

Judging emotion in reason: the effect of emotion in the Anglo-American legal system

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Abstract

The social construction of emotion shapes communities' definitions of what is "appropriate" to feel in a given situation. The social construction of emotion is especially salient and imperative to understand in the context of the current Anglo-American legal system. In this system, the perceived cognitive separation between emotion and reason is accepted as commonly held understanding for evaluating people's behavior, which prescribes a set of expectations that in certain cases comes forth in gendered terms. This study in cognitive anthropology explores how perceptions of the human cognitive mechanism affect how people are treated even in the allegedly most rational parts of society such as the legal system. The legal system imparts judgement which is designed to be an objective manifestation of justice, while relying on subjective culturally-informed ideas about emotion and gender. These ideas result in a prevailing preference toward male over female and rational over emotional associations in the Anglo-American legal system and result in biased verdicts and inequality.

Introduction

Emotion, it is said, suspends reason. In traditional Western thinking, what is rational cannot at the same time be emotional. The role and importance of emotion, however, is viewed differently across cultures as well as in people's daily lives. The different perceptions of things such as how to deal with emotion are "folk models" that are formed by societies as ways to understand the world around them.¹ Each society will have their own folk model for the cognitive process and what role emotion plays, but they generally fall into two broad categories: emotion and reason either occur simultaneously as part of one cognitive process, or they occur in separate realms. In a society, such as the traditional Anglo-American society that privileges rationality, rationality is seen as more dominant, powerful, and preferable to emotion. The domination of one part of the cognitive process over the other has historically become associated with the more dominant gender.² As a result, the very concept of "emotion vs. reason" has, over time, taken on gendered meanings. While men are considered to be rational, protective, and stable, women are considered to be irrational, vulnerable, and insecure emotional beings.

This paper attempts to trace culturally-ascribed meanings of emotion as well as the implications and consequences of the emotional-rational dichotomy in the U.S, drawing on scholarship and literature pertaining to cognitive anthropology. Specifically, the paper will look at how certain parts of the U.S. legal system deal with questions of emotion and the consequences

the emotional-rational dichotomy has for male and female defendants. The present analysis is not a comprehensive sociological or psychological examination of the inner workings of the legal system, although the topic would certainly benefit from further systematic and quantitative inquiry. The paper outlines where the emotional-rational dichotomy is most apparent by analyzing trends in legal cases that attempt to regulate emotional crimes, such as homicides caused by a sudden rush of emotions. These trends bring to light the unequal and subjective facets of the legal system and how it delineates the boundaries of the legal discourse in terms of gendered biases. Judgments of emotion on the part of jurors and people surrounding the trials highlight the legal system's dependence on social norms. Specifically, the legal system is affected by the widespread acceptance of the division of emotion and rationality, as well as from historically unequal power relations between women and men. Despite the fact that the cognitive process, in general, incorporates both rational and emotional components prior to action, in some instances the U.S. folk model of cognition accepts the division between the rational and the emotional, which has an impact on how legal cases are handled.^{2,3,4}

Using rational processes, the people involved in the legal system, such as judges, lawyers and jurors, attempt to understand irrationality on the part of defendants. Jurors evaluate how "reasonable" a defendant's action was during their irrational moment, often based on their own pre-conceived notions of what is and is not acceptable. Irrational behavior can come from anyone,

yet in the legal setting, the gender of the defendant has an effect on the verdict of the case. The verdict is affected by how irrational behaviour is judged and depends on how jurors view the emotional and rational cognitive mechanism and which folk model of cognition they rely on. Although verdicts sometimes adhere to the rational/emotional folk model, nowadays they can also exhibit a paradigm that accepts a combination of the two. When the rational and the emotional are seen as one mechanism, the verdict assigned to the perpetrator is much different than when the two are viewed as separate. When the rational and the emotional are considered separate, verdicts tend to excuse certain kinds of behavior—but only for certain actors. The choice of which framework is used and when depends on the gender of the defendant. In other words, having two competing understandings of the cognitive process can lead to different treatments and verdicts for the defendants.

In order to explain how human perceptions of emotion and cognitive functions affect the results of legal proceedings, it is first imperative to understand the role emotion plays in the human cognitive process. Then, the relationship between rationality and emotion will be explored by looking at the impact of culture, specifically, the social construction of emotions and the transmission of gender norms. These topics will then be explored in the context of the U.S. legal system. After a brief overview of the development of the legal view of emotions, the paper will look at some cases that exemplify the role of emotion in the legal system; specifically

the paper identifies instances of homicide cases caused by crimes of passion or self-defense after domestic violence that illustrate the variable application of folk models in judgments and their effect on verdicts. The trends in verdicts outlined below, based on the gender of the defendant, highlight the consequences of social folk models of emotion. In the future, to further solidify ideas presented in this paper, it will be beneficial to conduct a more comprehensive study of U.S. homicide cases resulting from crimes of passion and the consequent uses of the defense strategies of provocation and self-defense to evaluate the existing gender (and other) bias. The last part of this section turns to jurors to discuss how the social parts of the legal system disrupt the rational and objective assumptions of law. The paper concludes by detailing the limits that exist within common cultural definitions of "human reason" and the negative effects non-white*¹non-male participants can experience in the legal system.

