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Contents

Between passion and senses?

Emotional dimensions of legal cultures in historical perspective

Dagmar Ellerbrock and Sylvia Kesper-Biermann

Does passion influence law making? Are senses part of the juridical process? Do emotions have anything at all to do with law?[1] Law regulates emotional behavior and legal procedures often arouse emotions (Posner 1999). But are passions and emotions innately woven into the texture of law? This special issue argues that understanding the debates on, and concepts and perceptions of, emotions is essential to comprehending law in a fundamental and multifaceted manner.[2]

Law and emotions share a complex, reciprocal relationship. Only recently have scholars started to explore their various interactions (Maroney 2005; Abrams and Keren 2007; Bandes and Blumenthal 2012) and emphasize the significance of emotions for deeper insights into juridical practices as well as into conceptions of justice. These studies follow a contemporary approach and aim at, among other things, a better understanding of or even improvement of current legal doctrine, juridical decision-making or policies. The results of this research are an important starting point. Their

1 Passions and emotions are not used here in a distinctive way. For a study of the historical semantics of these concepts, see Thomas Dixon (2003).

2 The contributions to this special issue were discussed in February 2014 at the international workshop »Recht und Gefühl: Zur historischen Relevanz einer konstitutiven Beziehung,« Ludwig-Maximilians-University, Munich. We would like to thank the Max Planck Institute for Human Development, Berlin, and the Historical Seminar, LMU Munich for funding, as well as the staff in both locations for reliable support in preparing and realizing the workshop.

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perceptions cannot be overrated, since they have proven that emotions are an important factor influencing the framework and notion of law as well as the application and legitimation of legal practices (Bandes 1999). The legal system, as regards its conceptual dimension and its actors—judges, lawyers, defendants and deponents, politicians and experts, citizens and public—is deeply intertwined with emotional norms, rules, experiences, and expectations.

It has now been recognized, in contrast to former self-conceptions, that legal cultures are not an emotion-free, rational space, but an area deeply affected by emotions (Nussbaum 2008; Posner 1999). Consequently, a historical perspective is indispensable to fully understanding the dense connections between passions and law as well as the transformations these correlations have undergone over the last 200 years. Analyses of historical developments offer an opportunity to understand changing concepts, meanings, and actions over time.

Current legal research meanwhile goes beyond the mere statement that »emotion is everywhere in law« (Abrams and Keren 2007, 2009) and explores its various manifestations and functions. This issue of InterDisciplines applies this understanding to historical contexts. To this end, emotions are understood as bio-social phenomena (Engelen et al. 2009; Scherer, Schorr, and Johnstone 2001; Hopkins et al. 2009; Chiao 2015). What does this mean? Grounded in the body and connected to innate processes of reactions, emotions are necessarily shaped by social interpretations and social interactions. Emotions in this sense combine affective, corporeal dimensions and socio-cultural elements (Ortony, Clore, and Collins 1999; Reddy 2001; Solomon 2003, 2004; Demmerling and Landweer 2007) and bring together feelings based in the body with socio-cultural meanings (Frevert and Wulf 2012). It is the interplay between these distinct dimensions that constitutes emotions. Though the body-based dimension is an indispensable part of emotions, this issue focuses on the social facet of emotions, since this is the element that is variable in time and across cultures (Rosenwein 2002; Frevert 2013).

With reference to law, »all previous attempts to establish an exact definition […] have reached no generally accepted agreement« (Otto 2011; Abrams and Keren 2007). This is partly due to the fact that several classifications (using different criteria) are possible and that these concepts have in addition changed over time. Objective law can be distinguished from subjective rights, natural law from statute law, and positive law from customary law. Furthermore, legal areas have been divided into realms of public law, criminal law or private law.

Though emotions matter in all these areas, they have as yet received varying levels of attention by (legal) historians. Their significance has recently been studied with regard to the mobilization of rights, notably during the second half of the 20th century and in conjunction with social movements (Abrams 2011). Since the 1970s, the expanding research on the history of human rights and on human rights activism also refers to emotions. Lynn Hunt has argued that the very existence of human rights »depends on emotions as much as on reason« and traces their genesis, based on changing emotional regimes, back to the second half of the 18th century (Hunt 2008). Whereas emotions have entered international history in general and the history of international relations in particular, for example with regard to fear (Bormann, Freiberger, and Michel 2010; Ariffin 2015), international law has seldom been looked at against this backdrop (Emotions and International Law 2011). Recently, Martha Minow has stressed the impact of emotions in legal procedures redressing mass violence (Minow and Rosenblum 2002; Minow 2004).

Aside from these rare pioneering studies, historical scholarship (at least in Germany) has seldom systematically addressed the affiliation between emotions and law and refers to it only *en passant*. To overcome this desideratum, this special issue will explicitly conceptualize the many-sided relationship in order to understand how and where law and emotions were connected and what this means for the historical development of legal cultures and juridical practices. It thereby sheds light on the intricate as yet unanalyzed ways in which emotions help to structure legal cultures. Additionally, this point of view allows the study of the relation between law and emotions in specific settings and contexts.

To exemplify that, the special issue brings together seven case studies from 19th and 20th century European history, including colonial history. These papers highlight the potential of studying the past to conceptualize, on the one hand, the relationship between law and concepts of emotions and add, on the other hand, important previously neglected dimensions to the historiography of both fields. The introductory remarks in the following will combine these two viewpoints by pursuing systematic questions on the basis of the individual articles' findings. This issue thereby expands the current state of research in two ways: it analyzes the diverse entanglements between emotions and legal cultures in their historical genesis and variations and it focuses on European case studies which were not before touched by the emotional turn in legal research (Gregg and Seigworth 2010; Frevert 2011; Weber 2008).

The case studies offer a coherent spatial frame since they focus on continental Europe, in the main Germany. Hence the articles draw attention to related civil law cultures distinct from the Anglo-American common law system (Röhl 2001, § 70), which up to now has received particular attention in English-language research on law and emotion. The oft-stated differences between legal cultures in civil law and in common law—for example in the perception, creation, understanding, and application of law (Peters 2010, 381–429, esp. 413–15)—exerts substantial influence on the relation between the two.

That applies first and foremost to the perception and presentation of law as an arena of rationality, opposed to emotions as a »catchall category for much of what law aspires to avoid or counteract« (Bandes and Blumenthal 2012, 162). This dichotomy was particularly pronounced in continental Europe with its more theoretical, abstract approach to law, a tendency to codification and a high esteem of general principles. Germany especially experienced a scientification of jurisprudence from the beginning of the 19th century onwards, which added to the appreciation of reason and shaped the self-perception of legal experts. These viewed themselves as impartial and autonomous, dissociating law from, for example, politics, conceived as a completely different sphere connected, inter alia, with passions (Kesper-Biermann 2009, 71–72; Kästner and Kesper-Biermann

2008). The strong emphasis on the scientific nature of law, which promised prestige and was understood to be free from emotion, proved to be the lasting and prevailing image throughout the 19th and 20th centuries.

The above underlines the necessity to historicize the relationship between law and emotions and to show the emergence as well as the alteration of individual features. Since important foundations concerning both areas were laid around 1800, the 19th and 20th centuries constitute a useful timeframe for historical analysis, as the contributions to this issue show. Furthermore, some research has already been conducted on the medieval and early modern eras (Smail 2003), during which the strict dichotomy of law and emotion was not assumed from the outset. This is all the more reason why a thorough examination of the modern period is necessary. Moreover, in view of geographical coverage and/or legislation, international, national, regional and local law should be mentioned.

The legal area most commonly associated with emotions is criminal law, where, among other sentiments, honor, shame or remorse figure prominently. Recent studies also focus on the relationship between punishment and emotions, examining for example changes in the execution of the death penalty or analyzing »shaming sanctions,« which aim directly at the emotions of the perpetrator (Martschukat 2010; Karstedt 2011; Frevert 2014; Wettlaufer 2010). Hence, it is not surprising that many of the case studies in this issue also deal with this field.

Contrary to the above-mentioned categories, we suggest a systematization in four domains to delineate historical relationships between the law and concepts and perceptions of emotions during the 19th and 20th century. These focus on the »intellectual reality« of, first, legal doctrine and legal thought; second, legal norms and legislation in the strict sense—which are basically identical with legal texts in the 19th and 20th century; third, the field of legal institutions, procedures, and decision-making, e. g. courtrooms; and finally fourth, public negotiations and perceptions of law, for example in the media, including legal policies. As a matter of course, this analytical distinction does not deny multiple reciprocal influences or interdependencies between the four.

(1) In the area of legal doctrine and legal thought, the 19th and 20th century self-presentation of jurisprudence as a dispassionate science consisting mainly of rational reasoning has already been mentioned. But this did not prevent the law from dealing with concepts of emotions, not only as a particular object of legal thought but as the very foundation of law itself, »the genesis of law out of emotion.« As **Sigrid G. Köhler and Florian Schmidt** show in their contribution, reflection on this relationship was closely intertwined with the emergence of a very influential branch of modern legal doctrine in Germany during the late 18th and early 19th century: the German Historical School associated with Friedrich Carl von Savigny. The concept of *Rechtsgefühl* (sense of justice) proved to be of particular importance not only to Savigny and has formed parts of scholarly discussion since that time. These debates again culminated between the 1870s and 1920s, **Sandra Schnädelbach** argues, when numerous jurists published texts on the subject and attempted to adjust the concept to new patterns for the definition of law and new ideas about emotions adapted from the developing natural sciences. At the same time, writers tried to define the functions attributed to *Rechtsgefühl* in legal practice. Further changes occurred slightly later when Nazi jurisprudence invented the *Rechtsempfinden der Volksgemeinschaft* as a modified concept of Savigny's *Rechtsgefühl*, declaring Hitler to be the ultimate embodiment of the people's sense of justice and therefore the only source of law (Mertens 2009). Hence, West German legal thinkers evaded term and concept for some time until it was reconsidered in the late 1970s and 1980s (Meier 1986; Lampe 1985; Oestreich 1984).

(2) Various theories of emotions also played a prominent role in 19th and 20th century *legal norms* and *legislation*, especially in criminal law. Legal norms are closely related to the social and moral norms of a given society. Whereas the boundaries between law and morality have been widely discussed since the Enlightenment (Smith 1761; Reeder 1997), recent studies have rediscovered the role of emotions in moral settings (Nussbaum 2008; May 2013; Kelly 2011; Haidt 2003; Kim and Stocker 2001; Ortony 1991). Disgust and/or compassion for example have recently been widely discussed regarding their productive effects on social and

legal norms (Schnall et al. 2008; Nussbaum 2004; 1999). Furthermore, the role played by concepts of emotions in European legal codes in legitimizing and eventually discarding practices of so-called honor killings have also been examined (Frevert 2014).

Criminal law covering sexual offences constitutes a field in which the convergence of emotions, (moral) values and legal order is most obvious. Plans to reform the Penal Code of 1871, partly revised during the Nazi era, towards a decriminalization of homosexuality, argues **Philipp Nielsen**, show the conflict of supposedly »emotional« versus »rational« arguments in West Germany during the early 1960s. At this time, he concludes, a general shift of criminal legislation could be noticed; from the protection of collective moral emotions to the protection of subjective/individual rights and feelings.

(3) *Legal decision-making*, *judicial proceedings* and *institutions* are additional arenas in which emotions become relevant, especially those of the various legal actors. It has been shown that integrating affect extends the understanding of juridical decision-making (Müller-Mall 2014; Hänni 2011, 2014; Nussbaum 2008). **Sandra Schnädelbach** takes us further along this path by analyzing the historical dimensions of the emotional elements of judging.

Niklas Luhmann has pointed out that institutions are in need of and at the same time produce trust (Luhmann 1989). »Trust« therefore can be understood as an emotion essential to modulating social interactions and vital for individuals as regards insecure future outcomes (Frevert 2003; Hartmann and Offe 2001; Welz 2010). With respect to legal cultures, one can argue that the working and acceptance of the judicial system requires and at the same time produces trust. If it is missing the legitimacy and stability of the political order will be seriously jeopardized, at least in some parts of the population, as occurred during the Weimar Republic (Ellerbrock 2003). The so-called *Vertrauenskrise der Justiz*, the crisis of confidence in courts and judicial authorities during the late 1920s, although well-studied (Siemens 2005), still demands an examination that systematically takes emotions into consideration. **Warren**

Rosenblum in his contribution shows how this topos figured prominently both in contemporary judicial professional circles and in public debate.

The *Vertrauenskrise* discourse focused on the role of judges. The ideal of the jurist as »manager of emotions« drafted in the discussions about *Rechtsgefühl* in the early 20th century and explicated by **Sandra Schnädelbach**, was an influential conception of one key figure in legal proceedings. But desired, unwanted or expected displays of emotion were also ascribed to the accused, to witnesses, and to courtroom audiences. These depended heavily not only on time-bound emotional regimes, but on the legal framework that assigned expectations for the respective groups' performance. This becomes obvious with regard to the significant differences between common law and civil law systems. Many problems and characteristics discussed in English-language research on law and emotion, for example concerning victim impact statements, jury decision-making, or immigrant policy (Ahmed 2014) are also relevant for continental European proceedings. **Bettina Severin-Barboutie** examines the impact of the specific settings and »hidden scripts« of police interrogations in Stuttgart from the 1950s to 1970s with regard to various emotional strategies established for and by suspects, witnesses and police officers.

Focusing on Italian immigrants in Germany, her findings, too, shed light on the connection of national stereotypes—expressed for example in the attribution of certain feelings—to their consideration in legal proceedings. The relevance of emotions was conceded especially for perpetrators who committed particular offences, for example so called crimes of passion. This concept had a long history and was well-established as early as the beginning of the 19th century. Others, as **Ulrike Schaper** shows in her contribution, emerged with the rise of colonialism. *Tropenkoller*, understood as excitement produced by nervous reactions to the medical, social, and climate conditions in the German colonies, were—like other extraordinary emotional states—conceived as interfering with otherwise rational conduct. This reflected the general idea of human behavior underlying law during the 19th and 20th centuries in which »human« was implicitly equated with »male.« As a matter of course, gendered beliefs

of emotional conduct were also inscribed in legal decision-making and proceedings (Ortmann 2014).

(4) Finally, emotions shape *public perceptions* and *negotiations* of law. In this area of study, the relevance of emotions has long been acknowledged, although mainly in global terms, for instance the power of the media to »emotionalize« debates on crime and punishments. Media coverage of spectacular murders, especially during the Weimar Republic, has repeatedly been analyzed, hinting at all sorts of emotions from pleasure to revulsion. In this issue, **Warren Rosenblum** elaborates on the »passions of the public sphere« in connection with the Ebert trial and the Haas-Helling affair. **Susanne Krassmann**, on the other hand, looks at the absence of a broad public debate accompanying the 2012 German Federal Constitutional Court decision on employing military forces on national territory. She conceptualizes the public security discourse as a practice with emotional scripts in which fear figures prominently, providing an analytical framework for investigations of legal policy making.

To sum up, understanding the deep impact of passions on law, and reflecting on the emotional effects of legal cultures as well as on the impact of juridical procedures on the acknowledgment of (in)justice contributes to comprehending the moral foundations of society, social interactions between individuals and even individual self-conceptions regarding self-respect and self-efficacy (Minow 1999; Posner 1999).

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The enigmatic ground

On the genesis of law out of emotion in the writings of Savigny and Uhland

Sigrid G. Köhler and Florian Schmidt,
translated by Charlton Payne

The historical ground

Emotion and law are not irreconcilable opposites. To be sure, according to a dominant »cultural script« of Western discourse since the eighteenth century, they are supposed to be incompatible (Maroney 2011, 657–64). There are many reasons for the dominance of this cultural script. Among them is the one-sided privileging of the Enlightenment as an age of reason, a privileging which forgets that the eighteenth century was also the age of emotion. Another would be the claim that law is universally valid and binding, which in the logic of the eighteenth century could only be based upon reason. A more precise look at contemporary as well as historical debates, however, shows that there indeed has been an at once enduring and sophisticated scholarly discussion about the function and relevance of emotion in law. The debate about law and emotion conducted in the USA but also in Germany since the 1980s has put the question of emotion once again back in the focus of investigations in legal studies and has spurred an interdisciplinary openness of the law towards research on emotion.[1] In accordance with current transdisciplinary emotions research, emotions are now conceived as complex processes

1 For a representative volume on the debate in the US, see Bandes (1999), for the debate in the 1980s in Germany, see Lampe (1985). For a more detailed account of current concepts of emotion as well as of the current law-and-emotion debate, see the introduction to this issue, 1–15.

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that involve cognitive, corporeal, evaluative, and voluntative aspects that, moreover, are socially and culturally formed (Bandes and Blumenthal 2012, 163). In the interplay of emotion and cognition, according to one underlying assumption, the former is just as irreducible as it is indispensable: »Emotion reflects reason, motivates action, enables reason, and is educable. This evolved view of human emotion provides a new baseline from which evaluation of judicial emotion may proceed« (Maroney 2011, 632). Alongside the conceptual determination of emotion, the current law-and-emotion debate has attempted to systematize the interface of the two. In addition to the fundamental epistemological relevance of emotion, Bandes and Blumenthal identify in their overview three points of intersection: first, the influence of emotion on behavior; for instance, when a crime is committed out of affect, such as rage or vengeance, which then has to be normatively adjudicated in the form of a verdict. Here emotions appear, secondly, as institutionally shaped by the law, insofar as in law certain emotions (such as remorse) are allowed or encouraged while others are sanctioned. Thirdly, emotions ultimately intervene in the formation of a judgment. This can be viewed as a threat to the non-partisanship of the judge, but also, as an assumed feel for the law, and hence an intuitive cognition and judgment, can lead back to the question of the epistemological connection between law and emotion. In dispute is »the appropriate role of emotion in the identification and implementation of legal norms in the deliberative process« (Bandes and Blumenthal 2012, 162). In the German-speaking context, such an epistemology of emotion and law is conveyed by the term *Rechtsgefühl*.

The debate in German legal studies over Rechtsgefühl and its methodological relevance is usually said to start in legal history with the pertinent writings by Gustav Rümelin and Rudolf von Jhering in the 1870s (Rümelin 1948; Jhering 1963).[2] Yet the notion of an epistemological relevance of emotion for the law is considerably older. First references to this term can be found in the writings of the criminal law expert Ernst Ferdinand

2 See the essay in this volume by Sandra Schnädelbach: »German debates on Rechtsgefühl in the late 19th and early 20th century as sites of negotiating the juristic treatment of emotion.«

Klein (1799) (*Ueber die Natur und den Zweck der Strafe*), in Johann Heinrich Pestalozzi's anthropological tract *Meine Nachforschungen über den Gang der Natur in der Entwicklung des Menschengeschlechts* from 1797, and in Heinrich von Kleist's play *Die Familie Schroffenstein* (1803). Yet, as we will show in what follows, even beyond its concrete terminological usage, Rechtsgefühl is variously present at the turn of the nineteenth century in legal, political, and literary texts, for instance, whenever a feeling for the law and its premises, a sensation of the law, or even a sense for legal forms is concerned. Accordingly, our argument is that the formation and conceptualization of Rechtsgefühl already starts at the end of the eighteenth century, and this takes place, as in the interdisciplinary perspective of the law-and-emotion debate adumbrated above, in an interdiscursive field of law, philosophy, anthropology, aesthetics, and literature.

The turn of the nineteenth century represents the period between Revolution and Restoration. Two tasks entered the focus of the law at this juncture: For one, there was the matter of the codification of positive law and the question of how to create a constitution, hence of the juridical forming of German territorial states as modern legal entities. Furthermore, legal studies began to conceptualize itself as an independent and systematic discipline. Both issues were linked to the overarching discussion about the nation (which did not yet exist in Germany as a political entity). Moreover, the self-reflection of legal studies as well as the question of how to interpret the national identity and law of the German states, arose out of the new understanding of history in the eighteenth century as a continual and primarily organic process. Complementarily, a new concept of emotion arose in the eighteenth century, most decisively in the discourse of philosophy. Conceived as an inner sense, emotion began to be regarded as an independent faculty (Franke 1981; Scheer 2001). In contrast to deterministic conceptions of affect, this concept of emotion was treated as not contrasted to but compatible with freedom. Similar to contemporary research on emotions, feeling in the eighteenth century began to involve cognitive, physiological, and voluntative parts and to be seen as equally informed by a socio-cultural process—although the eighteenth century did not yet have a fixed terminology. There was a

coexistence of designations such as *Empfindung* (sensation), *Sinn* (sense) or *Gefühl* (emotion) in German, of »sentiment,« »passion,« »inner sense« or »feeling« in English.[3] However, emotion became a central category of aesthetics and cultural anthropology as they conceptualized individual and collective processes of *Bildung*, in the double sense of formation and education (Vierhaus 1972, 508–23).

In light of this, it might not be a coincidence that *Recht* (law) and *Gefühl* (emotion) met around 1800 in the concept of Rechtsgefühl. Its formation is located at a more fundamental level: it reaches beyond the very concrete horizon of jurisprudence and the formation of legal judgment that is at the core of criminal law. At issue, we contend, is the genesis of law out of emotion, whether in public law (criminal or constitutional law) or in civil law. Since, around 1800, law is always conceptualized as referring to a political state and emotion as a faculty is conceived anthropologically, the focus thus becomes the relationship between the human being, the state, and the law. By means of Rechtsgefühl, the human being gets cast as always already related to the state, or more precisely, is projected as a citizen—with important ramifications. For alongside and against the assumption of an absolute sovereign, who is, as legislator, at the same time the author of the law, there emerges a notion of the law as generated out of the »emotion« of man. As a consequence, Rechtsgefühl can also serve as a political argument about law-making.

Thus, at the beginning of the nineteenth century, the connection between law and emotion was especially discussed at two particular sites: in legal studies and in the context of the political debates around 1815. This essay focuses therefore first on Savigny as an exemplary protagonist of legal studies and then turns to the romantic poet Ludwig Uhland, who, in a highly regarded lyrical cycle, commented on the dispute over the constitution of Württemberg. Although the constitutional dispute in Württemberg was a regional problem, it was discussed across regions. Moreover, in the nineteenth century, Uhland was considered to be the

3 With a view to current terminology, the German term *Gefühl* is in general translated as »emotion.«

third classical author of German literature alongside Goethe and Schiller. Savigny's and Uhland's positions on Rechtsgefühl can thus be read as representative for the period around 1800. Despite all their differences, they share, as we will show, central aspects of the discursive formation of Rechtsgefühl, including the origin of »emotion« in moral philosophy and aesthetics as well as the new conception of history as a continuous and organic process (Fröschle 1973, 122).[4] Prefacing these two parts is a discussion of the conceptualization, in the eighteenth century, of a normative feeling which is the condition for the emergence of Rechtsgefühl. We will start with Shaftesbury and Hume as two authors of the moral-sense debate to »discover« the relevance of emotion for moral judgment. Their take on moral philosophy reveals the decidedly normative orientation of emotion in the eighteenth century. We then describe Rousseau's coupling of law and emotion. For him, the love of laws goes by the name of a project for civic education that is necessary for the preservation of the republic. Finally, with Herder we find a concept, so important for the period around 1800, of a historically grounded cultural anthropology that enables the genesis of normative feeling to be thought as a collective process of cultural and historical formation.[5]

4 The link between law and emotion in the eighteenth century is a near desideratum in the humanities research informed by cultural studies. No comprehensive study exists to date. With regard to the period around 1800, almost all prominent German-language authors can be studied in this connection (for instance, Kleist, Adam Müller, Schiller, Goethe, Jean Paul, etc.), as can central debates in jurisprudence, such as the debate over juries. On the debate about Rechtsgefühl around 1800 from the perspective of literary studies, see Köhler and Schmidt (2015), Köhler (2013), Schmidt (2016).

5 The above-cited authors represent exemplary positions and stations that have contributed to the discursive history of the formation of Rechtsgefühl. However, listing them in this sequence implies neither a necessary development nor an uninterrupted continuity.

Normative feeling

»*I feel! I am*!« (Herder 1994b, 236; italics in the original).[6] In this programmatic reformulation of the Cartesian *cogito ergo sum*, an important discursive strand found its culmination in Johann Gottfried Herder's essay *Zum Sinn des Gefühls* (1769). This discussion started in the moral-sense debate of the first half of the eighteenth century and in its course promoted emotion to an inner faculty in its own right. As a sense of self, it became a primary mode of self-perception, and concurrently the point of origin and basis of subject formation.

An important juncture in the moral-sense debate is provided by Shaftesbury's conception of emotion as an inner sense between sensibility and reason. In *An Inquiry Concerning Virtue, Or Merit* (1699), Shaftesbury locates emotion in a space between nature and culture that casts emotion as a natural predisposition but also as open to socio-cultural and institutional (and hence also normative) molding (Baum 2001, 185–86). Striking in Shaftesbury's conception of inner sense is its self-referentiality. Inner sense, at times designated by Shaftesbury as »reflected sense« or »reflex affection« (Shaftesbury 1984, 66), describes an intuitive capacity for perceiving and ordering internal moods and affections. It thereby generates for the human being a representation or emotion of itself and is accordingly to be distinguished from concrete emotions such as love or sympathy. Essential for Shaftesbury, but also for the moral-sense debate as a whole, is the wish to separate morality from religion in order to ground it in emotion. *Moral sense* does not thereby merge with inner sense, but is to be understood as moral consciousness. In addition to emotion, it involves cognitive elements as well, namely the ability to judge. Emotion nevertheless retains a constitutive function, because the motivation to act morally first arises out of the emotions of pleasure or aversion. So without it, according to Shaftesbury, judgment would be rational and not moral (Sprute 1980, 228).

6 Unless otherwise indicated, quotes from the primary texts (by Herder, Rousseau, Savigny and Uhland) are translated by the authors and/or translator.

The conceptualization of a moral sense undertaken by Shaftesbury is then extended to the law by other authors of the moral-sense debate, for example Francis Hutcheson, Adam Smith, and of course David Hume. In his *Treatise of Human Nature* (1739–40), Hume initially regards emotions, in his terminology *passions*, as »reflective impressions« (Hume 2003, 181). In other words, emotion is understood, as it was with Shaftesbury, as a mental or reflexive achievement of the subject (Klemme 2007, 100–103), which is always intersubjectively conditioned and morally oriented (Demmerling and Landweer 2012). Remarkably, Hume assumes the existence of a »sense of justice and injustice« which he treats as a special instance of *moral sense* (Hume 2003, 311; see also Haakonssen 1989). This sense is not a natural but an *artificial* emotion, insofar as it presupposes the existence of a normative man-made order that, for instance, vouches for the security of property and the binding force of a promise. The point of reference for the sense of justice is thus less fairness and more the rules of positive law that human beings have given themselves (»*rules of justice* […] *establish'd by the artifice of men*« [Hume 2003, 311; italics in the original]). Compliance or violation of that order is sanctioned by the emotions of pleasure or aversion, which are more than mere private emotions. Through the conformity of actions to legal norms, legal norms themselves also become an object of intuitive knowledge.

The moral-sense debate was discussed intensively in the eighteenth century, also in political philosophy, and prominently in the work of Jean-Jacques Rousseau. The central point in Rousseau's political thought revolves around the question of how a state can be thought that provides for the natural freedom and self-determination of the human being. His famous answer in *Du contract social* (1762) points to a sovereignty grounded in the *volonté générale*. For Rousseau, the will of the sovereign is nevertheless tied to existing morals or a communal ethos, which is to say that, in the ideal case of a well-ordered state, moral tenets and positive law are congruent (Kersting 1994, 165–70). This becomes clear in Rousseau's classification of the different kinds of law (in a wider sense), which, alongside public, civil, and criminal law, includes, as the most important categories of all, morals or mores and custom. The laws

of custom are »graved in the hearts of the citizens« and form »the real constitution of the State« (Rousseau 1964b, 394). The »laws of the heart« are understood as a force that enlivens positive laws, i.e. morals and customs, and hence the hearts of citizens. They should also provide the foundation of law: in the ideal republic, legislation is invested with the task of transcribing felt law into positive law; it positivizes »what all have already felt« (Rousseau 1964b, 437). Thus regarded, the normative feeling of citizens advances to a source of the law. Yet for this to happen it must undergo socio-cultural forming. That is, human beings are ascribed a predisposition to feel law, but they nonetheless require education as national citizens (Riley 2001). Aim is to establish a positive affective relationship to community and to the legal order that makes citizens »love the fatherland and its laws« (Rousseau 1964a, 955).

One of the central theorists of emotion in the German-language context in the second half of the eighteenth century is the aforementioned Johann Gottfried Herder. While the issue of law, and thus the question of the connection between law and emotion, does not exactly occupy the center of his attention, the juncture between history and aesthetics does all the more. He takes up the thread of the moral-sense debate at the point at which inner sense combines the subject and emotion, and he treats intersubjective formation primarily as a temporal process, and thereby conceives temporality organologically as natural growth and change. Serving as a model for this thought is the contemporary concept of the organism, which takes as its point of departure a sensible and excitable body, and ascribes to that body a formative power (Matala de Mazza 1999). The process of cognition, as Herder demonstrates in his important text *Vom Erkennen und Empfinden der menschlichen Seele* (1778), occurs in the body, through a complex interplay of the subject's sensory/aesthetic and rational faculties that are systemically connected as a »feines Gewebe« (fine tissue) (Herder 1994a, 392).[7] This process originates in a »dunkeln Grund« (dark ground) (ibid., 355) of emotion. Herder's metaphor here reiterates the semantics, prevalent in eighteenth-century

7 On the aspect of the systemic in Herder, see Gaier (1998).

aesthetics, of the senses as a »dark« or »enigmatic« faculty of cognition that cannot be analytically accounted for but only phenomenologically described in its effects. Nevertheless, it stands at the origin of cognition on its way to »clarity« (ibid., 354).[8] This foundation is as indispensable as it is irrecoverable for cognition. Through emotion, the human gets identified as a cognitive being in a way that is always already aesthetic.[9]

The temporal moment in the formation of cognitive faculties comes into play when Herder describes this process as an interaction between the individual and the environment. To this end, he resorts to the theory of climate popular in the eighteenth century. In *Ideen zur Philosophie der Geschichte der Menschheit* (1784–91), he writes that all *Bildung* is »always and everywhere organic and climatic« (Herder 1989, 294). However, Herder operates with a very broad concept of climate that includes the cultural environment of the human being together with his/her upbringing and traditions (Fink 1987; Beller 2005). Individual *Bildung* is hence always adapted to collective formation, on both the synchronic and diachronic axes. Through the individual development of the faculties of cognition, collective history thus becomes internalized and perpetuated. Herder condenses this conception of a historically growing collective identity, in the sense of a communal feeling and thinking and the resultant morals and ways of life, in terms like »*Geist* der Völker« (*spirit* of peoples) (Herder 1994a, 368; italics in the original), »genius of peoples« (Herder 1989, 304), or »national character« (Herder 1989, 369). Herder's cultural anthropology comes to a head in these formulations, and they entail a political dimension that appears in Herder's reflections on the state: For the »most natural state« is »a people with one national character« (Herder 1989, 369). The juridico-political forms of cohabitation should, therefore, harmonize with the national (emotional) sense of self respectively

8 Herder's discussion of the dark foundation harkens back to Alexander Gottlieb Baumgarten (1714–62), who is considered the founder of aesthetics. For a situating of Herder in the anthropological-aesthetic discussions of the dark or enigmatic, see Adler (1988).

9 »All volition begins sure enough with cognition, but all cognition in turn only through sensation« (Herder 1994a, 361).

national character. According to Herder it is »futile« and »injurious« to want to »impose a *new doctrine and manner of thought* upon the unchanged stem of a nation's sensations« (Herder 1994a, 368; italics in the original).

The »legal capacity« of emotion (Savigny)

The connection between historical becoming and national law is explicitly at the center of the Historical School's understanding of the law. Underscoring the historicity of law, its authors criticize proponents of natural law for what they regard as arbitrarily seeking to deduce the law from reason, whether in the sense of systematic scholarly descriptions of the law, or through codifications based on precepts of natural law. The Historical School's treatment of law marks an essential milestone in the conceptualization of law as an autonomous scholarly discipline.

The most prominent representative—and relevant for the link between law and emotion—is Friedrich Carl von Savigny (1779–1861). Although his name stands paradigmatically for the systematic interweaving of law and emotion in the Historical School, he is only one among others to do so (Haferkamp 2009). The term »Rechtsgefühl« does not itself appear in his writings. And yet Savigny presupposes the necessity of a law that can be *felt*. That this emotion results in the conceptual assumption of a Rechtsgefühl becomes apparent, at the latest, when in the second half of the nineteenth century authors such as Gustav Rümelin or Otto Gierke use the term »Rechtsgefühl,« drawing on the Historical School and Savigny in particular, in order to grasp precisely this connection between emotion and necessity of law (Rümelin 1948, 5; Gierke 1983, 7–10). Emotion thus holds for the Historical School and Savigny a thoroughly privileged position, first of all with a view to the genesis of law, but also for the activity of jurists, i.e. in the »interpretation« of the law.

Savigny's writings are in multiple ways intertwined with their discursive context. His proximity to Romanticism has become a commonplace in the scholarly literature, not least because of the eminent significance of emotion (Rückert 1984; Nörr 1994). The epistemological potential of emotion, however, can only be distinguished in all its relevance when considered, as above, in a historical trajectory alongside the central theo-

rists of emotion in the eighteenth century. The other discursive strand that is constitutive of Savigny's conceptualization of law and stems from the eighteenth century is the organological thought linked to historicity. This concept of the organism enables the idea of the autonomous development of social sub-systems which remain at the same time members of an organic whole. As a consequence, an organic naturalness can be imputed to historical processes, resulting in a philosophy of history that models human history in stages. It thereby assigns emotion a special place in the faculties of cognition, which is itself situated prior to differentiation. Likewise, the notion of the organism enables history to be conceived in terms of diverse national developments, which are manifested in various »national characters,« but without renouncing the idea of a unitary humanity. Herder's concept of »national characters« is thus present in Savigny's thought, where peoples and nations are regarded as autonomous members of humanity that develop their own characters and emotions to the point of a national »Selbstgefühl« (sense of self) (Savigny 1959, 96).

The argument for the historical becoming of law nevertheless raises anew the question concerning the beginning of the law. Answers from natural law, which think the origin of law as an arbitrary postulate of a social contract, are ultimately inacceptable according to this new logic. The special status ascribed to emotion indirectly answers the question. For law emanates from emotion. Human beings, according to Savigny, have a need for order. Law corresponds to a »feeling of inner necessity« (Savigny 1840, 15). It is co-originary with morality and therefore translates the human need for normative order into legal provisions. In this way, it is closely interwoven with the »nature of human beings,« yet is not anthropologized in the process. It is, so to speak, an artificial prosthesis that is inherent to the seed of human »imperfection« (Savigny 1840, 332). For Savigny, too, the beginning of the law cannot be historically or analytically accounted for. Significantly, Savigny resorts to a semantics comparable to Herder's, when he describes this beginning as a »dark secret« [dunkles Geheimnis] (Savigny 1993, 182). Just how much these semantics became a topos of that time is revealed by the metaphorics

of authors such as the legal scholar Georg Friedrich Puchta or the Romantic Joseph von Eichendorff. Both place the beginning of the law in a »dark workshop« [dunkle Werkstatt] (Puchta 1893, 18; Eichendorff 1958, 357), in which emotion operates. In view of the semanticization of the lower cognitive faculties as »dark« by eighteenth-century aesthetics, it stands to reason that in the first half of the nineteenth century the law acquires an aesthetic basis in the dark or enigmatic beginning of emotion. Yet, and this is a central distinction, this aestheticization of law does not for Savigny result in a potent Rechtsgefühl for the individual. On the contrary, according to Savigny's organology, law can only be thought as communally produced. It has its »seat« (Savigny 1840, 19) in the spirit of the people (*Volksgeist*), and the actions of individuals are only expressions of it.

