what is good for humanity, which is largely a question of human emotion. The nature and purpose of human emotion is a reality, which human reason can discover by observation and experience. The humanistic nature of justice is an axiom of reason which must be accepted as true before anyone can understand or interpret the law. Reason makes sense of the emotions and in the context of law must make a harmony of the emotions, so that all members of society can live worthwhile and fulfilling lives.

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<sup>28</sup> M. Tullius Cicero, *de legibus*, I.vii.23: "Est igitur, quoniam nihil est ratione melius eaque est et in homine et in deo, prima homini cum deo rationis societas; inter quos autem ratio, inter eosdem etiam recta ratio communis est; quae cum sit lex, lege quoque consociati homines cum dis putandi sumus."

<sup>29</sup> *Ibid.*: "inter quos porro est communio legis, inter eos communio iuris est; quibus autem haec sunt inter eos communia, et civitatis eiusdem habendi sunt."

<sup>30</sup> *Ibid.*: "ut iam universus hic mundus sit una civitas communis deorum atque hominum existimanda." Cf. Aristotle, *Politika* III, 1287a.

### 3. Emotion

Emotions are those feelings and appetites that move us to action of their own accord. This may happen directly, as in anger or disgust, but also less directly, as through certain feelings of happiness, harmony, or justice, which we seek to achieve, because we embrace them as good. There is a vast literature going back to the Stoics and beyond on the nature of human emotion, the universality of human emotion, and the science of human emotion. There isn't space to rehearse it here, except to draw attention to one general conclusion that has been obvious since Aristotle: many human emotions promote social cooperation and service to the well-being of other human beings.<sup>31</sup>

The preeminent human emotion in any discussion of law is the sense of justice. This feeling concerns the right order of society, and arises in the face of unfairness, oppression, exploitation, or any of the many other transgressions through which someone may violate the precept according to which all members of society should have the opportunity to live worthwhile and fulfilling lives. Thus the sense of justice arises most often in response to injustice, which may have been practiced against others, as well as against oneself. The sense of justice and injustice patrols the boundaries of cooperation among allies, by protecting the rules that make it possible to work together in pursuit of some common end. The sense of justice may also be mobilized against outsiders, justifying violent action by identifying their behavior as "unjust." This illustrates the dangerous side of making claims about justice. They justify strong action.

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<sup>31</sup> Two very recent examples are in the useful *Nomos* series on social and legal philosophy. James E. Fleming and Sanford Levinson, eds. *Evolution and Morality* (2012) and James E. Fleming, ed., *Passions and Emotions* (2013).

Scholars sometimes speak of “the moral emotions,” such as contempt, anger, or disgust, when directed at others, or shame, embarrassment and guilt, when directed towards oneself.<sup>32</sup> This range of feeling can be highly nuanced, but all apply or can be applied to human behavior, which is also the subject matter of law. Put in a less flattering light: human beings are subject to appetites, which cause them to pursue ends (*ad + petere*), which may or may not advance the well-being of others. Emotions arise from these appetites. We all want food, drink and companionship. We all need exercise and rest. We want to live, to learn, to play, to experience beauty, and friendship and love. Or we may want honor or glory or domination or even to enjoy the pain or abasement of others. The sense of justice helps to determine when these appetites and emotions are appropriate and when they are not.

The sense of justice, like all other human emotions, developed in the first instance through the vagaries of natural selection.<sup>33</sup> As one emotion among many, the sense of justice may not always predominate, but its purpose, when it prevails, is to facilitate human cooperation, by guiding or regulating our other appetites and emotions. One may feel anger or contempt for those who harm others by taking more than their share. One may also feel guilt or shame when one transgresses by denying others the opportunity to live worthwhile and fulfilling lives. The sense of justice measures our access to food, drink, and sexual gratification, and our ability to exercise, rest, learn, play, associate and love. We are subject to the feelings of justice in others, but also within ourselves.

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<sup>32</sup> See e.g. Jonathan Haidt, “The Moral Emotions,” in: R.J. Davidson, K.R. Scherer, H.H. Goldsmith (ed.s), *Handbook of Affective Sciences* (2003), p.p. 852-870.

<sup>33</sup> See e.g. Marc D. Hauser, *Moral Minds: How Nature Designed Our Universal Sense of Right and Wrong* (2006).