Part I: Emotion and Cognition

Folk theory of emotion: the role of emotion in cognition

Emotion is often viewed in opposition to rationality. This opposition is as persistent as the "nature vs. nurture" divide and has captured many people's imaginations.⁵ Some cognitive scientists have theorized that the region of the human brain that processes individual emotion is separate from the region associated with rational decisions.⁶ Although the physical places in human brains are separate for the two processes, they constantly work together to generate thought.³ The assumed division between rationality and emotion contends that, although these two parts constantly interact to generate thought, together they do not constitute one whole. In other words, the division supposedly works in such a way that emotion can inform rationality, but if it is too strong it can overpower rationality and shut down rational thought completely and allow an irrational action such as murder.⁴ This means that it is perceived that if someone is too emotional, they can no longer act rationally and engage in irrational acts.

This folk view of emotion is problematic for two reasons. First, emotion is an inherent part of the cognitive process, not just a distant influence. Second, the separation between emotion and rationality justifies and perpetuates other socially constructed biases, such as the view that women are more

emotional and consequently less rational than men.² As we will see in the second half of this paper, the emotionality of women and the assumed rationality of men warrant unequal legal punishments for the two sexes, with men more likely to receive lenient sentences if they use the defense that they had been provoked and were acting following an emotional shock.⁴ On the other hand, it is perceived that since women are already more emotional, they are more accountable for their actions in unprecedented situations, and therefore more likely to receive harsher sentences.⁴ In effect, men can say they were provoked and could no longer control their emotions as part of their defense for committing a crime of passion, while women are held more responsible for their emotions and receive different punishments as result.

The first problem of the folk view is that it sees the emotional and the rational as separate entities. At the very extreme, the emotional part of the brain is seen as disruptive to rational thinking. Criticizing this "disorganization theory", V.J. McGill argues that emotions do not disrupt, or "disorganize" perception of social situations.⁷ The view of disorganization theorists is that while emotion disrupts rationality, it is at the same time adaptive in emergencies and can help people survive.⁷ Emotion, therefore, cannot be disruptive to the cognitive process. On the contrary, emotion is a crucial part of the cognitive process as it allows humans to appraise everyday situations and react appropriately. This means that actions can never be unmotivated.⁷ In other words, the view that due to emotions "things just happen" is invalid. The two mechanisms work together in order to give an appraisal of the situation and evaluate what sort of action needs to be taken.³ Emotional responses are the result of picking up certain cues and paying attention to them in a specific way. The cues that were picked up are still part of the cognitive environment of an individual. Feeling emotions is the most basic way in which an individual is capable of responding to their environment. Even in times of "failed communication", when another person's intention is misunderstood, these moments are not caused by emotions disabling the rational and cognitive abilities of an individual. Rather, emotions, even if mild, influence how people react to given situations.³ Emotional responses come first and are an integral part of the cognitive process. In effect, emotion helps people be rational because it helps evaluate a given situation; emotion does not make humans less capable of thought or less rational. Even impulsive behavior is a consequence of people's perception and evaluation of the situation, not a disruption of their cognitive

process.

While emotion is part of the cognitive process, the appraisal of situations and the reactions to them change depending on the environment of the person, and can be influenced by social factors. For example, while fear when faced with a life-threatening situation (fight or flight) may create a similar physiological response in human beings everywhere, the understanding of what to be afraid of is often different from culture to culture.¹ Furthermore, Robert Levy, who studied the Tahitian conceptualization of emotion, argues that the cognitive evaluation of emotions occurs in two steps.⁸ The first appraisal operates out of an awareness of a relationship with something in the outside world. "It is knowledge that mobilizes the culturally influenced systems of percepts, concepts, words, values etc."⁸ In simple terms, if a person loses someone they care about, they will know that they have experienced a loss, but how they experience the emotion is based on their environment and culture. For example, a Tahitian, upon feeling loss will interpret that loss as "feeling heavy" because that is the culturally appropriate response.⁸ The first appraisal and the knowledge of emotion is learned through random experiences that become more and more structured later in life in a way specific to the culture in which one lives.⁸ The influence of culture on the first appraisal is much more limited than culture's influence on the second appraisal. The first reaction to emotion triggers the second cognitive appraisal of the situation, which will follow a specific learned cultural program.⁸ The second appraisal allows the person to classify, name and understand their knowledge. This understanding occurs in a learned system of meaning that was taught to the individual throughout their life.⁸ The reference to "cultural" in this passage is used to refer to the shared experiences that shape individual reactions. Consequently, the reaction may be different if the individuals were in another community.⁸ Emotions are therefore multifaceted: they are an inherent part of the cognitive appraisal process but are also influenced and structured by society and experience.