This notion of a natural, organic genesis of the law out of communal emotion has far-reaching consequences: for the status of law and legal studies, for legislation, and ultimately for the scholarly methods of legal studies. It leads to the assumption of the autonomy of law. Law does not only arise out of natural necessity, but perpetuates and renews itself in the course of social differentiation. The state in its function as sovereign legislator thereby becomes obsolete, in theory. Indeed, for Savigny it is the state's privilege to legislate, though not in the sense of an arbitrary act of sovereignty, but as the organic advancement of the law on the basis of interpretation. The generation of norms is conducted by the law itself. Savigny explicitly advocates this position in his text published on the occasion of the codification debate, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814). As arbitrary postulates and determinations by the legislator in the form of statutes, codifications are deleterious for the natural development of the law. The task of the state should rather be to ensure that the law »herrscht« (rules), that is, to »make the idea of the law regnant in the visible world« (Savigny 1840, 25).

The assertion that interpretation is the proper activity of the legislator leads to Savigny's methodological considerations. As it so happens, he does not distinguish categorically between the act of legislation, disciplinary reflections, and the application of the law, because they all proceed,

all differences notwithstanding, from hermeneutic acts. Savigny no longer considers the latter a mere exegesis of text passages, but rather a »freie« (free) and »geistige Tätigkeit« (spiritual activity) (Savigny 1840, 207; 210; 216), which, despite the systematic description furnished by Savigny himself, can be neither completely rationalized nor described. Hermeneutic understanding hence becomes for Savigny—even before the publication of pertinent writings by Schleiermacher—a comprehensive method that is concerned with grasping a part of an overall context that is both assumed and must be reconstructed. Thus, even a legal case or a single law are always to be considered against the background of the entire legal system and can only be understood within it (Meder 2004). Never can this overall context as a matter of principle be fully deciphered; it can only be »felt« (Savigny 1959, 84). Interpretation of law is, in this sense, for Savigny always also »Anschauung« (intuition) (Savigny 1840, 214), and thus an aesthetic or artistic activity. Considered systematically, what he had assessed for the original genesis of the law is repeated in his methodology: the operation of an emotion that cannot be further rationalized. Yet in the face of social differentiation, the universal validity of Rechtsgefühl can no longer be taken for granted, as Savigny does with regard to the genesis of law. He subsequently assigns it to the jurists, because in the socially differentiated world of law, they become the »representatives of the whole« (Savigny 1840, 46). On account of their profession, but especially thanks to their art of interpretation, they are regarded as the well-nigh »experts of emotion« in law.

With the empowerment of the juridical profession in matters of Rechtsgefühl, Savigny effectively completes the expulsion of Rechtsgefühl from the other subdomains of society. Just how much he makes a feeling for the normative order into an affair of specialists is revealed *ex negativo* in his systematization of civil law, which for him supplies the kernel of law (Haferkamp 2008). For the main function of law, according to Savigny, is to provide a territory for individual moral action. Without explicitly naming Kant, his moral philosophy serves as the model insofar as Savigny conceives moral action as free and autonomous action. This is then expressed in individual *Herrschaft* (rulership) (Savigny 1840, 333) over an

area of law and leads Savigny, in the logic of his system of civil law, to property law. A rulership of the law grounded in collective Rechtsgefühl and the spirit of the people is replaced by the perspective of individualistic interest. It is owing to this conception that Savigny's system of civil law is considered an expression of liberalistic bourgeois thought (Lahusen 2013, 122) that caters to individual wealth. With a somewhat differently oriented concept of morality, Savigny later explicitly entrusts the state, in his *System des heutigen Römischen Rechts* (1840), with the care for the indigent, because »in property relations the law rules fully, and indeed without concern for the moral or immoral exercise of a law.« The rich might »let the poor perish through a failure to offer support or through severe exercise of the right of the creditor« (Savigny 1840, 371). No longer does the idea of the law nor even the feeling for the common normative order guide action for those conducting civil law. The (socio-)political potential inherent to Rechtsgefühl—in the sense of a community-forming and regulating principle that could aim to serve as a base for popular sovereignty—literally gets lost in Savigny's writings in the process of social differentiation.

Sovereignty and Rechtsgefühl (Uhland)

In contrast, this dimension of Rechtsgefühl is entirely present in the writings of Ludwig Uhland (1787–1862), even despite the fact that, as a contemporary of Savigny's, he shares the connections to Romanticism and hence also thinks the genesis of law and state organologically (Fröschle 1973, 122). In Ludwig Uhland, we find an historical person who personally occupied the fields of law, literature/aesthetics, and politics interwoven in Rechtsgefühl insofar as he was an educated jurist and literary author, later also a literary scholar, and of course a prominent politician, at first during the Württemberg constitutional dispute as speaker of the political opposition, later as representative of the Assembly of Estates and of the National Assembly in 1848. His lyrical cycle *Vaterländische Gedichte* (Patriotic Poems), highly regarded not only by contemporaries, should be read against this background as a literary intervention that constructs out of Rechtsgefühl a political argument against authoritarianism and political arbitrariness. With the foundation of law in an aesthetics of

emotion, the subject—or in the emphatic diction of that time, »man«—becomes the point of departure and foundational moment of political and juridical community. Uhland's lyrical cycle articulates a bourgeois self-conception and engagement for political emancipation at the beginning of the nineteenth century that is generated out of Rechtsgefühl.[10]

The *Vaterländische Gedichte* were published successively between 1815 and 1819.[11] They explicitly inscribe themselves into the political context of their time, i.e. into the Württemberg constitutional dispute and the realignment of political relations after the wars of liberation. At the center of this manifesto-like cycle is the invocation of the »old right« as well as the admonition to an unnamed prince that law is a »common good« which flows in every human being as »the source of its lifeblood« (Uhland 1980, 64–65, 75). While, to be sure, the patriotism of the *Vaterländische Gedichte* applies to the »German« in general, the concrete frame of reference is tightly bound with Württemberg, namely the attempt by Friedrich I to introduce a new constitution for Württemberg in 1815.

After the alliance with Napoleon, Württemberg was elevated to a sovereign kingdom, which Friedrich I organized in an absolutist manner, in contrast to the previous constitution dating from the sixteenth century, when Württemberg was still a duchy. With the so called Treaty of Tübingen from 1514, the provincial estates (*Landstände*) had been guaranteed extensive privileges and above all a say in the raising of taxes, the military, and

10 As prominently received as Uhland's *Vaterländische Gedichte* were among contemporaries, they are all the less singular in the first half of the nineteenth century in their »activation« of Rechtsgefühl for political (and national) identity. Along with Uhland's historical dramas *Ernst Herzog von Schwaben* (1817) and *Ludwig der Baier* (1819), it can be found, for instance, in Wilhelm Hauff's historical novel *Lichtenstein* (1826) or in Ferdinand Freiligrath's lyrical cycle *Ein Glaubensbekenntnis* (A Confession of Faith; 1844), to name just a few authors and texts.

11 The sequence and compilation of the poems varies according to edition. In the edition of his writings used here, the poems are arranged in the order in which they were ascertained as having been written. The last poem, »Hike« (Wanderung), was not written until 1834 and is markedly distinct in both tenor and theme.

in juridical authority, so that the reigning duke could not rule independently.[12] The Treaty of Tübingen thus established a dualism of territorial ruler and estates which lasted into the eighteenth century. In contrast to the other two large states of the Confederation of the Rhine, Bavaria and Baden, enlightened absolutism was not able to make its way into the Württemberg of the eighteenth century. Rather, a strong (urban) bourgeois civic tradition dominated the Württemberg corporative state, as the nobility had been for the most part subordinate directly to the Kaiser since the sixteenth century, and alongside the bourgeois estate only the prelates were part of the corporative representation. By drafting a constitution, Friedrich I sought to undermine the Vienna Congress' aspirations of once again establishing provincial estate constitutions as part of a federal constitution. The new constitution aimed to modernize the state in its administrative structures and, in the process, to abolish the corporative organization. Friedrich's plans for modernization would have eliminated the participation of the bourgeois-dominated estates in matters of government, which had been legally guaranteed for centuries (Grawert 1988; Fröschle 1992; Fröschle and Scheffler 1980). It did not take long for the political resistance to mount and take up the cause formulated as a demand for a re-instating of »old right.«[13] Yet the position of the proponents of old right should not to be interpreted as solely anti-modern and reactionary on the basis of its recourse to historical law and opposition to Friedrich's modernizing aspirations, as Uhland's response, among others, shows (Fröschle 1992; Arbeiter 2006).

12 Strictly speaking, the Treaty of Tübingen is not a contract but an imperial arbitration verdict, which sets forth that the disputing parties must again agree. On the historical legal context and significance of the Treaty of Tübingen, see Sydow (1991) and Schmauder (2008).

13 For the significance of the »old right« in the political history of Württemberg, see Hölzle (1931). In the dispute over the constitution of Württemberg, the argumentative recourse to the »old right« was able to gain such relevance because in Württemberg, in contrast to the majority of other states in the Rhineland Confederation, the Code Civil was never introduced, not even temporarily or in modified form. See Fehrenbach (1978, 13).

Uhland's *Vaterländische Gedichte* are thus to be situated in this historical and political context. Not only do they articulate a politically motivated critique of the constitution and the attendant disempowering of the provincial estates, but, as will now be shown, they also base this critique on an aesthetically grounded popular sovereignty that emanates from Rechtsgefühl. The genesis and publication of the individual poems are aligned with concrete events and make use of relevant contemporary medial possibilities for their dissemination, most of all, the song as an oral form, as well as the newspaper, the pamphlet, and of course the letter, as written forms. From today's perspective, these poems appear as part of a transregional media debate that transpires in the form of counter-poems and replies in newspapers and letters.

The *Vaterländische Gedichte* are comprised of fifteen poems. The first one is titled »Am 18. Oktober 1815« (On the 18th of October 1815). The date, which indicates a day of commemoration, sets the agenda. In an almost narrative tone, the first stanza sketches the historical situation: the »battle of nations« has been »fought,« the country is liberated, the »foreigner« has yielded, etc. With the exception of the date marked by the title, the dedication, and the locating of events on »the German plain« (Uhland 1980, 63), more precise indications of historical reference are not provided. Following this miniature history is an appraisal of the situation marked by the absence of »old right.« »Oppression's traces still remain« (Uhland 1980, 63) in the country: »And many a sacred right of ours/That breathes 'mid ruin, we must save« (Uhland and Platt 1848, 109). This is of course an implicit allusion to the constitutional dispute. The second stanza then clarifies the context: how it came to be that the old right has not been reinstated. The relationship between people and ruler, which had been built on trust and reverence, is fractured, according to the first and short part of the answer. With the second part of the stanza at the latest, it becomes clear that the relation of people to prince is based on mutual recognition, that it must be made in »love and faith,« and not one-sidedly decreed by the prince, because the »German« is by nature »free.«

Wo Liebe fehlet und Vertrauen
Und Eintracht zwischen Volk und Herrn.
Der Deutsche ehrt' in allen Zeiten
Der Fürsten heiligen Beruf,
Doch liebt er frei einherzuschreiten
Und aufrecht, wie ihn Gott erschuf. (Uhland 1980, 63)[14]

In the »historical depiction« of the first and second stanzas, a political partisanship comes to word that claims the law for itself, that is, for the side of the people, because it is based on freedom. If the relationship between prince and people is revealed as one of voluntary recognition, then it would seem to be modeled on the social contract of natural law.

After, in a manner of speaking, recent history has been »told« and the present situation has been diagnosed, the third stanza forcefully raises the question concerning the future. This occurs in the form of an appeal to those present, who are addressed as representatives of the people: They should step forward as »champions of the law,« erect it once again »auf dem alten Grund« (upon the old foundation) and in this way act »im festen Bund« (in firm association). To be sure, in the context of law and the constellation of freedom and harmony laid out in the previous stanzas, this talk of association (*Bund*) is semantically reminiscent not only of a communal act, but again of the juridical institution of contract. However, through the arrangement of the stanza, the rhyme establishes a narrative logic linking the association or *Bund* to the old *Grund* (foundation), so that this proves to be not merely a theoretical concept of natural law, but a historical right:

14 Translation: »When love and faith unite not truly / The people and the people's lords. / On princely rights, the boon of heaven, / The German ne'er profanely trod; / But still he loves the freedom given / The form erect bestow'd by God« (Uhland and Platt 1848, 109).

So wirkt auch ihr im festen Bunde
Ihr guten Hüter unsres Rechts!
Ihr bauet auf dem alten Grunde
Das Wohl des künftigen Geschlechts. (Uhland 1980, 63)[15]

The old law evoked in the poem, which was at issue in the constitutional dispute and would have again contractually guaranteed the representation of the provincial estates, was ultimately based on the Treaty of Tübingen. At the same time, the reference to »association« summons a specific community of a »we,« which is projected nationally in the first stanza in demarcation to foreigners (France), and is in the second pit against the disloyal and arbitrarily operating princes, as a community of free bourgeois citizens.

The first stanzas of the opening poem thus lay out, with allusion to the historical situation, the theme of a threatened right, which is decisive for the entire lyrical cycle, together with its semantic context of patriotism and natural as well as historically warranted freedom. Moreover, the missing referentialization implies an exaltation, which universalizes the notion of law evoked in the poems. A law is constructed that exceeds the immediate context and that receives its legitimation from history as well as from human nature. The poem »Am 18. Oktober 1815« is dominated by metaphors drawn from the fields of architecture and archeology, describing cities, ruins, building, digging, etc. When in the last stanza the »seeds are swelling« (Uhland 1980, 64), it becomes clear that for Uhland, too, the law is »living« and likewise has its metaphorical »roots« (Uhland 1980, 68) in the organism concept already identified for Herder and Savigny. No longer are the historical and natural evolutions of the law in opposition. On the contrary, this law »will take root / In German domains all over« (Uhland 1980, 75–76)—and it arises in an almost Savigny-like fashion out of the spirit of the people: »I follow the honest sense / The people dare avow« (Uhland 1980, 68).

15 Translation: »'Tis thus, in firm association, / Ye faithful champions onward press / To rear upon the old foundation / A future race's happiness« (Uhland and Platt 1848, 110).

For Herder and above all for Savigny, the organism concept stands in for the assumption of a process of differentiation and autonomization that was taking place around 1800, and of course included the law. It corresponds for Uhland in the talk of a »good old right,« which takes on a life of its own and to which the second poem of the same name is dedicated. Considered rhetorically, »Das alte gute Recht« (the good old right) makes use of personifications that enable the law to become an agent who levies taxes, organizes the military, etc.: »The law which modestly imposes taxes […] / The law which gives to every freeman / Weapons in the hand« (Uhland 1980, 65). The poem lists precisely those rights of co-determination which were guaranteed to the provincial estates by the Treaty of Tübingen. It thus proceeds exactly as the opening poem: the historical constellation is evoked through allusions on the level of content but without concrete indications of historical reference. When the right then also »decrees laws / that no arbitrary power may break« (Uhland 1980, 65), it teams up conceptually with Savigny's autonomously normative force that is inherent to the law and is fed by necessity. For Uhland though, a community-founding potential resides in this normative force of law that transforms Savigny's collective »sense of self« into patriotism: »The right […] / which by one sweet bond of love / Unites him to his own« (Uhland 1980, 65).

The subsequent poems offer variations on this theme in form and content: as prayer, as address to the representatives of the people, as New Year's wish, etc. The provisional conclusion of the lyrical cycle is supplied by the prologue to Uhland's tragic drama *Ernst Herzog von Schwaben*, dated 1819, which was performed on the occasion of the celebration of the establishment of the Württemberg constitution. In October of 1819, an agreement over the constitutional dispute was made, and a constitutional monarchy with a bicameral system was instated. Unlike in many other German states, the constitution was not decreed from above, but was based on a contract in conformity with the »old right,« and it again guaranteed important rights to the provincial estates (Grawert 1988, 155; Fröschle 1992, 306).

The apex of the cycle, from the perspective of Rechtsgefühl, is provided by the poem »Nachruf« (Obituary), which appeared two years before as a reaction to the provisional dissolution of the Assembly of Estates by King Wilhelm I. Manifesto-like, the position of the absolute sovereign, together with his monopoly of law, is called into question in order to then recall that the right to legislate is only ever transferred contractually to a sovereign (Uhland 1980, 75). And yet law does not originate in contract, but in the human being:

> Noch ist kein Fürst so hochgefürstet,
> So auserwählt kein ird'scher Mann,
> Daß, wenn die Welt nach Freiheit dürstet,
> Er sie mit Freiheit tränken kann,
> […]
>
> Die *Gnade* fließet aus vom Throne,
> Das *Recht* ist ein gemeines Gut,
> Es liegt in jedem Erdensohne,
> Es quillt in uns wie Herzensblut.[16] (Uhland 1980, 75) [17]

As already was the case with Rousseau and Savigny, law is here grounded in the nature of the human being. Conversely, every individual participates in the production of the law. This constellation, consisting of individual Rechtsgefühl as source of the law on the one hand, and of the equality and freedom valid for all on the other, leads to law only being able to

16 Like many other verses by Uhland, the last one of this stanza has become a dictum that could be cited without verification—by among others Gustav Rümelin (Rümelin 1948, 20).

17 Translation: »No prince is so supremely first, / No king so high a stand can take, / That if the land for freedom thirst, / Unaided he that thirst can slake. […] Though from the throne sweet *Mercy* flows, / Yet *Justice* [Recht/law] is a common good, / In every son of earth it glows, / It runs in every vein like blood« (Uhland and Skeat 1864, 99). Platt's translation of *Vaterländische Gedichte* does not include the poem »Nachruf.« Therefore, we rely here on the translation by Skeat which translates the poems rather freely. The poem »Nachruf« is entitled »The Charter« in Skeat's translation.)

enter into life through agreement. It is an agreement, however, that comes from emotion. The connection between emotion and law is already couched in the metaphor of the heart in the poem »Nachruf,« and it finds its continuation in the image of the handshake undertaken »treulich« (faithfully), in which the production of the law by the heart becomes its communal foundation:

> Und wann sich Männer frei erheben
> Und treulich schlagen Hand in Hand,
> Dann tritt das Recht ins Leben
> Und der *Vertrag* gibt ihm Bestand. (Uhland 1980, 75)[18]

Unlike for Savigny, the production of law does not harken back to a communal force, but remains individualized for Uhland. That human beings resemble one another in their Rechtsgefühl is provided by their organically-grown collective identity, in Herder's terms, their »national character.« Yet they do not fully converge with the latter. From a juridical perspective, the notion of a »contract« in which individual civil rights are preserved, ensures the integrity of the individual. By means of the contract, in fact, law is always bound to the community through the Rechtsgefühl of the individual. For Uhland, Rechtsgefühl proves to be an eminently political category, which ultimately relocates legislative competency, and hence sovereignty, from the prince to the people, or more precisely to the individual citizen. At stake in the *Vaterländische Gedichte*, and hence in the constitutional dispute read through the lens of the cycle, is thus a popular sovereignty that is founded on Rechtsgefühl and harbors a democratic principle. It is only consistent that this aesthetic foundation of sovereignty finds expression in a lyrical cycle, which in turn presents itself in the style of a lyrical manifesto. In Savigny's writings, this political dimension is not so obvious. He first assigns Rechtsgefühl the function of a guiding principle of cultural history in his reflections on

18 Translation: »And when for freedom heroes [Männer/men] strive / And faithfully join hand in hand, / The justice [Recht/law] proves itself alive— / A Charter [*Vertrag*/contract] makes it surely stand« (Uhland and Skeat 1864, 99).

the genesis of law and then a systematic function in his expositions of the methods of jurisprudence. Nevertheless, when he entrusts jurists with the further development of the law, this implies a political position that should not be underestimated with regard to the sovereignty of the state and the importance of the juridical profession. Despite all the differences, both Savigny and Uhland propagate Rechtsgefühl as a productive and irreducible moment of the genesis and practice of law which is typical for the debate around 1800. Both correspondingly conceive the human being as always already a citizen, and in relation to the state. For both Savigny and Uhland, the state must, for its part, take this Rechtsgefühl into account and accommodate it, whether by entrusting the further development of the law to the »expert emotion« of jurists, or by institutionalized participation of citizens.

These are fundamental constellations that still define the link between law and emotion today—aside perhaps from the decidedly national anchoring of Rechtsgefühl. The anthropological argument in particular, which was so important for the eighteenth century, could pave the way for a transnational theory of Rechtsgefühl (Rorty 1966). Savigny and Uhland, however, do not provide one. Due to their historical and political circumstances, their focus understandably lies elsewhere.

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The jurist as manager of emotions

German debates on Rechtsgefühl in the late 19th and early 20th century as sites of negotiating the juristic treatment of emotions[1]

Sandra Schnädelbach, translated by Adam Bresnahan

Writing in 1914, the well-known German jurist Gustav Radbruch took up the longspun cultural narrative of Western tradition that connects law with reason and places emotions in a juridical danger zone (Maroney 2011): When thinking about law, Radbruch (1914, 344) wrote, what first comes to mind is »ponderous reasoning, sharp will, but certainly not warm feeling.« During the 19th century, law had become more and more codified and juridical practice standardized through rules of procedure (Raphael 2000). During this period—whose measure of scientificity was founded on the separation of reason from feeling (Jensen and Morat 2008, 12)—a »new type of scientific objectivity« (Daston and Galison 2002, 30) gained footing, not only in the legal field, but in many sciences.

It is thus all the more notable that German jurisprudential thought at the end of the 19th and beginning of the 20th century dedicated itself intensively to questions of emotion, namely to the constitution of Rechtsgefühl. Multi-faceted and difficult to translate, this concept's spectrum of meanings ranges from an innate feeling for justice or an inner moral sense to a trained feeling for the written law and for legal right. It is also related to the process of making a judgment in a case, understood as a juridical intuition or hunch. Even concepts like *Rechtsbewußtsein* (consciousness of

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justice) and *Gewissen* (conscience) were used synonymously with the term.[2] Despite this multitude of meanings, the concept was discussed under the category of »feelings« in the late 19th and early 20th century, and was evaluated with concepts and terminology commonly used at the time for defining emotions. Precisely that makes the notion particularly interesting from the perspective of the study of the history of emotions.[3] At the term's core is not only the question of how emotion and law are related to one another, but also the question of how both should be defined. On the one hand, debates on Rechtsgefühl gave emotions an epistemological function; while on the other hand, the debates addressed the influence emotions have on human thought and action, in particular within court proceedings and juridical decision-making.

Viewing emotions as an epistemological category had become popular in the 18th century, when philosophical trends like sensualism, moral sense philosophy and Romantic philosophy exerted a decisive influence on broader understandings of what an emotion is. During this period, justice was »felt« and thus translated into emotional categories (see the contribution in this volume by Köhler and Schmidt »The Enigmatic Ground: On the Genesis of Law out of Emotion in the Writings of Savigny and Uhland«). But just as jurisprudence changed, the sciences that defined emotions also underwent radical shifts up through the 20th century. Philosophy and theology lost their positions as leading disciplines, while 19th century medicine, with its focus on physiological and neuronal processes, gained in influence. Along with this, physiology and psychology developed into independent disciplines with considerable powers of interpretation (Landweer and Renz 2008, 3–15; Frevert 2011, 264; Dixon 2003).

2 About usages of the term, see Rümelin (1925, 3, 6). In a broader sense, Rechtsgefühl can even be connected to the Greek and Roman concepts of *epieikeia* and *aequitas* as well as to the discourse of natural law. See Sykora (2011, 5–13); Hubmann (1962).

3 For a theoretical background of the history of emotions see Reddy (2001).

This historical background provides the context for my analysis of texts that deal with Rechtsgefühl from the fields of legal philosophy and legal theory.[4] The paper will chart the shifting understandings of the relation between law and emotions in the late 19th and early 20th century and show how conventional ways of interpreting emotions changed not only the definition of Rechtsgefühl, but also its position in juridical practice. Could a jurist consult his Rechtsgefühl when making a judgment? Should he? Was he permitted to do so? Historical debates on the meaning and practical use of Rechtsgefühl can be viewed as sites where the juristic treatment of emotions was negotiated. In the end, jurists were supposed to approach their emotions in a way that made them something like »managers of emotions,« a concept that draws on the work of the sociologist Arlie Russell Hochschild. Hochschild described how strategies and practices of shaping (producing, altering, or suppressing) one's own emotions have acquired an exchange value in the service economy as well as in the private sphere. He speaks of a »currency of feeling« (Hochschild 1983, 18). As I will show, the jurist of the 19th and early 20th century—at least as depicted by source texts—can be considered the manager of emotions *par excellence*. His currency of feeling would thus not be part of the service economy, but rather would have an exchange value within the bourgeois world of jurisprudence. Viewed in this way, the social roots of the concept of Rechtsgefühl become clearer: what is negotiated with this currency is the jurist's occupational as well as social status as a bourgeois man. However, this social status begins to erode in the years around 1900, while at the same time the debates on Rechtsgefühl put contemporary concepts of masculinity on trial.

Rechtsgefühl as innate drive: Gustav Rümelin

One of the first texts dedicated to the concept Rechtsgefühl was written by Gustav Rümelin. Chancellor of the University of Tübingen with a background in theology, Rümelin held an honorary doctorate in jurisprudence.

4 This essay is based on research for my PhD thesis, which will broaden the topic and source material, drawing on, among other things, court sources.

As an educator, he focused on topics in sociology, psychology, and jurisprudence; legal philosophy was a central element of his pedagogical work (Mann 2005, 224; Wolf 1948, 41–44). In 1871, Gustav Rümelin held the speech »Über das Rechtsgefühl« before his colleagues at the University of Tübingen. Here he addressed the question of the origins of law, which he thought were to be found in a feeling, namely Rechtsgefühl. He defined Rechtsgefühl as an »unwritten natural law and law of reason that we bear within ourselves.« For him, it was a normative measure possessed by all humans that made it possible for them to differentiate between right and wrong. An innate human capacity, it was »something that drives us, a force in us« (Rümelin 1871, 5, 11).

This description gives us a good idea of Rümelin's general understanding of feelings. He saw them as effects of inner drives that affect the body in the form of a »dark, indeterminate impulse« (Rümelin 1871, 12). Rechtsgefühl, which in Rümelin's conception stems from an innate »justice drive« (*Rechtstrieb*), is thus equated with the »feeling of an unconditional ›ought‹« (1871, 11). It follows an inner force that strives towards the »good,« and is the motor of the social development of law.[5] The notion of a *Rechtstrieb* directed towards an ideal has its roots in the jurisprudential thought of the influential early 19th century German Historical School of Law. The key thinker of this school, Friedrich Carl von Savigny—some of whose formulations Rümelin adapted almost verbatim—does not speak of a »Rechtsgefühl« per se. Nevertheless, he did deduce the law from the »inner, silently working forces« (Savigny 1814, 79) of human beings. According to him, these forces give rise to a sort of collective »spirit of the people« (*Volksgeist*), a force that pushes the development of law forward by spurring people to follow a »feeling of inner necessity« (Savigny 1814, 76; Rümelin 1871, 5). Of key importance for Savigny was the idea that humans had an inner drive to be logically consequent and consistent, a drive that was determined in advance by nature and that made the »organic« development of law possible (Coing

5 The term *Rechtstrieb* thus includes not only the notion of a »justice drive« but also the notion of a »drive to do what is right.«

1973, 153). Similarly, Rümelin also maintains that the metaphysical »idea of the good« is the »ethical root« of Rechtsgefühl (1871, 12–13).

New in Rümelin's conception is the way he questions the precise functioning of these »inner forces.« In the early 19th century, conceptions of the drives and inner forces remain within the purview of Romantic theories of the organic whole, thus drawing on ideas from holistic medicine and the pathology of the humors. But the late 19th century saw the birth of new models. Following developments in the natural sciences, ideas of vital principles and inner life forces were gradually supplanted by mechanical models and causal stimulation-reaction schemata (Harrington 2002, 37–41; Schiera 1992, 60). Traces of this paradigm shift can also be seen in Rümelin's thesis: Moving away from metaphysical speculation, he tried to give a functional explanation of Rechtsgefühl by developing a hierarchy of human drives in which Rechtsgefühl also had its place. Rümelin's model corresponds with mid to late 19th-century theories of emotions, which, as already mentioned, were strongly influenced by mechanistic trends in the natural sciences. These theories gradually carried over the concept of drive—originally conceived of as the moving force of human action—to the semantics of emotions. Following contemporary physiology, emotions were no longer thought of as inner cognitions, but rather as a flow, triggered by physiological stimuli (Eitler 2011, 101–7; Mertens 1998, col. 1492). Thus Rümelin appropriated both old and new concepts in describing Rechtsgefühl as an inner, natural force that followed a metaphysical good, while tracing its roots to mechanical/physiological notions of »stimuli« and »flows.« Accordingly, Rechtsgefühl was defined as a stimulation effectuated by the inner force of the *Rechtstrieb,* and could thus be placed in relation to other emotions in a hierarchical model.

Rümelin's hierarchization of the drives led to a hierarchization of emotions, which in turn functioned as a way of categorizing emotional intensities. Rümelin (1871, 8–9) separated the »animal drives«—equivalent to »burning passion«—from the »human drives,« which he saw as »gentler [and] milder,« as connected to a feeling »of another, purer, higher sort.« The tumultuous drives, which »dominate and dictate« humans as if they were »attached to invisible strings,« were seen as being common to both

humans and animals. But it was precisely the »ethical drives« of humans that differentiated them from animals (Rümelin 1871, 7). The widespread moralization of drives and emotions and the distinction between lower drives and higher emotions were often used as criteria for the differentiation of man and animal (Perler 2011; Frevert 2011, 267; Eitler 2011). But the appearance of Charles Darwin's *On the Origin of Species* in 1859 (German 1860), which reduced all living beings to the same ancestors and the same composition, made qualitative differentiations between man and animal seem anachronistic (Eitler 2011, 111). Darwin's theory of evolution posed a challenge to contemporaneous concepts of emotions in general and, with them, to Rümelin's Rechtsgefühl in particular, which was defined by such a distinction between man and animal.[6] In contrast to Darwin's theory, Rümelin (1871, 8) understood human nature as naturally fixed, given, and unchanging.

A closer look at Rümelin's hierarchical model and the position of Rechtsgefühl in it shows that he believed the *Ordnungstrieb*, or »drive to order« played a significant role in the system of human drives. For Rümelin, the human *Ordnungstrieb* is the root of all higher drives, out of which the *Rechtstrieb*—and thus by implication the Rechtsgefühl—is derived. As part of the *Ordnungstrieb*, Rechtsgefühl serves to balance and hierarchize the drives (Rümelin 1871, 6). But Rechtsgefühl had more than this structuring function. Differing from the »passive« emotion of sympathy, for instance, Rechtsgefühl was characterized by activity. It was primarily manifested in »outrage and indignation« when rights were violated, and was accompanied by a compulsion to take direct action. Rechtsgefühl thus approached a sort of feeling of righteousness, which, however, was not viewed as detached from other emotions. *Mitgefühl* (compassion, literally »feeling with«)—in contrast to the passive *Mitleid* (sympathy, literally »suffering with«)—was also of considerable significance for the makeup of Rechtsgefühl: it fostered Rechtsgefühl and was at once »condense[d] and transfigure[d]« by it (Rümelin 1871, 12–13).

6 On the problems of German interpretations of Darwin, see Gliboff (2008).

In summary, for Rümelin, Rechtsgefühl is part of a hierarchically organized model of the drives. According to his theory, law develops »naturally« out of this system. Specific concepts of »nature« and the »nature of man« thus form the foundations of Rümelin's views on law. The law, he thought, had its origins in Rechtsgefühl, a *Rechtstrieb* innate in every human being.

Rechtsgefühl as corporeal emotion: Rudolf von Jhering

Only one year later, in 1872, Rudolf von Jhering, a teacher of civil law, held a speech entitled »The Struggle for Law« that was highly respected by contemporaries and subsequently translated into 18 languages.[7] Jhering can be counted among the best-known, most influential personalities of 19th century jurisprudence. But despite the fact that Rümelin's and Jhering's speeches were held only a year apart from one another, their basic assumptions and points of reference starkly diverge. Rümelin and Jhering agree that Rechtsgefühl was a fundamental pillar of law and of society itself, and they concur on its guiding function for human actions. But Jhering substitutes the »naturalness« of the law's origins in Rechtsgefühl with the fulfillment of Rechtsgefühl through conflict in the courtroom. Jhering completely discards Savigny's notion of organic growth to which Rümelin still subscribed. He sees law not as the reign of a »quiet working power« (Jhering 1915, 7), but rather as a »continual struggle« (ibid., 6–7) of »restless striving and working« (ibid., 2). Jhering invests this notion with positive connotations: in his conception, Rechtsgefühl carries with it an imperative to actively shape the law. Law could only develop in society if it was felt, if it was taken seriously as a guide for individual action. For this reason, Jhering pleads insistently for the active cultivation of Rechtsgefühl in private and in public life. The state, too, has the »urgent duty« to »nourish the powerful Rechtsgefühl in every possible

7 The source material for this text was taken from the original speech (1872) as well as the extended written version entitled *Der Kampf um's Recht* ([1872] 1897), the English translation of which, *The Struggle for Law* (1915), is primarily quoted here.

way« (Jhering 1872, 122). For Jhering, the instinct for self-preservation is manifested in Rechtsgefühl:

> The preservation of existence is the highest law of the whole living creation. It manifests itself in every creature in the instinct of self-preservation. Now man is not only concerned with his physical life but with his moral existence. But the condition of this moral existence is right, in the law. In the law, man possesses and defends the moral condition of his existence—without law he sinks to the level of the beast […]. (Jhering 1915, 31)

This quote pointedly demonstrates how strongly Jhering—in opposition to Rümelin—appropriates and productively deploys the language of evolutionary biology. The similarity of the speech's title, »The Struggle for Law,« with Darwin's »struggle for existence« thus appears to have been more than a marketing ploy. Jhering, as was common at the time, repeatedly draws on models from the natural sciences (Coing 1973, 153; Treiber 1998, 170–74). Contemporary scholars have shown that jurisprudence in particular shows a »tendency towards appropriating this type of ›transfer knowledge‹« (Treiber 1998, 173). The »exact« sciences, with their promise of precision and objectivity, underwent a leap in popularity during the second half of the 19th century and advanced to become the lodestar of contemporary scientific culture (Tanner 2008, 38). Consequently, the category of »emotion« gradually became a somatic category (Hitzer 2011, 135).

This shift can be clearly seen in Jhering's text, which defines Rechtsgefühl in biological terms. Rechtsgefühl expresses itself through a »moral pain« (Jhering 1915, 28), which in a sense is a corporeal means of knowledge acquisition. Rechtsgefühl can thus serve as a substitute for mental knowledge; it is a sort of corporeal knowledge, a »gut feeling«:

> [W]hat do the people know of the right of property, of contract as a moral condition of the existence of the person? Know? They may know nothing about it, but whether they do not feel it is another question; and I hope that I shall be able to show that such is the case. What do the people know of the kidneys, lungs, liver, as

> conditions of their physical life? But every one feels the stitch in the lungs, or a pain in the kidneys or liver, and understands the warning which it conveys to him. Physical pain is the signal of a disturbance in the organism, of the presence of an influence inimical to it. […] The very same is true of the moral pain caused us by intentional injustice, by arbitrariness. (Jhering 1915, 41)

Jhering develops a »pathology of Rechtsgefühl« (1915, 60). He uses the oppositions of »healthy« and »vigorous« vs. »blunted,« »diseased,« and »apathetic« to characterize Rechtsgefühl[8] (Jhering 1915, 103, 98). According to him, Rechtsgefühl can become decayed and blunted, and thus always needs to be practiced and trained (ibid., 41–42, 49). As opposed to Rümelin, Jhering (1884, 17) does not hold the view »that nature gave human beings special equipment,« as he stated in his 1884 speech »Ueber die Entstehung des Rechtsgefühles« (On the origin of Rechtsgefühl). For this reason, there can be no innate drive out of which Rechtsgefühl simply develops. Even instincts, as the natural sciences had shown, were malleable and acquired through experience (Jhering 1884, 28). Going against the current of popular opinion, Jhering connects the insight that Rechtsgefühl is not given at birth with ideas drawn from the natural sciences; for example, he uses the image of »ethical spores« that »float in the ethical air surrounding us« and that we breathe in from childhood on (1884, 43). For Jhering, Rechtsgefühl is thus a »historical product« (ibid., 19). Accordingly, the forces that stimulate Rechtsgefühl can vary historically as well as along lines of »class« and class interests (Jhering 1915, 3, 10, 46).

