

**I: From *Rechtsgefühl* to *Rechtsgefühle*?**

**I: Von „Rechtsgefühl“ zu „Rechtsgefühlen“?**



# Why *Rechtsgefühle*? The Turn to Emotion and Affect in Legal Studies

(What are impassioned feelings about law and justice, and why are they pertinent?)

Greta Olson

## 1. On the Pertinence of Understanding *Rechtsgefühle* (Passionate Feelings about Law)

Two recent events speak for the relevance of addressing *Rechtsgefühle* at this particular historical juncture: the near break-in in the German Reichstag in August 2020 and the storming of the United States Capitol on 6 January 2021. For the time being, I will translate *Rechtsgefühle* as impassioned feelings about law and justice, but will come back to the variability in possible translations of the term.

In Germany, where I have lived for over thirty years, Corona-restriction protesters attempted to break into the historic Reichstag in Berlin (the parliament building) in August 2020, surprising officials who had grown accustomed to anti-restriction protests happening regularly and demonstrating to them that they were entirely unprepared for a break-in into the fortress-like building.<sup>1</sup> Many protesters displayed quite disturbing allegiances to far-right groups by, for instance, carrying flags from the German Reich and the National Socialist period. Others avowed the validity of their protests by displaying posters and signs that listed their fundamental rights according to the Basic Law (the German constitution that has been in place since 1949).<sup>2</sup> See, for instance, the demonstrator in Figure 1. With

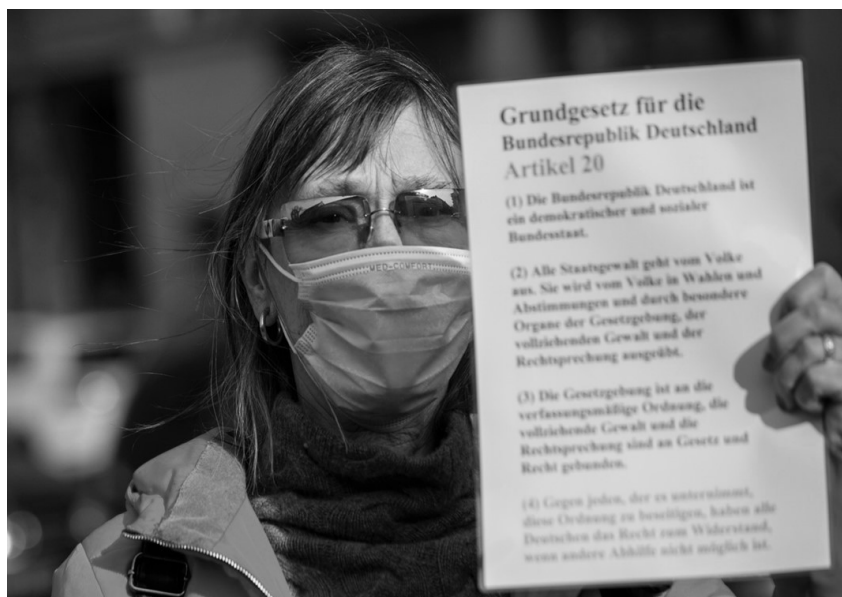
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1 “Entsetzen über Eskalation am Reichstagsgebäude,” *Berliner Tageszeitung*, last modified 30 August 2020, last accessed 21 July 2022, <https://www.berlinertageszeitung.de/politik/72769-entsetzen-in-der-politik-nach-rechtsextremer-eskalation-am-reichstagsgebäude.html>.

2 The German constitution is called the Basic Law (*Grundgesetz*), because it was intended to be provisional for as long as Germany remained divided after World War II. In fact, the Basic Law remained the constitution after reunification in 1989. See “Grundgesetz – Warum heißt es nicht Verfassung?” *Süddeutsche Zeitung*, last modified 23 May 2019, last accessed 21 July 2022, <https://www.sueddeutsche.de/wi>

mottos such as “For the Good of the German People for Freedom and Democracy” and “End the Corona Panic and Give Back Basic Rights,” protesters vehemently insisted that their constitutional rights were being infringed on by the then Angela Merkel-led government. In the most extreme and historically problematic cases, the so-called Corona dictatorship was compared by protesters to fascism and to Hitler’s totalitarian regime.

Figure 1: *A Demonstrator Protesting Corona-Related Restrictions Holds Up a Copy of the German Basic Law. (©dpa)*<sup>3</sup>



A passionate appeal to law and the *felt* rights it guarantees and protects was made by these Corona-restriction protesters. The protesters’ invocation of German constitutional law at the would-be Reichstag break-in and at other demonstrations was based on the argument that the pandemic regulations did not constitute protective measures. Rather, the hygiene restrictions

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ssen/geschichte-grundgesetz-warum-heisst-es-nicht-verfassung-dpa.urn-newsml-dpa-com-20090101-190523-99-342782.

- 3 “Polizei nimmt nach Demonstration in Mitte Personalien auf,” *Berliner Morgenpost*, last modified 28 March 2020, last accessed 21 July 2022, <https://www.morgenpost.de/berlin/article228797933/Polizei-nimmt-nach-Demonstration-in-Mitte-Personalien-auf.html>.

were manifest attacks on the protesters' personal and constitutionally protected liberties. Guaranteed fundamental rights were *felt* by the protesters to have been violated by those in power.

In opposition to this position, any number of constitutional laws were cited as concrete grounds for arresting the anti-restriction protesters, including statutes about endangering others through violating restrictions pertaining to the spread of the COVID-19 virus, such as the mandate to wear masks and maintain social distancing, and the prohibition against violence to the police. Subsequent to August 2020, weekly occurring anti-restriction demonstrations frequently turned violent, with protesters throwing firecrackers at the police. Again a frequent motto in these demonstrations is: "No Corona Dictatorship."<sup>4</sup> In discussions of vetoes of further anti-Corona protests, politicians cited the comparative merits of the right to gather and protest in a pluralistic society versus the prohibition against harming others while doing so.<sup>5</sup>

I now turn to events in the United States, my country of origin, where on 6 January 2021, a mob of would-be insurrectionists laid siege to the Congress building where the Electoral College votes from the presidential election in November 2020 were being certified by Congress members. This violent insurrection was aimed at overthrowing actual election results, which the protesters – reacting to Trump's fallacious narrative – insisted were invalid, calling them the "Big Lie." Violations included forceful and unlawful entry into the Capitol building, violence towards police officers, destruction and theft of property as well as threats to do bodily harm, also sexual violence, to Representatives Alexandria Ocasio-Cortez and House speaker Nancy Pelosi and to hang then Vice President Mike Pence, who was viewed by the mob as a traitor.

Individuals committing these illegal acts insisted that they were entirely justified in fighting against the illegal 'steal' of the election. Flags displayed

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4 Henry Bernhard, "Anti-Corona-Proteste im Osten / Disparate Angriffe auf 'das System'," *Deutschlandfunk*, last modified 15 February 2022, last accessed 21 July 2022, <https://www.deutschlandfunk.de/anti-corona-proteste-osten-rechtsextremismus-100.html>.

5 In this context, the German *IfSG* ("infection protection law") states in § 28a sec. 1 and 2 that several fundamental rights are restricted for the sake of preventing Covid-19 outbreaks. Most importantly, the freedom of assembly anchored in Art. 8 GG ("Basic Law for the Federal Republic of Germany") is considered less important than the "right to life and physical integrity" as stated by Art. 2 sec. 2 GG. See also "Corona und Grundrechte: Fragen und Antworten," *GFF Team*, last modified 11 February 2021, last accessed 21 July 2022, <https://freiheitsrechte.org/corona-und-grundrechte/#grundrechte>.

by mob members recurred to flags and symbols familiar from the Revolutionary War period, which were then meant to protest English tyranny in the U.S. American colonies and have now been repurposed to far-right anti-government aims. Note the South Carolina Moultrie flag in the back of Figure 2, with its crescent moon and liberty inscription, which was used during the Revolutionary War era. All of these symbols bespoke the mob's insistence that it was passionately defending the 'correct' ideals of the Declaration of Independence and the Constitution rather than breaking the law by committing acts of terrorism. One notes the sign quoting the first words of the Constitution in Figure 2. As has been multiply commented on, one of the alarming things about the would-be insurrection was how proudly the mob members documented the break-in, thereby attesting to their impassioned certainty of the validity of their actions. They filmed themselves, produced endless numbers of selfies, and posted their actions incessantly on social media platforms, even as they were damaging property and stealing, fully convinced, as it would seem, of the legitimacy of their actions and their immunity to being sanctioned for these actions afterwards.<sup>6</sup>

Other flags and symbols recurred to the American Civil War (1861-65). One Confederate battle flag-bearer entered the Capitol, and other mob members wore pre-printed shirts commemorating January 6, 2021 as the beginning of a new civil war.<sup>7</sup> The comparison between Confederate flag-bearers in the Capitol attack in January 2021 and would-be Imperial Citizens in the 2020 Reichstag break-in is an obvious one, as both actions were based on the blatant denial of historical facts.

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6 Seamus Hughes and Jon Lewis, "The Capitol Mob's Gleeeful Selfies Are Easy to Mock. They're Also a Warning Sign," *Washington Post*, last modified 19 January 2021, last accessed 21 July 2022, <https://www.washingtonpost.com/outlook/2021/01/19/rioters-incompetent-fbi-arrests/>.

7 Simon Mallory and Sara Sidner, "Decoding the extremist symbols and groups at the Capitol Hill insurrection," *CNN*, last modified 11 January 2021, last accessed 21 July 2022, <https://edition.cnn.com/2021/01/09/us/capitol-hill-insurrection-extremist-flags-soh/index.html>.