Social construction of emotions

"In processing people, the product is a state of mind."⁹ People's minds are affected by the various processes that surround them, and as a result the societies they live in affect various parts of their lives. Given the evidence previously described, emotions and emotional responses are socially constructed. Emotions are preceded by experiences that are evaluated with the help of emotional responses. This evaluation has

*I state non-white and non-male because literature suggests these two categories are similar in the treatment they receive in the Anglo-American legal system. Though the concept of ethnicity is deserving of similar examination, it is beyond the scope of the present analysis.

to come from what the person has learned. The learning is generally influenced by the people, environment, and the community that surround an individual.¹⁰ In other words, emotions are cognitively evaluated with the knowledge that a person has learned through their environment.⁸ This idea is further complicated by the fact that everyone who participates in a community does not construct an appropriate emotional response in the same way.

In the case of gender, the social construction of emotion corresponds to the structures of power within the society.² In Western conceptions, women are seen as more vulnerable and therefore more emotional.¹¹ Moreover, women are expected to show positive emotions, and “are allowed to express negative emotions as long as these expressions do not hurt others.”¹¹ On the other hand, men are seen as more powerful and are not supposed to express weak or negative emotions, although this trend has been somewhat changing in recent years due to the rise of emotionality in the West.¹¹ Interestingly, depending on the situation it is still less acceptable for a man to cry than a woman, although crying men are generally more well liked than their non-crying counterparts.¹¹ While generational and behavioral changes do exist, there are still major differences in how male and female behaviors are constructed.² Since women are seen as lacking power, they become associated with various aspects of culture that are less valued.² Since in some instances rationality is privileged over emotion, women are viewed in opposition to rationality, as weaker, more emotional beings.

The way emotion is shaped by society thereafter informs how emotions are individually experienced and which emotions will be felt at any given moment.² In some societies, women are perceived as emotional, ruled by passion and therefore more irrational, while men are perceived as logical and rational. This development reflects the power and status dynamic found in gender relationships.² Social sanctions will usually follow if a boundary of appropriate emotional conduct is crossed (and will depend on the power of the person among other things), which in turn means that the acceptable socially constructed emotions become reproduced in a self-perpetuating cycle.² The cycle therefore, not only prescribes how people should behave, but also how people should conceive of themselves, their gender, and their emotions. When people go outside their prescribed boundaries—or “cross the line” so to speak—such a transgression results in social repercussions. These gender-based consequences take on strikingly more evident characteristics in the context of the

Anglo-American legal system. Gendered assumptions about the way women and men should express their emotions and which reactions are appropriate have an impact on how homicide cases are judged in the courtroom and their verdicts.

Part II: Emotion and Law

Criminal law, rationality, and justifications for murder

For the sake of clarity, a brief overview of criminal law, its history, development, and application, is presented here. Of particular relevance to the present analysis are cases of homicides caused by crimes of passion or executed as acts of self-defense. In each, the evolution of emotion and the circumstances of the victim's death play a crucial role in the final verdict. There are three degrees of murder that a person can be sentenced to in the Anglo-American legal system. First degree murder refers to the pre-mediated act of killing someone; a particularly well-planned, tortuous, or cruel way of taking someone's life. Second degree murder refers to a premeditated murder committed with an intention of personal gain (but not the intention of killing someone). Finally, third degree murder has two distinctions: either involuntary or voluntary manslaughter. Involuntary manslaughter is the result of negligence or an accident resulting in someone's death. It is the second of these distinctions that is of keen interest to the present analysis: voluntary manslaughter. Voluntary manslaughter encompasses murders that were committed in the spur of the moment or in self-defense. Third degree voluntary manslaughter refers to cases where there is no premeditation for the crime but the murder was nonetheless intentional. In the context of criminal charges, third-degree voluntary manslaughter is considered to be a lighter sentence with more lenient punishments. Many defendants use the defense of provocation (in cases of crimes of passion) and self-defense (in cases of domestic violence) in order to attain the lighter sentence of voluntary manslaughter in homicide cases. While the three-degree process for evaluating a homicide exists objectively on paper, in practice the court's conduct while reviewing homicide cases is questionable. The judging process and results are inconsistent because of involvement of subjective jurors, judges and direct coaching by attorneys—all of whom may rely on a variety of folk models and apply them to the case's evidence differently.