For Jhering, Rechtsgefühl has the irreplaceable function of making the law reality. There can be no functioning law without this energy, without this emotional connection. Without this feeling, rationality would be impotent: »The power of the law lies in feeling, just as does the power of love; and the intellect cannot supply that feeling when it is wanting« (Jhering 1915, 61).

8 On discourses of »health« and »illness« in Jhering's time, see Brink (2009), which also goes into the popular reception of Jhering's *Kampf ums Recht*.

The Rechtsgefühl of the jurist as the foundation of the law

For Gustav Rümelin as well as for Rudolf von Jhering, Rechtsgefühl stands at the center of a functioning legal order and society. But what consequences was this supposed to have for jurists? If Rechtsgefühl is so central for the law, must the judge, for example, call upon his Rechtsgefühl when making a judgment?

Rümelin thought that the practical relevance of this emotion lies in the role it played in the genesis of law. For him, it was important to demonstrate that law is not only made by jurists, but has its origins in a »natural« Rechtsgefühl. Nevertheless, because of its growing complexity, the law needed trained jurists to interpret and apply it. And for their part, jurists need more than just their Rechtsgefühl: »Nobody will ever be able to deduce a single law from Rechtsgefühl alone« (Rümelin 1871, 18). For Rümelin, Rechtsgefühl serves as an ever-present guide and a reliable warning signal, but it can be quickly overburdened by the complexity of life, necessitating »relief from a logical-technical element.« The problem for the jurist thus lies in the fact that an appeal to his Rechtsgefühl seems necessary, but is at the same time made almost impossible by the complexity of life and law (Rümelin 1871, 19). One solution is for the jurist to »stay in touch with the Rechtsgefühl of the people« (ibid., 20). The jurist is thus supposed to allow his Rechtsgefühl to be supported and guided by that of the community. This also applied to the professional judge, for whom Rümelin makes a sharp distinction from others whose work demands they draw upon their Rechtsgefühl, such as lay judges. Rümelin in no way claims that the »undeveloped and naïve Rechtsgefühl« of the average person was comparable with the »trained and practiced« Rechtsgefühl of the professional jurist (1871, 28). While judges need to have a connection to the people's Rechtsgefühl in order to make sound judgments, they nonetheless possess a better Rechtsgefühl. The judge's Rechtsgefühl is an educated Rechtsgefühl, which can nevertheless be easily overburdened by the ever-increasing complexity of the law.[9]

9 Rümelin does not go into the ways this qualitative emotional connection is supposed to take place. As drives and emotions are in principle unchang-

Rudolf von Jhering holds a wholly different position on the practice of the jurist: He pleads *for* the inclusion of Rechtsgefühl, and precisely for a »strong« Rechtsgefühl of a »simple nature« as opposed to the »degraded form of Rechtsgefühl« found among those trained in law (Jhering 1872, 129–30). Jhering diagnoses an emotional deficiency in juridical professionals that had its origins in their focus on abstract legal rules.[10] The law has »gone through the filter of learnedness; the learned man does not feel himself to be like the man of life, the practical man« (Jhering 1872, 127). Jhering thus makes use of a common thread of contemporaneous juridical and legal criticism, namely the idea that German jurists are detached from life (Ormond 2000). As opposed to Rümelin, Jhering is concerned with the actualization of the law, which includes its application by the jurist. He wants »to make a place for a concrete, simple Rechtsgefühl in our contemporary institutions« (Jhering 1872, 130). The jurist's Rechtsgefühl needs to be cultivated in order help shape the laws themselves, because contemporary law, according to Jhering (1897, 74–75), does not support Rechtsgefühl and thus allows it to become dull. Only »in the form of an emotion, of direct feeling« can the true meaning of the law first appear (Jhering 1915, 61). As the focus on reason, abstraction, and rules corrupts and weakens Rechtsgefühl*,* Jhering demanded that jurists consciously orient themselves towards a »healthy,« »powerful« Rechtsgefühl, defined as an emotional tie to the law.

Putting bourgeois masculinity to the test

To get a clearer idea of the place Rechtsgefühl was given within juristic practice, it might be useful to take a closer look at the social status of jurists in the late 19th and early 20th century. The various conceptions of Rechtsgefühl and its functions were influenced by the social background

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eable for Rümelin, one can presume that he understood them as being refined through their intellectual treatment.

10 In the published version of the speech Jhering states more precisely that it was not the jurist's level of education in itself, but rather the shape the law took and its level of abstraction that has a retroactive effect on the »health of the Rechtsgefühl« (Jhering 1872, 44).

of those writing and of those whom they were writing about: male representatives of a bourgeois culture with its own codes of emotional behavior. Legal historians have often viewed debates on juristic methods as a political tactic of jurists to position themselves in their relation to the state.[11] However, if one shifts the focus to the role of Rechtsgefühl, it becomes clear to what extent juridical debates have been historically characterized by questions of honor, masculinity, and, bound up with these concerns, the idea of a well-balanced emotional life.

As far as their social background goes, jurists of the German Empire as well as of the early Weimar Republic were a fairly homogenous group. The majority of German jurists came from the families of high-ranking civil servants, families embedded in the values of the educated bourgeoisie (*Bildungsbürgertum*). Many were sworn into the behavioral norms of bourgeois life at university in the popular student organizations (Rottleuthner 1988, 148, 156; Frevert 1991, 139; Möller 2001, 64). The ideal of orienting oneself towards an »unchangeable identity as citizen, man and human« was central in this constellation (Frevert 1991, 181; Ringer 1990, 83–90). This identity also included one's profession: the profession and personality of a bourgeois man were seen as an amalgam (Kondylis 1991, 41). Consequently, the behavioral norms of private life spilled over into professional life and vice versa. During the 19th century, the *Bildungsbürgertum* in particular—a social strata that included jurists—experienced a rise in social status. Central to the mores of the *Bildungsbürgertum* were practices and attitudes based on notions of honor that were, for their part, shaped by the growing significance of military culture in the German Empire. The elevation in social standing brought with it the need to publicly demonstrate one's mastery of behavioral norms and the moral integrity of one's person (Frevert, 1991, 87, 98; Ormond 1994, 561–62).

Training and respecting Rechtsgefühl as a »question of moral self-preservation,« in Jhering's formulation, has its place here. For Jhering, Rechtsgefühl is thus a motivating factor not only in the maintenance of a functioning legal order. The defense of individual interests and social status

11 See Ogorek (1986); Ormond (1994).

also goes hand-in-hand with the cultivation of Rechtsgefühl and the active defense of the law. Central to Jhering's argumentation is the idea that Rechtsgefühl makes it possible for everyone to take part in the formation and propagation of the law. And, concurrently, obliges them to do so (Jhering 1872, 117). In a sense, Jhering sees every person as a personification of the law by virtue of their innate Rechtsgefühl. Because the law is »a part of the person, it emanates from the person; […] it is, so to speak, an extension of my powers and personality, I myself am it« (Jhering 1872, 119). If the law is personified in every human—that is, every man—then the »struggle for law« becomes a way of demonstrating one's status.[12] For Jhering, the »order of civil life« would be destroyed if one did not defend the sense of justice fostered by Rechtsgefühl (1915, 75). Jhering's argumentation revolves around the polar categories of courage and cowardice, which allowed him to invest Rechtsgefühl with relevance for the whole of society and connect it to emotionally laden questions of honor and respect (1872, 117–30). The cultivation of Rechtsgefühl[13]—to be demanded of everyone, in particular of jurists—is equated with the development of character, making it a touchstone of »manliness« (Jhering 1915, 131). For Jhering, Rechtsgefühl is thus a category formational for both character and masculinity.

In the 19th century, this connection between the treatment of emotions and the formation of the masculine personality is not at all unusual. The superabundance of behavioral guides in this period shows that a balanced approach to emotions was seen as something through which the bourgeois man had to prove himself (Kessel 2000, 173). Domination of one's emotions functioned as a means of distinction, both between the sexes as well as in the context of defending one's social position (Kessel 2000, 167, 173). The debates on Rechtsgefühl can thus be viewed as sites

12 The concept of property is closely bound up in this, a concept central not only for Jhering's argumentation but for the propertied bourgeoisie to which Jhering belonged.

13 Jhering does not provide details on the ways this cultivation might take place, but it is clear that it is contingent on a well-founded understanding of essential values, such as property.

where a specifically masculine, juridical treatment of emotions was negotiated. Exemplary in this respect is Gustav Rümelin, for whom the »correct« treatment of emotions is essential to the masculinity of a jurist, and of a judge in particular. This idea becomes clearest in the conception of the female sex he developed in an 1880 speech on Rechtsgefühl. The essence of women, according to Rümelin, cannot be brought into harmony with juridical judgment because »the peculiarity of the female spirit […] lags behind [that of men] in its sense for law and justice.« Women lack the necessary emotional control, and thus »impartiality.«[14] »The female sense of justice,« according to Rümelin (1880, 38–39), is »the ideal, naïve sense of justice […], led by immediate emotional impressions,« whereas the male sense of justice is the »realistic, rational, empirically schooled and trained form of justice.« And only he who keeps his feelings in check also has his Rechtsgefühl under control.

However, the disciplining of feelings so important for bourgeois self-understanding is in no way a simple suppression of emotions. It is precisely the co-existence of emotional control and well-rationed passion that are definitive for the 19th century masculine culture of emotions (Kessel 2000, 157–58). This is manifested, for instance, in Rümelin's demand for a precise, rational treatment of emotions. In his definition of Rechtsgefühl as an expression of the *Rechtstrieb*, Rechtsgefühl stands in a relation of mutual determination with other emotions: it feeds on compassion while being held distant from »dangerous,« meaning too intense, emotions. Rechtsgefühl, Rümelin writes, is »only a tender feeling« and thus has »a difficult time standing up against the impulse of burning desires« (1871, 16). In contrast to Jhering, in Rümelin's conception Rechtsgefühl is distinguished from the »furious« emotions. It is defined not by passion, but balance. Precisely this ability to dominate one's emotions turns Rechtsgefühl into »trained Rechtsgefühl,« making it a hallmark of the good jurist. Through the successful management of

14 Although at the time women were attributed with a higher emotional sensibility, this was often due to the common idea that women's capacity to think logically was inferior to that of men. On notions of gendered emotionality, see Borutta and Verheyen (2010).

emotions according to bourgeois emotional codes, the judge can prove both his professional capability and his masculinity.

The turn towards the judge: The early 20th century

When reading the texts on Rechtsgefühl composed during the early 20th century, one sees that the lines of inquiry and points of departure underwent a marked shift. In contrast to the texts written in the early years of the German Empire, which grappled with the genesis and essence of law, the role of the jurist now took center stage. With the introduction of the *Bürgerliches Gesetzbuch* (the German Civil Code) in 1900, and the political challenges posed by the Weimar Republic later on, questions about the function and application of law and legal practice acquire a new significance (Wilhelm 2010, 322, 599; Ortmann 2008, 413). These questions are also discussed in debates on Rechtsgefühl.

One sign of the shift of focus towards judicial judgment in jurisprudential discourse is the rise of the so-called *Freirechtsbewegung* (Free Law Movement), which focused on the subjective aspects of judgment and which became influential in jurisprudential circles, both nationally and internationally (Wilhelm 2010, 600–603).[15] But supporters of Rechtsgefühl were directly countered by its vehement opponents, who decried it as a feeling that »unconsciously« misled jurists, claiming that it was the »holy duty of the judge […] to never allow the voice of his personal Rechtsgefühl […] to come to the surface« (Bülow 1906, 94–96). Max Rümelin's 1925 speech »Rechtsgefühl und Rechtsbewußtsein« serves as a good example of the shape of these debates and demonstrates the challenges faced by jurists of the time. In this speech Max Rümelin, son of Gustav Rümelin and a professor of civil law, grappled with the question of whether Rechtsgefühl should guide a judge's actions. Despite the change of

15 Although these theses were not in any way epistemologically novel, as the subjective elements of judgment had already been conceptualized beforehand, the *Freirechtsbewegung* nonetheless gave the topic of the »subjective element of will and emotion« a new significance. The *Freirechtsbewegung* even had some adherents outside of Germany, exerting a particular influence on the American Legal Realists.

circumstances, Rümelin's central argument in one area shows continuity with the positions of his Imperial predecessors: The successful management of emotions, including Rechtsgefühl, stands, he claimed, at the heart of understanding how a »good« judge is to be defined. New, however, was the context in which this judicial emotional work played itself out. According to Rümelin, it was precisely the judge who had the task of facing the great challenges of his time. He believed these challenges lay in the subjectivist and relativist trends that he saw not only in the field of law, but also in society in general. For him, these trends called into question the possibility of universally binding values and were the illnesses of an epoch that found itself in a state of decay (Rümelin 1925, 59). In response, Max Rümelin defended his belief in historically shifting, but nevertheless temporarily objective ethical values. He held to the idea that these universal values manifested themselves in a people's consciousness (*Volksbewußtsein*) accessible to the jurist (Rümelin 1925, 63, 72–74). The greatest thing a judge could accomplish was to have a feeling for this consciousness in such turbulent times.

Max Rümelin's image of society exemplifies the general crisis of confidence in bourgeois culture at the beginning of the 20th century (Kondylis 1991, 54). The focus on practicing jurists is intensified by the feelings of uncertainty dominant in the legal world itself. Even in the years of the German Empire, German jurists experienced a loss of prestige: An ever-growing number of university graduates flooded the market, the professionalization of the university and the strengthening of new disciplines caused jurisprudence to call its self-understanding into doubt, and judges in particular considered their profession undervalued (Treiber 1998, 174; Ormond 1994, 563; Röwekamp 2011, 193–96). Along with the structural transformation of the legal system came a loss of certainty among jurists that affected not only their professional, but also their social status. The defeat in World War I contributed to this sense of uncertainty. In particular, the relation between the people and the legal apparatus had fallen into a »crisis of trust« (Kondylis 1991, 56–57; Wilhelm 2010, 323). In the Weimar Republic, these shifts intensified and led to the further destabilization of the social position and values of the bourgeoisie (Jensen and

Morat 2008, 26). One crucial factor was the suffrage movement. The struggle for social equality also aimed for the inclusion of women in the administration of justice, a demand that contemporary, exclusively male judges vehemently protested. Only at the end of the 1920s were women allowed to become judges.[16] In the Weimar Republic, the majority of jurists still held the opinion that a woman was not suited to be a judge because of her »peculiar mental composition, which makes her subject to the influence of emotions to the most extreme degree« (Stadelmann 1921, 199).

Thus, it seems that the debate on the judge's Rechtsgefühl began to gain steam at a time when the bourgeois model of society began to erode, a time when the bourgeois man, and thus the bourgeois jurist, began to lose ground both in his social legitimacy and in his understanding of himself. Parallel to this debate, the question of the judge's treatment of emotions became ever more pressing.

Rechtsgefühl through strength of will: Max Rümelin

According to Max Rümelin, one of the most significant representatives of civil law in the early 20th century, only a well dominated Rechtsgefühl could master the trials and tribulations of the era. Nevertheless, he was not in complete favor of Rechtsgefühl. In fact, he attempted to perform a difficult balancing act in his speech: On the one hand, he pointed out the dangers of a subjectively determined turn towards Rechtsgefühl, but on the other hand, he spoke of the necessity and omnipresence of this feeling during the act of judging. Differing from his father Gustav Rümelin and from Rudolf von Jhering, whom he named as his predecessors in thought on Rechtsgefühl, Max Rümelin was able to reference newer works that dealt specifically with the topic.

In contrast to his father, Max Rümelin rejects the idea of an innate *Rechtstrieb* as the origin of Rechtsgefühl. Rather, he views Rechtsgefühl as a mix of innate principles of the will and cognitive elements, such as concepts of

16 On varying opinions of who the »first female judge« was and the year she assumed her office, see Röwekamp (2011, 453–54).

law, which are historically and culturally variable (Rümelin 1925, 16, 25–27). The models drawn from medicine and evolutionary biology that Jhering deployed give way to other points of reference: more important for Max Rümelin are the insights of psychology and the »volatile theory of emotions,« which define emotions as effects of the will (1925, 12–13n6).

At the beginning of the 20th century, the quickly ascending field of psychology, which had absolved itself of philosophy and become an empirically-based discipline, exerted a powerful influence on theories of emotions. Notions of inner force no longer served to explain human emotions (Jensen and Morat 2008, 22; Stöckmann 2009, 490). This helps to explain the shift that Max Rümelin's definition of Rechtsgefühl took. He relied on the research of the legal psychology of his time,[17] which among other things emphasized the relation between emotion and cognition. The »idealism« still attached to Rechtsgefühl in Jhering's work became a secondary matter. The categories of will, intellect, and cognition now carry more weight and open new lines of argumentation for the legal theory of the early 20th century. As a legal psychological study by Erwin Riezler explains, the judicature strove towards a level of precision and certainty that was often seen as opposed to emotions and to Rechtsgefühl. He claims, however, that the intellectual aspects of Rechtsgefühl had often »been overlooked« (Riezler 1921, 151).[18]

Nevertheless, the emphasis on emotions, according to Max Rümelin (1925, 78), harbors the danger of opening the flood gates for their »overpowering influence« in judicial praxis. At the same time, Max Rümelin is conscious of the fact that judicial decisions are often value judgments that can only be made through »intuition« or »feeling« (1925, 43). According to him, judgments are formed in two steps: the primary, central process of cognition is followed by the emotional, or—used

17 See Kübl (1913); Riezler (1921); Maier (1908); Sturm (1910). On the intersection of psychology and jurisprudence, see Schmoeckel (2009).

18 This does not mean, however, that there were not similar theories in legal philosophy before. They simply did not find their way into juridical doctrine. See Ogorek (1986).

synonymously by Max Rümelin—intuitive act of evaluation, which he often describes as a »lightning-like flash.« Rechtsgefühl marks the end of the process of evaluation. In the ideal case, that evaluation would correspond with the evaluation of society as a whole, a correspondence whose likelihood would increase in correlation with the »the brilliance of the personality of the judge« (Rümelin 1925, 54–57). Max Rümelin thus demands that the judge have a feeling that bordered on genius for the needs and views of his time and society. The judge's social sensibility thus came to serve as a norm against which his capacity to exercise his office could be measured.

Max Rümelin agrees with the idea that the capacity of Rechtsgefühl to aid in making judgments »can be practiced and developed, but also suppressed, disrupted and misled« (1925, 15). For him, Rechtsgefühl is not something inherent in all humans to the same degree, but rather a disposition that could be intentionally developed both by culture and by the individual. This aspect of Rechtsgefühl is more extensively connected to the concept of character than is the case with the other authors examined. For Max Rümelin, »temper and character« are just as important as intellect for the good judge. But how was »character« supposed to manifest itself in a judge? Max Rümelin thought it was primarily expressed through the judge's approach to emotions. According to Max Rümelin, specialized knowledge could not stand alone: »love of law and love of others must step into the foreground, along with the feeling of inner involvement in the fates of those to be judged.« For him, the judge's capacity to »place himself in the others' shoes, experiencing the sufferings and joys of all involved« is a cornerstone of Rechtsgefühl. The one forming the judgment must be able to »feel his way into« the situation of others. He views this capacity as a key emotional competence, even for the professional judge. Nevertheless, he believes it must be trained: »It is not as if the judge should give himself over to the impulse of sympathy. He is not permitted to do this any more than he is permitted to follow the emotions of rage and anger. It is precisely these emotional impulses that he must learn to overcome.« Max Rümelin thus attributes »a strong

and certain Rechtsgefühl« only to him who did not allow himself to be led into error by these emotions (1925, 76).

The notion of the judge as a »manager of emotions« appears here most clearly. It is no doubt a complex task to strike a balance between the emotions that foster judgment and those that hinder it, between the use of emotions and the suppression of emotions. In Max Rümelin's words, it demands not only »practice,« but also involves »strength of will,« while »lack of self-control« poses the greatest danger (1925, 78). In Max Rümelin's perspective, Rechtsgefühl thus serves as a sort of filter. An emotion that is based on a conglomerate of emotions, it must be intentionally cultivated. However, reason has to keep it separate from other emotions. For Max Rümelin, the complex emotional competence demanded of a judge thus forms the core of what he calls »strength of character« (1925, 80).

Conclusion: The jurist as manager of emotions

The texts of the early period of the German Empire considered here place a strong focus on the law and its genesis, whereas the texts of the early 20th century focus on the question of whether Rechtsgefühl might serve as a guide for the actions of jurists. As this paper has tried to show, many different influences played into the shifting conceptions of Rechtsgefühl. First, structural changes in the legal sphere brought forth the need to rethink the foundations of jurisprudence. These influences compelled jurists to pose questions about Rechtsgefühl, its role in the formation of law and—in the 20th century—the role it played in the methodical application of the law in the act of judgment. The focus of the texts thus shifted from the examination of Rechtsgefühl as a general human capacity to the conceptual specification of the judge's Rechtsgefühl. Secondly, shifts in the sciences influencing jurisprudence also influenced concepts of emotions and of Rechtsgefühl: Models of fixed inner forces were called into question by evolutionary biology, while psychology's volitional theories of emotions offered new approaches that produced various, historically specific conceptions of Rechtsgefühl. Finally, social factors had an impact on the way the individual conceptions of Rechtsgefühl were shaped, in particular in those cases where its relation to the judge

was analyzed. During the late 19th and the early 20th century, bourgeois values and morals increasingly became an object of criticism. And the jurist, as a classic representative of this social class, was increasingly open to attack. These criticisms were aimed at bourgeois scientific traditions as well as bourgeois mores in general, both of which were closely related.

Thus although thoughts about the function and effect of Rechtsgefühl and its role in juridical practice greatly diverged, they all concurred on one point: namely that emotions had to be managed by the judge in one way or another. The »correct« treatment of Rechtsgefühl demanded the management of emotions, and the capacity to do so became a test of character that the jurist had to pass. At the beginning of the 20th century, the judge himself moved to the center of the debate. The erosion of bourgeois values and morals reinforced the interest in Rechtsgefühl and the »correct« management of feelings. From Rümelin senior to Rümelin junior, the fight for the appropriate treatment of emotions can be seen as a fight for prestige on multiple levels: Despite their diverging conceptions of the proper way to treat Rechtsgefühl, it is at every moment clear that this special emotion poses a difficult task for the judge. Whether he succeeds or fails at this task serves on the one hand as a measure of the quality of his professional work, and on the other as a measure of his bourgeois character, and thus his masculinity.

It is precisely the combination of both levels—the investment of professional abilities with dimensions of bourgeois, masculine character formation—that seems to have made the topic of Rechtsgefühl so important around the turn of the century. In this light, the office of the judge appears as a *professionalization* of the tests on the proper treatment of emotions that the bourgeois man of the 19th and early 20th century had to pass. The judge had to prove himself an able manager of emotions.

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Tropenkoller

States of agitation and mood swings in colonial jurisdiction in the German colonies

Ulrike Schaper

> That these circumstances and the burdensome, muggy climate affect the reasoning and the feelings of Europeans who come from different zones is a fact well recognized by medical experts, which in my disciplinary procedure should have received the same consideration it has always received in the Foreign Office, without thereby creating […] a thorough easing of state-officers' discipline. (Leist 1896, 270)[1]

With these words the former vice-governor and chancellor of the German colony Cameroon, Heinrich Leist, commented on a disciplinary procedure in which he was accused of »having ordered disobedient negro women to be chastised with a whip and, secondly, to having mingled closely with so-called deposit-women« (Leist 1896, 259)—in other words, of having raped detained African women.

The corporal punishment ordered by Leist in 1893 was part of a wider trend of physical violence directed against the colonized population. Such violence was executed not exclusively, but to a large extent, by colonial officials. However, in this specific case, the German public reacted with indignation, not least because the punishment Leist had imposed resulted in a rebellion led by a group of African police soldiers married to the beaten women. Though Leist was not prosecuted, he was transferred for disciplinary reasons, and later, in 1895, dismissed from civil service

1 All translations by the author unless otherwise noted.

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altogether by the higher court.[2] In his commentary on the trial, cited in part above, Leist first attacked flaws in disciplinary procedure. He argued that the experts consulted lacked the necessary knowledge of the situation in the colonies. Secondly, in conclusion he emphasized the personal sacrifices he had made in the colonies and apologetically added »that under the tropical sun, one is inclined to take actions that one abstains from at home« (Leist 1896, 270).

Leist's argumentation was part of a wider discussion on the effects of the climate in the colonies, in which the term Tropenkoller (roughly translated as colonial frenzy or madness) played a central, often legitimizing role. Tropenkoller and its relation to other tropical diseases was discussed by medical experts.[3] It featured in literary and satirical texts and was invoked by the press when commenting colonial officials' wrongdoings. Research has tackled the different contexts in which the phenomenon of Tropenkoller has been discussed, contexts that tended to foster and shape one another. In this way we have learned much about the extent to which Tropenkoller was used as a form of apology for violence as well as about the gender and sexual implications of Tropenkoller—for example its close links to concepts of masculinity and the ways in which it was associated with both perversion and sexual relations between the colonizers and the colonized (Schwarz 2002; Besser 2003; Besser 2004; Besser 2013; Bischoff 2013; Maß 2013).

This article draws upon and extends this research, analyzing the functions of Tropenkoller within a wider discussion on colonial jurisdiction and associated questions of how the colonial state was to function and

2 Discontent with their wages was a further motivation for the rebellion. The police soldiers were ex-slaves who had been purchased by the German government in the West African kingdom of Dahomey and had been obliged to work off their purchase price (see Rüger 1960). On the scandal surrounding Leist, see also Walz (1981, 59–75).

3 For the colonial genesis and racist implications of the concept »tropical diseases,« which uses a geographical marker to differentiate a complex of disorders from other illnesses that remain geographically unmarked, see Gerlach and Hornscheidt (2010).

how colonial law was to be administered. In seeking to complexify the understanding of Tropenkoller as an apologetic concept that served to downplay violence in the colonies, I am predominantly interested in the problem that the actions of certain colonial officials—actions linked to Tropenkoller—posed for the colonial power apparatus. Consequently, medical discussions on different causes for Tropenkoller remain as secondary to my argument as discussions on the relation between Tropenkoller as used colloquially and diagnoses of tropical neurasthenia or of aberrations as a result of malaria, which, in contrast to Tropenkoller, were at the time perceived as medically sound.[4] My analysis includes the discussion on different forms of states of agitation, even if the term Tropenkoller was not used in the particular situation and the coeval medical literature referred to malaria or tropical neurasthenia rather than Tropenkoller.

The problems Tropenkoller caused for colonial authorities had much to do with its close connection to emotionality. Examining how Tropenkoller was situated within the colonial legal and political order thus also aids the systematic exploration of the role allotted to the emotions connected with Tropenkoller in colonial jurisdiction. My analysis is centered on a discussion of the causes and legitimacy of emotions such as anger and feelings of mental overload, the expression of these emotions as well as their respective characterizations and valuations, and, finally, the role attributed to these emotions in relation to law and the exercise of colonial jurisdiction. On this basis, I seek to demonstrate why colonial authorities perceived these emotions—or more importantly the uninhibited expression of these emotions—as a danger to jurisdiction. My analysis thus contributes

4 In the context of a general discourse on neurasthenia as a nerve related condition, tropical neurasthenia was constructed as a weakness of the nerves that occurred almost inevitably when Europeans stayed in the tropics for a longer period of time, a weakness that often lead to insanity (Besser 2013, 68). Besser interprets the wide conviction that tropical neurasthenia was medical truth as an effect of the ambivalence of Tropenkoller. He argues that the emergence of the frowned-upon term Tropenkoller and its exclusion from medical knowledge helped to substantiate tropical neurasthenia (Besser 2013, 65).

to research on Tropenkoller as a concept in colonial discourse as well as to the history of emotions, more specific the relation between law and emotions. It seeks to demonstrate how emotionality was constructed as the opposite of reason and rational action in a specific historical situation.

To explain my usage of the term »law« and the background of the debates on Tropenkoller, I shall first sketch the legal situation in the colonies. From the mid-1880s, the German Empire had claimed protective sovereignty (*Schutzherrschaft*) over different territories in Africa and Asia and in so doing entered the circle of European colonial powers. At first, the German government modelled their colonial administrations after the British governance of India—favoring to transfer political and administrative authority to trade organizations. Yet as time passed, the Germans began building up a state administration in the colonies that was also increasingly responsible for jurisdiction over the colonized population. Whereas in 1886 the Law Concerning Legal Relations in the German Colonial Protectorates (*Gesetz betreffend die Rechtsverhältnisse der deutschen Schutzgebiete*) introduced German law for Europeans living in the colonies, no such law was put into effect for the colonies' indigenous populations until the end of German rule.[5] After the turn of the century, the colonial administration in Berlin tried to tie colonial penal jurisdiction more closely to the German criminal code and even initiated the drafting of a colonial criminal code. But they did not succeed in their attempts (Schaper 2012, 138–40). Thus, in colonial criminal jurisdiction, administrative officials had great leeway. They often imposed severe sentences—particularly in the form of forced labor in connection with corporal punishment—which were justified by racist arguments. Officials had to decide cases that in German law were considered civil law cases on the

5 Riebow and Zimmermann (1892, no. 15). The Law Concerning Consular Jurisdiction (*Gesetz über die Konsulargerichtsbarkeit*) from 1879 provided German consuls with jurisdiction over Germans abroad under certain conditions. The law concerning legal relations in the protectorates extended the regulations for consular jurisdiction to the colonies, stating they should be maintained for all Europeans. Thus German civil law, criminal law, procedural law, and the constitution of the courts were also to be applied to the colonies as far as they were relevant for consular jurisdiction.

basis of local laws—however in doing so they were admonished not to apply uncivilized legal practices. Therefore, the legal basis on which officials were forced to base their decisions was never more than vaguely defined.

In addition, jurisprudence often merged into administrative decisions. Officials themselves did not always have a clear understanding of whether their decisions were to be made in their role as an administrative official or in their role as a judge, as they assumed both offices in one person (Schaper 2012, 136). In the inner territories of the colonies, which had rarely been developed by the colonial administration, outposts were often manned by military personnel without legal training (Hausen 1970, 97, 124).

Thus law as a normative structure bound to formalized procedures and its enforcement with the help of government coercion is less important for my analysis. Similarly, the instances of conflict resolution and punishment that form the background of this discussion seldom resembled classical conceptions of formalized court procedures. Rather, drawing on approaches from the sociology of law, I refer to law as the product of those individuals who were occupied with enacting legal regulations and exercising jurisdiction, as well as the sum of all effects these actions produced (Rehbinder 2000, no. 43). Law is therefore a changing, culturally-specific, manmade construction that develops in relation to social power structures and interests. In my analysis, law is relevant above all as a specific institutional practice and its importance is in relation to its ascribed authority. From the perspective of the colonial power, this authority was based on institutional preconditions and on its execution by people commissioned by the state. Under the term court decision I therefore include all arbitrations presided over and punitive measures commanded by colonial officials in the name of the law.

In the following article, I will first trace the emergence of the term Tropenkoller and the discussion of its possible causes in order to then examine how the relationship between Tropenkoller and emotions was conceptualized. Subsequently, I will examine the extent to which associations with emotions or uncontrolled expressions of emotion made Tropenkoller a problem for the conception of colonial rule. I will demonstrate that through Tropenkoller, individual misconduct was perceived to

coincide with the constitution of the colonial state. Finally, I will analyze the measures proposed by colonial authorities to eliminate Tropenkoller from colonial jurisdiction and, in doing so will argue that these measures constituted a form of institutional tropical hygiene.

The emergence of Tropenkoller

The discussion on the effects of the climate in the colonies on Europeans came to gain new meaning in the context of various colonial scandals that occupied the German public between the mid-1880s and the mid-1900s. The scandals concerned acts of violence committed by individual colonial officials. In the mid-1890s, in the context of these scandals, the term Tropenkoller emerged (Besser 2013, 49). The term took up older notions that a foreign environment and climate could influence both the body and the psyche (Frank 2006, 173), and as a disarray of mind and emotions, the idea of Tropenkoller served as a justification for excessive violence committed under its alleged influence.

Leist's case was but the first of many similar scandals that were to plague German authorities and that were widely discussed, both in the German public and in the Reichstag.[6] Within these debates, Tropenkoller remained an unspecific concept characterized primarily by states of agitation caused by »hygienically harmful moments, which are active in the tropics« (Werner 1920, 689). Medical literature contributed to this discussion with descriptions of possible causes and symptoms as well as with general reflections on the effect of tropical climates on Europeans.[7] The classification of Tropenkoller as a disease was contested from the term's

6 On colonial scandals, see Bösch (2011, 142–46); on scandals as an object of an entangled history of colony and metropole, see Habermas (2013).

7 Fears that Europeans in the tropics degenerated culturally and socially and medical reflections on the effects of tropical climates on the nerves were not unique to the German context. Similar concepts such as »going native« and »soudanite« existed in Great Britain and France as well. For a comparison of British and German discourses, see Bischoff (2010, 63); on the different medical concepts of nervous conditions in the tropics, see Neill (2012, 67–68).

conception, with most medical experts remaining skeptical on the question (Brero 1905, 211; Mense 1902, 22–23; Besser 2004, 303). They mostly understood Tropenkoller—if in a given case it did have medical dimension after all—as a colloquial term for the state of agitation that occurred as a consequence of neurasthenic illness (tropical neurasthenia) or as a symptom of another disease such as malaria (Plehn 1906, 250–51; Scheube 1900, 649–50).

In those scandals in which colonial officials or members of the *Schutztruppe* (colonial military) had perpetrated violence in connection with trials or punishment, discussions centered on the extent to which the deed was connected with the perpetrator's mental state in the climatically and socially unique situation. This was for example the case with the last scandal discussed in reference to Tropenkoller during this time. It centered around the actions of Prince Prosper von Arenberg, lieutenant of the *Schutztruppe*. Arenberg had tortured a so-called *Mischling* (a descendant of a white and a non-white parent) and, on the basis of an alleged confession, had him brutally murdered. In his retrial at a military court in 1904, the main focus of the investigation was Arenberg's mental state—most notably the possibility of medical side effects caused by malaria and his consumption of alcohol in connection with the climate—both factors which were also often discussed as possible causes of Tropenkoller. Arenberg was ultimately discharged on the basis of insanity and referred to a psychiatric hospital as a patient with a curable mental illness. The question of the extent to which Tropenkoller eroded sanity, diminishing accountability, added a juridical dimension to the discussion on Tropenkoller. Most medical experts negated the question. However in cases of extreme acts of violence perpetrated under the influence of tropical neurasthenia or malaria, which in their perspective had physical or nerve-related causes, they referred the question of juridical consequences to legal experts.[8]

8 Brero (1905, 211); Alsberg (1913). However, Plehn argued that penalties should be slighter for deeds committed under circumstances related to what was known as *Tropenkoller* (Plehn 1906, 251).

