EMOTIONS, VALUES, *and the* LAW

JOHN DEIGH

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For Lynn

Preface

Philosophy progresses very slowly. Its movement, like that of continents along the earth's crust, becomes evident only after long periods of seemingly stationary activity. For much of the last century and continuing to the present, such movement has gone on in Anglo-American moral philosophy. While the standard and seemingly stalemated clashes between the believers in moral law and the believers in utilitarian ethics or between what Mill calls the intuitive and inductive schools of the discipline have continued to occupy center stage, a change in how we conceive of the phenomena that these clashes are about has been taking place in the background. In the space of about eight decades, the understanding of these phenomena as products of reason or will, operating independently of feeling and sentiment, has yielded ground to an understanding of them as manifestations of the work of emotion. Beginning with the first exposition of an emotive theory of moral language in Ogden and Richards, arguments in Anglo-American moral philosophy concerning the nature of these phenomena have come increasingly to rest on theses about human emotions. And while such arguments were at first the exclusive property of the inductive school, the emergence of more complex conceptions of the emotions has enabled the intuitive school to make such arguments of its own. As a result, questions

about the nature of emotions and their place in the thinking and practices that morality encompasses are now very much a focus of study and debate among moral philosophers who work in the analytic tradition.

The first five essays in this collection concern these questions. They belong to the movement whose course I have just sketched. The first essay, "Emotions: The Legacy of James and Freud," explains the revolution in our thinking about emotions that chiefly arises out of the work of William James and Sigmund Freud. Of course, neither James nor Freud wrote under the influence of analytic philosophy. James completed his writings on emotions more than a decade before its founders came along, and Freud's views are the product of the intellectual traditions of the European continent. Indeed, Freud's importance to the revolution in our thought about emotions should remind us that even before Anglo-American moral philosophy began shifting its focus onto them, thinkers on the European continent going back at least to Nietzsche had already initiated such a shift, and their work undoubtedly influenced thinking across both the Channel and the Atlantic. The impact of Freud's work alone on twentieth-century thought about human psychology and culture is so great that it leaves no discipline to which these subjects are central undisturbed.

The three essays following the first concern a single problem in the study of emotions. How are we to understand their intentionality? This is perhaps the hardest problem for the philosophical study of emotions. What makes the problem so hard is the resistance that the most natural understanding of the intentionality of emotions meets when it is applied to emotions of other animals than human beings or to emotions of humans in their first year or two of life. For the most natural understanding of an emotion's intentionality is that it consists in some kind of propositional thought about the object at or toward which the emotion is felt, yet propositional thought presupposes linguistic capacities and seems therefore to be thought of a kind that beasts and babies are not or not yet capable of having. The problem becomes especially acute when one considers emotions like fear and anger that beasts, babies, and adult human beings are all capable of experiencing. The second essay, "Primitive Emotions," sets out this problem and examines attempts at its resolution that proceed either from the thesis that the intentionality of emotions consists in propositional thought or from the thesis that other animals besides human beings experience emotions. Attempts at resolution that proceed in the first way represent cognitivist theories of emotion. Attempts that proceed in the second way follow from theories of emotion that grow out of Darwin's work on the expression of emotions in humans and other animals. Neither of these theories' attempted resolutions

is successful, and what we see in their failure, I argue, is the depth of the problem.

In the third essay, "Cognitivism in the Theory of Emotions," I survey different cognitivist theories in analytic philosophy and critically examine those that by the end of the twentieth century had come to dominate the philosophical study of emotions. The examination is more thorough than that of the second essay and includes extensive probing of the difficulties in these theories' accounts of the intentionality of emotions. I conclude, as in the second essay, that these accounts are unsuccessful. This essay is the oldest in the collection. Since its appearance some of the chief defenders of the theories I criticize have responded with further development of their views. Their responses consist mainly in bringing out the perceptual character of the cognitions that they identify either as emotions or as the essential cognitive component of emotions. These are significant developments in the defense of cognitivist theories. Nonetheless, I am unpersuaded that they succeed in answering my criticisms. Despite the greater emphasis on the perceptual character of these cognitions, the theories still assume a conception of them as evaluative thoughts, and for reasons that I advance in the fourth essay, linguistic capacities are necessary to having such thoughts. Hence, their accounts of the intentionality of the emotions of beasts and babies remain problematic.