The evaluation process opens a door for gender disparity in the applications of sentences, basing judgements on defendants themselves and the type of murder conducted. The boundaries between the

three types of murder are often ambiguous and are judged on a case-by-case basis with jurors' and attorneys' emotions and pre-existing convictions permeating each case. While the legal codes have been written to limit the influence of emotions to help jurors arrive at a sentence in an objective manner, the legal system and actors within it, such as judges, juries, attorneys and defendants themselves are still a product of society and thus subject to social standards. The legal process is not immune to external social processes while judging cases, especially in regards to attitudes towards gender and emotion.

Since the founding of the legal system, there have always been issues with adjusting the legal code to the uncertain and changing reality of the human world.¹² Nevertheless, it is the purpose of the law to contain human behavior in order to foster an ordered and just society. The legal system essentially delineates what is just or unjust in a given society.¹³ In *Doctrine of Right*, Kant outlines three cases where it is acceptable to kill.¹⁴ The three cases are the right of necessity, killing in a military duel, and bastard infanticide.¹⁵ The first of the three, the right of necessity (to preserve one's own life), is most ambiguous and problematic in contemporary criminal law.¹⁵ The justification to kill in the name of necessity exists explicitly because of an understanding that not everything in human life can be “rationally” controlled. This means that there will be things that do not fit neatly into the rational categories of behavior outlined by law. The irrationality, however, is not due to an overwhelming reliance on emotion. Rather, it is due to an unforeseeable convergence of situations and reactions that result in irrational consequences, in which the first cognitive appraisal is nevertheless still emotional.⁸ Emotions are thus not irrational, but they are not necessarily desirable or follow logically the correct social prescription.² The courts acknowledge this, and the legal system was created partially to regulate the irrationality of human life.¹² Yet in the Anglo-American legal system, irrational and emotional were soon clumped together because of social factors such as gender and as a result it currently fails to justly arbitrate unfortunate and unpredictable circumstances.⁴ Emotions reflect the situation by including a cognitive component and a readiness to act:

“Rationality and adaptive value depends on the adequacy of these two components in the given situation... foreseeing that an object promises good or ill and the knowing, or not, how to deal with it, determines the attitude toward it, and also the feeling.”⁷

Rationality and emotion work together to appraise the situation and determine a person's feeling and reaction towards a situation. The "rational and emotional divide" present in the legal system, brought in by jurors, judges, attorneys and defendants themselves, often does not describe the cognitive appraisal system in an accurate way, because there is no divide. Although the response may not be appropriate, it does not mean that it lacks rationality based on cultural premises and previous experience of the individual. Action, therefore, can never truly be unmotivated, since it is responding to something external and motivation comes from a cognitive appraisal. In order to arrive at a response to a given situation, an individual uses emotional appraisal as an inherent part of the cognitive process.

Separating the rational and emotional, therefore, does not present a realistic view of the cognitive process. In the case of the Anglo-American legal system, the separation unnecessarily privileges the rational part of the cognitive process over the emotional part, though in reality the two work in tandem. Individual cognition is, first and foremost, based on an emotional evaluation and only then it is informed by a rational response.³ The emotional evaluation itself is not a random response, rather it is subject to the rules of the society that surrounds the individual and the emotional propriety must be evaluated against social norms.⁴ Emotions are an inherent part of the cognitive process and are a necessary component in arriving at a response and ability to act, despite the fact that the action may be irrational.

Emotions are thus valid cognitive responses to the outside world and should be judged in a manner that corresponds to their importance in the cognitive process. They are an integral part of action, and should not be evaluated as separate when judging a person's action. They are not merely an excuse for hard situations, but rather they function as a guide that prescribes a consistent understanding of acceptable responses to certain situations. In attempts not to regard emotions as invalid and irrational, some scholars suggest emotions should be judged based on how well they adhere to social standards and how acceptable they are in similar situations: whether they are reasonable or unreasonable.¹⁶ This approach, however, threatens to bring more bias into the legal system.

While evaluating the validity of emotions based on social standards, the question of how the legal system should handle emotion becomes particularly relevant. Is there a reasonable emotion and set of experiences that can lead to an excusable homicide? In a society that values rationality over emotion,

a man is still required to exercise control over his actions, since emotions are seen as disrupting rationality.¹⁶ Essentially, people are being measured to what is socially acceptable. As a result, the "social rationality", which is created by social norms, enters the legal system. Social rationality abides by what is common-sensical for the society, rather than the consequences of hard, cold logic. Nevertheless, the legal system maintains its insistence that it is objective and logical, despite the fact that it reflects the power relations of the society it is based on (since it is also the product of the same social rationality). It is thus unsurprising to find that the legal system contains inherent prejudices.