The sense of justice regulates our other moral emotions, our appetites, and our passions by judging their relative legitimacy, in the light of our common project of society. All other appetites and emotions arose, like the sense of justice, to serve some evolutionarily useful purpose, but almost all of them, taken to extremes, would have the opposite effect. The sense of justice helps to keep the other emotions in proportion, by judging their effects on other persons and society as a whole. Speaking of “justice” in this way subsumes a host of other-regarding emotions. This does not diminish the importance of generosity, loyalty, and the rest. The sense of justice stands here as representative of the others. Like all moral emotions, the sense of justice has a social effect, in this case the effect of strengthening human society.

The point here is not that the sense of justice is always correct, or useful, or productive in the current state of human society. Nor does it follow that the sense of justice should apply unrestrained or without education or mediation, any more than any other emotion can or should be left as we find it. Nor is it necessary that the sense of justice be a single or uniform emotion. The sense of justice may best be described as a family of emotions, that all serve a similar purpose of coordinating human relations. The importance for law of the emotional sense of justice is the motive it gives humans to create and maintain legal systems, and the attitudes that it gives them, when they face presumptions to legality. Human beings are motivated by the sense of justice to respect or resist the laws, and laws are most effective when they coincide to some extent with the prevalent sense of justice.

The primary importance of emotions for law, including the emotional sense of justice, is the motive that they give for human action, and the human appetites they reflect, which will

always cry out to be satisfied. Emotions are in the first instance the natural and unmediated expression of generally embedded rules of action and social interaction that the law improves or seeks to improve through the application of reason to the problems of human society. Emotions have much broader application than the law. They also embrace morality and all aspects of the human condition, extending beyond humanity to all creatures that benefit from simple rules of action. Emotions supply the ultimate basis of law. They animate the purpose of our lives.

#### 4. Justice

Rational justice is the reasoned expression of the emotional sense of justice, and serves the same purpose, which is to maintain the welfare of society as a whole, including all its members. Expressed in this way, justice is an axiom of reason, whose value is taken as evident. “Justice” signifies the proper structure of rights and duties, benefits and liabilities, restrictions and liberties in society, when the purpose to be served is the common good, taking all equally into account.<sup>34</sup> No legal system denies this purpose and all legal systems claim to advance it, whether they actually do so or not. Rational justice differs from the emotional sense of justice because it is considered and reflective. Given the purpose of worthwhile and fulfilling lives for all, justice determines which emotions should be cultivated and which should be modified, or denied.

The great breadth and variety of human appetites and emotions is one of the beauties of human society. We all have vast opportunities for self-cultivation and so many worthwhile and fulfilling possibilities in life that many thousands of lives could not satisfy them all. We can also broaden our experience by living vicariously through our friends and neighbors and relishing

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<sup>34</sup> Plato, *Politeia*, I.xv.342 E; *Nomoi* IV.715B; Aristotle, *Politika*, III.iv.7; VII.iii.10; Marcus Tullius Cicero, *de republica*, I.xxv.39; *de officiis*, III.vi.26.

their diversity. Society cultivates the fruits of diversification. One needn't be a shoemaker to have shoes, or an athlete to enjoy the game. Justice contemplates and encourages this freedom, which everyone desires. We all are to some extent the authors of our own lives. Justice sets the boundaries of this autonomy. Many expressions of emotion or appetite must be constrained, because they threaten the welfare of others, or of society as a whole. Other emotions should be encouraged, because of the joy they bring to human existence.

Some parameters of justice are universal, as expressed in such widely accepted documents as the Universal Declaration of Human Rights, which begins with the inherent dignity and the equal and inalienable rights of all members of the human family, protected by the rule of law.<sup>35</sup> The rights to life, liberty, and security of person, the prohibitions against servitude, torture, or arbitrary arrest, these and many other attributes of a just society<sup>36</sup> are “self-evident,” to use the old-fashioned vocabulary,<sup>37</sup> because they serve such obvious human needs.<sup>38</sup> Other aspects of justice are more aspirational, to be achieved progressively, within the constraints of existing economic and cultural resources.<sup>39</sup>

Rational justice is universal, in the sense that human emotions are universal, but it is also variable, as the expressions of emotion are variable, given the differences between societies in their history and circumstances. Some legal systems and societies will be more just than others, because of differences in design or the administration of justice. Others will be more (or less)

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<sup>35</sup> *Universal Declaration of Human Rights* (December 10, 1948), Preamble.