The fourth essay, "Emotions and Values," offers a resolution to the problem of understanding the intentionality of emotions that is distinct from the attempted resolutions I examine in the second and third essays. The resolution it offers depends on the relation of emotions to evaluative thought. That I look to this relation for a resolution does not, of course, distinguish my view from the cognitivist theories I criticize. In particular, it does not distinguish it from those cognitivist theories that accept the ancient Stoics' identification of emotions with evaluative judgments. These theories too make use of the relation of emotions to evaluative thought in giving their accounts of the intentionality of emotions. But unlike their view, I do not take the relation to explain the intentionality of every emotion or hold that evaluative thought is implicit in every experience of emotion. Rather, I maintain that the connection between emotions and evaluative thought is forged through the education of emotions that children undergo at an early age. Accordingly, there is a radical difference between the intentionality of emotions prior to their education and their intentionality subsequent to it. Only the latter is identical with evaluative thought. It presupposes that the subjects of the emotions it characterizes have linguistic capacities. The former, by contrast, does not. Being the same as the intentionality of

the emotions of beasts, it does not imply evaluative thought but is to be understood, instead, as given in the sensory experiences that these primitive, which is to say, uneducated emotions comprise. The explanation of how the connection between emotions and evaluative thought is forged thus becomes crucial to resolving the problem.

Any account of evaluative thought and its relation to emotions must contend with the view that the values, whether positive or negative, attributed to objects in such thought are mere figments of our feelings toward those objects. Such subjectivism in the theory of values has a long history. In modern philosophy, Hume is its most celebrated defender. The account of evaluative thought I give presupposes the same conception of such thought as that on which the cognitivist theories of emotion descending from the ancient Stoics proceed. It thus opposes Hume's view. The argument of the fourth essay begins with criticism of this view. The main targets of the criticism are subjectivist theories of value that take Hume's analogy between values and secondary qualities as their point of departure. The analogy not only informs Hume's projectivist account of evaluative thought but also extends to accounts of such thought on which it is true or false according as it corresponds or fails to correspond to properties in the objects that the thought ascribes to them. The latter are the so-called "response dependent" theories of value that have attracted significant support among contemporary moral philosophers. These accounts too are targets of my criticism. Hume's analogy, I argue, is refuted by considerations of the learning through which a child acquires values, acquires, that is, a capacity for evaluative thought. The overall thrust of my account of the intentionality of emotions, then, is to justify an understanding of values as objective properties that one can comprehend independently of the emotions through which we commonly experience these values and that is consistent with naturalism in the theory of values.

My account of evaluative thought in "Emotions and Values" is general. While my aim is to advance our understanding of how we are capable of perceiving moral and aesthetic values, I take as the major hurdle to achieving this aim explaining how we can understand the evaluative thoughts that figure in our emotional responses to objects as perceptions of properties that those objects have consistent with our understanding of those properties as natural properties. They are natural properties of the objects that have them, that is, in the same sense as the toxicity and digestibility of the objects that have them are natural properties. Consequently, I do no more than gesture toward how this explanation works specifically in the cases of moral and aesthetic perceptions. The fifth essay, "The Politics of Disgust and Shame," does more. It extends the explanation specifically to the perceptions of moral value

in those experiences of disgust in which the emotion is a moral emotion. I do this in the context of discussing Martha Nussbaum's critique of the use of disgust and shame in politics and law. Nussbaum, in her critique of disgust, draws on the work of the social psychologist Paul Rozin, whose account of the emotion is congenial to her own cognitivist theory. In criticizing Rozin's account, I observe that it does not apply to the full range of experiences of disgust, including, in particular, disgust at the actions of "sleazy politicians," which Rozin aptly calls "moral disgust" (while acknowledging that it lies outside his account). Using my account of how the connection between emotions and evaluative thought is forged through the education of emotions, I show how, through such education, a liability to disgust at putrid things is extended to morally corrupt acts and morally corrupt people. And I then explain the importance of this extension for understanding the programs of such conservative political thinkers as Sir Patrick Devlin and the force of Nussbaum's critique of their views.