The confusion surrounding the consequences of emotional actions and the subjective judgement of emotions means that it has so far received inconsistent treatment in court.¹⁶ Rather than basing judgements on cognitive appraisals and emotional effects being identical for human beings as a whole, the legal system judges each emotional homicide case based on the person accused rather than the action, opening its allegedly objective judgments to prejudiced and gendered perceptions. To understand whether what the defendant was feeling was an appropriate response to a given situation, the court evaluates the personal relevance of the individual towards the defense they chose to use, which results in inconsistent treatment of homicide cases.¹⁶ For instance, in two similar cases where both defendants committed a homicide, the two cases will be judged differently depending on whether it is realistic that the specific individual could feel those emotions and what potential impact on their rationality the emotions may have had. In other words, because of the emphasis on rationality, the legal system is ill-equipped to judge emotional homicidal cases consistently—especially when defendants use defense strategies such as defense of provocation and defense of self-defense.

Defense of provocation: crimes of passion

The defense of provocation is used in cases where the defendant has committed a crime because the victim provoked an unstable emotional response from them. The role of emotion in reason is the central question when assessing the sentence a defendant receives after committing a crime of passion. Considering the role of emotion and the rationality of the defendant at the moment of the crime reveal the way people involved in the case (juries, lawyers, judges) perceive emotion. In the Anglo-American legal system, rationality is no doubt privileged, but it is recognized that irrational things do still occur. This is where defense of provocation comes into play. Defense of

provocation is a way for the judicial branch to let society know that certain conduct is not acceptable, while at the same time releasing the perpetrator. In a way, the defense of provocation describes the limits of human rationality.¹³ When people who murdered their spouse "in the heat of the moment" are charged with murder, they can use the claim of being too emotional (and by default too irrational to think otherwise) in order to soften their sentence. As a consequence, the rationality of the person and appropriateness of their response (reasonableness of the provocation) are evaluated by the jurors. When a man commits a crime of passion and then proceeds to use the defense of provocation, his own rationality is considered. If the man has had a history of violence, it is unlikely that he will receive a light sentence. If, on the other hand, this act was a complete departure from the usual conduct of the individual, then a lighter sentence may be expected.¹⁶ As we will see, because of the conception of rationality and emotion, men are able to use this excuse more successfully than women.

Regardless of his feelings, the defendant may have acted rationally depending on his evaluation of the case, given the information available at the moment. The rationality of the individual's action thus has to be evaluated based on the context of his situation and the defendants' previous behavior. As a result, the timing of the passion crime becomes central to the decision of the jury. Generally, if the defendant had time to "cool off" between the initial emotional provocation and the murder, then the murder is more likely to be viewed as premeditated. If, however, jurors perceived that cognition was informed by both emotion and rationality, this would not be necessary, as all action would be seen as premeditated already. Since that is not the case, the evaluation of the situation as well as the character of the accused in homicide cases, seems to lead to different sentences for men as opposed to women. Men in these situations are often compared against the "reasonable man" standard, whereas women, viewed as more emotional, are seen as "unreasonable women".⁴ Men are more able to benefit from the defense of provocation than women and as a result are more likely to achieve lighter sentences. Although more statistical evidence needs to be gathered before suggesting the degree of this problem, the current social trends suggest that such inequality within the legal system does exist.

Defense of self defense: battered women and domestic violence

The difference in judging male and female perpetrators is also evident in the

results of cases in which women murder their husbands after experiencing domestic violence. These women often use “battered women syndrome” (BWS) as a justification for self-defense.¹⁷ Most murders by abused women occur when the husband is immobile (for example, sleeping) and no provocation had taken place, and therefore, a defense of provocation cannot be used. Instead, the defendants appeal to self-defense to try to soften their sentence to voluntary manslaughter.¹⁷ In this sense, the right of necessity to defend one’s life is justified because of the emotional, psychological, and physical consequences of husbands’ abuse. Nevertheless, the defendants in these positions are judged similarly to those who committed a crime of passion. Whereas the evaluation of the provocation is waived because of the circumstances of the crime (which are often premeditated BWS self-defense cases), the jury looks at the character of the woman rather than the actions. In domestic violence cases, the jury evaluates the validity of her BWS and her previous resistance to her husband’s beatings. If the case is considered to be “typical”, the woman is likely to get a more lenient sentence. A typical case means that there was an imminent danger to the woman’s life, but more importantly, that she acted as a typical woman and did not have a history of active resistance.¹⁷ To evaluate cases where the defendant claims self-defense due to domestic violence, judges and juries have to look at the emotional composition of the female and her history of active or passive resistance.

Making judgments

In Anglo-American law, emotions are viewed as being capable of overwhelming the rationality of a man (and not a woman) because of the socially constructed division between emotion and rationality. As a result, male momentary irrational behavior is more excusable and can often receive a more lenient punishment, because they are seen as more rational and therefore more likely to be overwhelmed by emotion. The application of a lighter punishment because of a loss of rationality, however, does not apply to all members of society. The evaluations of the types of criminal cases outlined above roughly depend on two considerations: the evaluation of the experience and the evaluation of the person. In the case of crimes of passion, the experience is evaluated in terms of the feasibility of the provocation; for self-defense claims, the experience is based on establishing whether domestic violence took place. When evaluating experience, therefore, the possibility of the provocation and the defendant’s reaction

to that provocation are both evaluated. The jurors analyze the circumstances of the crime and the appropriateness of the emotional state of the defendant to understand whether the victim has received a response that they themselves provoked.¹³ The provocation itself can become gendered, as social norms make provocation by women look different than provocation by men.