<sup>36</sup> *Ibid.* Arts. 1-20.

<sup>37</sup> *Declaration of Independence of the United States of America*, July 4, 1776.

<sup>38</sup> See e.g. the *International Covenant on Civil and Political Rights* (1966).

<sup>39</sup> *International Covenant on Economic, Social, and Cultural Rights* (1966), especially Art. 2.I.

just, because of the constraints of culture or history. Justice arises in society at the interface of culture and institutional design. The emotions and sensibilities of citizens and public officials must be cultivated and improved as much as the laws themselves, and one of the primary purposes of law is to educate the citizens in this way.

Justice depends on emotion, because the harmonization of appetites and aversions -- expressed in emotions -- is the primary purpose of rational human society. Our desires to live, learn, play, experience beauty, friendship, and love (for example) may be easier to harmonize with the welfare of others than desires to hurt or dominate those around us. Not all untutored emotions will survive the scrutiny of rational justice, measured against the standard of the common good. Some attitudes and appetites with non- or anti-social purposes may not deserve the same level of encouragement as more beneficent emotions. Our feelings matter, but they are capable of improvement in the light of reason.

The human sense of justice is deeply ingrained in our social natures, present in all human beings. But the natural scope of our desire for justice may not be very broad at all. The progress of justice in the modern world has been the gradual extension of society to embrace increasingly broad communities of humanity. Cicero considered us all to be citizens of one great society of all creatures and the gods together.<sup>40</sup> Too often we have taken a narrower view. For most of human history, people gathered in small, selfish, and mutually antagonistic bands, each seeking justice within her or his own small group, but advantage against everyone else. Peace, prosperity and justice have advanced as we have expanded the scope of our social affinities.

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<sup>40</sup> M. Tullius Cicero, *de legibus*, I.vii.23.

The highest justice is cosmopolitan, which is why cross-cultural gatherings of scholars and statesmen from different nations are so important. Trans-cultural experiences open our eyes to the parochial nature of local laws -- and even of legal philosophy, which differs in different communities. This should not be taken to imply that parochialism is always a bad thing. The opposite is true. Much that is sweetest in life arises from the shared experiences and affinities of local experiences and culture. But we also benefit from distinguishing what is parochial and contingent in justice from what is cosmopolitan and universal.<sup>41</sup> The human desire for justice is “written by the finger of God in the heart of man,” as Coke quaintly explained it (following Aquinas).<sup>42</sup> We feel and make use of our moral emotions whether we wish to or not.

## 5. Legitimacy

Legitimacy denotes conformity with the governing standard or rules by which we measure a status or practice. And the governing standard of legitimacy for laws and legal systems is justice. The legitimacy or illegitimacy of laws and legal systems is important, not only for its own sake (we want our laws to be just), but also because the perception of legitimacy encourages compliance. It is not enough to say that a law is valid according to the terms of the legal system that promotes it. People must also accept that the legal system itself is legitimate before they will defer to its judgments. Legal systems seeking this necessary legitimacy inevitably incorporate some basic standards of justice into the structure of their legal rules.

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<sup>41</sup> See M.N.S. Sellers, ed., *Parochialism, Cosmopolitanism, and the Foundations of International Law* (2012).

<sup>42</sup> Edward Coke, *Reports*, 12a-12b on *Calvin's Case* (1610). Cf. Augustine *de lib. arb.* 1.5 in Thomas Aquinas, *Summa Theologiae*, 1-2.95.2.