A second, less medical and more socio-emotional explanation attributed the occurrence of Tropenkoller not to climactic conditions, but to unsuitability for ruling in connection with the specific situation in the colonial territory. Lack of social controls and an inheritable predisposition towards power abuse were seen as the main causes. »So came the era of Tropenkoller. What this newly-invented word sought to defend and disguise were the bad manners made to cower back home, only to erupt unfettered outside in freedom« (Buchner 1914, 338). With these words the former imperial commissioner (*Reichskommissar*) in Cameroon, Max Buchner, articulated his attitude towards the rebellion caused by Leist in Cameroon. Similarly, a prominent literary interpretation of Tropenkoller, Frieda von Bülow's novel of the same name, dealt with the motif that the position of ruler overstrained certain individuals (Bülow 1905, 64). Bülow distinguished between those who were not used to and not suited for domination (Bülow 1905, 64), because they became overpowered by their plenitude of power, and those who suffered from the climate's influence on their nerves. In her novel, two protagonists embodied these different causes of Tropenkoller.[9]

The neologism Tropenkoller and the discussion on states of agitation occurred in different areas of German Imperial society. They are significant as an indicator that individuals' (illegitimate) outbursts of violence against the colonized population were common and perceived as a problem in the metropole. One example of critique on the apologetic function of Tropenkoller is a poem from the popular satirical magazine *Simplicissimus*. The poem commented on a scandal concerning bribery revolving around clothing supplied to the Schutztruppe in German South-West Africa. The poem asserts that the »smack of the hippopotamus-hide whip« is always dismissed as an isolated case and thus ignored. It also referenced Tropenkoller directly:

9 On the motif of personal suitability for ruling as a character trait, see also Besser (2004, 302, 305).

It's so very hot in Africa—
Even the eagle of Hohenzoller
Barely cried as he should his first »Hurra«
Before starting to tropenkoller. (Steiger 1906)

Tropenkoller as a state of emotion and agitation

The precise ways in which excessive violence—especially in the context of jurisdiction—was perceived, classified, and problematized, sheds light on the self-conception of the German colonial power. Within this self-conception, I argue, the ways in which emotions were addressed played a central role. In the following, I will examine the role ascribed to emotions in the emergence of Tropenkoller and its consequences. In a second step, I will show the extent to which Tropenkoller's close connection to emotions made the condition problematic for colonial jurisdiction and the concept of colonial rule it was based upon.

Tropenkoller was connected to emotions in various ways. Feelings of overexertion and loneliness, on the one hand, and feelings of superiority, a plenitude of power, and a certain lust for violence, on the other hand, were seen as causes for the states of agitation typical of Tropenkoller. The symptoms listed in medical literature include emotional phenomena such as mood swings, irritation, an increased propensity for violence, and a heightened sex drive (Tropenkoller 1908; Scheube 1900, 649).[10] Extreme emotionality was thus a central element of Tropenkoller. Two aspects of its connection to emotions in particular were problematized:

First, Tropenkoller was at the time perceived as an (at least pseudo-)pathological state because it directly affected the power of judgment. The state of excitement was perceived to have the consequence of »inconsiderate actions« (Scheube 1900, 649–50; see also Werner 1920, 689) affected by emotions overtaking rational behavior.[11]

10 For an analysis of medical literature, see also Bischoff (2013, 121).

11 Recent studies on emotions have challenged the binary juxtaposition of emotions and the rational that underlies this notion. They emphasize that

This loss of rationality also included a gender dimension: In German Imperial society, emotionality was strongly associated with femininity. That is not to say that men were not allowed or supposed to have feelings. On the contrary, certain feelings, such as courage, anger, and aggressiveness, were connoted as masculine (Newmark 2010, 51).[12] However it was regarded as particularly unmanly to express emotions in an uncontrolled manner or to be dominated by one's own feelings. In this view, men had strong feelings, but also possessed the ability to control them (Newark 2010, 49–52). Women—constructed as the irrational Other of the male subject—were at the mercy of their emotions and dominated by their emotionality (Hausen 1976, 385; Weickmann 1997, 94; Mosse 1996, 39, 94). With regard to the relation of masculinity and emotions, it is interesting that the discussion of Tropenkoller or nerve-related states of agitation in the tropics identified and pathologized strong states of emotions and the actions they induced in men. Climatic and social conditions in the colonies were thought to produce circumstances that intensified nervousness and irritability. Features assigned to the tropical climate and surroundings included heat and sun exposure (which strained the nerves and blood, especially when it decreased the quality or amount of sleep), strong sensual impressions, or the contraction of tropical diseases like malaria, which physically inhibited the reasoning of the brain (Kohlstock 1905, 3; Nocht 1908, 69; Plehn 1906, 250–51). Among the psychological consequences of the situation in the colonies ranked frustration due to the colonized population's behavior, stress caused by responsibilities, and an eclipse of education and morals due to the lack of social controls (Schütze 1904, 208; Mense 1902, 23; Nocht 1908, 69).

emotions are not indeed the opposite of the rational, but have a cognitive dimension (Bandes and Blumenthal 2012, 164).

12 In regard to the historical relationship between masculinity and emotions, Newmark has convincingly pointed out that there was often a tension between images of male intensity of emotions and of male lack of emotions. Simplified narratives of phases of emotive and emotionless masculinity should be made more complex and hegemonic concepts in particular should be questioned in reference to their social reach (Borutta and Verheyen 2010, 21–22).

These experiences in and influences of the colonies were thought to make individuals more prone to feelings in general—to joy and gloom (Scheube 1900, 650), to megalomania and disputatiousness (Kohlstock 1905, 3–4), and countless other affects of the mind (Rasch 1898, 748).

At the same time, Tropenkoller was primarily perceived as a danger to men—as a condition in which masculinity was lost or had already been lost (Bischoff 2013, 123). Admittedly, Tropenkoller resulted in the expression of emotions most commonly associated with masculinity—including anger and lust—and the expression of emotions through aggression, violence, and sexual actions were also perceived and constructed as masculine (Borutta and Verheyen 2010; Newmark 2010, 51). Nevertheless, the emotions that accompanied Tropenkoller were equally perceived as the cause and the expression of a loss of masculinity. Mostly, the (uncontrolled) expression of emotions was pathologized in the discussion on Tropenkoller and nervous illnesses in the tropics. Men were no longer capable of controlling their tears (Rasch 1898, 248), they lost command of themselves (Kohlstock 1905, 55), and often got carried away, acting inconsiderately against their own will, and without the cerebral cortex being able to intervene and inhibit violent actions (Schütze 1904, 208; Nocht 1908, 69; Rasch 1898, 772; Plehn 1906, 250–51).

The second aspect through which Tropenkoller was problematized as an emotional state of mind is also closely connected to the conception of rationality and masculinity: its eruptive and excessive character. Tropenkoller was conceptualized as an excess of emotion and violence that exceeded what was considered to be an even and controlled temper.[13] Tropenkoller manifested itself above all in impulsive reactions. Impulsiveness was seen as cause and symptom at the same time, as can be seen in the advice given by medical experts on adequate behavior in the tropics.

Measures meant to prevent so-called tropical diseases while also reducing the effect of the tropical climate on Europeans living in the tropics were classified as tropical hygiene (Nocht 1920, 726). Rules of conduct dictated

13 The medical expert B. Scheube wrote of »explosions« (Scheube 1900, 649).

by tropical hygiene ranged from medical prophylaxis (e.g. the intake of quinine to prevent malaria) to dietary advice, to recommendations on how to best organize one's day in accordance with the climate.[14] In addition to proper equipment, tropical hygiene also involved self-discipline and behavioral adjustments based on the surroundings (Frank 2006, 177). Tropical hygiene was seen as both an instrument to confront real and imagined health risks in the colonies as well as a means of evading the influences of the surroundings. Apart from keeping the body healthy, the rigid regiment of behavioral rules was also meant to preserve a balanced state of mind—central to which was the demand for moderate behavior. »In the tropics one must neither starve nor feast« (Nocht 1908, 71), as medical expert Bernhard Nocht formulated the demand for moderation in diet. Similarly, moderation was suggested for intake of fluids, consumption of alcohol, length of sleep, as well as sexual relations (Kohlstock 1905, 76, 78, 95, 229; Nocht 1908, 71, 75).

Tropenkoller as a danger to colonial self-conception and state rule

Tropical hygiene in a broader sense was also always meant to secure the self-control of individuals exposed to alien climate conditions. Johannes Fabian understands measures of tropical hygiene in this sense as techniques of self-preservation. They were meant to stabilize the male subject in the colonial surroundings through a corset of behavioral regulations and thus save them from adapting to the life of the colonized and in this »*Verkafferung*« (going native) lose their masculinity (Fabian 2001, 87–90).[15] Self-control was seen as a necessary precondition for colonization: »Neurasthenics are bad colonizers« (Kohlstock 1905, 264), Paul Kohlstock asserted in his advice book for the tropics.

The irrationality and impulsivity associated with Tropenkoller strongly contradicted the self-image of the German colonial power. Rationality

14 See e.g. the respective passages in Nocht (1908) and Kohlstock (1905).

15 On »*Verkafferung*,« see Axster (2005).

was a central element of the German utopia of rule.[16] It was understood both as the controlled and reason-dominated behavior of those subjects who embodied colonial power and, in a broader sense, a colonial state apparatus' manner of functioning, characterized by ordered procedures. Importantly, rationality was used to justify the claim to colonial power, which was based on its opposition to the alleged arbitrariness and despotism of traditional rulers and to a legal order that colonial authorities perceived to be based on superstition and brutality (Schaper 2012, 128, 272–73).

In this respect, the German ideal of masculinity and the conception of law and rule were also constructed in opposition to what was seen as the emotional culture of the colonized population. Colonial discourse meant to justify colonial conquest included motifs of non-Europeans' stronger and less controlled emotionality, which went hand in hand with feminization and used both racist and evolutionist concepts to explain this difference (Gilman 1985, 229–31; Sinha 1995; Pernau 2011, 258–59; Maß 2013, 94). Colonial powers ascribed to their subjects a wildness characterized by lack of restraint and closeness to raw origins in harmony with nature (Schaper 2010).[17] In regard to their emotions, they were also seen as uncultivated and dominated by sexuality, revenge, and fear, and irrationally loyal witnesses dominated their legal order (Kohler 1898, 161; Schaper 2012, 272–73, 342).[18]

Through the concept of Tropenkoller, the climatic and social conditions of colonial space were blamed for the emotionally-charged actions of colonial officials. At the same time, Tropenkoller, as a consequence of

16 I use the term utopia of rule (*Herrschaftsutopie*) in reference to Trutz von Trotha's understanding of the ideal of insitutionalizing state power in the colonies (Trotha 1994, 12–15). For the creation of a blueprint for the self-controlled, rational colonial master, see also Maß (2013).

17 On the role of emotions in the British and French discourse on civility, see Pernau (2011).

18 On the link of emotions and the body in the context of British and French race theory, see Pernau (2011, 251–54).

the influences of colonial space and colonial officials' close, often sexual, relations with the colonized population, was interpreted as a regression to an uncultivated state of emotions. The officials showed a dangerous emotional structure which resembled that of the »savages.« The medical and advice literature used similar words to describe the behavior of the colonized population and of men affected by Tropenkoller: cruel, temperamental, and inconsiderate (Kohlstock 1905, 108). While this behavior was seen as consistent with the evolutionary state or race of the colonized population, for colonizers, it was unsuitable and stood in opposition to the ideal of a representative of state jurisdiction who behaved both objectively and impersonally.

Researchers have pointed out that the people who were allegedly afflicted by Tropenkoller were simply exercising, on an individual basis, violence that—structurally—was an essential element of the process of colonization (Schwarz 2002, 90). The concept of Tropenkoller thus served above all as a rhetorical figure that disguised the violence inherent in colonial rule by conceptualizing acts of violence as the deviant behavior of pathologized individuals under the influence of the colonial space (Bischoff 2013, 119). In general, I agree with this interpretation of structural violence and the masking thereof via individualized blame. However, I believe that two modifications to this hypothesis are necessary: First, Tropenkoller was not only used as an apologetic instrument, but from the beginning was exposed as an ostensive phenomenon in order to criticize this rhetorical strategy—as in the poem quoted above (see also Rasch 1898, 752; Besser 2013, 53).

Second, in dealing with cases of Tropenkoller, colonial authorities did not take up the concept as a justification. On the contrary, as I will show in the following, Tropenkoller was a latent threat to their institutional logic, which they sought to retain through various measures. Although violence against the colonized population was an everyday phenomenon, acts of excessive violence that reached a broader national or international audience had the potential of becoming a political problem. Likewise, Tropenkoller endangered the colonial position of power, as the loss of self-control and the institutional lability evident in cases of Tropenkoller

undermined the authority of colonial officials. Rampant violence, for example, could be read as weakness: »To swat blindly only makes the white man more laughable in the eyes of the negro« (Stetten 1898, 109; see also Schütze 1904, 208), a reminder for controlled beatings read. Dealings with Tropenkoller can thus also illustrate a tension between everyday structural violence and the scandalization of individual excesses. In light of the everyday execution of violence against the colonized population, the violence itself was not particularly problematic. What posed a problem was that men—representatives of the colonial state and legal order no less—were overpowered by their emotions and consequently acted disproportionately violent in relation to the occasion.[19] Beyond its apologetic structure, Tropenkoller remained a concept used to differentiate legitimate from illegitimate violence (see Besser 2004, 302). As a manifestation of excessive violence, Tropenkoller had no place in the bureaucratic utopia of rule (Trotha 1995, 531). It unsettled the colonizers' self-image as controlled and rational rulers—and in doing so, pathologized emotionality and lack of self-control, which proved detrimental to the authority possessed by colonial officials.

From the perspective of the colonizers, colonial officials represented or even embodied for the colonized population not only the colonial state but also its legal order (Schaper 2012, 134). Hence, the central authorities imparted institutional significance to individual cases of *Tropenkoller*. If state representatives took actions that were characterized by Tropenkoller, they were not only dominated by their emotions rather than rational considerations, but they also often neglected all existing bureaucratic-legal standards. They undermined the understanding of rule as oriented towards an ideal of the rational, legitimate state: For in spite of a calculated legal insecurity for the colonized population and in spite of structural leeway for the officials acting as judges, surprisingly attempts were made in the colonial administration to bind officials' actions closer to existing legal regulations.[20] These attempts originated mostly from Berlin.

19 Kohlstock for example demanded that a European should not chastise in a fit of violent temper (*Jähzorn*) (Kohlstock 1905, 108).

20 On the following, see Schaper (2012, 144–48).

Admittedly, stipulations such as extensive duties to report to Berlin, regulated documentation of legal decisions and the execution of punishments, as well as repeated corrections to the lists of punishments handed to the colonial administration rarely changed the exercise of rule in the colonies. Indeed, they were not meant to restrict independent, situational opportunities for officials to act on the spot, but were primarily directed at creating a semblance of lawful behavior. And yet, on a formal level, the degree to which bureaucratic procedures and the means of their documentation were legally defined stood in latent contradiction to officials' actual arbitrary and autonomous decision-making in colonial jurisdiction.

Tropenkoller not only proved that colonial officials did not always demonstrate rationality and discipline, it also called attention to the lability of the colonial state. Tropenkoller—I argue—was seen as a coming together of two things. Personal tropical hygiene measures failed to help state representatives to maintain self-control and the colonial state lacked procedural standards. An individual, pathologized emotionality coincided with the institutional weaknesses of the colonial state and a colonial jurisdiction that was only rarely regulated. Together, they made possible acts of excessive violence committed by officials and thus proved that the state they sought to represent was only imagined to be a rational-legal state.[21]

Institutional reactions to Tropenkoller

The colonial administration reacted to the problem of excessive violence in colonial jurisdiction in two ways. First, as a consequence of the scandals concerning Leist and Wehlan, it enacted a decree that regulated criminal jurisdiction in Cameroon, Togo, and German East Africa.[22] In creating a

21 On questions of the colonial state's »strength« or »weakness,« in particular with regards to state violence, see Pesek (2006, 117, 138); Herbst (2000, 91); Lawrance, Osborn, and Roberts (2006).

22 *Verfügung des Reichskanzlers wegen Ausübung der Strafgerichtsbarkeit und der Disziplinargewalt gegenüber den Eingeborenen in den deutschen Schutzgebieten von Ostafrika, Kamerun und Togo*, April 22, 1896, in Ruppel (1912, no. 401).

rudimentary legal framework, criminal prosecution of colonial officials in future cases became theoretically possible. Aside from these rather reactive measures, preventive strategies were also designed to exclude Tropenkoller from the colonial bureaucracy in general and from the colonial court system in particular.

One preventive strategy addressed the individual preconditions of Tropenkoller, concentrating on the suitability of officials who suffered from Tropenkoller for certain tasks in the colonies. Instead of focusing on the ineptitudes of those individuals already in office, the administration instead pinpointed shortcomings in the selection process (Schwarz 2002, 89). In this way, the extensive debate about the type of individual fit for office in the tropics and the criteria for the selection of future officials aimed at excluding people who were not sufficiently fit for certain position from the outset. Individuals who had a predisposition for excess and nervousness, who could not control their emotional expressions, and would turn aggressive and violent once »the straitjacket of culture« (Mense 1902, 23) was loosened were to be rejected (Nocht 1908, 85). They were to remain in social and climatic surroundings that would prevent this penchant from emerging. Tropenkoller was not primarily seen as a specific pathological emotional condition. Rather conditions in the colonies impeded those mechanisms—be they social, moral, or physical—that in more »civilized« and temperate areas made men refrain from inconsiderate, irrational, brutal, and excessive reactions. A strict selection of officials in order to identify individuals with a certain disposition was meant to keep this pathologized emotionality and states of agitation out of the colonial bureaucratic and legal apparatus.

Since impulsivity and irritability were seen as the main dangers of Tropenkoller, a balanced, even-tempered character and a degree of neurasthenic stability were thought to be the central features that made one fit for the tropics. Heredity and prior incidences of certain illnesses reduced suitability for a position in the tropics (Scheube 1900, 650; Steudel 1920, 537–38).

However, even in the debate on personal fitness for the tropics, the individual and the institutional level overlapped at the juncture of the

individual official's ineptitude for ruling and the German state's perceived lack of colonial experience (Besser 2004, 307; Schwarz 2002, 87). In this perspective, the relatively young colonial power lacked the necessary routine and experience needed to prevent emotional eruptions—or at the very least channel such emotions in a manner compatible with colonial rule.

In addition, preventive strategies were ordered that were designed to impose strict controls on high-risk officials when they issued or executed court-imposed corporal punishments (Hermann 1908, 82). In addition, a decree from 1907 ruled that officials responsible for deciding criminal law cases concerning the colonized population were not permitted to execute punishments themselves.[23] This separation of jurisdiction from penal execution was meant to prevent officials from acting »rushed and under the influence of a momentary excitement« (Ruppel 1912, no. 414). In cases in which individual tropical hygiene measures were on the verge of failing, the corset of institutional constraints had to be tightened in order to prevent the individual from undermining the rational functioning of the administration and from provoking resistance from the colonized population through their own acts of violence.

The reinforcement of bureaucratic and legally regulated procedures can thus, in a figurative sense, be understood as a kind of institutional tropical hygiene. Here I use the term tropical hygiene—under which contemporaries understood behavioral rules for individuals—to explore the function such procedures had for the consolidation of colonial state power. This figurative meaning can help delineate the interface between individual actions and the structure of the colonial state, which came to the fore in instances of Tropenkoller among state representatives.

First, colonial officials' formal compliance with the rules and procedures of the colonial state was meant to be an antidote for the imagined chaos of the colonized world and the uncontrollability of the colonial order,

23 *Verfügung des Staatssekretärs des Reichskolonialamts, betreffend die Anordnung körperlicher Züchtigung als Strafmittel gegen Eingeborene der afrikanischen Schutzgebiete*, July 12, 1907, in Ruppel (1912, no. 413, II).

which had to rely on semi-autonomous colonial officials as well as on local authorities.[24] Similar to the self-controlling function of individual tropical hygiene, I read formal compliance as an instrument meant to tie the officials in the colonies into the bureaucratic order, to discipline them, and to minimize leeway for reckless or irrational actions.[25] Such rules and procedures were meant to ensure behavior was unaffected by the possible overextension, aggression or irascibility of the individual official.

Second, these behavioral rules for state representatives—like the daily routines prescribed by tropical hygiene—formed a figurative corset of adequate behavior. This was intended to convey to officials the trust being invested in their ability to govern the colony and to reassure the German and broader international public of the capability of these officials. Anthony H. M. Kirk-Green saw »confidence in performance« as central for keeping up the »white man's bluff« (Kirk-Greene 1980, 44) within a functioning colonial administration. Compliance with these formally lawful procedures was part of this bluff.

Third, the pressure exerted by the administration in Berlin upon officials in the colonies to write reports, comply with administrative regulations, and correctly classify their legal decisions can be seen as an attempt to stage functioning statehood both internally and externally and, moreover, to function as a performative act of constructing statehood.[26] Similar to the function tropical hygiene had for the constitution of the male subject, the reference to law contributed to producing the colonial state in the execution of legally regulated procedures. It also served to formally

24 On the intermediary structure of the colonial order, see Trotha (1994, in particular 278).

25 Not surprisingly, officials in the colonies struggled against this bureaucratization (Zurstrassen 2008, 139).

26 With the term »performative act« I am referring to symbolic actions that in their execution create social facts and meanings, which at the same time are ascribed to, and deduced from, these actions. The meaning is thus exposed in the action itself (Wirth 2007).

legitimate the actions of its representatives and to assert colonial rule as rational and state-dictated. The various administrative requirements and the demands to comply with lawful procedures can thus be understood as a kind of tropical hygiene for the entire colonial power apparatus.

Conclusion

Unsurprisingly, the structural violence inherent in the colonial system of domination was more powerful than these strategies to counter-Tropenkoller, particularly because the latter aimed primarily at the individual impulsivity, emotionality, and lack of inhibition that most commonly resulted in excessive violence. It was not so much violence itself that was problematized in debates within the colonial administration. Violence was seen as a practice central to the daily realization of colonial rule. But the violence of state representatives—executed under the influence of excitement and emotions, and uncontrolled—posed a threat to colonial order, because it contradicted the colonial utopia of rule.

The emotionality associated with Tropenkoller was understood as a loss of rationality and control produced by the specific situation in the colonies. It resulted in reckless behavior and a loss of self-control among colonial officials, and constituted an individual as much as an institutional failure. The emotionality as well as the actual emotions and actions associated with Tropenkoller—such as anger, aggression, furor, and violence—were conceptualized as irrational and unpredictable elements. As such, they impeded the functioning of the colonial power apparatus. Interpreted as the Other of law, emotion was to be kept out of colonial jurisdiction.

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Serene justitia and the passions of the public sphere

Warren Rosenblum

> »Tear away the false blindfold from this figure of Justice! We no longer have any justice.«
>
> ——Kurt Tucholsky, »Prozess Harden« (1922)[1]

In 1907, the German Ministry of Justice decreed that Justitia—the allegorical representation of justice—should no longer be blindfolded. The order applied to statues and reliefs of the goddess that decorated new courthouses. The Ministry offered no explanation. While most Germans probably never heard of this decree, they almost certainly observed its effects. In the Wilhelmine era, Germany was in the midst of a courthouse building spree. In Berlin alone, nine court buildings were completed between 1901 and 1907, many adorned with a blindfolded Justitia. Construction continued apace in other Prussian cities after 1907. For the editors of the *Deutsche Juristenzeitung* (DJZ)—whose masthead featured the goddess—the Ministry's decision was distressing. »What is next?« asked the author of a regular legal news column. »Will they take away her sword and scales, or perhaps ban her altogether from the courts?« (Stranz 1907, 1130). Clearly, something larger was at stake than just a question of decorative style.

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Why was Justitia blind? Art historians note that the first appearance of a blindfold on Justitia was almost certainly intended to satirize the courts. Blindness in the Renaissance was a disability associated with moral turpitude. It was only in modern times that the blindfold took on positive connotations. According to Martin Jay, the origins of this »dramatic reversal« in the valence of blind justice lay in the Reformation, when Europeans increasingly denigrated the role of vision and, correspondingly, valorized language as the foundation of sound judgment. Virtue demanded that one resist the »lust of the eyes.« Justice was blindfolded, Jay writes, to »avoid the seduction of images and achieve the dispassionate distance necessary to render verdicts impartially.« There would be no locking of eyes with the contesting parties, the perpetrators or the victims, and thus no focus on their individuality. Justice would not be swayed by sympathy, anger, fear or disgust, but rather by universal truths applied to a disembodied, disembedded, decontextualized subject (Jay 1999, 29; Resnik and Dennis 2011).

That Justitia was a woman made the wearing of the blindfold still more important. (And no matter how stern and sharply drawn her visage, Justitia *was* a woman.) As Ute Frevert notes, women have historically been perceived as »the sensitive sex […] highly impressionable and affected by all kinds of sentiments.« The great liberal reforms of the nineteenth and early twentieth century opened the judiciary to new classes of men, but continued to exclude women, in large measure because of fears that women experienced an excess of empathy (Eich 1919, 627; Frevert 2011, 105). Such views were based not only upon sexism, but also upon the belief that women, for better or worse, made moral judgments differently than men. As recent feminists have argued, men have been conditioned to consider an abstract »generalized other,« while women have been taught to value »narrative uniqueness« and »specific context.« The blindfolding of Justitia was therefore, in Jay's words, not a »thwarting of the gaze per se, but of the specifically female gaze, or at least those qualities that have been associated with it in our culture.« Justitia's blindfold constrained the promise of empathy—of any emotional connection between the court

and its subjects—until reason had done its work (Gilligan 1982; Kyte 1996; Jay 1999, 29).

The ubiquitous presence of Justitia in the iconography of justice in Wilhelmine Germany reflected the prevalence of this ideal of rationality counterpoised to emotion. Legal associations, journals, book publishers, and cartoonists adapted Justitia to represent both the enterprise of law and the philosophical ideal of justice. Prussian state architects Rudolf Mönnich and Paul Thoemer used the allegorical figure to provide a common visual identity for the diverse array of courthouses they designed, together or independently, after 1894. A rather masculinized bust of Justitia glowered over the main portal of the neo-Gothic District Court (*Amtsgericht*) in Berlin-Neukölln and the neo-Baroque Criminal Court in Berlin-Moabit. A more overtly feminine goddess was enthroned with a law book on her lap before the Romanesque regional court (*Landgericht*) in Berlin-Charlottenburg (Kissel 1984; Kähne 1988, 40, 64–66). The values embodied in blind, dispassionate Justitia dovetailed with the positivist understanding of the judiciary as a priestly sect practicing a form of abstract reason that was indifferent to the political, social, and cultural currents swirling around them. As political theorist Nancy Rosenblum argues, the juxtaposition of reason and emotion was an essential part of liberal ideology. Liberals embraced »legalism« precisely in order to »protect political society from the intrusion of emotional inclinations« (Rosenblum 1997, 35; 1993). The independent, rule-bound, logical world of the courts was the ultimate tool for the legitimation of sovereignty as rational (Karstedt 2011, 2, 7; Ledford 1993).

This essay considers how the ideal of blind dispassionate justice became problematic in the late Wilhelmine era and a symbol of crisis during the Weimar Republic. The rise of the mass press, I argue, challenged the role of the court as a uniquely public and authoritative body to adjudicate truth. The new social sciences and the legal reform movements of the Wilhelmine era, moreover, questioned the effectiveness of a mode of reason that ignored experiential evidence and popular sentiment. Even as the Weimar Constitution enshrined the supremacy of law, the great palaces of justice lost their aura of legitimacy. Historians have frequently

described how »reactionary judges« in the Weimar Republic produced justice scandals that undermined public confidence in the legal system (Kuhn 1983; Siemens 2005). Here I focus on two such scandals; not, however, to retrace the familiar narratives of judicial bias, but to consider how these cases and the »sensations« surrounding them transformed the economy of emotion. In the wake of these scandals, a new style of political mobilization emerged among defenders of the Republic—concerned in good measure with rallying the public *against* the courts—while the conservative right repositioned itself as the defender of traditional legal reason.

»Tear away the blindfold«: Justitia under fire

The ideal of blind, rational justice came under attack from two directions at the end of the nineteenth century. A highly politicized critique challenged the courts' claims to objectivity and dispassion. Critics accused judges and prosecutors of practicing »class justice«: protecting the propertied interests against workers and peasants. They pointed to the vigorous prosecution of left-wing journalists for libel and the harsher punishments meted out to lower-class offenders and those associated with the Social Democrats (Wilhelm 2010, 324–28, 437–53; Hall 1977, 72–88). Writing in the Austrian monthly *Der Kampf,* Richard Engländer argued that the ideal of blind justice was part of the »fundamental lie« (*Lebenslüge*) of the existing social order, an ideological smoke screen for class interest. (Engländer 1908, 552) Such views found enormous resonance among the socialist rank and file in Germany. »More than any other party slogan,« historian Alex Hall wrote, accusations of class justice were »stirring up popular emotion and releasing pent-up reserves of resentment and fury« (Hall 1977, 73).

While radicals argued that blind justice was a sham, more mainstream critics averred that the courts' promise to operate behind a veil of ignorance and with complete dispassion was largely fulfilled—and this was exactly the problem. The insularity of judges was itself a liability, they argued: judges were alienated from the people and ignorant of social and political realities (*weltfremd*). New schools of criminology and jurisprudence

insisted that justice must open itself up to the experiential sciences and create opportunities for lay participation. The Social-Democratic politician Edmund Fischer argued that judges in the future might no longer be jurists at all, but anthropologists and sociologists (Fischer 1906, 488). Reformers envisioned new roles for women as mediators between the courts and the social realm. Whether as volunteers or as professional staff, women were to help the courts interpret the emotions of defendants, plaintiffs, victims, and witnesses and to manage and normalize emotions for those under court supervision (Rosenblum 2009, 147–49; Ortmann 2014, 73–75).

For critics of German justice, the allegory of the blindfolded goddess was a natural target. »The most succinct definition of reform,« wrote Fischer, »would be […] to remove the blindfold from justice, so that decisions are no longer made without consideration of the person« (Fischer 1906, 488). Psychiatrist August Forel, in a famous essay, called upon the goddess to, »open your eyes and look, so that you, with the help of the natural sciences and social investigations can hold your scales in true and just balance« (Forel 1905, 448). In all likelihood, it was in response to this growing spirit of reform that the Ministry of Justice decided in 1907 to strip Justitia of her blindfold. At the dedication of the Higher Appeals Court building in Cologne three years later, Governor Freiherr von Rheinbaben expressed thanks that its statue of Justitia did *not* have a blindfold, since justice »should not generally be blind. She should look people in the eye, recognize the human within humans, be a friend« (*Recht und Wirtschaft*, November 1911, 64). For Christian social reformers like Rheinbaben, the coercive power of the courts must be wedded to the healing power of private welfare associations. In the motto of one prison society: »*justitia et caritas osculantur*«—justice and charity kiss (Rosenblum 2008, 73).

The press and the crowd

While reformers challenged the tenets of judicial practice, the press challenged the court's authority to adjudicate truth. The power of the court was bound up with its ability to create a dominant narrative that

brought closure to legal disputes. The »public« was represented by the courtroom audience, which was limited in scope, size, and character (Ortmann 2014, 166). Newspapers were a useful adjunct to the courts so long as they uncritically amplified these proceedings and affirmed their moral legitimacy (Siemens 2007, 62; Domeier 2010, 114). The press became a problem, however, when legal reporters moved beyond the courtroom drama to describe a richer context and »real human destinies« that were inaccessible or of no interest to the court. The great Weimar journalist Moritz Goldstein argued that the essential purpose of legal reporting was »to measure the law against our sense of justice (*Rechtsempfinden*)« and then push the law in that direction.[2] Reporters before 1918 were perhaps less grandiose and less combative, but already in the Wihelmine era the press had emerged as a »fourth power« and the voice of an »increasingly unruly public sphere« (Domeier 2010, 111; Hett 2014, 106).

While Justitia was shielded from the seductive power of images and emotions, newspapers made seduction their stock and trade. To lure its readers, papers offered what historian Cory Ross calls »an exaggeration of reality« or what contemporary critics called »sensations« (Ross 2008, 16–20; Domeier 2010, 36–38). The concept of the sensation denoted a surge of collective emotions around an event or an occurrence. As the liberal politician and publicist Theodor Barth wrote, sensations had no »sustained justification« (Barth 1886). They were fleeting storms of feeling, whether pleasure, anger, anxiety, empathy or shame. For the press, sensationalism meant cherry-picking and framing information to not only provoke an emotional response, but to make readers identify with a larger community of feeling. Big city tabloids were accused of »cultivat[ing] sensation as a genre,« with screaming headlines about sordid or absurd affairs culled from everyday life (Fritzsche 1998, 179). At the same time, judges believed that even some of Germany's most respected publications were »flippantly« and »tendentiously« presenting certain details of court cases in »garish colors« in order to plant »mistrust and hatred« toward the

2 *VZ*, September 11, 1928. Goldstein, writing as »Inquit,« replaced the legendary »Sling« as legal reporter for the *VZ*. See Siemens (2007, 70–71); also Ortmann (2014, 163–66).

judiciary (Warschauer 1909, 228–29). The concern with sensationalism in the Wilhelmine era echoed the fear of the crowd: the »nervous excitation,« in Georg Simmel's words, which »overwhelms individuals« (Borch 2010, 8; Barrows 1981). What defense lawyer Erich Sello called the »excited opinion of the day« was, like the crowd itself, feminine, irrational, and driven by emotions (Sello 1908, 123).

A broad cross-section of jurists, state officials, and politicians in the Wilhelmine era were concerned that the emotional tumult and manipulations of the press threatened the integrity of the legal process. At one end of the spectrum was Kaiser Wilhelm II, accusing judges who ruled against the government of being unduly influenced by the press and the pressures of the crowd (Domeier 2010, 111). At the other extreme, ideologically speaking, were senior lawyers and strategists for the Social Democratic Party (SPD), who feared that any public discussion of ongoing cases upset the »apolitical sanctity of the courtroom« (Grunwald 2012a, 18, 37–42). Socialists and conservatives shared a faith in the legal process and fear about the consequences of mobilizing public emotions. Even liberal defense lawyers such as Max Alsberg and Johannes Werthauer, who were known for their savvy use of the press, fretted that public hysteria and superstition corrupted the orderly operations of the legal system (Hett 2014, 145–71). »Woe for our criminal justice,« wrote lawyer Erich Sello, »when the Judges make decisions […] based on uncontrollable and momentary moods and feelings« (Sello 1908, 125).

Tensions between justice and the press were exacerbated in the Weimar Republic. Newspapers became increasingly political after 1918, as they were forced to differentiate themselves within a more crowded field of publications (Siemens 2007, 66). They were also—it was said—more »sensational« (Ross 2008, 142). A series of political cases, in which judges gave harsh sentences to communists and pacifists and treated conservative offenders with special lenience, provided fodder for left-wing writers (Kuttner 1921; Gumbel 1922; Morris 2005). The lifting of censorship and the end of unique protections for the honor of civil servants emboldened journalists of all political stripes to attack their enemies with special vigor. Judges were both the targets of press attacks and adjudicators in a

new flood of libel disputes (Goldberg 2010, 194–200). Many judges saw the press as unprecedentedly powerful, ill-informed, and dangerous. The feeling was often mutual (Wagner 1921).

Ebert's quest: Searching for reason in a landscape of emotion

More than any other Weimar leader, Reich President Friedrich Ebert faced slanders and insults throughout his tenure in government. Many on the right saw Ebert's Party, the SPD, as inherently treasonous. Critics on the left were incensed that Ebert had »set loose the bloodhounds« of the right-wing militias against working class revolutionaries in 1919. Still, the unconstrained aggressiveness, of rightists in particular, in articles attacking the President was something of a shock. Right-wing critics derided Ebert's masculinity, his patriotism, and his decency. It was a campaign of shaming and humiliation that was intended to besmirch his honor as a German and a statesman. (Mühlhausen 2008, 101–9; Albrecht 2002, 122–76).