Figure 2: *Trump supporters outside the U.S. Capitol on January 6, 2021.*  
(©dpa)



In the former case, secessionist Southerners did not represent a noble ‘lost cause’ in what supporters continue to refer to as the ‘War between the States’ rather than the Civil War, thus belying the realities of slavery and its legacy in Jim Crow laws, systemic racism, regularized violence against Black life, and continuous microaggressions against Blacks and persons of color in the U.S. today. In the latter case, so-called Reich citizens believe that Germany was never defeated in WW II; thus, Germany’s borders from 1937 remain in place, and the ‘grand’ empire was never lost. According to this narrative, Germany is still occupied by foreign Allied forces, and therefore the current government has no legitimacy. Far-right German Corona protesters and the violent insurrectionists from January 2021 expressed racist, anti-immigrant, anti-feminist and anti-Semitic views. Members of both groups were inspired by the rhetoric of former president Donald Trump to commit illegal actions.<sup>8</sup> For example, the Camp-Auschwitz

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8 Katrin Bennhold, “Trump Emerges as Inspiration for Germany’s Far Right,” *The New York Times*, last modified 5 March 2021, last accessed 21 July 2022, <https://www.nytimes.com/2020/09/07/world/europe/germany-trump-far-right.html>.

sweatshirt, sported by one Capitol insurrectionist, speaks to connections between the groups in Washington, D.C., and Berlin.

Yet beyond the deniers of historical realities, individuals in both insurrections claimed that their actions were entirely lawful, as they understand ‘their’ laws to be constituted. They insisted that they were in fact exercising rights to defend democratic processes, and were anything but lawless in their actions.<sup>9</sup> In the U.S. American case, this was a “Rally to Save America,” and those who broke into Congress yelled enthusiastic phrases such as: “Keep moving forward! Fight for Trump, fight for Trump!” and “Military Tribunals! Hang them!” and “Arrest Congress!”<sup>10</sup>

Let me be absolutely clear. I am sickened by the events of 6 January 2021 in Washington, D.C., and the deeply felt divisions in my country of origin they have exposed, including the very real threat of a governmental coup to overturn election results and keep Donald Trump in power, and still now, by the threat of an impending civil war between increasingly polarized segments of the U.S. American population. I vividly feel the threat to a peaceful transfer of power that the mob’s violent attack represented. I also fear a return to violence by Trump supporters in a Republican Party that has made loyalty to Trump’s election-steal lie a “litmus test” for supporters.<sup>11</sup> In February 2022, the Republican Party determined that the riot represented “legitimate political discourse” and it voted to rebuke those Republicans who have condemned it.<sup>12</sup> Here in Germany, arguments with those who continue to deny the reality and dangers of COVID-19 have led to a number of personal falling-outs, as I know those who have died from the virus or who suffer from its long-term effects. Yet I recognize in both of these groups of would-be infiltrators an impassioned, visceral belief in

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9 In the German case, it may be important to note that Coronavirus denier groups were also composed of vaccine skeptics who adhere to alternative medicine philosophies such as homeopathy.

10 Dan Barry, Mike McIntire, and Matthew Rosenberg, “Our President Wants Us Here: The Mob That Stormed the Capitol,” *The New York Times*, last modified 10 November 2021, last accessed 21 July 2022, <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html>.

11 Steve Benen, “The ‘Unofficial Litmus Test’ in Today’s GOP: Embracing the Big Lie,” *MSNBC*, last modified 3 May 2021, last accessed 21 July 2022, <https://www.msnbc.com/rachel-maddow-show/unofficial-litmus-test-today-s-gop-embracing-big-lie-n1266142>.

12 Jonathan Weisman and Reid J. Epstein, “G.O.P. Declares Jan. 6 Attack ‘Legitimate Political Discourse,’” *The New York Times*, last modified 4 February 2022, last accessed 21 July 2022, <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html>.



what group members regarded as the correct interpretations of ‘their’ laws, and a readiness to commit violence – to act illegally according to actual prevailing laws – on the basis of a conviction about the rightness of their interpretations. So convinced are they of the correctness of their felt legal orders that they attempted to overturn the prescriptions of the prevailing system. The insurrectionists understood their actions to be revolutionary, even if for the majority they were committing acts of terrorism.<sup>13</sup>

Here, we find ourselves in the middle of what Rudolf von Jhering entitled *Rechtsgefühl*. In its most straightforward translation, *Rechtsgefühl* can be translated as a feeling for law and justice. The word “*Recht*” in German signifies both “law” and “justice,” in the sense of “rightness.” In previous work on Law and Affect, I have translated the plural term *Rechtsgefühle* as “legal affects” or as “impassioned feelings about law.” Yet any number of translations are viable. In this text I highlight this variability by using the abbreviation of “RG” in parentheses after each one of them. Historically, *Rechtsgefühl* has been used almost exclusively in the singular. Yet for programmatic reasons that will be explained further in the overview of the contributions, the editors of this volume examine *Rechtsgefühle* in the plural to denote the heterogeneity of interpretations of the original term.

Because we live in what has been described by Chantal Mouffe as a period in which agonistic or antagonistic affectively-driven politics alternate with one another, people’s individual and group allegiances to what they view as ‘their’ legitimate and passionately defended laws and legal orders take on a particular salience.<sup>14</sup> These evident passions for law (RG) – or what is perceived or imagined to be law – suggest that the notion of law as the repository of the rational and the rule-driven, and as a complex system for resolving social conflicts is in the best case fragile. The enforcement of law during our present quite affectively charged political era can only transpire successfully if people agree upon the legitimacy of the laws that regulate their behavior. This brings me back to Jhering.

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13 Ibram X. Kendi contends that the violent insurrection was not met by an adequate police presence because of the whiteness of the mob and the assumption that they would not be violent: “By contrast, the greatest domestic terrorist threat of our time is white supremacists. From my understanding, the local Capitol Police assumed that this demonstration wouldn’t turn into an insurrection and wouldn’t turn violent. To me, it just flies in the face of all evidence,” see Fabiola Cineas, “Ibram X. Kendi on Why White America is Still Shocked by White Supremacy,” VOX, last modified 12 January 2021, last accessed 21 July 2022, <https://www.vox.com/22227102/anti-racism-ibram-kendi>.

14 Chantal Mouffe, *Agonistics: Thinking the World Politically* (London and New York: Verso, 2013), 3, 6.

Jhering is remembered in histories of legal interpretation – if he is remembered at all, which is regrettably very little in the Anglophone world – as having ushered in a movement away from an adherence to so-called Roman-law-based forms of legal reasoning and their application in Germany’s science of law to a so-called *Interessenjurisprudenz*, based on individual interests. As a law professor, Jhering first published widely on the interpretation of Roman-based law. Yet during his tenure at the University of Giessen between 1852 and 1868, his views changed radically. He began to argue for the credence of an individual and group interest-based interpretation of the law. In his lecture and short volume *Der Kampf ums Recht* from 1872, which I translate as “the fight” or “the battle for law,” Jhering describes how law develops out of an impassioned feeling that arises in an individual when – importantly – her or his sense of justice has been profoundly violated. In other words, the intrinsic feeling for law (RG) first becomes appreciable when it has been hurt. Again and again in the 1872 text, Jhering uses images of physical discomfort, including examples of a mother’s intimate connection to her child after the pain of childbirth or the relief of pain to an injured limb, to describe an individual’s impassioned attachment to law and what is just (RG).<sup>15</sup>

## 2. Another Understanding of *Rechtsgefühl*

Before explicating Jhering’s seminal work on the impassioned feeling for law and justice (RG) in greater depth, I need to mention two caveats to what has been stated thus far. The first is that the examples of violent actions based on impassioned multiple *Rechtsgefühle* mentioned above were carried out by far-right groups and constitute measures that most readers, as I assume, will condemn. My citing these examples might inadvertently lead to the concept of *Rechtsgefühl* being cast in a highly negative right-populistic light. In my book on affect and the law, I offer counterexamples to the ones described above such as the arts of Black Lives Matter as instances of legal pluralistic interventions into the prevailing U.S. American legal order and its history of perpetrating systemic violence against Black life.<sup>16</sup> Artistic protests, sometimes also illegal ones, are positive examples

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15 Rudolf von Jhering, *The Struggle for Law*, trans. John J. Lalor (Chicago: Callaghan and Company, 1915) (orig. *Der Kampf ums Recht*, 1892 [1872]).

16 See Chapter 5 of Greta Olson, *From Law and Literature to Legality and Affect* (Oxford: Oxford University Press, 2022).

of efforts to change the dominant legal order that are also based in impassioned feelings about law and justice (RG).

A second point is that there is another tradition of conceptualizing *Rechtsgefühl* than the one based in laypersons' political conflicts with their legal orders, that is, as I am interpreting Jhering's work in *Der Kampf ums Recht* and explicating in the examples above. This tradition is discussed in the essays by Justice and Professor of Legal Theory Jeanne Gaakeer and by the legal historian Thorsten Keiser in this volume. Briefly, the feeling for law and justice (RG) can also be understood as, on the one hand, *Judiz* or a *sensus juridicus* – a jurist's intuitive sense of a right and just legal decision and the jurist's efforts to apply legal norms in a way that will lead to the outcome their sense of law (RG) dictates. Note that discussions of a judge's legal sensibility are based in Roman-law contexts in which the judge or judges determine how legal norms should be applied to the case at hand because there are no juries.