To be legitimate is to be justified according to some external standard<sup>43</sup> and for a practice to be legitimate requires justification. The totalitarian, technocratic, postmodern and romantic fallacies of law all fail precisely because they offer no persuasive justification to legitimate the legal system as a whole. The totalitarian justification (“because I say so”) has no bearing on justice and very little persuasive force. The postmodern explanation (“justification is impossible”) can place no significant constraints on human action. The romantic explanation (“my feelings are all that matter”) has very little intersubjective appeal, and the technocratic approach (“legitimacy is a separate question”) misses the nature and the purpose of law which always claims to be legitimate, justified by its service to justice.<sup>44</sup>

What, then, could justify a legal system, or give it legitimate authority? Legal systems are justified, and therefore legitimate, when they give better answers to questions of justice and the common good than society could otherwise find or implement, without their intervention. The legitimacy of law emerges on a continuum. Some legal systems will be more legitimate than others. Some will be legitimate for certain purposes, but not for others. Some will be legitimate only fleetingly and by chance, when they meet the standards of a separate and better measure of justice. The focus here will be on procedural legitimacy, making no direct inquiry into the substantive legitimacy of specific legal results. But these two aspects of legitimacy are related. The best measure of any procedure’s legitimacy is the likelihood that it will yield substantively legitimate results.

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<sup>43</sup> See John Tasioulas, “Parochialism and the Legitimacy of International Law” in: M.N.S. Sellers, ed. *Parochialism, Cosmopolitanism, and the Foundations of International Law* (2012), p. 17.

<sup>44</sup> See M.N.S. Sellers, “The Value and Purpose of Law” in: 33 *University of Baltimore Law Review*, 145 (2004).

Legal systems are legitimate when they serve justice well and illegitimate when they do not. Such questions are a matter of degree, but decent humility should lead us to concede that well-designed procedures of legal deliberation will yield better and more accurate answers to questions of justice than our own private reflections, however wise we may be. Even were this not true, well-designed systems of legal deliberation will coordinate our collective pursuit of justice better than any one of us could without help.<sup>45</sup> Legal systems are legitimate when they make the societies they guide more just, and do so better than any available alternative system of legal determination.

Students of the philosophy and practice of law do the world a great service when they question or seek to improve the legitimacy of the legal systems with which they concern themselves. Totalitarian, technocratic, postmodern and romantic theories of law subvert the primary benefit both of the legal and of the academic enterprise when they avoid fundamental questions of legitimacy in law. Our great universities developed first in Bologna, Paris, Oxford and elsewhere precisely to address this question: What is justice and how may law serve it? Or as an anonymous jurist expressed it in the 12<sup>th</sup> century: “Law and justice ought to be the same -- and whatever justice wants, the law ought to follow.”<sup>46</sup>

Sociologists and some lawyers seek to avoid substantive questions of legitimacy by making legitimacy a sociological rather than normative fact. This fails because it misses the

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<sup>45</sup> See M.N.S. Sellers “Republican Impartiality” in: 11 *Oxford Journal of Legal Studies* (1991).

<sup>46</sup> Anonymous jurist, (ca 1130) to Cod. 1.13.2 s.v. *Que religiosa mente*, Paris, Bibliothèque nationale de France, MS lat. 4517, fol. 18<sup>r</sup>; (Bottom margin); Vatican City, Biblioteca Apostolica Vaticana, MS. Vat. lat. 1427, fol 22<sup>r</sup> (next to Cod. 1.12.6.6-9.) Cited in Kenneth Pennington “*Lex naturalis* and *Ius naturale*” in Spencer E. Young, ed. *Crossing Boundaries in Mediaeval Universities* (2011), p. 233: “Iustitia est ius in effectu idem sunt vel esse deberent. Quid enim iustitia vult, idem et ius persequi studet.”

point of the enterprise. The sociological fact of perceived legitimacy hinges on arguments that legal systems make for their own normative legitimacy, and their acceptance by their subjects as just. Empirical or sociological legitimacy is parasitical on real legitimacy, which for law is measured by reference to justice. The proper purpose of law is the realization of justice, and law has value only to the extent that it does so.<sup>47</sup> This makes it possible to say of certain enactments or judicial decisions that they are “legal,” but not “legitimate.” Law always claims legitimacy, but may not possess it in fact.

Law’s legitimacy arises from right reason in permission and prohibition, in pursuit of the common good. Substantive justice matters,<sup>48</sup> but in fact, due to differences in the individual perception of justice, the more useful measure of legitimacy rests on good procedures, which find the laws and justice better than we could ourselves.<sup>49</sup> Scholars can attack injustice on both fronts, developing standards of substantive justice, and perfecting the procedures of rational deliberation. When laws and legal systems are known to be legitimate, their subjects are more likely to respect them, their magistrates are more likely to enforce them, society prospers, and justice reigns.