As we come increasingly to understand the phenomena of morality as manifestations of the work of human emotion, the importance of voluntary action in our conception of these phenomena should diminish. I do not believe this is an inevitable consequence of greater focus on the emotions in our study of these phenomena, but I do think it is predictable inasmuch as this greater focus should weaken the tendency to fall back on the traditional notion of the will as the site of basic moral assessment. It is also, I think, salubrious in that it marks greater maturity in our thinking about morality. The wisdom of abandoning the traditional notion of the will as necessary to grasping the moral character of human action is a theme that runs through the collection's last five essays. While these essays do not jointly make an extended argument for this theme, they cumulatively contribute to its advancement by finding its place in several different areas of morality. Taken together, then, they represent a working out of Bernard Williams's sage observation that "the idea of the voluntary... is essentially superficial."[1]

Each of the sixth, seventh, and eighth essays deals with a distinct bit of morality. The sixth concerns the authority of law. In this essay, "Emotions and the Authority of Law," I explain the law's authority as arising out of strong emotional bonds that the people whom the law governs have to their political institutions. My thesis follows the ideas of Jeremy Bentham and John Austin, who proposed to explain the same phenomenon, under the concept

1. Bernard Williams, *Shame and Necessity* (Berkeley: University of California Press, 1993), p. 67.

of sovereignty, as arising out of the habits of people in a political society to obey the coercive general commands of a certain individual or assembly. The concept of an emotional bond, I believe, improves on that of a habit of obedience, which, as critics of Bentham and Austin have shown, is insufficient for explaining the phenomenon of supreme authority in a polity. Like Bentham and Austin, though, my explanation is meant to supersede explanations on which the law's authority is due to the consent of those who are subject to it. Political authority, I maintain, when it is supreme or ultimate and not delegated or conferred by a higher authority, is a construct of collective emotion and not the result of separate acts of individual will spread across a population. The topic of the seventh essay, "All Kinds of Guilt," is guilt felt over thoughts, feelings, and conditions that are involuntary or the result of events for which one has no responsibility. Many commentators regard such feelings of guilt as irrational. Following Herbert Morris's lead, I argue to the contrary that one can make sense of them without attributing irrationality to their subjects, but in contrast to Morris's view, I make sense of them by appealing to norms of common sense morality that regulate nonvoluntary behavior and feelings. In the eighth essay, "Promises Under Fire," I highlight acts of surrender in war as examples of valid promises made under coercive circumstances, and I then use Hume's view of what makes promises obligatory to explain how such coerced promises create obligations despite their being made involuntarily. I take the success of this explanation as an argument for Hume's view and argue as well that an opposing view, powerfully expounded by T. M. Scanlon, is less successful at explaining how such coerced promises could be obligatory.

The last two essays in the collection mount a more direct challenge to the moral significance of the traditional notion of the will. The notion is particularly at home in the criminal law and in the political and economic institutions that have arisen out of classical liberalism. The essays argue against taking this notion as bedrock in our conception of the principles of justice that should regulate these institutions. In the ninth essay, "Moral Agency and Criminal Insanity," I consider the question of what justifies having a separate defense of insanity in the criminal law: why, that is, does the criminal law need a separate insanity defense for protecting mentally ill offenders from being unjustly convicted of and punished for their offenses? In answering this question, I argue for seeing the advent and continued support for such a defense as based on our realization that some voluntary actions are undeserving of punishment, despite being intentional, because they spring from mental disorders that negate the actor's capacity for moral agency. In effect, then, I argue for separating the capacity for moral agency and therefore the

preconditions of moral responsibility from having a will. The criminal law is more just when it uses exercises of the former rather than exercises of the latter to determine when an offender is responsible for breaking the law.