On the other hand, *Rechtsgefühl*, as Jhering used it in the singular, can be understood as a catalyst for legal reform when it functions to disturb and challenge existing legal norms. Jhering's move away from the conceptual jurisprudence in which he had been trained to one based on particularized interests and the feeling for law (RG) was caused by the difficulties he had with the inconsistencies involved in an 1858 case concerning which party should have to pay for a ship's cargo that had been sold twice and was subsequently lost at sea. According to Roman law, both parties would have to pay. This struck him as incorrect and led him to conceive a philosophy of law based on historically contingent particular interests rather than universal principles.<sup>17</sup> In an early manuscript version of his later *Zweck im Recht* (The Purpose in Law), dated from roughly 1865, Jhering writes that

the human (Mensch) brings nothing into the world other than itself, its desire for self-preservation, its egoism – its spirit, heart, and feeling are nothing more than an unwritten slate in which History has to first inscribe its experiential sentences. Law, customs, and conscience are

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17 Thorsten Keiser points to an understanding of RG as an inner-juristic process involved in improving or developing current legal standards: "Emotion als innerer Kompass für juristische Entscheidungen: Das Rechtsgefühl bei Rudolf Jhering," Introductory Lecture to the University of Giessen by Thorsten Keiser (2020), unpublished manuscript.

nothing other than historically contingent and well-tested politics of a clear egoism.<sup>18</sup>

Continuing the tradition of understanding *Rechtsgefühl* as a catalyst for legal reforms, Erwin Riezler insisted in a psychological study of law from 1921 that *Rechtsgefühl* can never exist independently of law but rather develops in relation to the existent legal order. Quoting Jhering's published version of *Zweck im Recht* (1883), he insists that "It is not legal feeling [*Rechtsgefühl*] that produces law, but rather law produces *Rechtsgefühl*."<sup>19</sup>

In both cases, the concept of *Rechtsgefühl*, widely associated with Jhering, is understood within inner-juristic discourse rather than in terms of individuals' and groups' affective reactions to their normative orders, based on their felt sense of what is just. "*Rechtsgefühl* is then much more than an instinct or an affect," Keiser writes in this volume to describe Jhering's 1872 formulation<sup>20</sup> and discusses various sources of conceptualizations of *Rechtsgefühl* that preceded and followed it.<sup>21</sup> Gaakeer, in turn, explicates Dutch and German legal theoretical histories of jurists, like

18 Michael Kunze, *'Lieber in Gießen als irgendwo anders...': Rudolf von Jherings Gießener Jahre* (Baden-Baden: Nomos, 2018), 11-40. Jhering's quote from: Rudolf von Jhering, *Der Zweck im Recht* Bd. 1, early manuscript. The original reads: "der Mensch bringt nichts mit zur Welt als sich selbst, seinen Selbsterhaltungstrieb, seinen Egoismus – sein Geist, Herz, Gefühl ist nichts als eine unbeschriebene Tafel, in die erst die Geschichte ihre Erfahrungssätze einträgt, Recht, Sitte, Gewissen ist nichts als die historisch gefundene u(nd) erprobte Politik des geklärten, einsichtigen Egoismus." (Unless otherwise noted, all translations from German to English are by the author.)

19 Erwin Riezler, *Das Rechtsgefühl: Rechtspsychologische Betrachtungen* (München, Berlin und Leipzig: J. Schweizer Verlag, 1921), 39-40. Jhering's quote from: Rudolf von Jhering, *Der Zweck im Recht*, Bd. 1, (Leipzig: Breitkopf & Härtel 1883), XIII in first edition, XIV in second edition. The original reads: "Einleuchtender erscheint auf den ersten Blick das rein logische Argument, daß das Rechtsgefühl nicht vor dem Gegenstande da sein kann, auf den es sich bezieht, also nicht vor dem Recht, daß mithin auch beim primitiven Menschen das Rechtsgefühl nichts Ursprüngliches, sondern etwas durch das Vorhandensein einer schon bestehenden Rechtsordnung bedingtes sei. Diesen Gedanken formuliert Jherings bekannter Ausspruch: 'Nicht das Rechtsgefühl hat das Recht gezeugt, sondern das Recht das Rechtsgefühl'."

20 The original reads: "Rechtsgefühl sei dabei ebenfalls viel mehr als bloß Trieb oder Affekt."

21 On the contextualization of the history of *Rechtsgeföhle* as based also on changing understandings of feeling, see Bertram Lomfeld, "Emotio Iuris: Skizzen zu einer psychologisch aufgeklärten Methodenlehre des Rechts," in *Recht fühlen*, eds. Sigrid G. Köhler, Sabine Müller-Mall, Florian Schmidt and Sandra Schnädelbach (München: Brill | Fink 2017), 9-32.

herself, struggling with “legal consciousness” and a *sensus juridicus* to reconcile the claims of sometimes inconsistent legal norms with the jurist’s knowledge of a just and judicious application of law.

Beyond this, Jhering’s other texts, including “Über die Entstehung des Rechtsgefühles” (On the Development of the Feeling for Law and Justice), a lecture from 1884, suggest that the feeling for law and the right (RG) is not universal or homogenous. Rather, prevailing legal feeling (RG) develops in relation to the constitutive legal order in which it arises and is therefore highly contingent and legally-historically determined. According to Jhering, how advanced a society’s legal feeling (RG) is depends on the degree to which that society has developed the ability to abstract legal feeling in contradistinction to legal rules.<sup>22</sup> Accordingly, legal feeling (RG) arises out of people’s socialization in existing legal norms. Through forms of strife, the resultant legal feeling leads to the further development of those norms.

Whether legal feeling (RG) concerns an individual jurist’s ability to apply legal norms to individual cases in just and juristically well-honed intuitive ways or pertains to the role of discordant legal feeling in the internal development of laws and jurisprudence, these definitions differ from the more pluralistic understanding of legal feelings (RG) that I take in this essay.

### 3. Jhering and the Context of His Discussion of the Battle for Law/Justice (RG)

I leave it to legal historians to delineate in full how a move to an awareness of a passion for law and rightness (RG) and away from explications of the spirit of Roman law occurred within Jhering’s life work. Instead, I want now to mention that Jhering described himself as a “man of powerful

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22 The original reads: “Eine zweifellose Thatsache ist es, dass unser Rechtsgefühl sich oft den Rechtseinrichtungen widersetzt, dass wir uns im Widerspruch mit diesen Einrichtungen fühlen. Woher kommt dieser Widerspruch, wenn unser Rechtsgefühle nichts ist als das Product der Rechtsordnung, die uns umgibt? Und darauf antworte ich, das beruht auf jenem Abstraktionsvermögen des menschlichen Geistes, ohne das wir uns den Menschen gar nicht denken können, das bei jedem einzelnen Vorfall etwas abstrahiert.” Rudolph von Jhering, “Über die Entstehung des Rechtsgefühles” (1984), *Jubiläumsschrift 125 Jahre Wiener Juristische Gesellschaft. Zeitloses aus 125 Jahren*, ed. Walter Barfuß (Wien: Manz’sche Verlags- und Universitätsbuchhandlung, 1992), 31-47.

feeling for law/rightness” (RG).<sup>23</sup> His recognition of this feeling, its vehement violence, and its role in the development of law and law’s role in mediating conflicts, resulted in part out of a legal battle with a former woman servant who had wanted to leave his family’s employment and went to court to get her missing wages. For Jhering, his loss to the former servant in court, despite his knowledge of law and social standing, led to his having a “felt sense of the sting of a suffered injustice, when one knows that one has a legitimate right and the institutions of the state are such that despite one’s best intentions one cannot make one’s rights be validated, cannot get them carried through.”<sup>24</sup> Importantly, as is stressed again and again in *The Struggle for Law*, as *Der Kampf ums Recht* has been previously translated, the fight for law occurs on the basis of a sense of “subjective injustice.”<sup>25</sup> As Jhering explicates, the “feeling of legal right [*Rechtsgefühl*] will be excited by an injustice done him [sic], a feeling which does not pulsate in accordance with the abstract notions of the system.”<sup>26</sup>

For the moment, I want to point out that Jhering’s move away from a legal methodology based on a highly formalistic method of interpreting Roman-law-based legal texts and applying abstract legal norms that were derived from them towards one based on practice, personal interests, and conflict was paradigmatic. It was part of an alteration of German legal sciences, *Rechtswissenschaften*, as the study of law is termed in Germany. Yet, in the context of this volume, what is more central is that it anticipated what I view as the turn to affect in Anglophone legal theory by more than a hundred years.<sup>27</sup> Jhering’s concern with the violation of *Rechtsgefühl* bespeaks a critical attitude towards law as causing pain rather than (solely)

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23 Inge Hanewinkel and Nikolaus Linder, “Ein Mann von kräftigem Rechtsgeföhle: Rudolf von Jherings Prozess gegen seine Hausangestellte und der Kampf um’s Recht,” *Zeitschrift für Neuere Rechtsgeschichte* 42 (1-2) (2020), 61-77. The original reads: “Und diesen Vorwurf mache ich den heutigen Rechtssätzen, sie sind darauf berechnet, daß ein Mann von kräftigem Rechtgeföhle heutzutage geradezu gezwungen ist, jenen Akt der Feigheit vorzunehmen, von dem ich vorhin sprach, sein gutes Recht im Stiche zu lassen.”

24 Hanewinkel and Lindner, *supra* note 23, at 62. The original reads: “Da habe ich aber, kann ich sagen, geföhlt den Stachel des erlittenen Unrechts, wenn man sein gutes Recht hat und die Einrichtungen des Staates derartige sind (‘Bravo!’), daß man mit dem besten Willen sein Recht nicht geltend machen, nicht durchsetzen kann.”