For Ebert, an especially galling accusation was that he had encouraged strikes and protests by industrial workers in order to undermine the German home front during the Great War. In 1924, Emil Gansser, a Nazi agitator in Munich, wrote that Ebert committed treason by joining the executive committee of a munitions strike in Berlin. In truth, Ebert had worked with the Berlin strike committee in order to end the work-stoppage and minimize damage to the war effort. Ebert accused Gansser of insult, but withdrew the charges after he was advised of the widespread anti-government sentiment in Munich. When a small right-wing publication in a town near Magdeburg reprinted Gansser's article, Ebert saw an opportunity to take action and sued the young editor, Erwin Rothardt (Jasper 1971, 111–21; Mühlhausen 2006, 936–66).

Why did the president of the republic prosecute the obscure editor of a tiny publication? Ebert had already pursued over a hundred libel cases in a seemingly hopeless effort to contain the mayhem in the press (Mühlhausen 2006, 952). He had both personal and political reasons for these actions. The accusations of treason caused particular distress. Ebert had supported the war unequivocally until the bitter end, watching his

party split in two and, more tragically, losing two sons at the front. It was painful for the president to see these sacrifices denied. He could have published a rejoinder to the accusations, but it would have lacked the imprimatur of a trial: public testimony given under oath, formal rules of evidence, and a professionally trained and objective judge. Defamation suits in Germany, in contrast to the Anglo-American system, were criminal prosecutions. A libel case aimed not just to establish the truth, but to bring retribution and thus a sense of emotional closure. By deterring future libels, prosecution supposedly closed public debate as well. Ebert believed that libel suits were necessary to protect the honor of his office. He had, in essence, inherited the old regime's assumption that, »a libel left unprosecuted […] would signal its truth to the German people and/or the weakness of the government« (Goldberg 2010, 96). The reining in of overzealous, hurtful speech was a tool of national policy.

Ebert's faith in the courts as both an arbiter of truth and a means of repression was especially notable given the recent history of defamation suits (Mühlhausen 2006, 941). The prewar SPD had frequently provoked insult prosecutions in order to publicly embarrass state officials and challenge their credibility. By European standards, defendants in German libel cases had enormous scope to introduce evidence for the truth of their accusations, largely because of battles fought and won by Socialist and Liberal legislators in the Imperial era (Goldberg 2010, 87–96, 144–48). The experience of pro-Republican leaders since 1918 underscored the risks of bringing slanderers before Weimar courts. Mathias Erzberger's attempt to halt personal and anti-Republican attacks through defamation suits ended in disaster. Erzberger's opponents turned the tables on him, making the trial less about the alleged slander than about his own wartime actions. In the end, the Center Party leader lost his suit and resigned in humiliation (Fulda 2009, 55–58).

Ebert too was to be gravely disappointed in the courts. Because Gansser's article did not explicitly declare why serving on a strike committee was treasonous, the trial in Magdeburg had an especially diffuse and open-ended quality. The presiding judge, Gustav Bewersdorff, allowed the defense to introduce any scrap of information that suggested disloyalty on

Ebert's part. A parade of accusers testified that Ebert had expressed support for the work-stoppage and encouraged civil disobedience, even to the point of telling workers to resist military enlistment. Witnesses for the prosecution spoke passionately about Ebert's patriotism and his support of the war. The judge rarely excluded testimony or adequately challenged witness accounts (Bremmer 1925, 31–102). Far from quelling or containing emotions, the trial stirred up more anger, new insults, and new humiliations.

A nervous gloom settled over the left-wing press, while right-wing papers luxuriated in the shaming of the Social Democrats. Still, the court's ruling, which affirmed the accusation of treason against Ebert, was a surprise to both sides. The tone of Bewersdorff's decision was pompous, pedantic, and absurdly formal—even by the standards of German courts. The judge declared it was not his task to evaluate whether Ebert's role in the strike was morally, politically, or historically justifiable. The only valid question was whether Ebert had violated the letter of the law. For Bewersdorff, the answer was clear. By joining the leadership committee of an illegal wartime strike, Ebert had committed treason. His intentions were irrelevant (Brammer 1925, 122–27). This conclusion, which was supported by a panel of professional and lay judges, offered significant protection for the young Magdeburg editor. The court sentenced Rothardt to a short prison term for the insulting nature of his rhetoric, while offering journalists across Germany a measure of impunity to publicly attack the president.

Bewersdorff's decision, through its appeal to formalism, embodied what historian Henning Grunwald called »the performance of impartiality« (Grunwald 2012b, 64). It delighted high-minded conservative journalists, who distanced themselves from Rothardt's gutter journalism and even offered a measure of sympathy for Ebert, while still condemning his alleged capitulation to the anti-war, anti-German elements of his own party. They assumed that Ebert would have to resign; David had defeated Goliath while the authority of law and the independence of the courts had been affirmed. The *Münchener Zeitung* called Bewersdorff's decision a »sensation«—and apologized for the use of this »foreign term.« The

editors predicted the judgment would »excite attention« and »produce emotional responses (*Gefühlsbewegungen*),« but the paper, like the Magdeburg court, sought to position itself above the fray. The editors felt no animosity toward Ebert, they insisted. He was a tragic figure, a decent man ensnared by his ideological commitments.[3]

Even many of Judge Bewersdorff's sharpest critics took his formalist reasoning at face value, refusing to question his impartiality or good faith. The left-liberal law scholar Moritz Liepmann argued that the problem with the decision was its slavish adherence to legal formulas (Brammer 1925, 190–92). In a similar vein, many liberal scholars suggested that the decision was legally sound, but lacking in »common sense« (*gesunder Menschenverstand*). It was, in other words, a manifestation of the flaws inherent in German justice. Law professor Alexander Graf zu Dohna wrote that the decision, for all its errors, contained solely »pure juridical considerations« (Graf zu Dohna 1925, 146). Eugen Schiffer, a former judge in Magdeburg and Minister of Justice after the Great War, methodically refuted Bewersdorff's reasoning. It was illogical to exclude moral and political definitions of treason, Schiffer argued, given that the ultimate purpose of Gansser's article was to attack Ebert's *moral* character and his *political* intentions. While calling the decision a miscarriage of justice, Schiffer never mentioned Bewersdorff by name nor questioned the judge's integrity (Brammer 1925, 162–66). He summed up the lessons of the trial in the most banal and apolitical fashion possible: judges were out of touch with lived experience (*weltfremd*), the people were ignorant of the law (*rechtsfremd*), and Germany must do better at educating and selecting judges (Brammer 1925, 167).

The left-wing press, by contrast, freely expressed its anger and disgust at the judge. *Montag-Morgen* denounced Bewersdorff's »self-deluding arrogance,« and accused him of acting as a »corrector of world history.« The usually restrained liberal newspaper *Die Vossische Zeitung* published two articles by members of the Republican Judges Association which pulsated with anger. Wilhelm Kroner, the chairman of the association, called

3 *Münchener Zeitung*, December 12, 1924.

the Magdeburg decision »a mournful, shameless, cowardly, despicable argument against the bearers of Germany's dignity.« His fellow judge Franz Brodauf accused the Magdeburg judges of letting their hatred for the republic trump legal concerns.[4]

Kroner's outburst created its own shockwaves. The leading juridical publications were dismayed that a Prussian judge would publicly comment on a colleague's »ongoing« case (since Ebert would presumably appeal) and state such emphatic opinions although he had no direct knowledge of the files. The editor of the *DJZ,* Otto Liebmann, accused Kroner of a lapse in professional ethics and charged the Republican Judges Association with willfully undermining trust in the courts. The Prussian Judges Association expelled Kroner for his »temperamental remarks.« Right-wing political organizations and newspapers echoed the jurists' indignation. At the 50,000-strong national meeting of the Stahlhelm in Magdeburg, a resolution was passed to condemn the alleged assault on judicial independence.[5]

While Kroner's intervention infuriated his fellow judges, it thrilled the courts' sharpest critics and inspired more attacks. In an open letter to Otto Liebmann, legal scholar Gustav Radbruch confessed that his initial response to Kroner's tirade was »joy over the outbreak of a lively and healthy sense of justice (*Rechtsgefühl*) against an infuriating miscarriage of justice.« Radbruch, who fought for the reform of legal procedure and the admission of women to the judiciary during his short tenure as Reich Justice Minister, expressed frustration with the suppression of emotion in legal discourse. Kroner's »impassioned free speech seemed […] more valuable and more sympathetic to me than the serene tranquility which the DJZ maintains in the face of the courts' mistakes« (Radbruch 1925, 193–97). Radbruch longed to see German intellectuals respond to miscarriages of justice in the manner of French intellectuals during the Dreyfus affair (Radbruch 1992–1993a, 13, 242; Radbruch 1995, 95).

4 *MM*, December 22, 1924; *VZ*, December 24, 1924 and December 27, 1924.

5 »Entschliessung des VI. Frontsoldatentages in Magdeburg,« Landeshauptstaatsarchiv Sachsen-Anhalt (LHSA), MD Rep C20 I lb, no. 1991.

Months before the Ebert trial, he joined the leadership committee of the Reichsbanner Black-Red-Gold, an organization that mobilized popular support for the Republic. In his speeches at Reichsbanner rallies, Radbruch employed a passionate rhetoric that departed radically from the high philosophical tone of his academic work and the measured pronouncements of his time as a government minister (Achilles 2010, 670, 678). At a torchlight parade celebrating his professorship in Kiel, Radbruch even seemed to question the liberal ideal of a Republic founded upon reason and law. The German Republic, he told his Reichsbanner comrades, was like the spirits who came to Odysseus on his visit to the underworld. It »takes shape only gradually, after nourishing itself from the blood of its noblest followers« (Radbruch 1992–1993c, 82–83). The constitution, in other words, was a mere abstraction or, at best, a frame or vessel. The Republic came alive only after sacrifice and suffering.

The most effective and unapologetically emotional critic of the Ebert decision was Radbruch's Reichsbanner colleague Otto Hörsing. Hörsing was the national Chairman of the Reichsbanner, Governor of the Prussian Province of Saxony (whose capital was Magdeburg), and a delegate to the Prussian Parliament. As a high Prussian official and popular politician, Hörsing's criticism of local judges carried special weight. The rank and file of the Reichsbanner treasured Hörsing's earthy demeanor, disdain for elites, and frank, impulsive manner. Harry Graf Kessler described the governor as »no educated man, but *a man* […] energetic as a bull and goal-driven […] a coarse klutz with a sense of humor and a rough fist« (Kessler 1961, 598). Responding to the Stahlhelm's support for the Ebert decision, Hörsing organized the first national Reichsbanner Congress for February 22 in Magdeburg, less than one week after the scheduled start of the appeals proceedings. The prospect of a massive public rally to condemn the Magdeburg decision and pressure the appeals court appalled SPD leaders in Berlin. The powerful Minister of the Interior Carl Severing was altogether skeptical of the Reichsbanner, and worried that Hörsing would somehow undermine the government's authority. In a personal letter, President Ebert himself urged the governor

to postpone the congress or at least avoid any mention of his defamation case during the event.[6]

The Reichsbanner Congress, however, proceeded as planned. As one colleague wrote, Hörsing had little patience with juridical process. »Rather than trip over legal threads, he preferred to slice right through them.«[7] Hörsing basked in the growing press attention and stoked the passions of growing crowds. At the opening speech for the Congress, before 100,000 cheering followers, Hörsing alluded to Judge Bewersdorff's decision as an attack on all supporters of the republic. »Insults […] and slanders have been pouring upon us,« he told the throng. This would persist so long as »monarchists« were sitting on the bench and in the administration. To what the *Vossische Zeitung* called »stormy applause,« Hörsing cried that »the Republic can and must be led only by Republicans.«[8]

The Magdeburg rally launched Hörsing into a campaign of speeches and articles expressing his disgust at the judiciary. Severing warned him that he was violating the Disciplinary Law of 1852 which required civil servants to show »restraint« both inside and outside fulfillment of their official responsibilities. Minister President Braun likewise admonished Hörsing for his lack of self-control. Prussian Ministers tried repeatedly to get Hörsing to stop speaking with the press about judicial decisions that he believed were politically biased, corrupt, or simply wrong-headed. They were particularly embarrassed when Hörsing, speaking at a Constitution Day celebration in Berlin, prophesized that the so-called »irremovability of judges […] will, thanks to the energetic contributions of the monarchist elements, burst and sink into the abyss much faster than these people believe.«[9] Hörsing's crowd appeal, his staging of »sensations,« and his

6 FES, Nachlass Osterroth, no. 163, Reichspraes. Ebert to Otto Hörsing, January 23, 1925. On Severing's skepticism toward the Reichsbanner, see Rohe (1966, 39–40).

7 FES, Nachlass Osterroth, no. 1, Erinnerungen I, 185.

8 *VZ*, Febuary 2, 1925.

9 FES, Nachlass Hörsing, Severing to Hörsing, April 1, 1925 and July 30, 1925; Minister President Braun to Hörsing, May 25, 1926; Prussian

close ties to the tabloid press marked a radical shift in style within the governing classes in Prussia, particularly when deployed against the courts. To the judges, Hörsing symbolized the politicization and sensationalizing of justice: an intrusion of unbridled emotion into the controlled domain of the courts. Hörsing and the Reichsbanner were not just an annoyance to the judges, but, in their view, a threat to judicial independence.

Historians have frequently depicted the Friedrich Ebert trial as a great blow to the Republic, but the evidence for this is thin at best (Mühlhausen 2006, 958–66; Winkler 2002). The oft-repeated claim that Ebert died because the trial caused him to neglect an otherwise treatable case of appendicitis is simply false (Evans 200, 81; citing H. A. Winkler 1985).[10] The picture of Ebert as mentally stricken, »bleeding to death from the slanders« in Philipp Scheidemann's words, is grossly exaggerated (Mühlhausen 2006, 967). In any case, the gleeful response by right-wing newspapers to Bewersdorff's decision hardly marked a substantive change in Weimar political discourse. It is doubtful whether the slanderous attacks on the president would have abated if the prosecution of Rothhardt had been successful. Did erstwhile supporters of the president become disillusioned with the Republic because a local court in Magdeburg declared him, by the most »exacting legal standard,« guilty of treason? That seems improbable.

What is clear is that Ebert's defeat in Magdeburg created a new rallying point for pro-Republican forces. The Reichsbanner grew dramatically in the middle years of the Weimar Republic, driven in large part by anger at »privileged« judges and excitement over a less »restrained,« more emotional style of politics. Hörsing and his followers sought to make the Constitution into a totem, a revered symbol of love for the republic, but they identified little with the ideals of judicial process and judicial

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Judges Association Charlottenburg to Prussian Minister of Justice, August 26, 1925.

10 According to Ebert's biographer, he became ill *after* the trial. His rapid demise was partly due to his doctor's misdiagnosis of his condition (Mühlhausen 2006, 967).

independence that were part of its foundational principles (Achillees 2010). The new politics of emotion had little in common with the old ideal of an austere, rational, blind form of justice.

Emotional rescue: The Haas-Helling affair

It did not take long for Hörsing's growing prominence and the new style in democratic politics to demonstrate an effect. In the summer of 1926, a second justice scandal in Magdeburg—the Haas-Helling affair—pitted Reichsbanner leaders against another intransigent judge. Numerous threads connected this new Magdeburg scandal to the Ebert trial. The Chief Prosecuting Attorney, Friedrich Rasmus, who had fought energetically on Ebert's behalf, initiated the prosecution of a Jewish businessman, Rudolf Haas, whose brother-in-law was Hörsing's closest adviser. The Governor took an unprecedented role in the affair by not only criticizing the court's investigation, but actively working for the exoneration of the accused. Hörsing succeeded not through the legal process but by channeling information to the press and mobilizing popular anger at the court and popular sympathy for Haas. After initial hesitation, the SPD-led Prussian state government supported Hörsing's efforts. For the judges, the case of Rudolf Haas became a stunning example of how the emotionally charged interventions of the press, the state, and the crowd were challenging the authority of the courts.

Rudolf Haas had been accused of arranging to murder his former accountant, Hermann Helling, in order to stop him from testifying in a tax fraud investigation. Most of the evidence was circumstantial. Helling disappeared on the day that he was scheduled to meet with the state tax investigator. Former Haas employees depicted their boss as ruthless and clever and obsessed with his firm's advancement. They claimed that Helling had been one of the few employees who understood how the company moved money between its various affiliates and was therefore a threat to Haas. The key »breakthrough« in the case, however, came when Richard Schroeder, a young ex-convict, was arrested with checks belonging to the missing accountant. Schroeder claimed that a stranger had given him the checks in exchange for running errands around Magde-

burg. After weeks of police interrogations, Schroeder identified Rudolf Haas as the stranger (Kuhn 1983; Kölling 1988; Braun 1928).

Rasmus, the prosecutor, then handed the case to Johannes Kölling, the Magdeburg District Court judge responsible for pre-trial investigations. It is not clear whether Kölling knew that Haas was a Jew or that Haas's brother-in-law Paul Crohn was a co-founder of the Reichsbanner and Hörsing's lieutenant. It is certain, however, that Kölling was nervous about the political implications of this case and the possibility that a vast and powerful conspiracy underlay the accountant's disappearance. Kölling went out of his way to choose as his lead investigator a young, untested police detective, Wilhelm Tenholt, who had a reputation as an outsider. With a solemn handshake, Kölling made Tenholt promise not to share the details of the investigation with anyone, even his own superiors. He explained that the success of the case rested upon getting Richard Schroeder to provide further details about his relationship with Haas and the fate of the accountant. Kölling advised Tenholt to treat Schroeder delicately in order to elicit the truth.[11]

The conspiratorial atmosphere and the pre-emptive suspicions against a wealthy Jewish businessman led to a series of mistakes on the part of investigators. Kölling and Tenholt largely ignored signs that Schroeder's entire story was concocted and never confronted him with the inconsistencies in his narrative. They never properly searched his home or interrogated his friends and family. Still, a three-judge appeals panel approved Haas's detention. Even Rasmus, the liberal prosecutor, defended the investigation, accepting the argument that Richard Schroeder was »a very sensitive person« and that a preponderance of evidence pointed to Haas's role in the affair. Most observers expected that Kölling would soon indict Rudolf Haas and send the case to trial.[12]

11 LHSA C20 I, Ib no. 1918, Report by Councilor Hirschberg, September 27, 1926; GStA 57525, transcript, disciplinary proceedings, October 6, 1926.

12 GStA no. 57524, Notes, undated (presumably September 1926, disciplinary proceedings).

Hörsing, however, fought the judge with his characteristic impatience for legal niceties. Though he had no official authority in the case, he arranged for a celebrated Berlin detective to conduct a parallel investigation into the accountant's disappearance. This detective reported to Hörsing, rather than to Kölling, and carried out his investigations with abandon—searching homes, confiscating evidence, and arresting suspects. Such steps contradicted the principle in German law that the investigating magistrate is »lord of the pre-trial investigation.«[13] The unorthodox and essentially illegal methods, however, bore fruit. In a remarkably short time, the Berlin policeman had fingered Richard Schroeder as the lone killer and exonerated Rudolf Haas of all responsibility.

None of this evidence was accepted into the official case file assembled by Judge Kölling, but all of it was incorporated into the daily press. Frequently the discovery of new evidence appeared in the papers even before Kölling or the Magdeburg police had any knowledge of it.[14] In an otherwise quiet summer (swarms of mosquitos dominated the news on some days), the Haas affair became a prominent, sometimes preeminent, news story in dozens of papers. Hörsing's Reichsbanner associates turned a local real estate office into »a veritable press station« and drove journalists to important sites using Haas company cars.[15] Hörsing himself entertained reporters around his Stammtisch at the Hotel Weissen Bär, a favorite Reichsbanner gathering place. Reporters followed the principal investigators around town, even hanging around the public pool in hopes of interviewing the Magdeburg detective between his laps.[16]

13 The phrase was used frequently both by the press and in internal correspondence. See, for example, GStA 57524, Dahm, Travel Report, September 1, 1926. See also Löwe (1922).

14 LHSA, C 29 Anh I Pa 36/1, statements by editors Dyck and Pinthus (undated); and Rep. C20 I, Ib no. 1918, Prussian Minister of Justice Fritze to Prussian Minister of Interior Severing, September 2, 1926 and September 3, 1926.

15 GStA 57549, States Attorney to Prussian Minister of Justice, August 6, 1927.

16 LHSA, Rep. C 29, Anh. I Pa 36/1, Tenholt Interrogation, August 12, 1926.

According to leftist and liberal papers, the Magdeburg affair represented a fight for the soul of the Republic. Using Hörsing as an anonymous source, they claimed, falsely, that the Magdeburg detective was a »Stahlhelm man« and that a cabal of reactionary judges was controlling the investigating magistrate. They accused the authorities of leaking information to Richard Schroeder so that he could doctor his testimony to incriminate Rudolf Haas. Resuscitating Bewersdorff as a symbol of judicial malfeasance, the press also insinuated his presence into the Haas case. Hörsing half-humorously referred to Magdeburg as »Bewersburg.«[17]

The Hörsing-authored melodrama that played out in the national press angered judges, yet Prussian officials refused to rein him in. The Prussian Interior Ministry instead helped Hörsing arrange for police assistance from Berlin. Police Vice-President Bernhard Weiss came to monitor the situation and admonish the local police. Another Prussian official commissioned the popular crime journalist and novelist Hans Hyan to file a statement on the situation in Magdeburg. Hyan, the author of a revolutionary pamphlet on the justice system, reported of shadowy figures and far-flung networks that suggested a right-wing conspiracy in Magdeburg.[18] Weiss, according to a justice official, constantly fed information about his investigations to the tabloid press.[19] In essence, the state was using the newspapers to shape public opinion, discredit the investigating magistrate, and pressure the judiciary and the Ministry of Justice to control or replace the investigating magistrate.

The relentless high-pitched attention from the press both politicized and emotionalized the Magdeburg affair. Pressure on the Prussian government forced the Ministry of the Interior to remove Tenholt from the case. The young detective went to Judge Kölling's apartment in tears to inform him of the decision. When Kölling sought to engage another detective from the Magdeburg force, the Ministry transferred that officer to another

17 *Magdeburger Volkstimme*, August 11, 1926.

18 GStA 57524, Hans Hyan to State Secretary Abegg, July 20, 1926 and Memorandum.

19 GStA 57524, Dahm, Travel Report, September 2, 1926.

region with less than a day's notice. Kölling was forced to work with two seasoned investigators from Berlin chosen by the Ministry. In the face of this pressure, the judge became deeply depressed and incapable of working. Finally, he published an open letter to Prussian officials in the conservative daily paper in Magdeburg. The letter accused Hörsing and Berlin officials of sabotaging the Haas investigation, besmirching the judge's reputation, and violating basic principles of criminal procedure.[20] The letter, which was reprinted in its entirety by papers around the country, was an extraordinary step for a judge in the middle of a pretrial investigation. Even many of the court's sympathizers condemned the letter as unprofessional. The Chief Justice of the Appeals Court in Naumburg called it a »derailment.«[21] Reprimanded by his superior, Kölling complained of nervous exhaustion and pleaded that publishing his letter had been necessary to stop the press from »ripping [him] to pieces.«[22] A judge's honor was at stake, Kölling charged, and no one was ready to protect him.

The Interior Ministry responded to Kölling's provocation by demanding that the Justice Ministry remove him. A plot was hatched to press Kölling into taking a long-planned vacation just when a more sympathetic and pliable judge would be filling in as investigating magistrate. In a meeting with Kölling, the Chief Justice in Naumburg offered »fatherly advice,« expressing sympathy »as a colleague, not a superior.« The Chief Justice believed Kölling's unfortunate letter to the press was excusable given the systematic attacks by the administration and the leftist press. He was busily looking through newspapers to see who should be prosecuted for insult. It was clear to him that there should also be charges against Hörsing. In the meantime, however, in the interest of bringing the legal process back on to »orderly, peaceful tracks,« the Chief Justice urged

20 GStA 57525, Kölling, Statement of September 28, 1926.

21 GStA 57524, Notes, Kölling, meeting with Chief Justice of the Superior Court Werner.

22 GStA 57525, Kölling, Statement of September 28, 1926.

Kölling to take his vacation.[23] Kölling acceded, a new judge took over, and Rudolf Haas was finally released from confinement.

The aftermath brought a kind of emotional climax for the democratic left. Photos of a liberated and smiling Rudolf Haas with his Reichsbanner lawyer and his stylish wife were featured on the front page of a number of papers. The *Vossische Zeitung* published Haas's prison diary, presenting him as a proud combat veteran, an apolitical husband and father, and an honorable employer. The pathos of his strange ordeal was underscored by his description of reading Arthur Schnitzler's popular *Dream Story* in his cell. The story of a respectable doctor plunged into a surreal and terrifying underworld in prewar Vienna made Haas »completely crazy.« He wondered if he himself might be a »double-being« (*Doppelwesen*).[24] Hörsing refused to celebrate this victory, but called upon his followers to press on in their fight against the judiciary. »Justice is lost,« he said in a press statement. »We German republicans are the most law-deprived people in the world. The restoration of justice can only be achieved by getting rid of judicial privileges.«[25] The subsequent trial of Richard Schroeder for murder recapitulated the failings of the justice system, as much as it laid the case for Schroeder's guilt.[26] In the wake of the trial, disciplinary proceedings were held for Judge Kölling and detective Tenholt.

Hörsing emerged from the affair the preeminent symbol of combative republicanism. He was an impresario of emotion, the Republican id, a foil to the restrained, bland, »rational republicans« (*Vernunftrepublikaner*) who otherwise seemed to be running the country.[27] His own account of

23 GSTA 57524, Chief Justice Werner to Prussian Minister of Justice Fritze, August 2, 1926.

24 *VZ* August 10, 1926 and August 11, 1926.

25 *VZ*, August 11, 1926.

26 *Magdeburger Zeitung*, September 18, 1926 and September 19, 1926.

27 Paul Löbe, President of the Reichstag, praising Hörsing. *VZ*, August 15, 1926; FES, Nachlass Hoersing, no. 18, Republican Judges Association to

the Magdeburg affair was published under the provocative title, »My ›Justice Scandal.«[28] While the essay's point was to document the errors of the Magdeburg investigators, the title coyly suggested an acknowledgement of his role in creating a »scandal.« Certainly, Hörsing felt no shame in scandalizing the legal establishment and disrupting the judicial process in pursuit of a greater truth. As Hörsing knew, creating a scandal was one sure means of making a sensation. If he had awakened a righteous passion, what Radbruch called »the German feeling for justice,« this was, for Hörsing, far more important than the personal victory of one Jewish businessman (Radbruch 1992).

Hörsing, May 30, 1927, and no. 23, Wolfgang Heine to Hörsing, July 25, 1927; on »Vernunftrepublikaner,« see Gay (2001, 23–25).

28 *VZ*, August 11, 1926; *Berliner Tageblatt* August 10, 1926; and *Magdeburger Volkstimme*, August 11, 1926.

Conclusion

In 1928, the liberal law scholar and former government minister Eugen Schiffer decried the »transformation of the mood« in Germany regarding the courts. In the immediate postwar period, he argued, the republican left showed great reverence for the courts. Otto Landsberg, Minister of Justice in 1919 who later represented Friedrich Ebert in the Magdeburg trial, had promised to resign his position within a minute, according to Schiffer, if judicial independence were threatened from any side. »How the times have changed!« Schiffer wrote. Many people now saw »judicial independence not as a bulwark of justice, but rather as a wall that protected injustice.« Other old school liberal jurists were similarly dismayed by the popular »crisis of trust« in the courts. Jurists such as Max Hachenburg and Alexander Graf zu Dohna had no doubt that Rudolf Haas was innocent and Erwin Rothardt was guilty: They conceded that judges in Magdeburg had made terrible mistakes. Nevertheless they blamed state officials and the press for emotionalizing and politicizing these cases. The Haas case, Hachenburg argued, could have been resolved with »cool calm […] tact and wisdom.« The intervention by outsiders simply riled »easily excitable heads« (*leicht reizbare Köpfe*), leading to more mistakes. The true challenge for Germany, Hachenburg believed, was not the bias of »reactionary judges,« but popular attacks on the very edifice of legal reason and procedure. [29]

For the history of emotion in German politics and society, the Ebert and Haas cases were turning points. Government officials, the press, and even German judges challenged traditional norms of »restraint,« by expressing their own anger and openly appealing to the people's »sense of justice.« It was not just that these critics questioned judicial decisions, but that they interpreted bad decisions as symptoms of a broader failure in the system. They suggested that a better, more direct path to justice could come through political mobilizations, state intervention, and the rallying

29 Hachenburg (1926); Schiffer (1928, 7, 12, 19–21); Graf zu Dohna, in *Frankfurter Zeitung*, September 12, 1926.

of public opinion. The left's romance with legal reason seemed to be ending; its dalliance with the politics of emotion was heating up.

Justitia, in this environment, was no longer a figure of inspiration but the symbol of a faded ideal. In a caricature in the left-leaning tabloid newspaper *8-Uhr Abendblatt*, a gaunt and flat-chested Justitia lies stricken in a hospital bed, sword beside her, her blindfold reminiscent of a wounded soldier's bandage. Otto Hörsing is the strong-willed nurse, stirring medicine for the helpless and forlorn patient. Thus the nurturing Republic, its masculine vitality playfully dressed up in feminine accoutrements, was now the active force: the only possible source for some kind of revival of justice.

As Hachenburg noted, an odd twist of the Haas affair was that while the left lined up behind its traditional *bête noire*, administrative police power, the right repositioned itself as the defender of the courts. In the right-wing iconography of the Weimar era, Justitia was vibrant and strong, but under attack and bound in chains, betrayed by the very forces that had sworn to defend her. In a caricature from the magazine of the *Stahlhelm*, Justitia cries out for assistance, her scales held aloft, her blindfold gone. Citizen Hörsing oafishly stuffs her in a chest, as he proudly upholds the law of the Republic. »Who gets justice in Germany?« the heading asks.

The right's passionate support for judicial independence, legal reason, and proceduralism, however disingenuous, helped right-wing parties mobilize their supporters and win over liberals disappointed with the Republic. It was one reason that jurists quickly accepted the Nazis' »coordination« or *Gleichschaltung* of legal organizations in 1933 (Ledford 1995, 317–20; Bozi 1933).

The Nazi regime benefitted from both the popular crisis of trust in the courts and the right's fetishization of the independent judiciary. Nazi ideology proposed an ideal judge, unfettered by gratuitous rules and procedures, who independently embodied the »healthy sensibilities of the *Volk*.« In this way, the Nazis resolved a contradiction in Weimar politics. The courts could be seen as unique realms, structured by their own special rituals and yet responsive to the emotional needs of the people. The allegory of Justitia—with or without her blindfold—stayed on as an aging piece of kitsch.

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Abbreviations

DJZ	Deutsche Juristenzeitung
FES	Friedrich Ebert Stiftung
GStA	Geheimes Staatsarchiv Preussischer Kulturbesitz. Rep 84a
LHSA	Landeshauptarchiv Sachsen-Anhalt, Abt. Magdeburg
MM	Montag-Morgen
MZ	Münchener Zeitung
VZ	Vossische Zeitung

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Police emotion work in interpersonal homicides and attempted murders (1950s–1970s)[1]

Bettina Severin-Barboutie

Interpersonal homicides and attempted murders have been related to the most intense of emotions. A long existing and well-known example is the so called »crime of passion,« a murder or attempted murder associated with a love relationship, in which individuals lose rational control of themselves and get carried away by their emotions. Consequently, »crimes of passion« are not considered to be premeditated, but have long been acknowledged as criminal acts triggered by intense emotions (Karstedt 2011, 7). Hand-in-hand with the presumed emotional nature of »crimes of passion« is the legitimacy granted emotion as a legal defense as well as lesser penalties for these objectionable acts; during certain times in history, perpetrators even went unpunished (Karstedt 2002, 300). In 19th century Paris, for instance, those accused of a »crime of passion« were likely to be acquitted even when they admitted the deed (Ferguson 2010, 1).

In European and US historiography to date, homicides have been studied as part of the history of crime, violence, and urbanization (Mc Mahon 2013; Schwerhoff 2011; Speitkamp 2010; Roth 2009; Spierenburg 2008; Guillais 1986; Harris 1989; Ambroise-Rendu 2006). Over the past few years, historical research has shifted towards a broader and more cultural understanding of murder. For example, Martin Wiener has explored how the legal treatment of homicides contributed to the shaping of gender and national stereotypes within the imperial contexts of Victorian England (Wiener 2004a, 2004b), Eliza Ferguson has studied the construction of

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sexual difference through crimes of intimate violence in 19th century France (Ferguson 2010), whereas Lizzie Seal has analyzed gender representations of women who kill (Seal 2010), and Marlou Schrover and Winfried Speitkamp have studied honor killings (Schrover 2013; Speitkamp 2010). Currently, Ute Frevert is investigating the influence of »crimes of passion« and »crimes of honor« on the making of penal law codifications and on the administration of justice in Germany from 1794 to 1945 (Frevert 2013a), and Gian Marco Vidor is analyzing the link between crime and emotion in Italian penal law between 1870 and 1920 (Vidor 2014).[2]

This article focuses on the intersection of law and emotion in both interpersonal homicides and attempted murders in postwar Germany. It analyses hearings, led by the Stuttgart criminal police department, on homicide cases from the 1950s to the 1970s, making use of Arlie Russell Hochschild's definition of »emotion work.« For Hochschild, emotion work refers »to the act of evoking or shaping, as well as suppressing, feeling in oneself,« and »it can be done by the self upon the self, by the self upon others, and by others upon oneself« (Hochschild 1979, 561, 563). This emotion work will in turn be explored using a performative studies concept: The police hearings will be addressed as *Aufführungen* as conceived by Erika Fischer-Lichte—that is as performances that relied on a specific text and were characterized by the physical co-presence and shifting roles of actors and spectators in a specific place and for a certain amount of time (Fischer-Lichte 2003, 39–41). The purpose of this approach is to broaden the understanding of law and emotion in the criminal justice system in three different ways: First by suggesting a new area of inquiry for Hochschild's concept of emotion work, second by scrutinizing a time span not yet extensively studied, and third by shifting the focus towards an institution of the criminal justice system that is among the first legal actors on the crime scene, but is far less researched than other judicial institutions.[3]

2 See also Vidor's article in this volume.

3 Historiography about the performative dimensions of the criminal justice system includes Habermas (2008); Jäger (2003); Martschukat (2003); and

The analysis draws on files in which male residents from Italy were charged with homicide or attempted murder. These examples have been chosen for two reasons. On the one hand, postwar German society still harbored assumptions—long present in different parts of Europe—about the emotional specificities of male Italians/»Latins«/Southern Europeans, such as their hot-blooded, impulsive characters (Wiener 2004, 204; Gräff 1969). Concurrently, crimes of honor (*delitti d'onore*) continued to be relevant in Italian penal law and allowed the mitigation of sentences if offenders were able to prove that they had acted under specific emotional circumstances in order to restore their sullied honor (Codice penale, §§ 544, 587, 592).[4] Thus, interrogations of Italian suspects inevitably raised questions about (diverging) »feeling rules,«[5] moral judgments, and legal underpinnings in police investigations of these acts. Furthermore, the cases selected include interrogations with distinctive communicative situations. Some in fact took place in the presence of interpreters; thus a certain number of the encounters were not face-to-face communication between police officers and interviewees, but triangular communication situations in which police officers talked to interviewees through a third party, who was very often a fellow countryman of the accused.

Apart from the records of Stuttgart's criminal police department (stored in the state archives in Ludwigsburg), this article relies on the *Polizei-Handbuch für Baden-Württemberg* (a manual designed for police officers by the police

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Steinmetz (2002). For historical research on trial and police records see Eibach (2003); Kounine (2013); Harris (2010). For research published before 2002, see the summary presented by Fuchs and Schulze (2002). On emotion management in contemporary police forces see Van Stokkom (2011).