## 6. Effectiveness

Law and legal systems that are perceived to be legitimate are usually also more effective than would otherwise be the case. “Effective” here signifies that laws have an actual effect.

Legislators, judges, and others who frame or interpret the laws generally want the laws that they

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<sup>47</sup> M.N.S. Sellers, “The Value and Purpose of Law” in: 33 *University of Baltimore Law Review* 146 (2004).

<sup>48</sup> Alexander Pope, *Essay on Man* (1734) iii.303. “For forms of government let fools contest; whate’er is best administer’d is best.”

<sup>49</sup> John Adams, *Defense of the Constitutions of Government of the United States of America* (1787) at I.128.

promulgate to be effective and frame the laws in part to achieve this end. This desire to be effective pushes even corrupt or despotic legal regimes to take reason, emotion, and justice to some extent into account in framing and interpreting the laws. They want their subjects to perceive the laws to be just, and therefore make the laws just, at least in part, in order to secure this perception.

The obvious value of effectiveness can also pose a threat to reason and justice in the law, through the line of argument advanced by Thomas Hobbes. The cost of anarchy or civil war is so high that almost any stable regime is preferable to civil unrest. Given the enormous costs of the absence of settled law, almost any existing legal system deserves some allegiance, in the interest of stability, however unjust it may be in fact. This raises the delicate question how much despotism or injustice must be accepted in the interest of peace, to maintain the effectiveness of law, even when the law is unjust. Simply to articulate better standards of legitimacy can threaten the effectiveness of regimes that derive their power from ignorance or fraud.

The discussion so far has emphasized the close connection between reason and emotion in the law, but in seeking effectiveness, the two may diverge, and the balance becomes more complicated. Recall that the emotional sense of justice may differ from justice itself. The same is true of many moral emotions. There are also the non-moral or even anti-social emotions of violence and domination. Law, to be effective, requires emotional support, but not all emotions serve justice. Legal systems maintained for purposes beyond or even counter to justice and the common good may draw strength from emotional sources beyond their institutional claim of justice. The claim of justice will always be made, but reality may be quite different. Profoundly

unjust regimes may maintain effectiveness in the sociological sense, by manipulating emotions against the interests of justice.

This gives the less praiseworthy emotions salience even in substantially just regimes, as is evident in the distinction made between justice and rhetoric. Since the first inception of the public sphere, orators and statesmen have studied the science of motivation, distinct from the science of right and wrong. To achieve its purpose of justice, law must be effective, and to make itself effective, the law and the servants of law must take human emotions as they find them. Law must consider not only the optimal distribution of permissions and prohibitions in society in the interest of justice, but also the optimal *effective* distribution of permissions and prohibitions, which may be different. Emotions have implications for effectiveness beyond their more direct role in the understanding the requirements of justice. The best understanding of law in its relation to justice will include its ability to be effective, and obeyed.

What matters in securing the effectiveness of law will depend on the state of society, the moral development of its subjects, and the culture and traditions to which the law must apply. John Stuart Mill famously observed that “despotism is a legitimate mode of government” in “backward states of society” and that “a ruler full of the spirit of improvement is warranted in the use of any expedients that will attain an end perhaps otherwise attainable.”<sup>50</sup> Strong governments in less-developed nations frequently make these arguments to justify their disregard for normal procedural justice, and this argument may have some validity, provided the ultimate

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<sup>50</sup> John Stuart Mill, *On Liberty* (1859), 1.9.

aim of justice is retained. But the argument from barbarism is ultimately unpersuasive. No people should remain in tutelage forever.

Emotion governs effectiveness because obedience requires motivation, but reason can modify emotion by directing rational attention to the value to be achieved. Constructing an effective legal system becomes every bit as much the work of reason as the construction and understanding of justice itself, because effective legal systems will not only respect, but also educate the emotions, to better maintain a well-ordered society, in which all persons can thrive. Emotions move us to actions that can in many cases be made compatible with the needs of others around us. Laws must be effective to make any difference at all.<sup>51</sup>

## 7. Conclusion

The discussion set out here has led to several conclusions about law, reason, and emotion. *Law* claims to be right reason in permission and prohibition. The definition comes from Cicero, but every legal system makes the claim, explicitly or implicitly, to “establish justice,” “promote the general welfare,” and “secure the blessings of liberty to ourselves and our posterity.”<sup>52</sup> The “rule of law and not of men,” so often praised by philosophers and statesmen, presumes a standard outside and beyond any particular human will to protect the subjects of law and society from the arbitrary control of any other person. This standard in law is justice, and all legal systems claim it, to justify their authority to rule. The claim of justice is what gives law its interest and force. And justice rests in the end on human emotion.