The biggest part that emotion plays in judgement is in the evaluation of the person. It is common in both instances to evaluate the rationality of the person and whether or not their emotional state was morally excusable. The evaluation of the character of the person plays a much bigger role in the decision making process than the evaluation of the experience. Judging what is emotionally appropriate for the person means that the jurors themselves rely on the social context to evaluate the evidence.⁴ This becomes especially problematic since jurors judge based on their own biases. Although the judgment is intended to be just and objective, because of pre-conceived notions of emotion as it relates to rationality among other things, judgments reflect social power divisions like those observed between genders. Essentially, thought process and conclusions are “not neutral but rather reflects the dominant social interests and values.”¹³ Gender stereotypes are thus perpetuated while also being considered just.

The evaluation of the emotional status of the person on trial can be analyzed by looking at two things. First, the jurors will consider the consistency of the character of the person (in other words, whether or not they have committed a similar crime in the past). The second dimension for evaluation considers the social norms directly by comparing the defendant to social mores. In the case of crimes of passion, the defendant is considered against the “reasonable man” norm, and although it has now become known as “reasonable person”, it largely relies on the same set of assumptions that a man is more powerful.⁴ If the situation involved self-defense at home, then cases are compared to other similar instances of domestic violence.

The jurors will first consider the character of the defendant. There is a need to understand whether the defendant usually acts this way and thus needs to be incarcerated, or whether this was a single, isolated event in their lives. In other words, the law will only excuse a homicide when it is a singular incident, and not part of a bigger behavioral problem.¹³ The consideration of the individual in a given situation is thus crucial, especially in cases of provocations and self-defense. If the jurors recognize the behavior as out of the ordinary, the defendant

is likely to get a lighter sentence.¹⁸ On the other hand, this also makes the appeals to provocations or self-defense gendered, since it allows for jurors’ perceptions of what is socially “ordinary” to judge the character of the individual (and even compare to gendered social norms) rather than adhering solely to the facts of the situation.

As a result, jurors often base their decision on whether or not the defendant acted as any “reasonable person” placed in the same situation.¹³ This is the pinnacle of the crime of passion defense. Judging whether or not this act adhered to social standards and if any other reasonable individual would do the same becomes an extraordinarily difficult task to accomplish objectively and equally. Still in hopes of eliminating bias, jurors rely on the “reasonable person” standard. This standard, however, is already infused with pre-conceived notions of what is “reasonable” (in effect rational and acceptable) conduct. In many courts, the term is not very well defined; leaving judges and jurors to conclude for themselves what constitutes “reasonable” behavior. The pre-conceived notions generally lead to the assumption that people who acted rationally are blameless whereas people who acted irrationally are blameworthy.¹³ The evaluation of the rationality of people’s actions, however, is not applied equally to everybody because of the existence of a pre-conceived understanding of who in society is likely to act rationally when comparing them to the “reasonable person” standard. As a result, women are still most often considered to be irrational, to be less “reasonable”, in comparison with the “reasonable person” standard, and thus they cannot reap the benefits of a more lenient sentence in a way that men can.¹³

Women do not have the same access to the benefits provided by the “reasonable person” standard because a woman killing her husband out of jealousy or anger over infidelity is considered to be an “unreasonable woman”. If she were a reasonable woman, she would not have taken such drastic action, because that is not how women are assumed to behave. To illustrate this dynamic, when Hilary Clinton’s husband publicly cheated on her with his intern, she did not retaliate and was expected to stand by her husband.⁴ Throughout the ordeal, an improvement in Hilary Clinton’s approval rating was observed. If she had reacted by publicly humiliating her husband, she would most likely have been viewed as petty.⁴ Such subdued behavior is expected of women in general.² Similar conduct would hardly be expected of men, for whom bearing the humiliation of a cheating wife without doing anything about it would be seen as

foolish.¹¹ We see in these cases that there are prescribed ways that women and men are expected to react to events, and in homicidal cases these responses are closely scrutinized and are evaluated differently. Violence seems to be a permissible way to react for white males whereas women are expected to react in a more positive, subdued, and submissive way.¹³

People who perceive the world rationally, but whose responses are inadequate compared to the mainstream social norms are thus not very well understood by the legal system.¹⁰ This is because, the legal system, despite attempting to be rational, is still based upon social mores in the application of its laws. Thus, if a person's social response to an event is not something the court would sanction as acceptable or "reasonable", their sentence is likely to be stricter.