The tenth essay, "Liberalism and Freedom," concerns the ideas of individual freedom in the tradition of liberalism. The kind of freedom that classical liberalism extols and seeks to protect from government intrusions is exemplified by freedom of contract. The nineteenth-century reforms in Britain that placed limits on this freedom in the interest of protecting workers from accepting employment conditions that damaged their health and placed them at risk of crippling injuries were advocated by liberals such as T. H. Green who extolled and sought to secure for workers and tenant farmers through government regulation of private contracts a different kind of freedom. This kind of freedom is often characterized as positive in contrast to the kind of freedom, often characterized as negative, with which classical liberalism is concerned. Classical liberals' love of this negative freedom, I argue, rests on their assumption of the simple faculty psychology that Locke inherited from Descartes in which the human soul has the twin powers of understanding and will, and their opposition to government regulation comes from their seeing it as interference with an individual's will through coercive threats and other means of thwarting it. The promotion of positive freedom through the nineteenth- and early twentieth-century reforms of welfare state liberalism, by contrast, rests on an assumption of a more complex psychology in which the idea of a well-integrated and intellectually developed personality replaces that of the will as the basis of human freedom. Thus, the moral progress that the enactment in liberal democracies of these reforms represents can be understood as an advancement as well in our understanding of human psychology such that having and freely exercising a will is no longer the essence of the capacity for self-government whose attribution to individual men and women is a fundamental doctrine of liberalism, whether classical or reformed.

These essays are collectively the result of more than a dozen years of philosophical work. I have, in the course of writing them, greatly benefited from the observations and criticisms of so many people that I fear I have not remembered everyone who has helped me. I am grateful to all who have and to the several philosophy departments, law schools, and academic societies to whom I presented these papers and from whom I received valuable responses in the subsequent discussions of them. I owe special thanks to Jonathan Adler, Robert Audi, Susan Bandes, Lawrence Becker, Jeffrey Blustein, Daniel Brudney, Marcia Cavell, David Copp, Russell Dancy, Meir Dan-Cohen, Derrick Darby, David Dolinko, Joshua Gert, Harvey

Green, Patricia Greenspan, Christopher Gowens, Ishtyaqui Haji, Bennett Helm, Eva Kittay, Richard Kraut, Jeffrie Murphy, Herbert Morris, Martha Nussbaum, Tim O'Keefe, Philip Pettit, Bernard Reginster, Michael Ridge, Robert Roberts, Connie Rosati, Michael Smith, Nic Southwood, Jim Sterba, Michael Stocker, Jon Tesan, and Meredith Williams. Michael Stocker read and commented on all of these essays, some in different drafts. His comments were of great help to me, and I am much in debt to him for his generosity and encouragement. Robert Solomon and Richard Wollheim also gave me many helpful comments on these essays, and sadly their recent deaths prevent me from thanking them again on this occasion.

I have had the good fortune to receive institutional support from the universities with whom I have been affiliated while working on these essays and am grateful to both Northwestern University and the University of Texas at Austin for this support. Twice in the last ten years I have been a visiting fellow for three months in the philosophy program of the Research School of Social Sciences at the Australian National University, and thanks to the wonderful academic environment and philosophical community the School provides, I was able to bring two of the essays in the collection to completion during my visits.

I wish to thank Peter Ohlin, my editor at Oxford University Press, for his interest and support as well as his valuable assistance in putting this collection together. Molly Wagener and Christi Stanforth also helped with the Press's editing and production of the collection, and I thank them too for their valuable assistance. I am grateful as well to Michael Sevel for his help in proofreading and constructing the index. Finally, I am indebted to Feris Greenberger for finding the photograph of the teenage girl in the throes of Beatlemania that appears in chapter 2.

Three of the essays, "The Politics of Disgust and Shame," "All Kinds of Guilt," and "Promises under Fire," were contributions to symposia on the work of Martha Nussbaum, Herbert Morris, and T. M. Scanlon respectively. These scholars have all replied to my discussions of their work, and their replies raise challenging questions about the cogency of the positions for which I argued. Interested readers can find these replies in the same issues of the journals in which my essays originally appeared. I have enjoyed years of friendship with Martha Nussbaum and Herbert Morris. While my views differ from and on some points oppose theirs, I have learned a great deal from them. They read and commented on many of these essays, and their influence on my thinking and its product in these pages will be evident to anyone who knows their work.