25 Jhering, *supra* note 15, at 39.

26 Jhering, *supra* note 15, at 39.

27 Greta Olson, “The Turn to Passion: Has Law and Literature become Law and Affect?” *Law & Literature* 28 (3) (2016), 335-53.

resolving conflicts, as well as a focus on how law obviates its interests and feelings in the name of legal reasoning. In accordance with Jhering's central analogy about the pains of childbirth and a mother's resultant love for and attachment to her baby, the violation of an intrinsic sense or feeling for law (RG) is followed by a personalized sense of having an affective connection to law. Indeed, Jhering frequently refers to "love" in his text on *Rechtsgeföhle*:

The power of law lies in feeling, just as does the power of love; and the intellect cannot supply that feeling when it is wanting. But as love frequently does not know itself, and as a single instant suffices to bring it to a full consciousness of itself, so the feeling of legal right uniformly knows not what it is.<sup>28</sup>

*Rechtsgeföhle*, which I believe have to be understood in the plural, are experienced unconsciously until they become newly tangible to those who harbor them, just as, according to Jhering, the lover becomes aware of her or his sentiment in a kind of a sudden awakening to something that has been present but unconscious over a longer period of time. As a form of unconscious and unrecognized love, or as an experience of acute pain, as in the breakdown of vital bodily organs and the cessation of health, a *Rechtsgeföhle* does not arise easily. Rather, it is transformative and violent and is experienced painfully. The collocation of injured legal feelings (RG) and physical pain shows an interesting overlap with the sensory aspects that are highlighted in affective theories of law.

In this essay, I am quoting from the 1915 translation *The Struggle for Law* of Jhering's text published 1879. I ask the reader to mentally amend the references to "the man" to "the person" to cohere with the less gendered language usage of the present:

The man who has not experienced this pain himself, or observed it in others, knows nothing of what law is, even if he has committed the whole corpus juris to memory. Not the intellect, but the feeling, is able to answer this question, and hence language has rightly designated the psychological source of all law as the *feeling of legal right* (*Rechtsgeföhle*).<sup>29</sup>

Once again, Jhering compares the violation of the "feeling of legal right," as the translator renders *Rechtsgeföhle*, to a bodily wounding or simply to

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28 Jhering, *supra* note 15, at 61.

29 Jhering, *supra* note 15, at 61 (emphasis in the original).



pain.<sup>30</sup> If this wounding is not actively fought against, Jhering insists, the individual who has received the wound will ultimately be destroyed. Therefore, a robust and passionately defended *Rechtsgefühl* appears to be necessary not only for the individual's existence but also for the evolution of law in general, something that Jhering expanded on at length in his subsequent *Der Zweck im Recht* (The Purpose in Law, 1877–1883). In the author's own words: "The man who does not feel that when his rights are despised and trampled under foot, not only the object of those rights, but his own person, is at stake."<sup>31</sup> A personally experienced legal pain, or a sense of violated justice (RG), is transferred onto the collective to which the individual belongs.

Another way that Jhering anticipates the Law and Affect research that became prominent at the end of the twentieth century is in his notion of different groups' having quite varying *Rechtsgefühl* or a discrete sense of the law and justice, depending on their cohort's placement within the given social hierarchy. Jhering differentiates between officers, merchants, and servants in his *The Struggle for Law* to point out, for example, that servants have no choice but to have a different and less developed sense of legal right (RG) than officers do, given the circumstances of their class conditions.<sup>32</sup> This point strikes me as highly ironic, given that Jhering's proud and from the current perspective quite unjust refusal to pay his former servant woman the wages she had earned in his family's service was an affective stimulus to his beginning to investigate impassioned legal feeling (RG). From our present purview, we can assume that both his class and his sense of masculine privilege had been injured by the outcome of the case.<sup>33</sup>

At any rate, Jhering's acknowledgement that the feeling about justice and the law (RG) inevitably depends on the social position of the group of people experiencing them anticipates recent work on legal consciousness. According to legal-consciousness theorists, people's subjective relations to

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30 Jhering, *supra* note 15, at 62, 64.

31 Jhering, *supra* note 15, at xlvii-xlviii.

32 Jhering, *supra* note 15, at 49.

33 Sandra Schnädelbach points to the gendered aspects of *Rechtsgefühl* in the context of "bourgeois masculinity" in her history of the development of the concept in Germany, a point that Thorsten Keiser also discusses in his contribution to this volume. See Sandra Schnädelbach, "The Jurist as Manager of Emotions: German Debates on 'Rechtsgefühl' in the Late 19<sup>th</sup> and Early 20<sup>th</sup> Century as Sites of Negotiating the Juristic Treatment of Emotions," *InterDisciplines* 6 (2) (2015), 47-73.



their legal environments depend entirely on their relative social positions within that environment, as individuals and as members of social groups. Members of a given legal order cannot in fact experience their legal environments equally, because depending on their cohort's experiences and histories, they will find themselves to "stand before the law" or to "play with the law" or to be "up against the law," as Patricia Ewick and Susan Silbey point out in a foundational U.S. American text on legal consciousness.<sup>34</sup> The first position channels Kafka's dark short story "Vor dem Gesetz" ("Before the Law," 1915), which relates the story of a man who is condemned to wait before the doors of law into perpetuity without ever having a hearing. For Silbey and Ewick, as for other legal-consciousness scholars, law is made comprehensible and people find strategies for dealing with legal authorities through the stories they tell about these experiences, stories that cohere with how their respective group has been treated previously. In other words, the experiences of tenured professors in dealing with law, like the three individuals who have edited this volume, will differ in kind from those of asylum seekers in Germany, as will the stories we tell about German citizenship and German legal culture.

A consciousness of law and whatever people think of as being normatively binding is highly subjective. I call this experience "legality" elsewhere, expanding on Silbey and Ewick's use of the term in their 1998 volume and in other publications. The expansion of the term functions to include unconscious attitudes and feelings about law (RG) that are only partially based on shared stories.<sup>35</sup> This demonstrates overlaps between Law and Narrative work and the turn to affect in critical legal studies.

#### 4. *Genealogies of Law and Affect Research*

When describing the interest in affect in recent critical legal studies written in English, one often looks to research in law and emotion that took place during the 1990s and which focused on cognition. In its U.S. American iteration, Law and Emotion research emphasized victim rights and the role of emotion in processes of adjudication, for the judge and the

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34 Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago and London: University of Chicago Press, 1998). For an overview of work in legal consciousness, see Susan S. Silbey, "Studying Legal Consciousness: Building Institutional Theory from Micro Data," *Droit et Société* 100 (3) (2018), 685-731.

35 Olson, *supra* note 16.

jury, for instance.<sup>36</sup> More recently, and most palpably in the work of the moral philosopher Martha Nussbaum, legal education and constitutional activism have been related to augmenting positively evaluated emotions, such as empathy – as a “capacity for imaginative and emotional participation.”<sup>37</sup> For Nussbaum, a narratively constructed sense of empathy stands in contradistinction to the feelings of disgust that lead people to marginalize others.<sup>38</sup> There is an obvious element of normativity about which emotions are acceptable and which ones are not in Nussbaum’s work, as Thorsten Keiser and others have pointed out.<sup>39</sup> The binary distinction that is drawn between visceral disgust and narratively-derived empathy renders Nussbaum’s considerable body of work on emotion and the law less useful for the less normative investigation of *Rechtsgeföhle* that we endeavor to undertake in this volume.

Regretfully, “emotion” and “affect” are often used synonymously in discussions of law, and this leads to several points of confusion. As Simon Stern writes: “Much of the work in law either takes affect and emotion to be synonyms, or else focuses on the performance of emotion in order to document its importance in various legal contexts (criminal trials, divorce litigation, etc.).”<sup>40</sup> Yet Law and Emotion research needs to be differentiated from work on Law and Affect. In its most common application, affect theory differentiates bodily sensations from emotions that are translated into language through a variety of representational practices. Affect theories often reference Baruch Spinoza’s *Ethics* (1677) as an early source, with its postulations that body and mind are aspects of the same substance, that human is indivisible from nature. Affect theories feature embodiment and sensation, rather than cognition or objects of consciousness. Further, affect theories – for there are more than one – review insights from the history

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36 Richard A. Posner, “Emotion versus Emotionalism in Law,” in *The Passions of Law*, ed. Susan Bandes (New York: New York University Press, 1999), 309-29, 327. For an overview of traditionalist scholarship on emotion see Terry A. Maroney, “Law and Emotion: A Proposed Taxonomy of an Emerging Field,” *Law and Human Behavior* 30 (2) (2006), 119-42.

37 Martha Nussbaum, *From Disgust to Humanity* (Oxford: Oxford University Press, 2010), xix; and on legal education and narrative imagination, Martha Nussbaum, “Cultivating Humanity in Legal Education,” *University of Chicago Law Review* 70 (2003), 265-80, xix.