The unequal treatment of what is and is not "reasonable" stemming from social assumptions is the chief reason the U.S. legal system does not treat all cases equally.¹³ Since white men are socially viewed as more rational beings, they are more often excused when they suddenly and temporarily "lose" their rationality. When men are emotionally provoked, such as after finding out that their spouse has been cheating on them with their best friend, the sentence they receive for murdering both people may be that of voluntary manslaughter (a fairly lenient sentence), based on the fact that the circumstances merited a huge departure from their "normal" state.¹³ Others are not as successful at using the same defense because they are not considered to be rational in the first place. It cannot be excusable to give women a lighter sentence based on the provocation defense, because if she does kill her husband after discovering his infidelity, she has engaged in a behavior that is reserved to more powerful actors, and thus her behavior is unacceptable and socially unreasonable—she ceased being a subdued being and became an active, violent actor. Women's actions tend to be punished with stricter verdicts. Since women are viewed as being more irrational, it may seem like the courts should excuse their behavior even more readily than men. Yet women cannot be excused based on the provocation argument, because they cannot be excused for losing something they did not have to begin with. Moreover, when women behave violently and cross the gendered-behavior boundary, they are further vilified by the society that surrounds them (in stark contrast to "crying men" mentioned earlier, for whom it is becoming more acceptable and preferable to take on certain female traits).

The divide in the consideration of what is considered "reasonable" and excusable

exemplifies the problem presented by the emotional and rational split that exists in the Anglo-American legal system today. Since men are considered to be irrational when they are emotional, their emotions can "disrupt" their reason, allowing them to commit the crime and walk away with a lighter sentence. The lack of rationality in that moment means that there was a lack of premeditation, and as a result the killing can be judged as voluntary manslaughter. The same logic does not apply when the perpetrator is a woman. Women are not always excused based on the fact that they are momentarily irrational. Their alleged irrationality in everyday conduct means that they are responsible for their irrational acts, which in turn implies that the emotional and rational capacities of women are much less conceptually divided. In a sense, the general lack of rationality in women means that they are much better positioned to premeditate a murder when in an emotional state. Women are thus held more responsible for their emotional actions than men. This shows the inherent inconsistency in the U.S. legal system and exposes the limits imposed on the legal discourse by outlining which actors are more able to benefit and which conducts are accepted within the discourse. The rational white male, it seems, enjoys the greatest benefit in the contemporary legal system.

The juror problem

The U.S. legal system depends on a pre-defined number (for example a single judge or a jury of twelve) of carefully selected jurors to decide whether a defendant will be found guilty or not-guilty. The jury itself is perhaps the most crucial part of the criminal trial. In his analysis of mock-jurors' judgment proceedings, Matthew Spackman describes how the relationship between emotion and rationality affected whether they chose the sentence of murder or manslaughter.¹⁸ The jurors who adhered to the idea that emotional and rational parts of the brain operate simultaneously were more likely to charge the defendant with murder. In contrast, jurors who thought of emotion and rationality as separate and disruptive parts of the brain were more likely to vote for manslaughter—a more lenient sentence.¹⁸ Adhering to the cognitive conception of emotion and rationality and the idea that they function together allows the jurors to judge the act committed rather than the emotion and person behind it. While it is hard to say which approach is more objective and just, it is pertinent to note that there is a disparity between how jurors view the relationship between emotion and rationality and the votes that they cast. Since men are seen as rational most of the time,

they are more likely to be excused when they act based on emotion; women are seen as always acting on emotion, meaning that they are held more responsible for their actions even in an emotional situation and thus are likely to receive a tougher sentence.

One of the reasons why it is hard to say which approach to the emotional-rational divide would ultimately be more just is because these paradigms are arbitrarily applied to cases by the jurors themselves—in that they are not sanctioned, controlled, or checked by the "objective" court system and therefore cannot be used to attain objectivity and equality in all court cases. As a result, the way jurors conceptualize emotion is crucial to the outcome of the trial. Therefore, analyzing the role that jurors played and the views of emotions that they use to evaluate can be particularly fruitful, as they reveal the inherent prejudices among the jurors. It is revealed that as a way to arrive at decisions, jurors often judge the emotional appropriateness instead of the rationality of the act itself.⁴ Judging emotional responses allows jurors to bring in their own conceptions of what a reasonable emotion and acceptable response for a given situation may be.