4 The three articles of the Italian penal code were abolished on August 8, 1981. Codice penale, §§ 544, 587, 592; http://www.altalex.com/?idnot=36653. Last accessed Oct. 31, 2014. For an analysis of the meaning of honor in Italian penal law today see De Simone and De Francesco (2007).

5 According to Hochschild, feeling rules are »a set of socially shared, albeit often latent (not thought about unless probed at), rules« (Hochschild 1979, 563).

school of the federal state of Baden Wuerttemberg, updated regularly since the 1950s), legal codifications both from the Federal Republic of Germany and from Italy; and contemporaneous sources about criminality among »guest workers« (Gräff 1969) and women (Damrow 1969), as well as about the culture of emotion (Pasolini 1964).

The article shall first give an overview of the role played by the police in the investigation of homicides and go on to examine police hearings as emotion work. The second part begins by focusing on the question of how law, fairness, and justice were intertwined with emotions in the hidden scripts of the police. It then explores the way police made sense out of emotions in their reports. Finally, the article concludes with remarks on sense-making processes after an offence had been communicated to the general public.

Gathering information, producing evidence, making sense, handling emotions: The police investigations

In the early hours of June 11, 1962, officers of Stuttgart's *Schutzpolizei* were patrolling the streets of Stuttgart-Vaihingen, a suburb in the south-west of the city, when they noticed a group of people composed of several men, but only one woman. One man was walking ahead of the rest and made the officers suspicious. Fearing that a fight was imminent, they decided to follow the group. As they were slowly driving along, the man walking ahead of the group suddenly turned around and shot one of the men following him. The officers immediately alerted Stuttgart's criminal police department from their telephone. When representatives of the criminal police department arrived at the scene of the crime half an hour later, the most urgent tasks had already been carried out by the *Schutzpolizei*. The fleeing suspect had been arrested, the weapon confiscated, several witnesses located, and the scene of the crime blocked off.[6] The criminal police began their investigation from that point on.

6 Police account on the homicide of Hans-Joachim K., July 24, 1962, Staatsarchiv Ludwigsburg, EL 51/3, Bü 217.

This example shows that the criminal police were not necessarily the first institution to come into play after a crime was revealed. Entrusted with similar functions as the criminal police in the detection of a legal transgression, the *Schutzpolizei* could actually precede their colleagues.[7] However, the criminal police were responsible for further investigations. They had to collect as much information as necessary in order to reconstruct as precisely as possible what had happened, convert the act into a criminal offence under penal law, and classify suspects or offenders according to disposition-based categories drawn from the state of research of criminology at the time. In other words, they had to categorize suspects into criminal subsets depending on whether these suspects had committed the crime intentionally or not. Consequently, criminal police officers contributed both to the construction of the crime and of the criminal.[8]

The categorization of suspects and offenders according to motives identified by the police was a cautionary measure. It was considered an important prerequisite for the appropriate treatment of the offender within the criminal justice system as a whole. Very much in line with the typology common in criminology at the beginning of the 20th century (Wetzell 2000), there were approximately three categories of offenders: those who did not premeditate their act but transgressed a norm in specific circumstances (*Situationsverbrecher*), those who committed a crime at a certain phase of their lives (*Entwicklungsverbrecher*), and lastly, those who were born criminals (*Charakterverbrecher*). In this context, emotions could explain and legitimize a normative transgression in the group of the *Situationsverbrecher,* and constitute a subcategory of these criminals. Defined as *Konfliktsverbrecher*, or criminals as a result of a conflict, these people were considered to have violated a norm due to an emotional outburst resulting from an inner conflict, and were consequently neither charged with premeditation nor seen as having a particular predisposition.

7 On the organization of the Baden-Württemberg police, see Hochschule für Polizei Baden-Württemberg (2008).

8 See the findings of historical research on police records departments (Jäger 2003, 209).

Women were believed to be particularly vulnerable to this type of crime (Polizei-Handbuch 1970, 10–15)—a belief that corresponded to enduring, commonplace assumptions on female criminality (Uhl 2003).[9]

While the legal evaluation of the crime and the characterization of the criminal had a forward-looking dimension, the reconstruction of what had happened necessarily focused on the past, since criminal offences were, by nature, closed events. However, the past never only meant a »simple past,« but always also included a »past perfect,« because police investigations did not only have to gather information on the criminal acts themselves, but also on the background explaining—or even legitimizing—them. The construction of the event and its background could take a certain amount of time and be comprised of multiple temporal layers.

The police investigations very much resembled a play in three acts: The first act, taking place at the crime scene, was intended to furnish insight into what had happened, to generate visual evidence (photographs, sketches, foot- and fingerprints, etc.), to uncover victims, witnesses, and informants, and, eventually, to arrest any suspects.

The second act had to produce information on the backgrounds of the event; above all through the interrogation of suspects, victims, witnesses, and informants. Interrogations had to begin as soon as possible after an offence had been discovered in order to prevent these crucial actors from adjusting their narrative and agreeing in advance about what to declare to the police. In addition, it was implicitly assumed that the shorter the time span between the crime and the hearings, the less time the people involved in the crime would have to reflect upon what had happened, to adapt their behavior and to do »surface acting« (Hochschild 1979, 568). Consequently, interrogations carried out shortly after a crime was committed were believed to be more trustworthy than those realized at a later date.

9 For contemporaneous assumptions about female criminality see the book published in Germany by crime reporter Hildegard Damrow (1969). Evidence on the gendering of crimes of passion in history is produced in the following works: Ferguson (2010); Ambroise-Rendu (2006, 35–44); Wiener (2003); and Harrison (1989, 204–42).

Although most of the interrogations took place at the police station, some were held in prison or places of work, and others in hospital rooms or private apartments. These environments were spatial settings that were highly charged with personal feelings, such as pain and love. Apart from any surviving victims, some of the persons interrogated by Stuttgart's police had been present on the crime scene, or had even observed the criminal act. They constituted the (often narrow) circle of eyewitnesses (*Tatzeugen*), who had not been directly involved in the crime, but had participated in it as observers. Furthermore, the police relied on people belonging to the social and emotional environment of the suspects (*Auskunftspersonen*) to testify on the suspect's biography and private life.

The suspects analyzed in this article all came from Italy, thus the number of potential informants was limited, since family members and friends often lived abroad—a finding that reveals the limits and challenges that transnational social networks imposed on German authorities at the time.[10] As a consequence, the police focused on those relatives and friends they could locate in Stuttgart or its outskirts; these people had often been frequently uprooted and were themselves legal aliens. Moreover, the police called on colleagues and supervisors to testify on the suspect's ethics and behavior at work. These informants, who did not have to be German nationals, were entitled to evaluate the conduct of others according to the moral claims of Germany's postwar society, because the working world was considered to be a social microcosm that shared the same set of norms and values as the society as a whole (e.g. punctuality, steadfastness, diligence, and integrity). Consequently, these informants fulfilled functions similar to those who acted as experts for the moral conduct of offenders in previous centuries.[11]

Usually, a confession was regarded as the greatest success, if not the acme, of police interrogations. In those cases in which offenders actually confessed the deed they had been charged with, assessment of the crime's

10 This matches findings of historical research on transnational families, see Derix (2012, 351).

11 On these »experts on moral conduct,« see Kästner (2008, 85–98).

background—including the question of a potential emotional trigger—became the central focus of the hearing. Interrogations eventually led to what was called the *Auffassung des Falls*, that is the interpretation of the crime according to penal law, which could in turn bring about the execution of search warrants for the homes of—as well as the arrest of—any suspicious persons who had not yet been arrested. The contents of all hearings needed to be written down verbatim by the police officers and authenticated by the interviewees (Polizei-Handbuch 1970, 40–41, 65, 157).

The third act of the police investigation was dedicated entirely to »sense-making.« In this last phase, officers transferred the data collected into a plausible, cohesive narrative of the events—a sort of plot—by translating the criminal act into a legal charge under German penal law and by categorizing the offender on the basis of criminological typology as mentioned above. This written account—representing »closed narratives« of »closed events« and the subsequent break-down of multifaceted stories into explanatory legal frameworks—was then handed over to the prosecution for further investigation and from there eventually went to the courts of law (Polizei-Handbuch 1970, 41, 160). In those cases in which criminal offences were followed by a trial, police investigations became retrospectively what Yon Maley has called »pre-trial processes« (Maley 1994, 16), and the evidence they produced was part of the script the performances at court relied upon.

Police hearings as emotion work

Performing law, fairness, and justice; working upon emotions: The hidden script of the criminal police department

There was no specific legal procedure defining how the police had to conduct interrogations (Polizei-Handbuch 1970, 153–54). However, officers were not entirely free in their questioning of people. On the one hand they had to respect the rules for interrogations stipulated in the German Code of Criminal Procedure (*Strafprozessordnung* §133–36), and

on the other hand they were advised to follow the guidelines in the police handbook.

The German Code of Criminal Procedure was meant to protect suspects, whereas the handbook intended to produce evidence. Hence, officers had to juggle between contradictory requirements. A further complication was that the German Code of Criminal Procedure was legally codified, while the handbook did not have binding character, rather it constituted a set of ideas on how the authors of the manual had imagined police officers should structure interrogations, and contained advice to be followed flexibly according to the individual interview situation.

Witnesses, informants, victims, and suspects were not familiar with these guidelines, nor were they meant to become aware of the techniques and strategies, used by interrogators to channel communication, elicit statements and induce emotions. As this was part and parcel of the »secret« character of criminal police departments' investigations (Hilgert 2013, 138–39), this ignorance was deliberate. The police did not want to give interviewees time to prepare themselves. They preferred to catch them off-guard and produce spontaneous reactions—in the eyes of the police this was more likely to mirror the emotional state of the interviewee and therefore more likely to be »true« than in a familiar procedure in which communication could be anticipated and the display of emotions controlled.

One of the major tasks of police officers in their call of duty to find the »truth« was the performance of law, justice, and fairness. »The defendant must have the impression,« suggested the handbook, »that the interrogating officer performs his duty correctly, stands outside of the affair, and does not try to bluff or cheat« (Polizei-Handbuch 1970, 151). The staging of law, justice, and fairness was intended to fulfill the moral principles of society. Research on the execution of the death penalty in private (Martschukat 2003, 246–50) suggests that this performance took not only the interviewees into consideration, but also the general public, who were physically absent during interrogations.

However, the performance of law, fairness, and justice was not limited to this aim, but also served two additional purposes. Firstly, it represented a

façade: the handbook advised officers to consciously deceive interviewees by asking important questions in a casual manner. They were to refrain from providing information to interviewees in order to collect a maximum of evidence without arousing suspicion. Only after a person had made contradictory statements, or had given testimony which did not match previous assertions or evidence otherwise produced, were the police to give further information or confront the interviewee with these contradictions (Polizei-Handbuch 1970, 64, 155). This meant that officers were to use practices inconsistent with the moral requirements they were simultaneously requested to perform.

This staging of law, justice, and fairness also fulfilled a creative function. It served as a tool to work upon the emotions of the interviewees by inducing in them a desired emotional state or inhibiting an undesired emotional state. At the core of this emotion work stood building and sustaining trust on the side of the interviewees. In the short term, this trust was to fuel cooperation for the undefined time of the police investigation, to produce evidence about the criminal act, and, in the best-case scenario, to obtain a confession from the suspect. In the long term, this trust was to ensure that suspects accepted the legal and moral judgment that would eventually be inflicted upon them at a later stage (Polizei-Handbuch 1970, 38, 148–51, 156). Trust-building in the criminal justice system therefore constituted a precondition for later judicial emotion work and can be considered to be a form of »future control« (Anderson 2010).[12]

Apart from the assumption that trust was essential for cooperation, the building and sustaining of trust requested by the handbook relied on two major presuppositions: First, that interviewees would in turn build up their trust in officers if they had the impression that they received fair and equal treatment.[13] Second, that the high moral demands of the

12 Research on trust and trustworthiness has multiplied over the last few years, but there still is no consensus about the emotional quality of trust. See above all the works of Ute Frevert, Niklas Luhmann, Russell Hardin, and James S. Coleman.

13 On the differences between confidence and trust see Luhmann (2000) and Frevert (2003, 8–9).

criminal justice system vis-à-vis offenders intended by legal punishments (acknowledgment of moral principles and development of the moral sentiments attached to them) could only be achieved if suspects had experienced justice and fairness in the criminal system and built up trust beforehand—an assumption that matches conclusions of contemporary emotion theory whereby justice has to be established before moral sentiments can be aroused, and legal procedures »are not built on ›basic emotions,‹ but are part of the emotion process« (Karstedt 2002, 309–10).[14] Consequently, trust represented a key—if not *the* key—to transforming the interviewees' emotional status altogether and therefore constituted an instrument in its own right for working upon emotions.

One of the feelings trust was to transform was shame. According to the handbook, shame and legal transgression were mutually inclusive. Shame emerged almost automatically once somebody had committed a crime and thus represented a quasi-universal feeling rule, regardless of the normative order and the sociocultural context in which the crime had taken place. While shame was considered intrinsic to any legal transgression, it hindered offenders from recognizing their crime. It could however be neutralized through a confession, and trust in the police was seen as the outside push or catalyst to drive an offender to confess. Hence, a confession not only represented the most successful outcome the police could achieve in an investigation, but it was also a cathartic act for the emotional state of the person who had transgressed the law (Polizei-Handbuch 1970, 151).

The manual supplied police officers with several trust-building techniques. It requested they ask questions in a measured way, avoid coercive interrogation, and refrain from using leading questions with the aim to obtain desired statements or confessions. Furthermore, it advised them not to talk too much, to ask short questions, and to adjust their language to the intellectual level of the interviewee, just as workers in other

14 On the link between moral judgments and emotions see for instance Prinz (2007).

professions had to be attuned to the economic status of their clients.[15] Besides these suggestions, it recommended opening hearings with a personal presentation by the interviewee him/herself and thereby creating further communication situations in which interviewees had time to express themselves and to begin to feel comfortable (Handbuch 1970, 150).

Apart from these verbal techniques, the handbook provided officers with a set of rules concerning the physical display of emotions. Among these was the recommendation not to express or get carried away by their personal feeling during the interrogations (*Gefühlszucht*), and to avoid physical symptoms of emotions, such as shouting or gestures, even when somebody was disrespectful. They were also asked to have a well-groomed appearance (Handbuch 1970, 150, 155)—a requirement that German police forces have had to fulfill ever since (Hilgert 2013, 143).

This reigning in of emotions amounted to a kind of »double-faced emotion management« (Van Stokkom 2011, 249), because it was supposed to not only build up trust but also contribute to shaping the emotional state of interviewees in other ways. For instance, *Gefühlszucht* was meant to elicit sympathy and to prevent the interviewee from developing strong feelings such as anger; whereas adjusting to the intellectual status of the interviewee either meant demonstrating superiority and firmness (in contact with eloquent people with sophisticated language skills), or avoiding feelings such as distrust or hostility (in contact with interviewees who manifested poor language skills) (Polizei-Handbuch 1970, 149–50).

While officers had to work upon the emotional state of the interviewees, they were to inhibit interviewees from altering their feelings—a recommendation that relied on the implicit assumption that emotions could be contagious. Thus, the interaction between the performance of law, fairness, and justice on the one hand, and emotions on the other, was reversed. Firstly, officers were to keep an emotional distance from the case, as well as to the suspect, in order to stay fair and objective. Secondly, they were to avoid allowing suspicion to give way to trust, but also to distrust

15 See Hochschild (1983, 183).

foreigners more than Germans, as it was supposed that there was an emotional gap between Germans and other nationals. It was suspected, for instance, that the latter possessed greater language skills than they pretended to have, and thus understood what they were being asked. Hence, it was feared that the presence of interpreters would give them extra time for reflection and the creation of excuses, thus making it impossible to take them by surprise. Those interpreters and fellow countrymen were considered just as untrustworthy as the interviewees themselves, no matter how long they had been living in Germany (Polizei-Handbuch 1970, 156). This implicit mistrust of non-Germans conveyed the idea that Germans constituted a national emotional community apart.[16]

In principle, the general mistrust of the »others« compelled police officers to double-check all information they collected. At the same time, it forced them to discount altogether certain information as evidential material. Translations were considered completely worthless (Polizei-Handbuch 1970, 153, 155–56). The distrust the manual demanded therefore generated the contradictory effects Niklas Luhmann has identified for mistrust in general: the need for more information and the development of strategies to gather it on the one hand and the constriction of information and the reduction of complexity on the other (Luhmann 2014, 93). Furthermore, officers had to constantly slip into the role of spectators in order to make sense of the interviewees' performances. Assuming that interviewees manifested their emotional state through visible physiological signs, rather than through verbal statements, the handbook considered the interviewee's body both as a »communication machine for emotions« (Groebner and Wildt 2015, 8) and as a guarantee of the truth, consequently placing it at the center of the police hearing. It advised officers to position the interrogated person in such a way that they could see them from top to bottom, to search for physical symptoms of emotions (for example gestures, language, loudness, shaking, and facial expressions such as blushing or going pale) and to analyze them. This procedure was called

16 On the concept of emotional communities, see Rosenwein (2006).

Ausdrucksanalyse (Polizei-Handbuch 1970, 155).[17] Particular attention was drawn to the eyes. The eyes were believed to give access to the emotional state of a person and officers were requested to maintain contact with what was called »the bridge of the eyes« (Polizei-Handbuch 1970, 155–56) throughout the encounter, except during a confession. However, while the handbook accorded an epistemic quality to emotions, it did not offer explicit guidance for decrypting or interpreting the emotional manifestations observed, nor did it provide an official paratext for cultural differentiation. Emotions were mentioned as if their meaning was so self-evident that they did not need further explanation.

Making sense out of emotions: Police reports

Although the handbook did not give instructions on how to write reports and final accounts (apart from the necessity of transcribing protocols word for word), police files were extremely standardized. The description of interviewees' multifaceted life stories and social relationships—particularly complex in migration biographies—was reduced to a minimum, the presentation of the circumstances surrounding the criminal act was fact-orientated, and the characterization of the offence was limited to the language of the law. Despite their importance in the hidden script for police hearings, emotions were almost absent—seemingly banned—from these reports. Their epistemic role was also rarely revealed.

In the main, the police referred only implicitly to feelings observed and to the consideration of these feelings in their work. There was only one instance where a police officer was straightforward: In his summary of the interrogation of an elderly male in March 1970, he noted he had significant reservations regarding the truth of the testimony because he had perceived the informant to be very nervous and confused during the encounter.[18]

17 For an historical overview of the facial analysis of trust and mistrust see Schmölders (2003, 217–26).

18 Police report, March 3, 1970, Staatsarchiv Ludwigsburg, EL 51/3, Bü 324.

While police officers very rarely provided explicit information about the display, awareness, and management of emotions during interrogations, they occasionally referred to emotions in the sense-making process. This concerned for example feelings implicitly emerging from interviewees, as in the case of the attempted murder of Adolf H. The latter had been seriously injured by two pistol shots outside a pub in Stuttgart-Bad Cannstatt in February 1970. The criminal police department charged Giovanni A. with the crime. Not only had he had a fight with Adolf H. and three other men on the night preceding the murder but, according to the testimony of Gonzalo F. (Giovanni's Spanish roommate), Giovanni had threatened to kill the four men on his return home from the fight that very night. With that testimony and other findings, the police retrospectively made sense of what Gonzalo had only mentioned implicitly. They concluded that Giovanni had taken vengeance on his victim and charged him with murder for base motives driven by revengefulness.[19]

Police officers referred to feelings mentioned by interviewees before or during the encounters. These utterances could be expressions of the interviewee's own feelings. For instance, Aldo B. justified himself in December 1966 by stating he had not strangled his girlfriend in order to kill her, but out of anger.[20] The feelings mentioned could, however, refer to someone else and therefore did not, strictly speaking, represent feelings, but communicated perceptions of other people's emotional state. For example, after the suspected homicide of Natala R. in Stuttgart, the police interviewed the prime suspect's girlfriend and brother-in-law. The girlfriend testified that her boyfriend's wife had become very angry and screamed loudly the last time she had come to visit them, while Natala R.'s brother remembered that his sister and brother-in-law argued constantly because of jealousy.[21]

19 Police account, March 2, 1970, Staatsarchiv Ludwigsburg, EL 51/3, Bü 324.

20 Police report, December 12, 1966, Staatsarchiv Ludwigsburg, EL 51/3, Bü 273.

21 Police report, March 2, 1972, Staatsarchiv Ludwigsburg, EL 51/3, Bü 365.

The investigation of these feelings and perceptions suffers from a methodological flaw, because it draws on historical sources that are biased. The police records do not actually mirror what was said, but the way police officers reported on what was said or translated during the encounters. However, the bias of the police records does not mean that utterances relating to feelings cannot be explored at all—quite the contrary. When analyzed in their performative dimensions, they can open new perspectives. Not only do they shed light on those feelings that officers considered noteworthy, and thus on the emotional landscape of Germany's postwar society, they also reveal the meaning accorded to them by police officers.

Analyzed from such a perspective, two types of utterances appear in the police records. The first type concern verbalized feelings, interactive speech which has been called »illocutionary utterances« in speech act theory (Martschukat and Patzold 2003, 4–5). In the main, these concerned trust explicitly expressed at the end of testimonies by foreign interviewees to confirm the correctness of the written report in German. »I will sign this report and refrain from reading aloud,« declared the suspect Guiseppe R. at the end of his interrogation by Stuttgart's criminal police department in 1972. »I am confident that everything has been written down the way I testified it or the way it has been translated.«[22] In saying that he trusted the police report, Guiseppe R. actually authenticated the German version of his testimony. Hence, his assertion of trust replaced legal authentication of the report through reading. However, such acts of faith at the end of an interrogation did not necessarily testify to trust in the police and therefore to the successful performance of the police. It could have also been the result of the asymmetrical power relationship between police and interviewees, or, alternatively, mirror insufficient language skills that hindered non-German speaking interviewees from understanding or verifying the German report. Wherever this was the case, interviewees were in a similar situation to that of illiterate persons in previous centuries.[23]

22 Police report, June 7, 1972, Staatsarchiv Ludwigsburg, EL 51/3, Bü 365.

23 See Ulbrich (1996, 208).

The second type of performative utterances concerns feelings brought forward to legitimate previous actions and corresponded to what speech act theorists have called »perlocutionary utterances« (Martschukat and Patzold 2003, 5). These utterances related either to the background of a criminal act or to performances in the investigation process. Ignazio O. and Calogero G. for instance, who had been involved in a homicide in 1962, were said to have lied for fear of punishment and testified to what they had seen only after the clergyman of Stuttgart's Italian Catholic community intervened on their behalf.[24] In another homicide case, an informant wanted to stay anonymous because he feared both the suspect and the suspect's brother.[25] The above-mentioned suspect Antonio P. refuted having first brought home the weapon the night of the crime. Instead, he declared that he had been scared at night since the last homicide committed in Stuttgart in May 1962, and therefore always carried a gun at night.[26] Guiseppe R., arrested in 1972 for attempted murder of his wife, explained retrospectively that he had failed to mention an injury on his middle finger because he had been too nervous to even realize that he had been injured.[27]

In some cases, the meaning the police made of such perlocutionary utterances was not necessarily what interviewees presumably wanted to achieve. Antonio P., for instance, was believed to have presented his crime as an act of self-defense.[28] Some utterances could even create meanings that were diametrically opposed to the speaker's intention and therefore fail. The investigation on the homicide of Herta P. is a sound example of a case with such a reverse effect:

On November 29th, 1960, Herta P. was stabbed in her lower abdomen in Stuttgart-Bad Cannstatt. She died in a nearby hospital only an hour after

24 Police report, June 6, 1972, Staatsarchiv Ludwigsburg, EL 51/3, Bü 217.

25 Police report, March 3, 1970, Staatsarchiv Ludwigsburg, EL 51/3, Bü 324.

26 Police report, June 11, 1962, Staatsarchiv Ludwigsburg, EL 51/3, Bü 217.

27 Police report, June, 7, 1972, Staatsarchiv Ludwigsburg, EL 51/3, Bü 365.

28 Police report, June 11, 1962, Staatsarchiv Ludwigsburg, EL 51/3, Bü 217.

the crime was discovered by Stuttgart's police. After having arrested the prime suspect present at the scene of the crime, Salvatore R. (Herta's ex-boyfriend, originally from Latina in Italy, who had come to Stuttgart to work in the late 1950s), the police immediately started to investigate the case and produced evidence not only about what had happened, but also how and why. They took photographs and drew geographical sketches of the crime scene, detected female footprints on the ground and eventually found both the weapon used in the crime, and a person who had eyewitnessed the criminal act, Benny H. (an American soldier, who had been living in Stuttgart since April 1960 and who had become Herta's boyfriend a few months later).

Collection of evidence from the crime scene was rapidly followed by the interrogation of the two men. Benny was interrogated twice; Salvatore went through several examinations the very night of the murder and the following days. Both were interrogated by different officers with the help of interpreters. Because he had been injured, Benny's interrogations took place in the hospital, whereas Salvatore was interviewed at the police station. Other witnesses and informants were also interviewed about the circumstances, as well as about the background of the homicide.

In none of his different statements did Salvatore openly admit having stabbed his former girlfriend with the stiletto found on the crime scene. According to the police reports, however, he purposely deflected suspicion from himself in two ways: He incriminated Benny by insisting that the American soldier had attacked him first, thereby presenting his deed as a legal act of self-defense, and he also legitimized his act with personal feelings. »I might have loved Herta more than any other man could ever love a woman,« he insisted. »Herta also told me that she loved me and used to present me to other people as her husband. When I love somebody, I am also jealous. I have always been jealous.«[29]

The police officers did not deny that jealousy could be an emotional companion of love, and a letter from one of Herta's friends, who obviously

29 Police report, November 11, 1960, Staatsarchiv Ludwigsburg, EL 51/3, Bü 203.

knew about her problems with Salvatore, reveals that love and jealousy were commonly regarded as linked feelings in postwar Germany. In this letter, confiscated from Herta's apartment by the police, the friend claimed that »where there is no jealousy, there is no love.«[30] The police did not dispute the fact that Salvatore's act had been driven by jealousy. However, on account of different testimonies, they believed that Salvatore's relationship with Herta had not been based on love, but on economic interest. Instead of earning his living honestly, Salvatore had been kept by his girlfriend. Under this perspective, the jealousy which had obviously triggered his act did not correspond to the sociably accepted—and therefore legitimate—feeling of jealousy the officers had in mind. Rather it had a rational basis and was hence premeditated. In the police interpretation, Salvatore had killed Herta because he did not want another man to benefit from her. Consequently, it was not so much the jealousy in itself that the police officers condemned, but the relationship that had caused this emotion. On one hand, it did not rely on the emotional bond that a relationship between a man and a woman ought to be based upon, that is to say love, and on the other hand it challenged the officers' gendered idea of the role women and men had to play in society. According to them, men had to provide for women and not vice versa.

Interestingly, the police reminded the suspect that it was forbidden to have such a knife in one's pocket in Italy,[31] but at no point did they refer to differences between German and Italian penal law concerning, for instance, murders committed following dishonor. Nor did they use emotions as an explanation or legal excuse for the crime in their final evaluation of the case, even though stereotypes about Italians as »guest workers« (*Gastarbeiter*) and Southern Europeans (*Südländer*), and also as members of an emotional nation, were ubiquitous in postwar Germany (Gräff

30 Police report, January 1961, Staatsarchiv Ludwigsburg, EL 51/3, Bü 203.

31 Police account, December 15, 1960, Staatsarchiv Ludwigsburg, EL 51/3, Bü 203.

1967; Sala 2006; Severin-Barboutie 2011), whereas in postwar Italy the idea of a specific culture of love affairs and sexuality was commonplace.[32]

Final remarks: Making sense out of emotions among the general public[33]

While the police officers did not openly distinguish between German and foreign-born interviewees in the way they interpreted emotions,[34] such differentiations were made explicit once criminal acts had been communicated to the general public. The rather impartial account of an Italian newspaper on the homicide of Hans-Joachim K. by Antonio P., for instance,[35] prompted an anonymous reader (who claimed to live in Italy but to be of foreign origin and who will be addressed as »he« in the following lines) to confront Stuttgart's police with an interpretation of the act of killing that was completely different from that of the police officers. In his anonymous letter, sent to the police in June 1962, the reader drew a close line between the homicide, World War II, and labor migration from Italy to Germany. His argument embedded the killing in a bi-national relationship gone wrong during the war. Moreover, he attributed it to the hatred Italians supposedly felt towards Germans. In this perspective, the crime did not have the character of an interpersonal affair, but had been committed by a member of an imagined national emotional community against a member of another national emotional community. At the same time he recommended that Germans not trust Italians and discouraged their employment in the German economy. He also requested Germans to generally be distrustful in any future wars, as

32 Pasolini, Pier Paolo (1964), »Comizi d'amore,« accessed October 25, 2014, http://www.youtube.com/watch?v=O38Qkyj5AXk.

33 For further details about the link between criminality and the general public, see Schwerhoff (2011, 178–96).

34 This matches findings of Rita Chin according to which terms such as race were not employed in public discourse in West Germany (Chin 2007).

35 The article was entitled »Siciliano uccide (a Stoccardo) autista tedesco,« 1962, Staatsarchiv Ludwigsburg, EL 51/3, Bü 217.

he predicted that nobody would stay on Germany's side up to the very end. Interestingly, this part of the letter was omitted in the German translation, even though the translated version had been testified as authentic.[36]

Not everybody went as far as the anonymous author when interpreting murder cases involving Italian suspects. His letter is therefore not representative of the meanings which could potentially emerge from homicide cases once they left Stuttgart's police station. However, the letter does provide insight into the stereotyped imagination of nations as emotional communities, as well as into the meanings that murders generated in postwar Germany after their communication to the general public. It may have been such dynamics that the authors of the *Polizei-Handbuch* also had in mind when they asked officers to be careful when informing the press or the general public (Polizei-Handbuch 1970, 148).

36 Anonymous letter to Stuttgart's police, undated (received June 29, 1962); German translation of the letter, Staatsarchiv Ludwigsburg, EL 51/3, Bü 217.

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Disgust, compassion or tolerance

Law and emotions in the debate on § 175 in West Germany

Philipp Nielsen

Introduction

Nineteen sixty-three was a liminal year. On the one hand, Konrad Adenauer resigned from the Chancellery, symbolically ending the reconstruction era. On the other hand, the premiere of Rolf Hochhuth's *Der Stellvertreter (The Deputy*, directed by Erwin Piscator) on the Vatican's stance toward the deportation of Roman Jews as well as the beginning of the Auschwitz trial in Frankfurt exposed Nazi crimes to a level of scrutiny not seen since the Nuremberg Trials. In the debates surrounding the reform of the penal code, the two questions for German society implicit in these two strands came together: What kind of society should West Germany be in the future, and in what way should this future be connected to its past? Within the reform process, the debate was most passionate as regards the decriminalization of homosexuality.[1] And in that debate, the question of the relative importance of past, present, and future emotions was paramount.

The role of emotions has seen a recent upsurge in interest, originating in anthropology and sociology and spreading to neuroscience, history, and legal studies. The history of emotions in particular stresses that emotions not only have a history, but also shape history. Emotions are historically contingent and they and the ideas about their source, role, and legitimacy mold the behavior of historical actors. They thus necessarily also shape

1 »Homosexuality« refers here always to male homosexuality. Female homosexuality was not criminalized in Germany.

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the law and ideas about the role of the same in society (on history, see for example Gammerl and Hitzer 2013; Frevert 2011; Eitler and Scheer 2009; Rosenwein 2006; for law, Bandes and Blumenthal 2012; Abrams and Keren 2010; Karstedt 2002).[2]

Within the discourse on decriminalization, emotions played a role on several levels. First, the government as well as defenders of the status quo invoked the supposedly »natural feelings« of the majority, namely disgust, to defend the criminalization of homosexuality. Second, it contrasted these »natural feelings« with the deviant desires of homosexual men. Third, homosexual men used their own feelings to defend themselves against accusations of deviance and to integrate themselves into an accepted discourse. And fourth, reformers either posited divergent moral sentiments, such as shame or compassion, or argued for the complete separation of feelings and law, emphasizing emotions' nefarious influence on law. Both sides used emotions descriptively as well as normatively. To proponents as well as opponents of § 175, the law governing homosexual conduct in the German Penal Code (StGB *Strafgesetzbuch*), could, for better or worse, stir emotions.

The article at hand focuses on the intersection of the first and the fourth levels, and thus concerns itself with emotions on the societal plane. It is of course impossible to detach these levels completely from the emotions of those involved in the debate and the emotions felt by or supposedly expressed by homosexual men. However investigating these fully would exceed the scope of this article. Instead it analyzes the place of disgust and compassion in the debate sparked by Hans-Joachim Schoeps' article of December 1962, »Soll Homosexualität strafbar bleiben?« (Should homosexuality remain a crime?) (Schoeps 1962a).[3] Schoeps, a Jewish

2 The section History of Emotions at the Max Planck Institute for Human Development in Berlin founded a working group on »Law and Emotions« in 2014. See https://www.mpib-berlin.mpg.de/en/research/history-of-emotions/projects/law-and-emotions. Accessed November 5, 2015.

3 Despite their different semantic histories, in current discourse on emotions in politics, compassion, sympathy, and even empathy are mostly used

German rémigré and closet homosexual, published this piece in the liberal monthly *Der Monat*. By connecting the discrimination of homosexuals to the persecution of Jews in the Third Reich, he broadened the focus of the discussion. Rather than being narrowly concerned with § 175 alone, Schoeps turned the debate into one about the desired connection between Germany's past and the country's future as prescribed by law. He also reopened a link between homosexuals and Jews as both sexually deviant and disgusting that had been made repeatedly in National Socialist ideology and praxis. Officially, of course, the discourse on Jews had changed in postwar West Germany. However public responses to Schoeps' writing brought to light sentiments towards Jews and homosexual men that demonstrated both the malleability of public feeling as well as its resistance to change. Within this article, these sentiments come to bear only on the construction of disgust and compassion by the participants of the debate.

The protagonists: How personal histories position people in public discourse

Schoeps' article not only provoked reactions from the readership of *Der Monat*. He also found a direct sparring partner in Rudolf Krämer-Badoni, a Catholic conservative writer invited in January 1963 to pen a rejoinder by the Protestant newspaper *Christ und Welt*. Schoeps, a regular contributor to *Christ und Welt*, Germany's most popular weekly at the time, was then allowed to respond in its pages and the exchange ended, much to Schoeps' chagrin, with a final statement by Krämer-Badoni on January 25, 1963.

It was remarkable that a Jewish rémigré intervened so forcefully on a topic as controversial as § 175, and with direct reference to the Holocaust. Usually, rémigrés kept a low profile in postwar public debates (Diner 2012, 50–51). They were viewed with suspicion by the German public, who still harbored not only antisemitic feelings but also lingering National

interchangeably. This article follows that custom with regard to compassion and sympathy.

Socialist accusations of treason and abandoning the *Volksgemeinschaft* (Bergmann 2008, 20–22). Yet Schoeps was not the only rémigré to argue publicly for the decriminalization of homosexuality. Another important force in the reform debates was Fritz Bauer, the Social Democratic State Attorney General of Hesse since 1956 who instigated the Auschwitz Trial. Bauer himself made little of the fact that he had had to leave Germany not only because of his Social Democratic convictions, but also because of his Jewish ancestry. He received enough hostile reactions for his investigation of National Socialist crimes as it was. The state prosecutor once remarked that he still felt as if he were in hostile territory as soon as he left his office (Steinke 2013, 257).