38 Nussbaum, *supra* note 37, “Cultivating,” at 270-1.

39 Thorsten Keiser, “Gnade und Rechtsgeföhle – Beobachtungen aus juristischer Perspektive” (unpublished manuscript).

40 Simon Stern, “Email on Chapter 3” of *From Law and Literature to Legality and Affect*, 10 June 2019.

of emotions, including that normative emotions represent social practices that are subject to change and are not immutable states. Hence, at the end of the eighteenth century, during what is called the Age of Sensibility in English literary history, a normative person, in other words, a Gentleman was expected to display melancholic emotions much more overtly than a man of the same status group would have been encouraged to do during other historical periods. This is marvelously illustrated in novels such as *The Vicar of Wakefield* (1766), in which the idealized protagonist Dr. Primrose is so paralyzed by feeling that he cannot move to save his daughter Sophia from nearly drowning. As changing reactions to the novel and its sentimental protagonist render clear, notions of appropriate emotional responses are contingent on a variety of socio-cultural factors and are tied up with mutable attitudes concerning appropriate masculine behavior and class membership.<sup>41</sup>

Various histories of emotion have demonstrated how practices of physical punishment, incarceration, and execution alter over time, with a move to a preference for private and invisibilized forms of punishment during the nineteenth century that was, however, anticipated by eighteenth-century literature.<sup>42</sup> It has been postulated that the discovery of human rights was only made possible due to a change in what one might call a culture of emotion, with the new ethical humanitarianism of the novel instigating a normative insistence on intrinsic and universal rights, and with the *Bildungsroman* providing a template for human rights discourse.<sup>43</sup>

An intersectional perspective needs to be taken to histories of normative sentiments and emotions, as they are class, and gender, and ethnicity dependent. Evaluations of what are regarded as appropriate and non-excessive types of emotions take place in the intersections of “gendered, class-based, and racialized hierarchies.”<sup>44</sup> This has become evident, for instance, in a new awareness of white fragility as an effective strategy whereby white

41 Vera Nünning, “Unreliable Narration and the Historical Variability of Values and Norms: The Vicar of Wakefield as a Test Case of a Cultural-Historical Narratology,” *Style German Narratology* 38 (2) (2004), 236-52.

42 As a particularly prominent example of this type of research, see Jonathan Bender, *Imagining the Penitentiary: Fiction and the Architecture of Mind in Eighteenth-Century England* (Chicago: University of Chicago Press, 1989).

43 Lynn Hunt, *Inventing Human Rights: A History* (London: W.W. Norton & Company, 2007); Joseph R. Slaughter, *Human Rights, Inc.: The World Novel, Narrative Form, and International Law* (New York: Fordham University Press, 2007).

44 Kiran Mirchandani, “Challenging Racial Silences in Studies of Emotion Work: Contributions from Anti-Racist Feminist Theory,” *Organization Studies* 24 (5) (2003), 721-42, 722; quoted in Eduardo Bonilla-Silva, “Feeling Race: Theorizing

people can refuse to face their imbrication in upholding systemic as well as personal forms of racism.<sup>45</sup> As Sara Ahmed writes, emotions “should not be regarded as psychological states [feelings], but as social and cultural practices.”<sup>46</sup>

Affects are then more primary than are emotions; affects describe the relations between things and bodies and the sensations they produce, at least according to philosopher Brian Massumi.<sup>47</sup> This leads to a differentiation between affect, as preverbal and embodied, and emotion, as a verbalized, cognitive, socially constructed, and historically variable set of practices. Witness discussions of appropriate sentiment in the Age of Sensibility or the increasing number of prohibitions against enjoying displays of violence, whether in executions or in animal blood sports during the eighteenth and nineteenth centuries. Note that, in contrast to Massumi, scholars such as Ahmed stress the collective nature of socially mediated cultural emotions in creating a sense of community or nation.<sup>48</sup>

Rather than Law and Emotion research with its more cognitive emphasis, I wish to highlight a different set of developments in the interest in Affect and Law, which was anticipated by Jhering as well as some of his contemporaries who were also interested in *Rechtsgefühl*. I want to postulate that Law and Narrative research has accompanied interest in Law and Affect as alternate but related avenues for critically investigating legal phenomena. Robert Cover’s seminal essays from 1986 on law’s inherent violence and the comprehension of law that derives from the embedding of legal concepts, processes, and institutions in a particular narrative universe provided a major impulse in common-law legal theory. Cover calls

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the Racial Economy of Emotions,” *American Sociological Review* 84 (1) (2019), 1-25.

45 Robin DiAngelo, *White Fragility* (Boston: Beacon Press, 2018), 131-38.

46 Sarah Ahmed, *The Cultural Politics of Emotion* (Edinburgh: Edinburgh University Press, 2004).

47 Brian Massumi, “The Autonomy of Affect,” *Cultural Critique* 31 (1995), 83-109.

48 A more complete history of competing theories of affect would include psychologist Silvan Tomkins’s model of universal emotions shared through bodily mimicry as a kind of contagion and the adoption of Tomkins’s work in queer theory. See Silvan S. Tomkins, *Affect Imagery Consciousness: The Complete Edition. Volume I and Volume II* (New York: Springer, 2008); and Eve Kosofsky Sedgwick and Adam Frank (eds.), *Shame and Its Sisters: A Silvan Tomkins Reader* (Durham and London: Duke University Press, 1995).

this universe the *nomos* of law.<sup>49</sup> According to Cover, law can only be made sense of through the epic narratives a society tells about itself and its origins and the beliefs that lend this society's law its validity. The basis of law's authority suggested in Cover's and other Law and Narrative researchers' work posits that law is constructed and materially bound by the culture out of which it emerges and in which it is applied to particular cases. One founder of the Law and Literature movement, J. B. White, argues that legal rhetoric and reasoning represent a form of narrating "what happened" in a plausible way.<sup>50</sup> Law's inherently narrational character allows legal practitioners to practice a poetics of law or legal creation in the positive sense. Understanding the courtroom as a forum for competing narratives became one of the bases for what Peter Brooks has repeatedly called "legal narratology," and was documented in Brooks's co-edited and tellingly named *Law's Stories* from 1996.<sup>51</sup>

Law and Narrative research has progressed since the second half of the 1980s in two competing directions, with some more linguistic and narratologically-oriented work pointing to form-function arguments in legal reasoning and applications. This includes research on how anchored narratives operate in legal proceedings or on how prototypical narrative schemas in trials and other types of law and narrative work point to much larger philosophical questions about how law functions in cultural terms. More linguistically-oriented analysis focusses on minimal units of testimony and on how these recognized units, or what are called prototypical narratives, operate within and without the courtroom and then influence legal procedural outcomes.<sup>52</sup> Other law and narrative work demonstrates, in turn, how personal testimony can function to alter existing legal regimes by leading to the recognition of communal rights that have heretofore been neglected or through bringing an awareness to forms of rights' violations that legal orders had not previously recognized. A case in point

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49 Robert M. Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1) (1983), 4-68; and Robert M. Cover, "Violence and the Word," *Yale Law Journal* 95 (8) (1986), 1601-29.

50 J. B. White, "Rhetoric and Law," in *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs*, eds. John S. Nelson, Allan Megill and Donald N. McCloskey (Madison: University of Wisconsin Press, 1987), 298-318, 305.

51 Peter Brooks and Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1996).

52 Bernard S. Jackson, *Law, Fact, and Narrative Coherence* (Liverpool: Deborah Charles Publications, 1988); Joachim Knappe, "Narratio," in *Historisches Wörterbuch der Rhetorik* 6, ed. Gert Ueding (Tübingen: Max Niemeyer Verlag, 2003), 98-106.

would be the recent recognition of domestic abuse as extending beyond physical violence to other forms of mental and emotional coercion, for instance.<sup>53</sup> Such work focusses on inequities as well as on what elements of narrative must be present and consistently related for an asylum seeker, for instance, to have her claim to protection be recognized and validated. In Law and Literature, the focus is on how narratives, and in particular fictional prose narratives, function to counter legalistic interpretations of law with stories of contingency and context.

Following out of Robert Cover's work but also Wilhelm Schapp's *In Geschichten verstrickt: Zum Sein von Mensch und Ding* (1953) (Ensnared in Stories: On the Being of Human and Thing) in the German context, has been the increasing recognition that law functions narratively but is also only sensible in terms of how it is imbedded in the various narratives that a culture or a society or a nation tells about itself and its application of legal rules. Simplistically stated, where there is a high degree of narrativity in law and legal processes an enlarged capacity for heightened affective expression and engagement will follow. Thus, higher degrees of narrativehood (whether or not something is a narrative) occur in preambles to constitutions and, occasionally, also to laws, to signal how they speak to larger cultural narratives. Distinct narrative forms underlie not only constitutions, with their identity-coalescing elements, for national collectives. They are also intrinsic to the histories of statutes, ordinances, and cases; and story-telling aspects are part of abstract legal norms and hypotheticals, which are also interpreted using narrative means. Law's narrativity bespeaks its positively connoted capacity to create new truths, to be jurisgenerative – to use one of Cover's terms – that is, to write and to juridicate the new and the potentially better than the status quo. Indeed, Jhering's discussion of personal and group attachments to law intersects with his interest in the evolution of law more widely.