At a conference on emotions several years ago, I became engaged in discussion with a young scholar who was very enthusiastic about the studies of brain activity that use MRI technology to locate the sites of emotional arousal in the brain. These results, she thought, advanced significantly our understanding of emotions, and she was somewhat taken aback when I expressed skepticism about this. A study of love, she told me, has, by using this technology to create photographic images of a person's brain when the person sees his beloved enter the room, determined in which part of the brain this emotion is felt, and wouldn't my beloved be distressed to discover that an image of my brain did not show activity in this part when she appeared in my visual field? "When you've been married as long as I have," I quickly replied, "love won't be a matter of there being activity in a certain part of your brain on seeing your spouse enter the room you're in." Lynn Hill has for many years shared the pleasures and frustrations of my philosophical efforts as I have shared those of her mathematical ones. The value of such mutuality is beyond words. While I have no idea of what part of my brain my dedicating this book to her has occurred in, I do know that the dedication comes from deep within my heart.

Sources

Essay 1, "Emotions: The Legacy of James and Freud," appeared in the *International Journal of Psychoanalysis* 82 (2001): 1247–1256. It is reprinted by permission of the Institute for Psychoanalysis, London, U.K.

Essay 2, "Primitive Emotions," was written for and published in *Thinking about Feeling: Contemporary Philosophers on Emotion*, Robert C. Solomon, ed. (New York: Oxford University Press, 2004).

Essay 3, "Cognitivism in the Theory of Emotions," was a contribution to a symposium on emotions and cognition at the 1994 meeting of the Pacific Division of the American Philosophical Association in Los Angeles. It appeared in *Ethics* 104 (1994): 824–854. It is reprinted by permission of the University of Chicago Press.

Essay 4, "Emotions and Values," in an earlier draft, was presented at a conference entitled "Minds in Context: Morality and the Imagination" at Franklin and Marshall College in 1998. Later drafts were presented at the sixth annual Kino-eye Conference at the Museum of Contemporary Art in Antwerp in 2005 and a conference on mind, self, and identity at the University of Aarhus in 2007. It has not been previously published.

Essay 5, "The Politics of Disgust and Shame," appeared in a symposium issue on the work of Martha Nussbaum in the *Journal of Ethics* 10 (2006): 383–418 and is reprinted by permission of Springer.

Essay 6, "Emotions and the Authority of Law: Variations on Themes in Bentham and Austin," appeared in *The Passions of Law*, Susan Bandes, ed. (New York: New York University Press, 1999), pp. 285–308. An earlier and shorter version was given at a conference on law and emotion at the University of Chicago Law School in 1998. It is reprinted by permission of New York University Press.

Essay 7, "All Kinds of Guilt," was first presented at a conference on guilt, shame, and punishment organized by George Fletcher in honor of Herbert Morris. It took place at the Columbia University Law School in 1998. I presented the paper again the following year at a symposium on the work of Herbert Morris at the Pacific Division Meeting of the American Philosophical Association in Berkeley. It was published in *Law and Philosophy* 18 (1999): 313–325 and is reprinted by permission of Springer.

Essay 8, "Promises under Fire," appeared in *Ethics* 112 (2002): 483–506. It was a contribution to a symposium on T. M. Scanlon's *What We Owe to Each Other*. It is reprinted by permission of the University of Chicago Press.

Essay 9, "Moral Agency and Criminal Insanity," was the keynote address of the nineteenth annual meeting of the Association for the Advancement of Philosophy and Psychiatry 2000. An earlier version was my contribution to the twenty-third annual Midwest Philosophy Colloquium at the University of Minnesota, Morris, in 1999. It has not been previously published.

Essay 10, "Liberalism and Freedom," is a slightly longer version of a paper of the same title that was published in *Social and Political Philosophy: Contemporary Perspectives*, James Sterba, ed. (London: Routledge, 2001), pp. 151–165. It is based on my comments on Eva Kittay's "What (Welfare) Justice Owes Care," which were given at a conference on alternative conceptions of justice at Notre Dame University in 2000. It appears here by permission of Taylor and Francis Books.

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