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<sup>51</sup> M. Tullius Cicero, *de re publica* II.xlii.69: “et quae harmonia a musicis dicitur in cantu, ea est in civitate concordia, artissimum atque optimum omni in re publica vinculum incolumitatis, eaque sine iustitia nullo pacto potest esse.”

<sup>52</sup> Cf. *Constitution of the United States* (1787), Preamble.

*Reason* differs from emotion because it claims to seek truth, always subject to revision in the face of better evidence. Reason rests on axioms, asserted as true, while emotion rests on feelings, accepted as real. One of the most interesting questions in legal science will always be which processes work best to specify what reason requires in the law. Totalitarians, technocrats, postmodernists and romantics all mistake the central purpose of law when they minimize reason as the measure of legal legitimacy. The subject of reason is reality and the most important reality in law is the architecture of human emotion. The nature of human emotion is a truth, which reason can discover by observation and experience.

*Emotions* are those feelings and appetites that move us to action of their own accord. These appetites or desires may or may not advance the well-being of others, but many of them do, including the sense of justice, which values all members of society, and disapproves oppression. This sentiment arises in the first instance, like all other human emotions, from the vagaries of natural selection, but it also provides the basis for the rational sense of justice, which pursues the same values more deliberately. To understand what people should be required to do or be prohibited from doing by law, we must first understand what they want and feel, as determined by human emotion.

Rational *justice* is the reasoned expression of the emotional sense of justice, and serves the same purpose, which is the universal welfare of society as a whole, including all its members. Rational justice is universal in the sense that human emotions are universal, but also variable, as expressions of emotion are variable, given differences in history and circumstance. Justice

depends on emotion because the harmonization of human appetites and aversions -- expressed in emotions -- is the primary purpose of rational human society. Justice is the universal standard of reason in the law.

All legal systems claim to be *legitimate*, which is to say they claim to be just, because justice is the standard of legitimacy in the law. The legitimacy or illegitimacy of laws and legal systems is significant, not only for its own sake, but also because the perception of legitimacy encourages compliance. The totalitarian, technocratic, postmodern and romantic fallacies of law all fail precisely because they offer no persuasive justification to legitimate the legal system as a whole. Legal systems are justified, and therefore legitimate, when they give better answers to questions of justice and the common good than society would be able to do without their intervention. The primary purpose of law is to advance justice, and law has little value unless it does so.

Laws will be more *effective* when they are more-or-less in keeping with other human emotions, including the sense of justice. Effectiveness itself is a significant virtue of law, which justifies certain departures from justice, in the interests of peace and legal certainty. Emotion governs effectiveness, because obedience requires motivation, but both are mediated by reason, which can shape our emotions, in the interest of justice. Reason and emotion are the twin pillars of the law, which make the law legitimate, just, and effective when they are properly taken into account, and otherwise not. No one can understand law without reference both to human emotion and to the purpose law properly exists to serve, which is the common good of each and every member of 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* seek and recognize justice (among other things). And to actually establish justice, laws must be both *legitimate*, and *effective* in fact, which may not always be easy to reconcile. None of this is original. None of it is difficult. All of it is present in every legal system that has ever regulated human society, wherever and whenever laws have held sway. Yet these conclusions challenge much contemporary discourse about law. The *reason*, the *emotion*, the *justice*, the *legitimacy*, and the *effectiveness* of law touch on every aspect of legal science. They deserve our careful attention, and a vastly more nuanced examination than is possible here.<sup>53</sup>

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<sup>53</sup> Duplex est enim vis animorum atque naturae. Una pars in appetitu posita est... Altera in ratione, quae docet et explanat, quid faciendum fugiendumque sit. M. Tullius Cicero, de officiis, 1.xxviii.101.