This discussion points to the constructedness and rhetoricity of law rather than the rational explication of legal norms according to those norms and the methods for applying them. This is the space in which the

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53 For the discussion in the US., see Melena Ryzik and Katie Benner, "What Defines Domestic Abuse? Survivors Say It's More Than Assault," *The New York Times*, last modified 4 August 2021, last accessed 21 July 2022, <https://www.nytimes.com/2021/01/22/us/cori-bush-fka-twigs-coercive-control.html>. For the UK context, see Dominic Casciani, "Domestic Abuse: Non-Physical and Economic Abuse Included in Law," *The BBC*, last modified 21 January 2019, last accessed 21 July 2022, [https://www.bbc.com/news/uk-46939735?fbclid=IwAR0UklhgFlvjD-gRQ7F5y-jiFq\\_2\\_d0FF70l3UCGAibW9i\\_X4wUMEJUG87cM](https://www.bbc.com/news/uk-46939735?fbclid=IwAR0UklhgFlvjD-gRQ7F5y-jiFq_2_d0FF70l3UCGAibW9i_X4wUMEJUG87cM).

subjectivity of law opens up and where work in Law and Affect coincides with that of Law and Narrative. Recent foci on metaphor and the unconscious in French and Anglophone legal theory and the renewed interest in Law and Emotion and Law and Affect in Germany are part of this overlap. Law and Narrative research conjoins with legal-sociological work about how law functions in context. Researchers look to Lawrence Friedman's work on legal cultures and to the work of legal sociologists such as Eugen Ehrlich on *living law* before him.<sup>54</sup>

I have argued that the move to affect in feminist and queer studies, in narratology, in political theory, and to a lesser but increasing degree in critical legal studies, represents a major theoretical turn that has large consequences for interpretive methods.<sup>55</sup> This turn moves away from a linguistic and semiotic model of analysis, that is, an analysis of articulations and encodings and representations and their various facets and functions – a methodology most strongly associated with Foucauldian discourse analysis – to considering things in terms of how they matter to one another. This can be in systems theory, in field theory, in actor-network theory, or through an interest in care and affect or what has been called the Material Turn in Law. I note the results of this theoretical turn in work on the metaphoricity, visibility, and unconscious of law and legal practices as well in an interest in law and fictionality.<sup>56</sup>

Affect theory allows one to understand individuals' subjective relations to law – also based on narratively-generated attachments to what is thought of as law – in a way that differs from sociological accounts, which tend to deny the role of the fictive in subjective perceptions of law. This research dovetails with that on legal mentalities<sup>57</sup> and on legal subjectivity, which have occurred more in French scholarship, such as in Pierre Legen-

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54 Eugen Ehrlich, *Gesetz und lebendes Recht: Vermischte kleinere Schriften*, ed. Manfred Rehbinder (Berlin: Duncker & Humblot, 1986); Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll (Cambridge: Harvard University Press, 1936); Eugen Ehrlich, *Freie Rechtsfindung und freie Rechtswissenschaft: Vortrag, gehalten in der juristischen Gesellschaft in Wien am 4. März 1903* (Leipzig: C. L. Hirschfeld, 1903).

55 Olson, *supra* note 27.

56 See in particular Maksymilian del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (London: Hart Publishing, 2020), which charts overlaps between discussions of fictionality in literary theory and the narrative and metaphoric analysis of law; and in Hans J. Lind (ed.), *Fictional Discourse and the Law* (Abingdon et al.: Routledge, 2020).

57 Pierre Legrand, "European Legal Systems Are Not Converging," *The International and Comparative Law Quarterly* 45 (1) (1996), 52-81.



dre's oeuvre. Law and Affect also overlaps with Andreas Fischer-Lescano's legal critique, which suggests that law has to return to upholding a culture of *Rechtsgefühl* if it is to move away from being simply a tool of capitalist interests.<sup>58</sup> Discussions of Law and Affect are more often than not critical, pointing out, in the spirit of Cover or Fischer-Lescano or Scott Vietch, that law is inherently violent and masks its violence in appeals to the rules of legal process.<sup>59</sup>

The recent interest in *Rechtsgefühl* in work originating in Germany references this concept's history in Romanticism and Friedrich Carl von Savigny's insistence on a so-called spirit of the German people that had to be the basis for a unified German law.<sup>60</sup> It also recalls the ugly history of attributing a particular affinity to 'correct' legal feeling (RG) to the German people under Nazi law.<sup>61</sup> Yet it also references the subsequent citation of a higher concept of justice as in Gustav Radbruch's post-war postulation of a "*Rechtssinn*" – a sense of law and justice based on inherent values that overrides positive law<sup>62</sup> – as well as in calls on a universal *Rechtsgefühl* as a reason for considering crimes committed during the Holocaust period to be forever punishable. As then Chancellor Helmut Schmidt insisted in 1979, "It would be an unbearable burden for the *Rechtsgefühl* of our people and the *Rechtsgefühl* of the world, if a perpetrator who had not been

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58 Andreas Fischer-Lescano, "Radikale Rechtskritik," *Kritische Justiz* 47 (2) (2014), 171-83, 171; and on *Rechtsgefühlkultur*, see Andreas Fischer-Lescano, *Rechtskraft* (Berlin: August Verlag, 2013), 118.

59 Scott Vietch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Abingdon et al.: Routledge-Cavendish, 2007).

60 "In the earliest times to which authentic history extends the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners, and constitution," Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward (Clark: The Lawbook Exchange, 2011 [1831]), 24.

61 Gesetz zur Änderung des Strafgesetzbuchs vom 28. Juni 1935 § 2: "Bestraft wird, wer eine Tat begeht, die das Gesetz für strafbar erklärt oder die nach dem Grundgedanken eines Strafgesetzes und nach gesundem Volksempfinden Bestrafung verdient. Findet auf die Tat kein bestimmtes Strafgesetz unmittelbar Anwendung, so wird die Tat nach dem Gesetz bestraft, dessen Grundgedanke auf sie am besten zutrifft," in "Gesetz zur Änderung des Strafgesetzbuchs," *Reichsgesetzblatt* 1935 (1) (1935), 839.

62 Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht," *Süddeutsche Juristen-Zeitung* 1 (5) (1946), 105-8, 106; Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (1946)," *Oxford Journal of Legal Studies* 26 (1) (2006), 1-11; see also Gustav Radbruch, "Der Mensch im Recht," *Der Mensch im Recht*, (Göttingen: Vandenhoeck & Ruprecht, 1957), 9-22.



previously recognized came and boasted about his actions after the time limit on legal sanctions had been exhausted.”<sup>63</sup> More recently, discussions of legal feeling (RG) have dovetailed with research projects on the history of emotion such as the ongoing one in Berlin.<sup>64</sup>

My recent work attempts to think forward forms of normativity that individuals and groups have impassioned feelings about, and to consider these feelings as objects of competing and violent *Rechtsgefühle*. My understanding of *Rechtsgefühle* is based on Jhering, Ehrlich, and the insights of the legal-consciousness movement in the United States. Legal feelings now frequently arise out of social-media-disseminated exchanges about law and justice. For example, the social-media-infused #FreeBritney movement led in no small part to the critical reexamination of legal conservatorship in the United States in 2021.<sup>65</sup> Note, once again, that this conceptualization of felt law’s (RG) relation to society differs from the inner juristic discourse on the need for a *Rechtsgefühl* to counterbalance legal rationality.

I understand the “Law” part of Law and Affect research to encompass everything that people think of and imagine law to be, whether this notion of law or “legality,” as I call it, is created through fictional representations of law, discussions of legal events in social media or in more traditional news accounts, or in the experiences of one’s cohorts with legal institu-

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63 Helmut Schmidt, “Deutscher Bundestag. Stenographischer Bericht, 145. Sitzung,” (1979), 11579-81, 11580. The original reads: “Wäre es nicht – anders als ein Vordredner heute morgen gemeint hat – eine geradezu unerträgliche Belastung für das Rechtsgefühl unseres Volkes und das Rechtsgefühl der Welt, wenn ein bislang noch nicht bekannter Täter nach Ablauf der Verjährung käme und sich seiner Taten rühmte?”

64 Research Group “History of Emotions,” *Max-Planck-Institut für Bildungsforschung*, last modified 2021, last accessed 21 July 2022, <https://www.mpib-berlin.mpg.de/research/research-centers>.

65 Under California law, the singer was placed under what was intended to be a temporary form of legal guardianship in 2008 during a time in which she was experiencing widely publicized psychological struggles. Against Spears’s express wishes, the conservatorship became permanent for a period of more than thirteen years with her father acting as the unwanted and, according to Spears, abusive conservator. The #FreeBritney movement was a social media fan movement that began in 2009. It contested the terms of the conservatorship and galvanized public support in favor of an end of the conservatorship in 2021, and a critical investigation of legal guardianship within the frame of Disability Rights. Laura Newberry, “Britney Spears hasn’t fully controlled her life for years. Fans insist it’s time to #FreeBritney,” *Los Angeles Times*, last modified 18 September 2019, last accessed 21 July 2022, <https://www.latimes.com/california/story/2019-09-17/britney-spears-conservatorship-free-britney>.

tions and legal proceedings. Feelings about what is perceived to be law – for instance, sentiments about the withdrawal of the U.K. from the European Union – inform affective attachments to law. Considers Brexiteers' passionate avowal of the need to preserve the rule of 'their' English law. A sense of subjective identity is created within people's imagined relation to their legal collective, or what one might call their legal imaginary. An individual's and her cohort's relational attitudes to law is based, in part, on how privileged or disadvantaged a position she and her group has within an existing legal order. These relationships are for most people negotiated in their felt relationships to law (RG), which are widely influenced by narratives and images of law that are transported through reporting on law and through fictional media vehicles.

This is a movement away from understanding medial representations of law as simply distortive and disruptive of legal proceedings, as terms such as "lexitainment" or "law gone pop" make clear.<sup>66</sup> From the point of many legal practitioners, media-based misinterpretations of legal procedures are destructive to legal proceedings. Be this as it may, legal language and legal procedures are so professionalized and rarefied, also in terms of their vocabulary and procedural rules, that what people actually think about as law belongs to a much larger field of expressions and representations than that afforded by legal institutions. As the examples from Germany and the United States in this Introduction show, felt law (RG) is what people perceive it to be.