There are two main problems with jurors relying on their own judgments rather than the evidence of the case. First, the jurors bring learned social beliefs and an a priori understanding of the legal process and its consequences. Second, they often use their own conceptions early on in the trial to judge the outcome.¹⁸ For example, in the OJ Simpson case, the jury was chosen in a way so as to secure a more lenient verdict for the defendant.⁶ While the actual mechanics of how the jury was chosen will be left aside in the present argument, the jury that presided over OJ Simpson's trial came from a demographic that was surveyed to have sympathetic feelings towards Simpson's position in the trial—namely middle aged black women.⁶ The possibility of such a pre-conceived bias goes against the alleged objectivity of the court system, and is therefore highly undesirable.⁶

The persistent "problem" of jurors drawing on their emotions has been of interest to many lawmakers. They represent the ultimate entry of "human irrationality" into the legal system. As he analyzed the Simpson trial, Thagard concluded that the influences of the jurors' biases needs to be further reduced. He proposed that it is possible for people to employ different emotions and attitudes at work than at home, and that the same thing should be practiced by judges and lawyers.⁶ Although, suggesting that an emphasis on "work" emotions is possible assumes that emotional and rational

parts of the brain are separate entities. While the individual will perceive different things when they are in different realms of “operation”, they are still a whole person, filtering their understanding of the world through a particular point of view.¹⁹ The legal system, therefore, is seen as having a very specific set of emotions that are allowed within its discourse. In addition, it relies on a very specific set of folk theories to make universal judgements about social conduct. Although Thagard concedes that getting rid of all emotional biases is impossible, he still supports the idea that the courthouse is no place for strong emotions and emotional biases. Instead of blocking emotions and subjectively choosing which emotions are valid, it may be more beneficial to view emotions and rationality as part of the same mechanism, allowing for a more coherent view of the individual and their actions.

The legal discourse and effects on gender

The legal process further creates precedents that have huge implications for what society views as appropriate and just. Currently, the legal system privileges the rational system over the emotionality of humans and allows gendered bias. Although it recognizes that emotions exist in humans, the limits on the discourse were created to differentiate between the emotional and the rational. Dealing with emotional cases that involve crimes of passion or self-defense constantly forces lawmakers to come into contact with the irrational. The provisions that the legal system creates for passion in crime delineates the limits of reason.¹³ The discourse, limited by its own proceedings and assumptions, drastically minimizes what the legal system can and cannot do and limits the kind of justice that the courts are able to exercise. “Even where courts imagine themselves engaged in expansive social inquiries...they fail to see the ways in which their investigations are drastically and specifically reduced before they begin.”²⁰ A court’s approach to dealing with emotions is prescribed beforehand. This has less to do with legal doctrines than with their applications.¹³ The entrance of socio-emotional factors furthermore limits the kinds of judgments the court can make. The court affects people’s behavior, but the people who participate in them also affect the courts. As a result, the legal discourse is constantly affected by larger societal conceptions like gender.

The limitations created by the legal system also demarcate specific subjects that can participate in the discourse and in what way these subjects are presented. As explained above, men are better positioned to receive lenient sentences because of the assumption

that they are more “rational” while women are more “emotional”. The extent to which women are able to participate in the legal discourse therefore depends on how their emotional responses are socially constructed. Since they are taught to view themselves in a certain way – namely as more emotional—women have begun to present themselves as such.² As a result, their capacity to represent themselves in the court system and attain same sentences as men is further hindered.

“Women’s capacity to represent themselves has always been severely limited by the manner in which they tell stories about themselves, the conditions under which they can tell those stories and the spaces to which their storytelling has been confined.”²¹

Women have to tell stories about themselves in a very specific way when they are in court, which severely limits their fair representation, especially if they want to be viewed as “reasonable”. While men are also restricted in the way they are perceived in court, the standard as it exists seems to favor men over women. In both cases, when norms such as killing another person are broken, social sanctions ensue. In cases involving a female perpetrator of violence however, the norm is broken automatically because women are not supposed to be violent, regardless of their emotions at the time. In extreme cases of domestic violence, where a woman—uncharacteristically and unreasonably—decides to kill her husband, she is more prone to receive a harsher punishment than a man in the same situation because of the limited view through which the court sees her.^{4,17,21}

Conclusion

The division between the rational and the emotional is socially constructed to reflect dominant societal interests, which in turn translates into gendered stereotypes and different treatment of women and men in court. The legal system—though supposedly an objective actor in serving justice to society—implicitly operates based on societal divisions, and as a result does not deliver justice to men and women equally. Indeed, the legal system attempts to do away with inequality, while allowing the use of an emotional/rational split that perpetuates inequality. The actors within the legal system need to reconsider the role of emotion in rationality and recognize that emotion is a key part of cognition of all human beings. In cases where the defendants are using the defense of provocation or self-defense, the pre-conceived notions about the role of emotion in reason allow the

courts to excuse more violence for men. In contrast, the courts tend to punish women for not acting as proper, emotional women. Lawmakers need to accept the social origins of the legal system and recognize the hidden biases within it. Since society perpetuates the emotional and rational division, the implications of this division affect the current legal system despite attempts to be objective. If the ultimate goal of the legal system is to reach objective truth and justice, it would benefit from recognizing these divides and attempting to limit the ways in which the system disseminates inequality.

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