Like Bauer, Hans-Joachim Schoeps had escaped the Holocaust in Swedish exile. He had also returned to Germany at the earliest opportunity. However, he differed from the state attorney general markedly not only in demeanor, but also in opinion. Schoeps initially spent most of his public efforts not on German accountability for the Holocaust, but on the rehabilitation of Prussian history in the postwar period. Following his return to Germany in 1946, as professor of the history of ideas he became one of the most visible champions of the re-establishment of the Hohenzollern monarchy in West Germany (*Der Spiegel* 1954). If his Jewishness had been a hindrance in monarchist circles in the Weimar Republic, in postwar West Germany it became an asset; he conferred legitimacy on the cause in a way that no one else could have done. The former imperial family recognized his efforts in 1955, when Schoeps became one of the last recipients of the Knight's Cross of the House Order of Hohenzollern (*Der Spiegel* 1955). Throughout the 1950s, he traveled conservative lecture circuits, and his books on Prussia sold briskly.[4]

4 Hans-Joachim Schoeps' *Das andere Preussen: Konservative Gestalten im Zeitalter Friedrich Wilhelms IV.*, first published in 1952, came out in a second edition in 1957 and a third in 1964; his anthology *Das war Preußen: Zeugnisse der Jahrhunderte—Eine Anthologie*, first published in 1955, also had a second edition in 1964, a third in 1968.

But in »Should Homosexuality Remain a Crime?,« Schoeps took a sharp turn from the apologetic to the accusatory. He argued that, above all, the German persecution of the Jews created an obligation for the Federal Republic to provide special protection for minorities, which would necessarily include homosexuals, who were still subject to National Socialist laws. Schoeps, who actively if secretly engaged in relationships with mostly younger men and who would come into conflict with § 175a himself less than two years later, for good reason never invoked his own homosexual identity, but stressed his Jewish identity instead.[5] He concluded his article with an attempt to evoke shame and guilt in German legislators, hoping to motivate them to action in light of the legacy of Majdanek and Auschwitz: »for homosexuals the Third Reich [was] not yet over« (Schoeps 1962a, 22).[6]

Schoeps tried to draw on his cachet as a defender of Prussia to legitimize his argument. Just as he had stood up for Prussia when it was delegitimized after the war, he was now standing up for another persecuted group. The fact that he also referred to his defense of Jews in postwar Germany showed that by that point they had, at least in his mind, been firmly established as a group deserving of the sympathy of the wider population (Schoeps 1962b; 1962a, 24). Yet few readers of *Der Monat* were willing to follow this line of argument; and neither was Krämer-Badoni in his piece for *Christ und Welt* (1963b, 10).

Krämer-Badoni, a veteran of the Second World War, was a conservative and an anti-Communist, but he had also distinguished himself as someone invested in Germany's democratic re-education and he was irreverent towards conservative authorities (*Der Spiegel* 1972). First an editor at the monthly *Die Wandlung* and later a longtime cultural critic for the right-of-center daily newspaper *Frankfurter Allgemeine Zeitung*, he switched to the

5 See Oberstaatsanwaltschaft Flensburg 239 to Hans-Joachim Schoeps, August 21, 1964, StaBi Berlin, Nachlass 148—Schoeps: Folder 106; and the folder in general for his contacts with other homosexual men.

6 All translations from German to English by the author and by Laura Radosh.

significantly more conservative *Welt* in the year of the debate. Why *Christ und Welt* chose him remains unclear. But as undogmatic as he might have been in other respects, his opposition to the decriminalization of homosexuality was completely in accordance with public opinion as posited by the draft law, based as it was on »revulsion against homosexuals« (Krämer-Badoni 1963b, 10).

Disgust and the *Sittengesetze* in Germany before the debate

Disgust, as Aurel Kolnai wrote in 1929, is an emotion tied closely to moral judgment. It »is characterized by a spontaneity and originality, an intimacy of feeling […], and thus is invaluable for the consolidation of an ethical orientation« (Kolnai 2004, 83). More recently, Dan Kahan and Martha Nussbaum have taken up the role of disgust in morality and law. While Kahan argued that disgust has an important role in translating social rules into legal norms, Nussbaum condemned disgust for demarcating in-groups and out-groups along power lines, thus discriminating against minorities (Nussbaum 1999, 19–62; Kahan 1999, 63–79). Their argument can be illustrated by the German debates on the decriminalization of homosexuality, although these were permeated by another aim, namely the complete separation of the law and moral sentiments.

The idea that morality and emotions are connected at all goes back at the very least to Adam Smith and his 1759 *Theory of Moral Sentiment*. For Smith, morality was rooted chiefly in the feeling of sympathy. Though Smith did not analyze disgust, he frequently refers to the feeling in his account. Disgust is elicited mostly either by situations in which we cannot empathize with another due to too great a difference in circumstances or in which propriety is transgressed. Yet according to Smith, these are exactly the instances in which we have to exercise our capacity for sympathy (Smith 2009, 45). Unlike Kolnai, for Smith the visceral nature of disgust does not qualify it as an orientation for moral judgment. Smith instead hinted at the way in which sentiment and morality can be in conflict.

That conflict made it a logical if not necessarily small step to call for the separation of law and morality. That was precisely what Anselm von Feuerbach implemented in his 1813 penal code for Bavaria. Among other

things, the code legalized all consensual sexual relations between adults, including those between men. Yet no other German state followed the Bavarian example and in 1871 the German Penal Code for the newly united German Empire contained *Sittengesetze* or moral laws that governed sexual behavior—besides homosexuality they also covered adultery, divorce, abortion, and procuration. The moral sentiments of the people became the yardstick for the law. From the beginning this more restrictive stance was controversial, and after debates begun in the Empire, serious efforts were undertaken to revise the code in the Weimar Republic. Gustav Radbruch, a Social Democrat and for a short time Minister of Justice in Weimar, and others criticized the entire category of *Sittengesetze* and demanded that morality and law be separated. Only clearly defined legally protected goods, rights, and interests (*Rechtsgüter*) should inform penal law, not the sentiments of the purported people (Goltsche 2010, 206–7; Sommer 1998, 209–10).

The collapse of the Weimar Republic put a preliminary end to these efforts. Instead, in the Third Reich the laws governing homosexuality were expanded to include acts that went beyond those resembling intercourse (*beischlafähnlich*), the limit that had previously formed the boundary of prosecution. The reform went into effect in 1935, exactly two weeks after the Nuremberg Laws (Friedländer 1997, 176; Sommer 1998, 314–15). In addition, the National Socialists established a parallel system of justice predicated entirely on National Socialist sentiments: the *Volksgerichtshof* (People's Court) (Rachlin 2013, 65, 70; Marxen 1994, 72–75). After 1945, the Allies originally meant to cleanse the German Penal Code of its National Socialist paragraphs. But as with other reforms, these efforts were cut short by the onset of the Cold War and § 175 remained on the books in the version of 1935 (Stümke and Finkler 1981, 357).

While the *Sittengesetze* thus stayed in force unchanged, the West German constitution generally upheld the rights and dignity of the individual rather than the people, another morally charged stance. This created a legal conflict of individual versus collective that the German Basic Law dealt with under article 2(1): the *Sittengesetze* should mark the limits of the freedom of the individual. On this basis, in 1957 the German Constitutional Court

ruled that the criminalization of male homosexuality was in line with »the moral sensibility of the people.« »Same-sex activities clearly transgressed the moral law« (cited in Stümke and Finkler 1981, 358–59). The decision of the German Constitutional Court affirmed the validity of the exception made in 2(1) for the supremacy of collective feelings over individual rights. »[T]he people's« moral sensibility was taken as natural and self-evident.

The German Penal Code itself, however, was deemed worthy of reform in the Federal Republic, and this reform process reopened the question of homosexuality and the role of moral sentiments in law. The process was initiated by Federal Minister of Justice Fritz Neumayer in 1954, resulting in a first draft in 1959 (E1959) that offered two different options for § 175. However by that time, the liberal Neumayer had been replaced by the Catholic conservative Fritz Schäffer. Together with his state secretary Josef Schafheutle, Schäffer adopted the more restrictive version of § 175. After further consultation with the German federal states, the new draft E1962 confirmed § 175 and § 175a, combining them into a new § 216. Both homosexual acts between adults and minors and between adult men were to remain illegal. However § 216 did return to the pre-1935 formulation that restricted punishable acts to those resembling intercourse. With regard to the role of the public, the new draft paragraph did not represent a break in legal continuity. Instead, in keeping with the constitutional court's 1957 verdict, the draft law argued that the continued criminalization of homosexuality was in line with the »views of the overwhelming majority of the people.« The statement went on to claim that homosexuality had the tendency to spread and where that happened, »the moral decay of the *Volk*« was soon to follow (cited in Schäfer 2006, 171).[7]

The question of homosexuality within the reform process was commented on noisily by Richard Gatzweiler of the Catholic *Volkswartbund*.

7 On the language of the decision and the legal precedent it referred to, see also Moeller 1996, 404; for conservative criticism at the time, see Gerhard E. Gründler, »Recht und Unrecht—was ist das?,« *Die Welt*, July 28, 1962.

Though the *Volkswarthund*'s pamphlets were not necessarily widely read, due to religious and geographical affinity, the association had considerable influence on politicians in the governing Christian Democratic Union under Chancellor Adenauer (Steinbacher 2011, 293–94; Heineman 2011, 27–28). Between 1950 and 1961, Gatzweiler published six pamphlets defending the criminalization of homosexuality. Gatzweiler's running commentary on the reform of § 175 is interesting in regard to the changing role of disgust in his argument against decriminalization. In 1953, he deemed the argument sufficient that if »that which is worthy of disgust«—*das Verabscheuenswerte*, i.e. homosexuality—was allowed to spread, it would compromise the health and strength of the entire nation (Gatzweiler 1953, 8). This line of argument was however plagued by inconsistency: if homosexuality was so disgusting, how could it also be so alluring that seduction by homosexuals was the greatest danger? To be sure, from Plato to Susan Sontag (Sontag 2003, 95–99), arguments have been made for the allure of the shocking. But these are primarily concerned with the appeal of suffering and bodily mutilation inflicted on people clearly worthy of our empathy, not with the attraction of morally deviant behavior. Gatzweiler's thinking seems much closer to descriptions of the temptation of sin, not least in Christian scripture and theology. Without acknowledging the inherent appeal of homosexual acts, this was a hard argument to substantiate.

Gatzweiler was an unlikely candidate to provide such substantiating evidence, even if the issue of seduction would reappear later in the debate. Instead—an important sign that by 1961 the terms of the legal debate had begun to shift—Gatzweiler later argued in favor of the »objective treatment« of the matter. According to him, the dynamics of the debate had »slipped from the scientific plane to the emotional.« This obscured the debate as »emotional judgments failed to address the real questions« (Gatzweiler 1961, 3). However in contradiction to his self-professed disinterest and objective rationality, throughout the text Gatzweiler repeatedly referred to homosexual acts as »worthy of disgust« and subtly or not so subtly added that the majority of the population felt the same in order to support his claim that these acts were unnatural and worthy of punishment

(Gatzweiler 1961, 6, 55). The fact that the majority population abhorred homosexuals only made them more dangerous: shunned by society, homosexual men withdrew into secretive and conspiratorial circles. If legalized, this behavior would only worsen. The feelings of the majority would not change, but homosexuals' separatist societies could be formed legally and from this platform they could become even greater seducers. Again, the contradiction between unwavering disgust and the increasing potential of seduction was not resolved (Gatzweiler 1961, 56–57).

It was clear to Gatzweiler that decriminalizing homosexuality would open the door to a *Sittenpfuhl*, a moral cesspit. »The moral strength of our *Volk*« was in danger (Gatzweiler 1961, 60). He saw the only solution in spatial isolation. Homosexuals should be concentrated in remote, completely separated facilities—all voluntarily of course—to save them from their own inclinations and the *Volk* from their polluting influence (Gatzweiler 1961, 67).

Disgust in the debate

Both the reform law and Gatzweiler referred to the disgust supposedly felt by the majority to support their conclusions; and opinion polls conducted in the early Federal Republic seemed to justify this stance. In a representative survey of September 1963, 46 percent considered homosexuality a vice, 40 percent a disease, 13 percent a habit and only 4 percent called it natural (Noelle and Neumann 1965, 591).[8] That represented almost no change from fourteen years earlier. In 1949, 48 percent of those queried had considered homosexuality a vice, 39 percent a disease, 15 percent a habit, and 4 percent natural. That year, the question of whether male homosexuality should be decriminalized was not even asked (Friedeburg 1953, 87). In 1963, no matter if moral failure or disease were seen as the cause of homosexuality, 61 percent of men and 70 percent of women thought that homosexual acts between men should be illegal—incidentally 51 percent and 66 percent of men and women respectively

8 Men and women were polled separately and these are the average numbers for both groups. Multiple entries were possible.

thought the same about female homosexuality, which was not criminalized. The stricter stance of women parallels their general attitude towards questions of sexuality (Noelle and Neumann 1965, 591).

These numbers, however, tell us little about emotions, while the letters to the editors of *Der Monat* and *Christ und Welt* do. *Der Monat* printed three batches of letters in its February, March, and April issues; *Christ und Welt* kept tighter reigns on the debate and limited response to Krämer-Badoni's rebuttals. Instead, the paper forwarded correspondence it received directly to Schoeps. Written with the intent to be published, these letters sent to the Protestant newspaper are no less revealing about what Germans thought they could legitimately say and feel than those sent to *Der Monat*. They are a fascinating source for openly displayed political emotions of a citizenry that for so long has been described in the literature as private and reluctant to express its feeling in a postwar state committed to *Nüchternheit*, the tamping down of emotions.[9] They also reveal that in 1963, Germans were far from silent in extolling the alleged virtues of the National Socialist regime.

The opening letter in response to Schoeps' article in *Der Monat* came from Bernd Muthig, a student of pedagogy from Würzburg. Muthig praised the solidity of the population's moral instinct and sentiment. This natural and instinctive opposition to homosexuality—he did not explicate what kind of feeling this sentiment might be—was the only thing that kept misguided liberal reform efforts in check. Strikingly, Muthig had no qualms defending the National Socialist persecution of homosexuals and accordingly did not believe the idea of a *gesundes Volksempfinden* or »healthy popular sentiment« was tainted. It was not obvious to him, why an »unjust state would not be able to pass a just verdict on questions of morality«—an argument that the German Constitutional Court had also made in its 1957 decision (Moeller 1996, 404). Muthig played a sly argumentative game here, invoking the darker side of the »natural feelings« the National Socialists had fostered:

9 For a recent challenge of that view, see Anna Parkinson (2015); and for an alternative take, see Till van Rahden (2011).

> Finally something else should be mentioned: the warm advocacy of the author for the minority of homosexuals, which he connects to the relationship between Nazis and Jews, could well re-awaken in the older generation Nazi slogans about the relationship of Jews to sexuality. This would neither serve the author's people nor the »minority« defended by him, something which was certainly not the author's intention. (Muthig 1963, 84)

Muthig's barely veiled threat hinged on the assumption that the emotional rejection of homosexuality would also revive antisemitic sentiments. The word »warm,« colloquially used to mean homosexual, was moreover a hint that Muthig suspected Schoeps of being homosexual himself, which would be enough to taint his argument as morally questionable. Not only syntactically was Schoeps thus a double outsider to the collective of natural sentiment (Muthig 1963, 84).

Muthig revealed the close connection between homophobia and anti-semitism in the Third Reich, a connection that reached farther back in history. The lacking masculinity of Jews as well as their sexuality more generally had been a well-established part of antisemitic discourse in the 19th century (Mosse 1996, 151–53; Hoberman 1996, 141–53; Harrowitz and Hyams 1995, 3–4, 8–9; Gilman 1991, 43–44). The National Socialists had only made explicit the link between Jews and homosexuals as sexually abnormal and predatory. In March 1937 for example, the SS propaganda paper *Schwarze Korps* declared the danger posed by homosexuals to be part of the »Jewish question« (Falk 2008, 55).

There was no »Jewish question« in Wilhelm Haas' argument, yet it also powerfully demonstrated that the positive valence of National Socialism was still deemed fit to print (at least by Haas), at least as long as it was coupled with the criminalization of homosexuality. Homosexual men in the early 1960s could, like the construction of the *Autobahn,* serve as an »it wasn't all bad« argument, albeit one played on a moral and not a material plane. Haas' letter to *Christ und Welt,* in which he openly and positively referenced the Third Reich, exemplifies Nussbaum's arguments about the connection of disgust to the body, as the body is both its object and its means of expression (Nussbaum 1999, 22–25). Haas

mentioned that the SA leadership murdered during the »Night of the Long Knives« in 1934 under the pretext of planning a coup had been a clique of homosexuals. He then quoted a supposedly popular expression of the time (that rhymes in German): »Take the girls to fuck and not the SA's butts!« His letter ended with the stark aesthetic argument that Schoeps need only look at »the male member after normal coitus and then look at one when it is taken out of a friend's ass!« Then Schoeps would see what normal and abnormal meant.[10]

Compassion and its pitfalls

Haas' letter demonstrates not only the physical nature of disgust, but also the way in which it enforces borders between groups and between the natural and the unnatural—a function that both Kahan and Nussbaum agree on, but evaluate differently (Kahan 1999, 64–65; Nussbaum 1999, 22). Haas had placed homosexuals in the unnatural camp, a view supported by a plurality of Germans. Muthig's open linkage of Jews to homosexuals and thus »abnormals« had by 1961 become less common, however. While in a 1961 survey 54 percent of the population said they would not marry a Jew and only 14 percent said they would, in another survey two years later only 18 percent claimed that Germany was better off without Jews, against 37 percent in 1952. Nevertheless the high percentage of undecided individuals, 43 percent in 1952 and 42 percent in 1963, is probably indicative not only of uncertainty of opinion but also of what people felt could be said (Noelle and Neumann 1965, 217–18).

Waltraud Totzeck's letter to the editors of *Christ und Welt* reveals this shift and demonstrates the selectivity of compassion as regards its objects. This is of some interest as the potential reach of compassion has been one of the enduring issues in the debate on the viability of emotions for social ends (see Nussbaum 1996, 48). Totzeck did not begin her letter with compassion. Schoeps' contribution to *Christ und Welt* had enraged her (*in Harnisch gebracht*) as rarely before. She was »full of the deepest

10 Wilhelm Haas to *Christ und Welt*, January 13, 1963, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

disgust over Schoeps'« response to the »normal« Krämer-Badoni. She felt that all of Schoeps' previous, and supposedly »normal,« writing in *Christ und Welt* could have only been meant to taint and mock.[11]

Despite her complete disdain and disgust for Schoeps, Totzeck had otherwise internalized an attitude that historian Dagmar Herzog, in connection with homophobia, has described as »superficial philosemitism« (Herzog 2005, 88–89).[12] Totzeck complained that it was an insult to »our dear fellow Jewish citizens« to compare them with those »pathologically abnormal people.« Jews were included into her circle of sympathy, and she felt offended on their behalf, while homosexuals did not deserve such an emotional embrace, but remained objects of disgust. Totzeck apparently failed to realize that Schoeps was indeed among those »dear fellow citizens,« something he admittedly had not stressed in *Christ und Welt* as pointedly as in *Der Monat*. What gave Totzeck confidence in face of this onslaught of immorality was her certainty that the »normal and sound moral sense of the people would support the side of normal, healthy morality.«[13]

The separation made by Totzeck into »normal« Jews and »abnormal« homosexuals was a postwar development. Even in the Federal Republic, this distinction was more tenuous than she claimed. As recently as 1957, Veit Harlan, the director of the infamous Goebbels' propaganda film *Jud Suess* (1941) in which »the Jew« was the ultimate seducer of pure German girls, had directed a large-scale and star-studded postwar feature film warning of the seduction of German youth by predatory homosexual men, *Das dritte Geschlecht* (The Third Sex) (Falk 2008, 84–88; Fehrenbach 1995,

11 Waltraud Totzeck to the editors of *Christ und Welt*, January 20, 1963, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

12 On philosemitism, see also Stern (1993, 717–35).

13 Waltraud Totzeck to the »Verlag der Wochenzeitung *Christ und Welt* Stuttgart,« January 20, 1963, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

195–202).[14] In a sign of how ingrained National Socialist codes remained in postwar German audiences, the trope of the »internationalist homosexual« in *Das Dritte Geschlecht* brought one reviewer to speculate that Harlan had meant to make the older seducer a Jewish character (Falk 2008, 39; Fehrenbach 1995, 200).

However, official sentiment about Jews had changed and disgust was supposed to be replaced by sympathy. Jews were, just barely, included in the general population as *Mitbürger* or »fellow« citizens. Looking at the readers' reactions, Schoeps' attempt to utilize the acceptance of Jews to expand sympathy to homosexuals failed. Considering the shaky foundations of the regard for Jews, amply demonstrated in the letters cited above, that should be of little surprise. If readers acknowledged Schoeps' reference to the Third Reich at all, they either did not consider its treatment of homosexuals a crime or they rejected the analogy between Jews and homosexuals, or both. There was only one person who embraced the entire analogy in her letter to Schoeps, Monika Wyss, daughter »of an old Prussian officers' family« who now lived in Zurich with her Swiss husband.[15] A Prussian who purportedly had Jewish friends before 1933 and homosexual friends at the time of writing, she thanked Schoeps effusively for speaking up for all the three groups.[16]

But even here, or in other instances where understanding of the »tragic condition of the homosexual« led not to calls for isolation, but to calls for shifting responsibility for treatment of that condition from the court to the church, this sympathy remained problematic. Though its importance for law and justice is much discussed today, not least by Martha Nussbaum in her most recent book on *Political Emotions* (Nussbaum 2014, 113),

14 Under pressure from the *FSK* or »voluntary self-regulation« board, which ironically deemed the film too homosexual-friendly, it did not go into wider release in Germany until 1962 and then with the title *Anders als Du und ich* (Different from you and me).

15 Monika Wyss to Schoeps, March 20, 1963, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

16 Ibid.

compassion carries a whiff of the patronizing. Moreover, it always originates from a preconceived mental framework. This is a problem distinct from the »narrowness of sympathy« acknowledged by Nussbaum and visible in Totzeck's letter (Nussbaum 2014, 3). It was in the name of compassion that Gatzweiler favored the isolation of homosexuals over their castration (Gatzweiler 1961, 67). Compassion did not lead him to question the purported dangerous nature of their acts. In the 1963 debate, sympathy for suffering from persecution all too quickly and easily turned into sympathy for the »tragedy« of *being* homosexual (Krämer-Badoni 1963b, 10).

Suddenly it was not the persecution thereof, but homosexuality itself that was tragic. At times, Schoeps himself seemed to move in this direction, as when he described homosexuality as a »tragedy« (Schoeps 1962a, 23). This stance was most obvious however in the arguments of the churches in favor of decriminalization, the only institution to base their argument on an emotion, namely compassion. In England, the Anglican Church, but also the Catholic Church, had recently come out in support of the decriminalization of homosexuality (Whisnant 2012, 186–87). In Germany, leading German Protestants such as Helmut Thielicke, member of the Protestant Working Committee of the CDU and professor of theology in Hamburg, had taken up the issue in the *Zeitschrift für evangelische Ethik* (Journal for Protestant Ethics) in 1962 (Thielicke 1962). For Thielicke, pastoral care rather than criminal prosecution was the right response to homosexuality. He believed homosexuality had to be accepted as »suffering« that deserved treatment by a »›compassionate‹ pastor.« Compassion was doubly necessary, as the public's »ineradicable« »natural aversion« to homosexuality needed to be neutralized. Contrary to Gatzweiler, Thielicke here accepted the full logic of this claim to natural aversion: since repulsion was so strong, the threat of »infection« was limited and did not warrant criminal indictment (Thielicke 1962, 164).

As liberal as Thielicke's approach might have been concerning actual legal reform—his proposal was essentially to treat homosexuality no differently from heterosexuality—both his approach toward compassion and Schoeps' description of the tragedy inherent in any homosexual relationship raised objections within homophile circles. Schoeps' view (and

Gatzweiler's, though not Thielicke's) was predicated on the equation of homosexuality with pederasty. At some point in the life of a homosexual man he would part from his lover and look for a younger one. Aging together was not part of the homosexual inclination. Any relationship was thus »a continuous parting« as Schoeps wrote (Schoeps 1962a, 24). He outlined his position in a very personal letter to a homophile publication under the pseudonym »Jochen,« the name he had gone by in the youth movement.[17] Yet even Rudolf Jung, staff-writer for *Der Kreis/The Circle/Le Circle*, probably Europe's most important homosexual publication, published in Zurich and trilingual—who had explicitly defended Schoeps' comparison of the persecution of Jews and homosexuals against Krämer-Badoni—rejected Schoeps' equation of homosexuality and pederasty, along with most of his magazine's readers (Jung 1963, 11–12). A few homosexual men also wrote anonymously to *Der Monat*, protesting Schoeps' accounts of tragic pederasty. One of them argued that homosexual relationships were in no way different from heterosexual relationships: committed, long-term, and equal.[18] Compassion for their tragic fate was misdirected if it was not aimed at overcoming persecution.

17 In his letter he also worried how the older lover could distinguish between true love and the material attraction of the younger man; »Jochen,« »Nachdenkliches über Freundesliebe und ihre seelischen Probleme,« Letter to the editor, n.d., StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 3. Schoeps was also a subscriber to *The Circle,* as demonstrated by surviving copies in his personal archive.

18 R. Sch., Berlin, to *Der Monat*, February 20, 1963, forwarded to Schoeps by *Der Monat* StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6. The argument on whether depicting homosexual men as »normal« or »exceptional« better served the achievement of homosexual rights, a debate also played out in responses to Schoeps, is interesting in its own right, yet would exceed the scope of this article. On this, see Griffith (2012) and Riechers (1999).

Democratic feelings: Tolerance and the separation of law and emotions

If readers like Haas and Totzeck expressed their disgust and natural aversion to homosexuality to justify its criminalization, and others like Friedrich Berg called for Christian compassion for this deviant behavior in a letter to *Der Monat* (Berg 1963, 88), yet another group proposed an altogether different emotional regime: tolerance. To someone like Alexander Rüstow, whose letter was published in the April 1963 issue of *Der Monat,* this was, in fact, something closely akin to a democratic feeling. It was potentially unpleasant to live with the difference that a heterogeneous and democratic society contained, since it meant experiencing things one »disliked, the abnormal and the undesirable.« Yet a multiplicity of aesthetic and moral judgments was the essence of the »Western concept of freedom« and Germans had to learn to accept this rather than call on the authorities to legislate away the displeasure resulting from this diversity (Rüstow 1963, 90–91). Eckart Prott, in a private letter to Schoeps, expressed a similar sentiment. He accorded the »aggressive tone« of the debate to a lack of true liberalism, of »fairness and kindness,« as a result of the harshness of sentiment propagated by the Third Reich.[19]

Rüstow and Prott acknowledged but hoped to neutralize the emotions that normatively underpinned the arguments of those invoking disgust or compassion and influenced their style of reasoning. Another approach was to separate emotions and law altogether, both on the level of discourse as well as on the level of legislation. Gatzweiler had already declared that emotions needed to be excluded from discussions about homosexuality, and that objectivity was key to finding an adequate response to the issue, though he himself failed to do so convincingly. Eduard Streit, in his letter to *Der Monat,* criticized the lack of objectivity and the overreliance on emotions in the debate around § 175—which he believed was a psychological response to everyone having some homosexual inclination, and thus a result of rejection and fear (Streit 1963, 92). Schoeps himself,

19 Eckart Prott to Schoeps, January 21, 1968, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

despite his own argumentative reliance on emotions, tried to dismiss Krämer-Badoni's argument with the claim that the latter did not know how to argue objectively but always only countered fact with emotion. This alone should have been enough to disqualify him from writing the closing words to such a charged debate.[20]

In fact though, Krämer-Badoni's final article was a perfect example of what Rüstow demanded (though his manner confirmed Prott's fears); the tone was aggressive, yet the author tried to separate his own feelings from his judgment. And Krämer-Badoni invoked liberalism as a justification for this stance. The title alone was a provocation: »*Sodoma bleibt Sodoma*« (Sodomy Remains Sodomy). Krämer-Badoni once more expressed his repulsion for homosexuality, arguing that lack of legal sanctions would only lead to more homosexual cliques. Above all he emphasized the danger of seduction that merited special protection for male youth from unwanted advances, and thus a higher legal age of consent than for heterosexual sex.[21] Yet despite this language, Krämer-Badoni had actually changed his opinion. In this final piece he endorsed, though with a »heavy heart,« the decriminalization of homosexual sex above the age of 21. He admitted that in a democratic state, law and morality needed to be separated. Based on the assumption of the equality of citizens, whatever moral disapproval and disgust for homosexuals the population might feel, the state could not deny homosexual adult men the right to do with their bodies whatever they pleased, as long as it did not endanger others, particularly youths (Krämer-Badoni 1963a, 9). The natural and instinctive aversion to homosexuality, the disgust that »normal people« felt, could not be used as a standard for legislation.

This might not have been Schoeps' preferred line of argument, not least because of his own preoccupation with pederasty, but even the editorial

20 Schoeps to Wirsing, January 24, 1963, StaBi Berlin, Nachlass 148—Schoeps: Box 39, Folder 6.

21 The fear of gay cliques and conspiracies in particular was widespread not only in Germany; see for example Johnson (2004, 106–15) on the »lavender scare« in the United States.

board of *Christ und Welt*—in effect Wirsing himself—followed Krämer-Badoni's reasoning. Though they emphasized the negative aspect of the author's conclusion, namely that the clauses of § 175 »protecting« underage men should stay in force, the board nonetheless accepted the idea that moral sentiment should no longer form the basis of criminal law (*Christ und Welt* Redaktion 1963, 9). The final statement of the board of *Der Monat* provided another demonstration of the close link between the separation of law and emotions and liberalism and democracy in the public mind. The editors not only claimed the label »liberal and forthright« for their paper, since they alone, and not others who invoked those descriptors, had been willing to break the taboo around talking publicly about homosexuality, they also defended their publication of Schoeps' remarks about Majdanek, Auschwitz, and the legacy of the Third Reich, although they had caused considerable offense. Unease was insufficient reason to limit the freedom of expression (*Der Monat* Herausgeber 1963, 90).

Conclusion

The closing statement of *Der Monat* reveals much about the ambivalent status of the Nationalist Socialist past for the German public at the beginning of the 1960s. It was impossible to deny, but also not yet fully acknowledged, and the rules about what could be said and felt about this past were in flux. The editors started out by congratulating themselves for breaking the taboo surrounding homosexuality and ended with an acknowledgement that the real taboo might have been the mention of Auschwitz and Majdanek. And indeed, the invocation of the Holocaust led to greater resentment than the support for the decriminalization of homosexuality. Neither those in favor of nor those opposed to § 175 wanted to engage with the murder of European Jews, and especially not with the concrete implications of any woolly moral and sufficiently abstract empathetic statement regarding German responsibility. For homosexuality, the case was different. Here the relationship between »emotional« and »rational« arguments was a live issue; whether the instinctive aversion of the people, compassion, or dispassionate liberalism should determine the law was hotly debated. In this discussion, the pitfalls of disgust as well

as the problematic nature of compassion, with its tendency to obscure causes and symptoms, became obvious. The debate in 1963 is thus interesting not only for specific discourses in and on German history, but also more generally for the potential role played by sympathy and disgust in creating laws.

In the end, neither compassion nor disgust determined the future of § 175. In 1963, the reform process stalled, and nothing came of E1962 and § 216. When reform of the penal code was taken up again six years later in 1969, circumstances had changed. No longer the conservative Schäffer, but Gustav Heinemann, the first Social Democrat to head the Ministry of Justice, was now in charge. Though he endorsed the decriminalization of homosexual acts between adult men, Heinemann explicitly stressed that the reform was not to be confused with moral acceptance of homosexuality. He invoked Fritz Bauer's argument that the state should not be an arbiter in matters of morality that related entirely to the private sphere and caused no-one else harm (Treffe 2009, 179–81; Stümke and Finkler 1981, 353). It was an argument explicitly separated from emotions and the beginning of a shift towards a decrease in the importance of collectively held »moral emotions« for governing sexuality. In 1970, legal scholar Albin Eser observed that in the 1960s one could see the beginning of a transition »from a penal code for moral crimes directed more towards the *community* and concerned primarily with upholding sexual mores of decency and prudence, to a sexual criminal law directed specifically towards the *individual* and meant primarily to protect the individual and his or her right to sexual self-determination« (Eser 1970, 219; emphasis in the original).

In particular the letters to *Der Monat* and to *Christ und Welt* display a public on the cusp of that shift. Moreover, they reveal that members of the general population drew very different lessons from the Third Reich. Readers not only disagreed about these lessons in general, but also about what the National Socialist legacy should mean for different minorities, and about whether parts of the National Socialist past might still be salvaged. This debate was not led quietly or rationally, but passionately and in the open. Even if the feelings expressed did not have an immediate

impact on the matter at hand—the decriminalization of homosexuality—they are nonetheless important for an assessment of postwar West German history in these liminal years of the early 1960s. The debate anticipated emotions vis-à-vis homosexual men and vis-à-vis Jews that would soon become publicly enshrined (reluctant toleration and active remorse respectively), while displaying sentiments that had been legitimate only a short while ago and were still in wide circulation (unbridled disgust toward both) although the onset of discouragement could be discerned. Despite its inconclusive ending and largely forgotten participants, the 1963 debate sparked by Schoeps is thus relevant not only to the history of emotions in the narrow sense, but also to West German postwar political and legal history in general.

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On the boundaries of knowledge

Security, the sensible, and the law

Susanne Krasmann

The preoccupation of security legislation

Security is intrinsically linked to emotions and affect, since it concerns undesired events or those dangers we do not wish to materialize. Security law is characterized by these particular temporal and affective dimensions. It operates with that which has not yet happened, but already preoccupies us. It does not limit itself to responsiveness to specific cases, since its focus is on potential dangers and threats. It is designed to be anticipatory, as it seeks to avert harm through the authorization of particular measures. Yet, there is always a gap between our preoccupations or fear right now, and the future to come.

In order to anticipate dangers and threats, societies generate diverse practices of knowledge production. The limits of knowledge, however, due to the difference between the present and the future, cannot truly be overcome by our »faculty of foresight,« as Immanuel Kant (2006, § 35) put it. That *praevisio* demarcates the boundary of the inaccessible that it seeks to transgress. It takes hold of the future. As Warren TenHouton (2005, 190), drawing on George Herbert Mead, observed: the »real« future, like the »real« past, »is unobtainable,« but »through the action of mind open to us in the present.« The act of anticipation, through our imaginations and related sites of knowledge production, fills in that gap between present and future.

Precisely this moment of anticipation of and attraction towards the future has received relatively little attention so far in legal theory. Drawing on the example of a supreme court decision, namely that of the German Federal Constitutional Court on the question of employing military forces

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on national territory, this article first discusses how modes of thinking about security necessarily rely on social imagination and related emotions and feelings. Social imagination is not the opposite of knowledge. It is a part of anticipatory knowledge practices, but goes beyond the realm of language and representation to the extent that it is, first of all, about images and the sensible. Security is inscribed into the law because dangers and threats affect us. But law, and accordingly legal theory, tends to ignore emotionality, the sensible, and affect. It lacks sensitivity for the »other of reason« (Fischer-Lescano 2013, 13), which is not to be confused with irrationality but rather alludes to what is a-rational. As legal theorist Andreas Fischer-Lescano has observed: »Until the present, law has defined itself as the embodiment of rationality, reason, and objectivity« (ibid.). For, as literary scholar Stanley Fish (1994) famously insisted: »The law wishes to have a formal existence.«

Generally, procedures that reinforce legal norms and politics of fear that allude to threats are seen as operating on a symbolic level. However, this view fails to capture the ways in which security becomes a matter of concern through particular practices of knowledge production that shape our perceptions and feelings. Anticipatory knowledge practices always constitute a fictive reality that is distinct from the supposedly »real reality« but is nonetheless real. They produce their own evidence. Thus we are not working on the symbolic level, but must take the materiality of the fictive into consideration—and the corresponding imaginations, emotions, and feelings—when analyzing the relationship between security and the law. This argument will be discussed further on. First, however, it is worth taking a closer look at how the Constitutional Court came to its historic decision.