## 5. *This Volume*

Why is the discussion of *Rechtsgeföhle* in this volume so important now? The premise of this collection of essays and the 2019 conference at the University of Giessen out of which it emerged is that Jhering's initial impulse to describe the passions inherent to law (RG) has a particularly vivid acuteness at our current historical juncture. First, the present is marked by people's demonstrations of a high level of affectivity regarding what they view 'their' laws to be. If anything, the powerful and conflicting social emotions that have been released in the Corona-pandemic era demonstrate

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66 Lawrence M. Friedman, "Lexitainment: Legal Process as Theater," *DePaul Law Review* 50 (2) (2000), 539-58; Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (Chicago and London: The University of Chicago Press, 2000).

an even more urgent need to re-evaluate the place and function of legal passions (RG).

The discussions in these pages concern law, affect, and affect in judicial practice, as in Justice Gabriele Britz's discussion of the role of emotions in legal decisions and in Franz Reimer's powerful defense of emotion in law making and in rendering judgement. Britz also discusses people's emotive responses to law as a justification for calling for political changes, a point that Frans-Willem Korsten will make as well, if in the far more negative context of right-wing political populism. Justice Gaakeer highlights the role of affect in legal consciousness and in a *sensus juridicus*, that is, in the judge's painstaking effort to make the legal norm fit the case and facts at hand while also making the antagonists in a given case, and in some cases the wider public, feel recognized. Legal affects – another translation of *Rechtsgefühle* – are also present in increasingly pluralistic legal environments, such as the EU, or in diverse societies such as Germany's in which arguably a number of *lived* legal orders or competing normative realms exist concurrently.

The pluralization of normative orders includes what has been called the horizontalization of EU legal practices. German federal and constituent state (*Länder*) laws react to the increasing recognition of cultural or religious norms in some family law disputes.<sup>67</sup> Where there is less homogeneity, one might hypothesize, there will be more powerful and conflicting legal affects (RG) regarding law. Alternatively, one might argue that in more pluralistic legal environments, law has to take on the role of a civil religion in order to even out individual differences of belief and value.

The case for law as a civil religion has been argued in response to the United States' demographic plurality<sup>68</sup> and to describe Europe's understanding of itself as identified around a common commitment to human rights.<sup>69</sup> For law to continue doing the business of regulating conflicts and providing the abstract rules and procedures to do so, or for law to continue to legitimize its violence – depending on how critically the reader views law – law has to address legal actors' and laypersons' feelings about what they consider to be law-full and to successfully evoke legal feelings, or *Rechtsgefühle*, in response to laws and court decisions.

67 See Franz Reimer on this point in this volume.

68 Robert N. Bellah, "Civil Religion in America," *Dædalus* 96 (1) (1967), 1-21.

69 Helle Porsdam, "Human Rights: A Possible Civil Religion?" in *Civil Religion, Human Rights and International Relations: Connecting People and Traditions*, ed. Helle Porsdam (Cheltenham and Northampton: Edward Elgar Publishing, 2012), 21-41.

The collection of essays presented here addresses this task by taking historical, legal-methodological, and theoretical perspectives to *Rechtsgefühle* into consideration as well as by providing case studies regarding the role of legal affects (RG) in courts in the Netherlands and in Germany in the history of torture. The authors argue for a plurality of *Rechtsgefühle* – feelings for law and justice – rather than any single one, as in Jhering's initial formulation. In the following overview, I describe the contributions in some detail in the assumption that many Anglophone readers will not be able to engage with the German texts.

### *Part I) Historical Developments of Rechtsgefühl in the German Context*

#### *The Role and Function of Rechtsgefühl and the Need to Include the Contextualization of Emotion in Legal History*

Following the preface in German and this introductory essay in English, the volume continues with an overview and a case study regarding the history of *Rechtsgefühl* in the German context. Thorsten Keiser charts developments in understandings of *Rechtsgefühl* in the form of a *longue durée* to demonstrate how law has consistently recurred to a higher power in order to legitimate itself. This legitimation process has alternated between making claims to a higher form of rationality or to God. As Keiser summarizes his projective history of *Rechtsgefühl*, every period's differing understanding of *Rechtsgefühl* and of the emotions implicit in these legal feelings (RG) discloses an individual form of normativity and a differing account of rationality. Both play into the understanding of law and legal processes at any given time. Further, an objective history of *Rechtsgefühl* in German jurisprudence has gone lacking up until the present due to the concept having been associated with legal naturalism and the mysticism of Nazi-era ideology and has led to legal feelings (RG) to be vilified.

In Keiser's historical overview, Jhering's works on *Rechtsgefühl* play only a comparatively minor role. Keiser's assemblage of sources for *Rechtsgefühl* includes Feuerbach's 1795 delineation of a feeling for law/justice (RG) that occurs outside of legal texts and which serves as the legitimating basis for claims to human rights. Given that recent neuro-cognitive work has located a sense of justice within the brain, Keiser anticipates that the study of *Rechtsgefühl* will eventually lose its heretofore esoteric associations and become a matter of the hard science of law.

Following the legal pluralistic aim of this volume, Keiser traces a move from an appeal to a singular *Rechtsgefühl* to multiple ones. He notes

the formulation of a typology of various *Rechtsgefühle* in a text in the already cited Erwin Riezler (1923), namely as, one, a feeling for good legal practices with which to achieve case resolution that can be learnt; two, the felt need to apply existing laws properly; and, three, as a desire to achieve a higher ideal of justice and law, given the double meaning “*Recht*” as justice and law in German.

Further, Keiser’s essay outlines how an emerging history of *Rechtsgefühl* functions analogously to the periodization of affect and emotion that has occurred in historical studies more widely. For Keiser, insight into the history of emotions needs to inform legal studies more widely. Further, an awareness of the connections between language, sensibility, and jurisprudence has to play a part in neuroscientific work. Keiser’s historical work on *Rechtsgefühl*, also in his already cited essay on *Rechtsgefühl* and mercy (“*Gnade und Rechtsgefühl*”), provides the basis for a new theory for and method of approaching legal history.

### *The History of Rechtsgefühle in the Context of German Language Discussions of Human Rights*

Following Keiser’s more general and programmatic overview, Sylvia Kesper-Biermann’s essay on the “Role of *Rechtsgefühl(e)* in Human Rights” provides a more specific case history, while also bringing up some general methodological issues such as the role of emotions in human rights discourse. Like Keiser’s, her essay highlights the fundamental changes to historical sciences that have been wrought by the generally accepted insight that emotions are at least in part socially constructed and therefore also experienced and represented variously throughout history and across geographies as well as amongst different population groups. Kesper-Biermann calls for histories of emotion to focus on the development of human rights, and to move beyond their previous more or less exclusive attention to the role of empathy. She also points out the importance of differentiating between the development of human rights and the history of humanitarianism, the latter constituting a discourse about the necessity of ending human suffering.

Kesper-Biermann focuses her attention on debates about torture in the nineteenth century in the German context, arguing that a history of the prohibition against torture and the emotions surrounding it stand in archetypically for the development of human rights in general. She points out that torture had already been forbidden in Prussia by the mid-eighteenth century. Explicitly forbidding torture was not necessary

in later criminal law discourse, because it could be assumed that it was never practiced. The author highlights how *Rechtsgefühl* was used in German-speaking areas in connection with nascent discourse about human rights through the long nineteenth century (roughly 1789 through 1914), demonstrating in an analysis of law professor Eduard Osenbrüggen's 1854 text that *Rechtsgefühl* came to be understood as an intuitive and naturalized sense of what law could and should be. With recourse to Jhering's 1867 text on guilt in private law, she traces how *Rechtsgefühl* came to be seen as part of the legal-social development of a collective legal culture. An increasing sense of disgust at the use of torture was part of a sense of legal collectivity and was accompanied by a sense of empathy as well as *Rechtsgefühl*, as an implicit sense of justice. This moralized sense of disgust at torture, as a collectively experienced social emotion, was instrumental to an understanding of human rights as moral rights.

Whereas German-speaking jurists no longer needed to discuss torture in the nineteenth century, popular discourse, as the author demonstrates, certainly did. Kesper-Biermann cites numerous novels and offers a close reading of an 1868 print in which a jealous husband, a criminal lawyer, is shown torturing his innocent wife. The young wife's extreme suffering is shown using highly evocative visual means that might arouse lust in some viewers. The popularity of this type of representation demonstrates the ambivalence of disgust as an affective state and the fascination and vicarious pleasure that some people will and do take in depictions of pain and other violations of moral (and legal) norms. The potential for a "pornography of pain" has been pointed out by the historian Karen Halttunen, among others.<sup>70</sup> And scenes of torture regrettably are still used in order to arouse audience sensation.

A collective consensus about the inadmissibility and immorality of torture became an essential part of German legal culture and an important vehicle for differentiating German legal culture from supposedly less advanced ones. *Rechtsgefühl* was then entwined with a sense of nation. As an illustration of this, Kesper-Biermann quotes Jhering on the implicit superiority of (German) criminal law:

But criminal law is the nodal point where the finest and most delicate nerves and arteries come together. Every sensation makes itself sensible and outwardly visible. The face of law, on which the entire individuality of a people, its thinking and feeling, its temperament and

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70 Karen Halttunen, "Humanitarianism and the Pornography of Pain in Anglo-American Culture," *The American Historical Review* 100 (2) (1995), 303-34.

its passions, its morals and its rawness makes itself known, and are reflected on its soul – criminal law is the people itself.<sup>71</sup>

The prohibition against torture as constituted by a combined sense of empathy, disgust and an intuitive *Rechtsgefühl* enabled nineteenth-century Germans to have a sense of a community within a civilized legal culture.