The people and the constitution under threat

In July 2012, the plenary of the Federal Constitutional Court made a farreaching decision, though it was largely ignored by the public. That decision paved the way for Federal Armed Forces combat missions within the borders of Germany, thus advancing a cause the Christian Democratic and Christian Social Union parties had advocated for more than twenty

years. The indispensable majority of two thirds of the members of parliament had never been achieved. Now, the Constitutional Court declared that »deployment of the armed forces and of specific military weapons« *were* in fact permissible under the constitution.[1] Critics considered this legal interpretation and its application a form of relinquishing the essence of the Federal Republic's political self-understanding. As the single dissenting judge, Reinhard Gaier, opined, the decision breached a fundamental principle of the Constitution founded in historical experience, specifically, the separation of the military and the police force.[2]

How did this come to pass? The basic facts of the case, which were of legal concern for almost a decade, can be briefly recounted. In 2006, the Federal Constitutional Court scrapped an amendment of the German Air Safety Law (*Luftsicherheitsgesetz*) that the legislature had passed two years earlier to allow the carrying out of air force operations in matters of public safety.[3] Among others, the First Senate of the Constitutional Court pointed out that parliament lacked the authority for such a far-reaching decision.[4] As a consequence, the Bavarian and the Hessian state governments initiated a judicial review (*Normenkontrollverfahren*) that six years later led to the above-mentioned plenary decision,[5] amounting to no less than a unilateral amendment of the constitution en passant.[6]

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1 BVerfG, 2 PBvU 1/11, July 3, 2012 (48); Press Release no. 63/2012, August 17, 2012. All translations from the German by the author.

2 BVerfG, 2 PBvU 1/11 (63). »The constitution,« the dissenter (62) went on to argue, »is also a renunciation of the German militarism that led to unimaginable horrors and millions of deaths in two world wars.«

3 The act that amended the legislation on aviation security tasks came into effect on January 11, 2005 (BGBl I, 78).

4 BVerfG, 1 BvR 357/05, February 15, 2006.

5 BVerfG, 2 BvL 8/07, May 4, 2010. This plenary decision was required, since in the judicial review the Second Senate had intended to deviate from the legal opinion that was essential for the First Senate's decision of February 15, 2006.

6 »Ultimately,« Judge Gaier opined (BVerfG, 2 PBvU 1/11 (61)), »the interpretation of the rules concerning a state of emergency reached by

But what exactly initiated this momentous decision? In the end, it was a minor incident which occurred in 2003 and received wide public attention that provided the opportunity to amend the Air Safety Law. A tiny power glider had gone astray over the skyline of Frankfurt. The unauthorized pilot, who had never obtained a flight license, threatened to crash the hijacked private machine into a skyscraper. This outcome, however, was averted by missions involving police helicopters and eventually a phantom jet fighter. As commentators observed at the time, this episode testified to »the power of images«—and, we may add, of emotions—to affect legal procedures, and security legislation in particular.[7] Even though things turned out well in the end, the federal government felt the need to take action. Otto Schily, at the time Minister of the Interior, introduced the contentious issue of employing military forces on national territory and, already in 2004, added amendment of the Air Safety Law to the parliamentary agenda.[8] In the public debate, the minister painted a scenario that clearly echoed the 2001 terror attacks on the twin towers of the World Trade Center in New York City, invoking the emotions this terrifying event had generated in the public. A passenger plane, he suggested, could be captured by terrorists and flown over a major German city. For the sake of the inhabitants' safety, he argued, approval must be given to shoot the plane down, which would require employing real jet fighters and hence the armed forces.

Lawyers subsequently weighed the issue of how to decide whether a hijacked plane and a destructive intention were at play and when it was warranted to approve shooting the aircraft down. Moreover, Otto Schily

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the plenary decision is in effect an amendment to the constitution.« Similarly, see Prantl (2012).

7 Taking up this observation made by commentators Janisch (2012) and Zeh (2012), the following argument draws on a discourse analytical perspective. This includes speaking of a general public security discourse and the way in which its terminology intrudes into legal discourse.

8 See German Bundestag, Plenary Protocol 15/98, January 30, 2004, agenda item 18. Pertinent here was § 14.3 of the Aviation Safety Law (LuftSiG), regulating the use of weapons for protection against threats.

himself later had to concede that downing a plane over a major city and thus threatening the lives of many people would be inadmissible (see Hipp 2005). It is thus all the more remarkable that this minor incident could function as a vehicle to transfer to the German context the New York City attack and the emotions and fears it triggered, resulting in such a far-reaching parliamentary decision.[9] Even if the power glider had not been intercepted, the city of Frankfurt would most likely not have sustained major damage. The financial district, rarely busy on Sundays anyway, had been partly evacuated and traffic redirected. Moreover, the incident did not involve a passenger plane and, most importantly, it was not even a terror attack. In reality, the small private machine that had been hijacked had no one but the pilot on board. Nonetheless, the endeavor that even Judge Gaier placed on the record in his dissenting vote—»to counter effectively the threat of international terrorism that had come to the fore with September 11, 2001«—had by then already shaped the political and juridical agenda.[10] Rather than on the basis of concrete intelligence, the decision had been inspired by fear-laden imagination.

Otto Schily evoked the typical »ticking-bomb scenario« familiar from the debate on torture (see Levinson 2004). In this hypothetical situation, a person is in custody who refuses to talk and who is aware of the location of a ticking bomb that directly threatens the lives of many people, for example, at a school or in a major city. Essentially, the question is whether it does not make sense to torture this person in order to obtain the desired information. Employing a highly emotive language, the ticking-bomb scenario makes »moral absolutes look ridiculous« (Waldron 2005, 1713). Implying that torture should no longer be prohibited absolutely, but should be an option in a state of emergency in the name of saving lives, it goes to the heart of constitutional democracy. The legal and moral problem that the scenario poses comes close to the issues raised in light of a hijacked

9 In its 2006 decision, the Federal Constitutional Court also paralleled the terror attacks of September 11, 2001 and the 2003 power glider incident, noting the multiple security measures and laws triggered by these incidents: BVerfG, 1 BvR 357/05, February 15, 2006 (2–4).

10 BVerfG, 2 PBvU 1/11, July 3, 2012 (64).

passenger plane: Can the human dignity of terrorists be weighed against the lives of innocent people? Are we allowed to risk the lives of some people in order to save the lives of others?

Citing the guarantee of human dignity and the fundamental right to life,[11] exactly these kinds of legal questions troubled the First Senate of the Federal Constitutional Court, which in 2006 declared the amendment of the Air Safety Law unconstitutional. According to German law, a human life is not a variable that can be traded off against another human life.[12] This argument still held in the 2012 decision of the plenary, for while employing military forces within national territory was made permissible under certain circumstances, their mandate does not include shooting down passenger planes. The Court also imposed strict limitations. Putting the Federal Armed Forces into operation may be done only as a last resort, such as in a state of emergency of catastrophic dimensions.[13] This definition meant to thus exclude mass demonstrations from situations in which military intervention would be legitimate. What is more, the Minister of Defense is not able to decide independently, but only the entire Federal Cabinet. Even so, the use of military force, including the entire arsenal of the air force, marines, and army, is in principle permissible in the future to combat terrorist attacks (understood as »grave accidents« according to article 35 of the German Constitution).

Critics were concerned that the suspension of the principle of the division of authority between the police and the military could unleash further authorizations. Journalist Heribert Prantl (2012) voiced the concerns of many when he remarked: »The Karlsruhe decision is the first step towards

11 German Constitution, art. I, § 1 and art. II, §2.

12 See also Roxin (2011, 554): »Hence, killing people who do not threaten the life of third parties is prohibited categorically. Conversely, saving the life of people is only imperative if possible without killing people who do not represent a danger.« For a further differentiation of this argument and a critique of the lack of clarity of the Constitutional Court's decision, see Merkel (2007).

13 BVerfG, 2 PBvU 1/11, July 3, 2012 (43, 46).

a process of militarization of internal security that is not in line with the German history and constitution.«[14] And, in fact, this critique was also expressed in the dissenting vote. Judge Gaier argued that the caveat articulated in the plenary's decision—that the state of emergency must be defined by an imminent damaging event of catastrophic dimensions—was sufficiently indeterminate to subsume mass demonstrations critical of the government under this definition in some future of escalated tensions.[15] Moreover, the question alone of the legitimacy and legality of shooting down an airplane that was allegedly hijacked by terrorists prompted a huge legal debate. Significantly, most commentators, eager to discuss and defend presumably pertinent legal norms such as the duty to save lives versus human dignity, and the fundamental right to life or the question of a state of emergency or of a legal black hole, took the scenario itself for granted. They disregarded entirely the difficult problem to be tackled in advance, namely how to ascertain whether a »significant incident in the air« is in progress.[16]

Against this backdrop, the question indeed arises as to how such a crucial decision could simply pass, quasi en passent, by an order of the plenary of the Federal Constitutional Court after decades of strong opposition—an order for this reason associated with a general tendency to extend enforcement powers in the name of security, for which the events of 9/11 functioned as a catalyst (Hecker 2006; Huster and Rudolph 2008; Mitsch 2005).[17] Is it in fact the power of imagination and emotion linked to security matters that allows for legal constructions to be dismissed that

14 The German Federal Constitutional Court is located in the city of Karlsruhe.

15 BVerfG, 2 PBvU 1/11 (85).

16 This was pointed out in the first judgement of the Federal Constitutional Court in 2006 (BVerfG, 1 BvR 357/05 [126–128]); see also Roxin (2011).

17 Rather than an evaluation of whether or not that decision was appropriate and in accordance with respective security exigencies, what is at issue here is the political conditions that made this decision possible at a certain point in time and, most notably, the absence of a broader public debate on a matter essential to German political identity.

once, and for good historical reasons, were deemed indisputable? To answer this question, let us first take a closer look at what it means to anticipate dangers and threats in the governing of security.

Thinking in scenarios as an emotional gateway

Security, to state the obvious, addresses that which is not desired and is feared. The possible, that which has not yet materialized, is (existentially) threatening. It is characterized by a particular intensity—insofar as the threat affects us—and temporality, to the degree that it is urgent and, by definition, cannot be ignored. In this sense, the unwanted possibility evokes an option, if not an obligation, to intervene. It is in this context that we may perhaps tend to agree with Otto Schily and be able to imagine that a catastrophic attack could also occur in Germany. And, likewise, it is in this context that the idea of the power of images and emotions appears plausible; in other words, that images and the perceptions related to them may have prompted the decision on the use of the military in the realm of internal security at the highest level of jurisdiction.

But what exactly does this mean, the »power of images« and emotions? Generally, more suggestive force is attributed to images than to words. Yet images do not have an inherent meaning. They are not self-evident, but rather signs (Schade and Wenk 2011) that receive their particular meaning only within a certain cultural readability. They are dependent on the context that frames them.[18] Hence, on the one hand, we may contend that images, as visual signs, are more easily accessible to sensuous experience than verbal signs: »Because visuals convey important meanings more rapidly and subconsciously than words alone do« (Feigenson 2014, 21). Images may affect us before and also independently of the particular meaning we explicitly attribute to them. As media theorist William J. T. Mitchell (1994, 114) observed: »If writing is the medium of absence and artifice, the image is the medium of presence and nature, sometimes

18 See, for example, Judith Butler's (2010, 100) reflections on how to render the particular moral-political meaning of the torture photos of Abu Ghraib visible by re-contextualizing them and thematizing »the forcible frame.«

cozening us with illusion, sometimes with powerful recollection and sensory immediacy.« In this sense, material as well as immaterial images are to be understood as producers of meaning: »Images are active players in the game of establishing and changing values« (Mitchell 2005, 105). On the other hand, the readability of pictures and images relies on verbal language—or legible contexts that are shared on an emotional level. It is the captions, comments, subtexts etc. that contextualize the images provided by mass media (Blair 2004). What is more, it is a cultural repertoire that allows for reading these images in a particular way. Imagination, by contrast, may be understood as the faculty of our »consciousness that transcends mere visualization« (Mitchell 1994, 115). It transgresses the world of language and representation insofar as it is, first of all, about the »sensible« (Rancière 2004) and the formation of images.[19] It is this moment that imagination shares with the notion of affect. In a Spinozistic sense, affect may be understood as the ability of a body to affect and be affected. Affects emerge and are the result of encounters. As a form of the susceptibility of our body or of our senses, affects provide us with access to the virtuality of dangers we sense or are sensible to before we are cognitively aware of them (Massumi 2010). Although affects may be conceived of »as the initial component and mediation of experience by the body and the brain,« this does not mean that they are not culturally conditioned. On the contrary, and the political question is how they are, in »later reflection,« translated into categories of individual feelings and social emotions (Holland and Solomon 2014, 264).[20] As Holland and

19 As Jacques Rancière points out, the sensible, in contrast to the sensorial, is always already discerned, distributed, and related to meaning (2004, 43). However, as an effect of forces (ibid., 39), the »partition of the sensible« comes before representation, as defined by Stuart Hall (1997, 17): »Representation is the production of meaning of the concepts in our minds through language. It is the link between concepts and language which enables us to refer to either the ›real‹ world of objects, people or events, or indeed to imaginary worlds of fictional objects, people and events.«

20 Holland and Solomon (2014, 264) address that »complex relationship« with the acronym of »ABCDE.‹ *Affect* is a *Biological* response to an event, which is conditioned by *Culture*, and later named within *Discourse* as *Emotion*. Affect, therefore, is that experience of an event which is biological, cultural

Solomon (ibid., 273–74) observed in their study of US security governance post-9/11, »states« or governmental authorities »retain a quite influential position in their ability to articulate affect as emotion—to name that which citizens ›felt‹«—»affect is what states make of it.«

The mode by which images and the sensible take effect in processes of negotiating security matters should then be conceived as a complex interplay of related experiences and their mediations—actual incidents and their translation into social meanings and emotions—and political continuations of social imaginaries. The incident in Frankfurt, for example, clearly would not have had such a powerful impact on the public debate were it not for the images of the September 11, 2001 attacks and the emotions bound to them. The depictions of the destruction of the Twin Towers, and the concurrent feelings of powerlessness, helplessness, and incomprehensibility undoubtedly left a deep impression on most everyone. Nonetheless, Jacques Derrida (2003, 89) drew an important distinction here. On the one hand, the attacks induced »compassion« with the victims, outrage, and »sadness« as a response »to an undeniable ›event‹« in a way that exceeded mass mediation. On the other hand, it was only through the mass media that the »interpreted, interpretative, informed impression« and hence the »belief« could arise »that this is a ›major event.‹«[21] As media theorist Richard Grusin (2004) has pointed out, unlike any other comparable incident before, 9/11 became a media event because the images

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and somehow before and beyond its discursive articulation.« Affect theory that follows the thinking of Spinoza and Deleuze insists on the pre-verbal and pre-personal nature of affects. Speaking of affects as unformed and unstructured »intensities« that emerge in the encounter of bodies, Brian Massumi (1995, 107) for example contends that affect »is not entirely containable in knowledge, but analysable in effect, as effect.« Affects may materialize, for example, in spontaneous corporeal reactions such as increased heart rate, outbreaks of sweating or blushing before we realize these effects and are able to translate them into (individual) feelings or (social) emotions, though without fully capturing them in language.

21 A philosophic debate ensued on the aesthetics and iconic status of the image. For a critical account of this discussion with reference to Baudrillard, see Bronner and Schott (2012).

were perpetuated medially the very day of the attacks. The actual event re-occurred constantly in real time. In this way, the images not only became symbols, but part of our cultural register. Pushing the argument even further, Slavoj Žižek (2002) contended that these images were already part of our cultural register. Specifically, the phantasm of the destruction of skyscrapers by flying objects had already been pre-mediated by Hollywood movies and provided an emotional script for reading such events, a fact which led the philosopher to remark that the relationship between image and reality was inverted in the event of 9/11: »It is not that reality entered our image: the image entered and shattered our reality (i.e. the symbolic coordinates which determine what we experience as reality)« (ibid., 16). Similarly, Albrecht Koschorke (2005, 93) observed: »Fact came after fiction.« The cultural imageries that mirrored our own imaginaries of hostility came true.

Like Otto Schily's vision of a hijacked passenger plane hovering above a major German city, disaster scenarios may rely on experiences and imageries that have already independently taken on the shape of a scenario through media reproduction. As constellations of people and things that abstract from concrete situations, catastrophes are literally and figuratively enacted (Collier 2008). In this way, they may become real for us or »*felt* to be real« (Massumi 2010, 53). They are imaginable and, as imaginations, emotionally tangible. Precisely because constellations do not provide for specific identities and positionings (see Görling 2011, 24), they are malleable and may be applied to a variety of distinct imaginable situations. Scenarios that follow the well-known pattern of envisioning an extraordinary situation of threat as possible or probable thus enter into actual experiential contexts and function as elements of a politics of affect. Consequently, affect may also merge with phantasm, that is, with visions of threats that lack a particular object (see ibid., 25). What is felt to be real, or possible, and what is fictive is indistinguishably interwoven.

Hence, the threat of, and our imagining of, dangerous situations that could materialize in the future also shapes our expectations. Scenarios literally emerge before our mind's eye. They work as scripts that frame and form our feelings and emotions. Anticipating and foreseeing is at the same time

seeing, perceiving, and experiencing (Amoore 2007). Reality sensed in this manner, and this is Brian Massumi's (2010, 54) critical point, may subsequently justify the need to employ anticipatory action and to pass attendant legislation, as Otto Schily intended. The argument raised by Constitutional Judge Gertrude Luebbe-Wolff during a hearing on the judicial review of the Air Safety Law took up a similar scenario, which forcefully demonstrates that it is the constellation—played out in a scenario of threat with varying actors and addressees—that suggests the need to take action, in this case, constitutional amendment. What if, she asked, a hijacked tank were on collision course with a chemical factory? Wouldn't this incident disclose a significant security gap if in such a situation the hands of the armed forces were tied?[22]

The flourishing of scenario thinking in today's security policy debates only exposes a peculiarity of security management in general. The US government *9/11 Commission Report* on the failure of the secret services can be seen as paradigmatic. The report argued that the available intelligence and the indications of an upcoming threat were not correctly deciphered due to an inability to imagine that civil planes might morph into weapons of mass destruction. In short, one was unable to see what might have otherwise been evident and decipherable.

Donald Rumsfeld's (2002) catchphrase »unknown unknowns« was probably the most articulate way of summing up this failure of imagination. This phrase, delineating a new state of (in)security after 9/11, is a clear manifestation of speech act theory, for in the very moment of articulation it brought into existence that which it claimed existed. That was possible because it envisioned a yet unknown threat which, given its abstractness, was irrefutable. We do not know, and cannot even conjecture (*unknown*), who, what, when or in which manner (*unknowns*) the next disaster will

22 Cited in Janisch (2012).

arise. What can be said for certain, however, is that we will have to reckon with it.[23]

The idea of pre-emptive action is inscribed into this logic. The intervention ignores the facts to the extent it is supposed to avert threats pre-emptively, that is, even before any symptoms emerge. Strictly speaking, in order to preclude any possible risk, we have to act and intervene before we even know, or are able to see, the enemy or threat (see Amoore and de Goede 2008, 11). This figure of thought has a convenient punch line, for it verifies itself. A catastrophic threat is per definition unforeseeable and incalculable (Massumi 2007) or, according to Rumsfeld (2002): »Simply because you do not have evidence that something exists does not mean that you have evidence that it doesn't exist.« The threat is potentially always already there and may be endlessly re-imagined.

One might think, this attitude is simply a reflection of the paranoia of one Secretary of State under the aberrational presidency of George W. Bush. But it is a narrative that has become predominant in the field of security governance. The concern is with those threats that are unforeseeable and incalculable.[24] Admittedly, although the expression »unknown unknowns« suggests otherwise, we are able to name expected catastrophes, so that we can face terrorist attacks or environmental disasters. Still, the temporal as well as the modal dimension—that is, the suddenness of a catastrophe's emergence and its actual appearance—are assumed to be unforeseeable and unpredictable.

23 »Was it a failure of the imagination,« Errol Morris simply asked Donald Rumsfeld in his film *The Unknown Known*, »or a failure to look at the intelligence that was available?« (cited in Danner 2014, 65).

24 In Germany, since 2004 the Federal Agency for civil protection (*Bundesamt für Bevölkerungs- und Katastrophenschutz*, BBK), for example, organizes transregional exercises on crisis management based on scenarios of unforeseeable and incalculable catastrophes, available at: http://www.bbk.bund.de/DE/AufgabenundAusstattung/Krisenmanagement/Luekex/Luekex_node.html, accessed November 4, 2015.

Anticipatory knowledge practices and the reality of the fictive

So far, it has been possible to establish two interrelated moments of security governance. On the one hand, security necessarily operates at the boundary of what is knowable (Burgess 2011). That is because it is oriented towards the future: threats are unknown insofar as they have not yet materialized. Dealing with the possible is therefore at the heart of security. The limit of the knowable is the non-transgressive boundary of our knowledge about the future. Security is always also concerned with its opposite: insecurity and uncertainty, and hence with that which is inconceivable. On the other hand, governing security involves transgressing precisely that boundary. That is its business as well. Security accordingly involves transgressing the boundary of what is knowable in order to avert a threat. The threat must be anticipated to render it accessible and manageable. Scenario planning and risk prognosis thereby function as knowledge practices that aim at achieving precisely this objective—without, however, ever actually reaching it. The future remains contingent. It cannot be grasped but in terms of the possible or probable.

How then do anticipatory practices and techniques convert the unknown into knowledge? These obviously replace the unknowable with a different form of knowledge. Anticipatory knowledge practices may be conceived of as modes of »affective time taking« (*affektive Zeitnahme*) (Opitz 2015), as they bridge the gap between the present and the future. However, it is not merely a matter of time, but also of speculation or »conjecture« (Aradau and van Munster 2011). Common to all anticipatory knowledge practices is that they operate on the basis of the unknown and at the same time constitute reality. In this context, the Italian sociologist Elena Esposito (2007, 31), following Luhmann, speaks of a »duplication of reality.« The duplicate does not compete with »real reality« but rather adds to it an »alternative description.« It is a fictive reality that does not simply approximate a certain truth, but forms a reality of its own. As narratives or imaginaries, fictive realities open up new perspectives and realms of experience that they then render tangible and comprehensible. Yet modern thinking is still shaped by the idea that we are actually capable of

distinguishing between author and imagination and between reality and fiction (Esposito 1998).

In contrast to the analytical concepts of social phenomenology, such as interpretative schemes and types, the discourse of the duplication of reality does not assume a »single reality.« Instead, it includes the idea of a »horizontal« division of the world into spheres of meaning (Esposito 2007, 68) that always only partially capture and describe reality. The literary notion of the fictive operates with the idea of multiple and overlapping realities that do not add up to a whole and consistent reality (Law 2003). Esposito refers to a »surplus of realities« (2007, 68). The fictive, then, is not the opposite of reality and alludes neither to »pure fantasy« (ibid., 120) nor to mere illusion. Rather, it is a practice of imagining, anticipating, and attributing meaning. It is a mode of operating within reality, of making sense of and, as it were, concretizing the imaginary. In this sense, the fictive may be understood as a reality of its own (for example when imagining the future) that appears to us as real—in the sense of imaginable, visible, and tangible—as the so-called real reality. In principal, it is distinguishable from real reality (e.g. we know that the imagined attack on a chemical factory or a nuclear power plant is fictive) and at the same time it takes effect in the real (Esposito 1998), meaning that we not only conceive of an anticipated terrorist attack or environmental disaster as a real possibility, but also act accordingly. Moreover, fictive realities always materialize within certain procedures and thus may deploy their own schemes of reference. Hence, risk schemes allow for comparing proverbial apples and oranges, for speaking of increasing or decreasing risks, and for focusing on quite disparate objects and activities as regards a certain risk, for example, to our health.

There is, however, a decisive difference between risk management techniques and scenario techniques as regards their relationship to the past and the future. This disparity reveals much about their varying ideas of reality. Risk management techniques analyze probabilities on the basis of past experiences. The presupposition of a certain continuity of our being in the world

allows for a projection into the future:[25] »The prognosis implies the diagnosis which introduces the past into the future« (Koselleck 2004, 22). Scenario techniques, by contrast, break away from that principle. In assuming a world of discontinuities, that is, of radical uncertainty, they aim to stimulate our faculty of imagination and thereby surpass the already known and familiar. In this sense, they ignore the idea of the singularity of events. As Jacques Derrida (2007) maintained in his deconstructive reading, for an event to deserve this attribution, it must be impossible to anticipate and foresee, or even to talk about in advance of its occurrence. In other words, there »is a certain impossible possibility of saying the event.«[26] Hence, the declared aim of scenario techniques is to transgress precisely this impossibility in order to render »the unimaginable imaginable.«[27] They are not merely a form of »affective time taking,« but also of affective reality creation. However, scenario techniques recognize that the faculty of imagination is always already culturally embedded. Fictional material, such as literature or movies, serves as a means of transcend our established modes of thinking and the limitations of our imagination.[28]

To be sure, both practices of knowledge production constitute reality by anticipating threats. That is true not only in that they produce knowledge as procedures for gathering insights. They also presuppose a certain order

25 Consider the principle of insurance: the higher the risk of a disease or an accident, calculated from past experience, the higher the insurance premium.

26 Alluding to the idea of an invention that likewise is »possible only on the condition of being impossible,« Derrida (2007, 451) continued: »The event's eventfulness depends on this experience of the impossible.«

27 This catchphrase was coined as far back as the Cold War, when scenario planning was developed as a practice of knowledge production by, among others, the RAND Corporation to create civil defense strategies in the event of atomic attacks (Ghamari-Tabrizi 2005).

28 At issue here are risk management and scenario techniques as practices and modes of thinking. On the actual impact of the practice of systematically employing fictional material in scenario planning in the aftermath of 9/11, see Elmer and Opel (2006).

of reality that they simultaneously reproduce. Risk thinking »inserts the phenomenon in question […] within a series of probable events« (Foucault 2007, 6), while suggesting calculability. As it is subject to the principle of accuracy, the claim, at least in principle, is that it can make the correct prognosis (one is not interested in conjecture but in knowing as precisely as possible the risk of a nuclear power plant disaster or the probability that a sex offender will recidivate). Risk thinking is thus about reassurance. It presumes that in the end a particular reality will materialize. Consequently, advocates of risk management only reluctantly concede that predictions, as part of the order of the probable, are only relatively accurate. As a form of knowledge that organizes a milieu of different elements in relation to each other, risk constitutes a fabricated and, accordingly, fictive reality that opens up a space of »speculative thinking« (O'Grady 2013).[29]

Scenario thinking, by contrast, acknowledges precisely this. It assumes that we live in a world of imagination in the first place. Here, the plane of reference is a possibility to be imagined (i.e. that of a catastrophic event), not a probability to be calculated. Rather than prediction, scenario thinking is a form of »premediation.«[30] Although insisting »on the reality of the premeditated future,« premediation, unlike prediction, as Richard Grusin (2004, 28) observed, is »not chiefly about getting the future right.« Scenario techniques aim at preempting the catastrophic event within our imagination, and in this sense they are about reassurance as well. Yet scenario techniques dismiss the idea that experience and expectation must be reconciled. They address the activity of premediation in order to prepare us for, and mitigate the horror of, the unforeseeable. The possible future that thus emerges is not antithetical to the real. It is rather, in Deleuze's sense, the virtual future that exists in the present: »a future to come that is already with us, but which remains ungraspable« (Braun

29 Ordinary conversation about a residual risk only euphemistically points to the fact that the remaining risk is actually unknown.

30 In contrast to *premeditation*, the term accentuates that *premediation* is always *mediated*: »knowledge, truth, or facts are never independent of mediation but are constructed and stabilized through the mediation of political, cultural, and technological networks« (Grusin 2004, 30).

2007, 17). A scenario's quality, then, rests not on its accuracy, but instead its vividness, or, as ethnographers would put it, verisimilitude. Truthfulness results when a presentation is convincing and has »internal coherence« (Atkinson 1990, 381). The fictional thus stipulates what shall be considered realistic.[31]

Both anticipatory knowledge practices thus serve to stabilize our expectations. At the same time, however, they may also have the effect of upsetting us, since there is potentially no limit to the imagination of threats. The experience of contingency is a key feature of our modern condition, and is also reflected on the etymological level. As the literary critic Burkhardt Wolf (2011, 19) insisted, modernity (from Latin *modernus*, from *modo*: »just now,« »only just«) represents a »state in-between« in a temporal and modal sense:

> [T]he modern presents [itself] as something that has emerged just now from the given and the certain and only just been inscribed into the future to be and to come. […] Because of their circular relation to the respective future, action and decision become contingent upon themselves. If there were just now sufficient reasons, then these only just need to be approved. Hence modernity has to prove itself not in the face of a particular reality, but with regard to those possibilities.

Modernity then is constantly engaged with the possible. And security is only a concurrent problematization of this experience of the contingent, though from the outset it is shaped by the idea of feasibility. Contingency, in this modern sense, is not the same as being inaccessible and inconceivable. As Reinhard Koselleck (2004) pointed out, for Kant it is not only the projections of our fantasy but also of our reason that proverbially

31 Scenario techniques have in common with the modern novel that they suspend the opposition of the fictional and the real: the novel is not the »fiction of reality but the fiction of the reality of realities« (Blumenberg 1969, 27). Fiction presents conditions that are usually not encountered in the life world. It portrays conditions that render reality »realistic.« Hence, in order to appear realistic, the novel must not be real (Esposito 2007, 17).

knows no limits. Precisely this limitlessness as regards the anticipation of possible dangers and threats characterizes scenario techniques as well as risk management techniques. »Data doubles« that duplicate our personal features, for example, are also representations. They may be reproduced, recombined, and re-calculated virtually without limits, precisely because as empirical data they are at the same time derived from and detached from the »real reality« they claim to describe. What is more, risks are not merely calculations; they also affect us. They affect us through our imagining of dangers and threats. Knowledge about and representations of risks translate into perceptions and feelings; they produce, in this sense, »effects in the real« (Foucault 1991, 85).

If these observations are true, this would also imply that the symbolic meaning of things, processes, and actions acquires materiality and efficacy in the real. The »duplication of reality« is not just a matter of introducing another layer of representation. The established differentiation between the symbolic and the world of meanings and representations on the one side, and the material world of procedures, arrangements, and practices on the other, would be suspended. »Discourse, in this sense, is any form of experience—linguistic or otherwise—which is even minimally organised« (Gilbert 2004).

Security matters, and fictive beings matter as well

As regards the analysis of law and its relationship with security matters, the observation above gives rise to two implications. First, »the struggle for law« (Jhering 1992) does not play out merely on a symbolic level. What is at issue, rather, is the practice of »dingpolitik,« as William Walters (2014, 104) has recently elaborated, leaning on Latour. Dingpolitik is to be distinguished here from realpolitik. Whereas the latter »is politics built on the belief in and assertion of indisputable facts,« the former is »a politics oriented around unsettled ›matters of concern.‹« Realpolitik implicitly assumes a division of the world into real things or facts, on the one hand, and sense and the attribution of meanings (that are nonetheless already at hand), on the other. We are, in other words, able to designate the things surrounding us more or less clearly through linguistic means. The notion

of »matters of concern,« by contrast, focuses on the question of »how matter comes to matter« (Barad 2003), that is, of how discursive objects determine what can be said and done. »Discourse is not what is said; it is that which constrains and enables what can be said. Discursive practices define what counts as meaningful statements,« and also what counts as meaningful emotions. Hence, discourse cannot be reduced to »linguistic or signifying systems, grammars, speech acts, or conversations« (ibid., 819), but is always a material and emotional practice. And objects or certain constellations that become subjects of the security discourse as matters of concern are »not just the result of a complex assemblage of social practices and values« but emerge »as an object whose materiality has both enabling and constraining effects on what can be said and done to secure it« (Aradau 2010, 492). There is, in this sense, »no ultimate distinction between the material and the ideal, the physical and the mental, between practice and meaning« (Gilbert 2004).

If we wish then to comprehend what accounts for the »force of law,« we should examine how particular »matters of concern« make their way into the law. In keeping with our example, we should try to explain how the threat represented by a power glider that went astray over the city of Frankfurt was able to merge with the images of the horrendous attack on New York City's Twin Towers and how these images have come to be tied to a narrative of catastrophic events and terrorist threats that has also inspired anticipatory knowledge practices aimed at producing evidence of just those threats. As legal studies has long-since emphasized, legal judgments and the »life of the law« in general rely on language and rhetoric as much as on legal procedures and practices of adjudication that authorize the speech act and the speaker in the courtroom. Yet what counts as law, as lawful, and as a pertinent legal norm, also depends on social imageries and imaginings and related perceptions that exceed language and representation in the first place.

Not only security law, but law in general is organized around cases that have not yet materialized. Liberal law does not, indeed, premeditate on the legality of future acts (see Opitz 2015, 167). Nonetheless, provision is inherent in its norms: to do justice to a particular case, legal norms have

to be sufficiently indeterminate, even vague (Waldron 2011). Hence, like any term, legal norms try to deal with that which is not yet imminent (see Blumenberg 2007, 12) and, in this sense, be prepared. Yet, security law does not limit itself to preparedness, it commends itself for being preemptive.

The idea of the formal existence of the law ignores its reliance on any kind of knowledge in order for its norms to be activated. The difficulty with security law is its reliance on anticipatory thinking which also provides us with certain forms of knowledge—with an idea of how to think about the future and how to face the concomitant uncertainties. Security law is susceptible to dangers and threats that, as fictive realities, are also real. And to the extent that we are preoccupied with the future and prepare for the worst case, security matters may become inscribed into the law so as to extend the norm or create new norms of intervention. What is more, if there is no ultimate distinction between the material world of things and practices and the world of meaning and imagination, it means that we live in and with fictive realities that take on a life of their own. The law itself produces such fictive realities that deploy their »own principle of being« (Pottage 2014, 162). One need only think of figures like the legal person, the legally protected good, or events that are not really determinate such as, in the case of the plenary decision above, an imminent occurrence of catastrophic dimension. As »cognitive or epistemological forms,« Alain Pottage explains, these are artefacts »that have been turned into procedures.« They are »substances« (ibid., 159) that are able to generate and sustain themselves. They are »practicable and intelligible without reference to [their] possible actions upon a social context« (ibid., 162). We should therefore, perhaps, be more aware of what Bruno Latour (2013, 242) has designated as »beings of fiction [that] populate the world.« These fictional beings, such as scenarios of terrorist attacks, invite us to follow their trajectory, that is, their own narrative and »course of action,« in order for them to make »sense« and »persist in being« (ibid., 236). And while we reprise them and prolong their existence, they in turn not only constitute our subjectivities (ibid., 243), but also fill certain legal norms with meaning.

If the »force of law,« understood as the »force within the law« to enforce the law, is not only determined by reason, rationality, and objectivity in a narrow sense, but also by a-rational moments which, »as energy, emotion, and desire are part of the law« (Fischer-Lescano 2013, 15), then we may likewise contend that the force of law is also inspired by imaginations and fictive beings that translate fears and hopes—and experiences and anticipations—into legal operations. And it is in this sense that the law »needs to develop a culture of a *sense* of justice (*Rechtsgefühlskultur*) that is reflected in legal constructs« (ibid., 118; emphasis added)—and that we should analyze the materiality of the »partition of the sensible« (Rancière 2004) when theorizing on legal mechanisms.

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