## Part II) *Rechtsgefühle in Legal Theory and Practice*

### *The Historicization of Legal Consciousness and Rechtsgefühle Demonstrates Law's Grounding in the Humanities*

In a legal theoretical tour de force, Justice and Professor of Legal Theory Jeanne Gaakeer examines varying approaches to *Rechtsbewusstsein* (legal consciousness), to *Rechtsgefühl*, and to a *sensus juridicus*. She unpacks competing notions of legal consciousness and *Rechtsgefühle* in order to elucidate and validate a philosophy of jurisprudence that is grounded in the Humanities. This includes an understanding of law as indivisible from other meaningful forms of human activity. Gaakeer's historical overview extends back to the Roman Jurist Ulpian (died AD 228), who defined law as “derived from justice” and as the “art of knowing what is good and equitable,” thereby anticipating concepts of intuitive understandings of law. Her point is to demonstrate that the still pertinent question of whether a sense of justice is inherent to law, or not, extends back to the beginnings of legal theory and is hardly a new consideration. Because “law” is notoriously difficult to define, feelings for law/justice (RG) and the consciousness of law/justice will inevitably remain highly contested concepts. Gaakeer also highlights the need to distinguish between individual and societal understandings of “*Rechtsbewusstsein*”, as a consciousness of (the) law, versus ‘*Rechtsgefühl*’, as an individual's innermost feelings.”<sup>72</sup>

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71 Rudolf von Jhering, *Das Schuldmoment im römischen Privatrecht: Eine Festschrift* (Gießen: Verlag von Emil Roth, 1867), 2-3. The original reads: “Aber das Strafrecht ist der Knotenpunkt, wo die feinsten und zartesten Nerven und Adern zusammenlaufen, und wo jeder Eindruck, jede Empfindung sich fühlbar macht und äusserlich sichtbar wird, das Antlitz des Rechts, auf dem die ganze Individualität des Volks, sein Denken und Fühlen, sein Gemüth und seine Leidenschaft, seine Gesittung und seine Rohheit sich kund gibt, kurz auf dem seine Seele sich widerspiegelt – das Strafrecht ist das Volk selbst.”

72 All quotes are from Jeanne Gaakeer's essay in this volume.



Gaakeer brings the Dutch legal philosopher Johan Jozef Boasson's (1919) investigation of *rechtsbewustzijn* (consciousness of law/justice) into the wider discussion of *Rechtsgefühle* in this volume and notes the distinction that Boasson makes between consulting one's individual consciousness and considering the overall well-being of society when exercising this form of consciousness. It is ultimately the judge who must balance out resultant frequently conflicting interests. Gaakeer uses recent Dutch cases in which affected citizens had radically different notions of what the role of law should be to demonstrate the judge's role in negotiating between public opinion and the application of legal norms. Gaakeer looks to Max Rümelin's study of *Rechtsgefühl und Rechtsbewusstsein* and his thesis that judges need to develop a "legal intuition." (Note that this was the second generation of Rümelins to work on the topic.) Moving through discussions of James Boyd White and Paul Ricœur, Gaakeer attests that a legal intuition provides the basis for the "professional empathy" which is necessary in judging and that differs from an individual sense of sympathy.

*Rechtsgefühle* have to be considered in terms of the emotions of those whom the application of the law will affect – a point that Gabriele Britz and Franz Reimer highlight as well. Like Keiser, Gaakeer discusses how recent neuroscientific research on the embodied quality of emotions demonstrates that earlier postulations of an innate sense of justice are not in any way romanticized or naive. Gaakeer posits that a feeling for law/justice (RG) combines what Ernst Weigelin called "a sense of what the law requires" with "a feeling for what law ought to be." Thereby "a humanistic, intermediate position [is created] between the value-absolutism of natural law and the value-relativism of legal positivism." This enables the judge to exercise a form of "judicial daring" at times when she must do so. In order to arrive at this point, judges must enact practical wisdom or "phronetic intelligence," as envisioned in Aristotle's *Nicomachean Ethics*.

Gaakeer's larger argument is that legal methodology as well as individual acts of rendering judgement must include insights from the Humanities. Making court decisions adequately requires narrative and metaphoric insight, the latter understood as a capacity to discern patterns of similarity and dissimilarity. Gaakeer advocates for an understanding of *Rechtsgefühl* as a *sensus juridicus*, an ability to apply the general legal norm to the particular case and to withhold judgement when necessary. In the words of twentieth-century legal theorist Paul Scholten, one has to be a "judge, who intuitively 'sees' the decision immediately after the case is presented to



him [sic].”<sup>73</sup> To illustrate the necessity of the judge’s developing a juridical conscience, Gaakeer cites examples in which the judge’s decision required a willingness to render difficult judgements using her “guts” and sense of judicial daring.

*The Myriad Ways in which Legal Feelings (RG) Inform Legal Processes*

We are happy to offer German Constitutional Justice and constitutional law professor Gabriele Britz’s keynote in its original version as well as in an English translation by Laura Borchert with annotations in this volume. The lecture speaks to Gaakeer’s empirical and theoretical piece about the act of judging consciously as well as to Justice Britz’s own experience of serving as a constitutional justice in post-reunification Germany. Britz offers a masterful overview of five distinct ways in which legal feelings (*Rechtsgefühle*) influence legal processes. This influence transpires, first, in the ways in which both new laws and court judgements can incite emotions amongst the public whose lives these laws and decisions regulate. These feelings include negative and positive ones. For instance, when a third gender was recognized by the German Constitutional Court in 2017, the lived experience of non-binary persons was lent legitimacy. Feelings are also evoked when new laws are descriptively and therefore also affectively named, such as in the “Gute-Kita-Gesetz” (The Good Day Care Center Law) from 2018, which was intended to improve the conditions in and the quality of day care centers.<sup>74</sup> Britz’s text also echoes Gaakeer’s essay in that it notes the effects of emotional and social contexts on legal decision-making.

Second, laws and judgements reflect on public legal feelings (RG) in terms of how they, for instance, can protect citizens from the unpleasant sensation of being permanently surveilled by the state, as is dictated by the

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73 Paul Scholten, “General Method of Private Law: Mr. C. Asser’s Manual for the Practice of Dutch Civil Law,” *Digital Paul Scholten Project*, Vol. 1, Chapter 1, Section 28, ‘The decision’ (Amsterdam: 2014 [1931]), available at <https://paulscholten.eu/research/article/general-method-of-private-law/#title30>, last accessed 21 July 2022.

74 On the affective naming of laws and the cultural-political work this does, see Greta Olson and Laura Borchert, “Transing / Narrative Authority, Affective Unreliability, and Transing Law,” in *Research Handbook in Law and Literature*, eds. Peter Goodrich, Daniela Gandorfer and Cecilia Gebruers (Cheltenham: Edward Elgar Publishing, 2022).

relatively restrictive German data protection law, or the damages awarded to plaintiffs on the basis of their imagined emotional suffering. Third, a form of legal “intuition” is required when judges apply the law, for example, when they have to determine if a person’s treatment by the state has violated their human dignity, the most important value and right according to German Basic Law. The acknowledgment of the intuitive aspect of legal decision-making demonstrates an important overlap between Britz’s and Gaakeer’s explorations of *Rechtsgefühle*. Yet, as Britz points out in the fourth meaning of *Rechtsgefühle* she enumerates, “disruptive ... gut feelings” are simply a part of the make-up of every professional jurist. These personal emotions have to be rationally questioned and sometimes also dismissed altogether. In the fifth and final meaning of *Rechtsgefühle*, according to Britz, laypersons develop powerful feelings in connection with wished for legal developments, and Jhering named this phenomenon with saliency.

Britz ends her lecture by charting the three parts in Jhering’s concept of *Rechtsgefühl* in relation to legal developments and reform. Importantly, Britz uncovers a strategic move that was made by Jhering in response to the authoritarian state in which he lived and in which democratic legislation was not yet in place as a tool for reforming and correcting existing laws. Accordingly, appeals to *Rechtsgefühl* were made to stand in for democratic processes. According to Jhering, *Rechtsgefühl* originates in an individual’s private sense of affront, in particular, and are then transferred from the individual’s feeling for law and justice (RG) to a sense of the community’s suffering when its *Rechtsgefühl* is not appropriately met. Recognizing this pattern led Jhering to postulate that a state can only flourish when its citizens express their healthy *Rechtsgefühl*. Finally, Britz questions the relevance of Jhering’s legal reformist strategy based on legal feeling (RG) for legal debates transpiring now. She points out that it is important to not incorrectly label a desire for political change as a legal feeling (RG) to uphold the separation of the judiciary from the legislature and to preserve the independence of the former. This is the case even if legal feelings (RG) will and should always remain present in legal reformist efforts.

### *Human Emotionality Constitutes Law’s Biggest Asset*

As the final contribution to the topic of how *Rechtsgefühle* inform legal practices in this volume, Franz Reimer’s “The Empire of Laws and Not of Men’: Rule by Law as the Avoidance of Feeling” focusses on the persis-

tent juxtaposition of the rule of law with that of the ‘rule by men’ (aka humans) as a point from which to question a general understanding of law as being free of emotion. Quoting political philosopher James Harrington’s *The Commonwealth of Oceana* (1656) in his title, Reimer focusses on the supposed binary opposition that is perpetually made between an abstract rule of law and a human-based one in the context of the German constitutional state. He demonstrates that law and human actors can never be represented as polar opposites.

His contribution outlines a compelling argument for understanding human actors to be assets in lawmaking and legal decision-making rather than impediments to law’s rationality and objectivity. Rather than relegating the role of *Rechtsgefühle* to a negatively connoted form of human capriciousness, Reimer posits that emotions provide an avenue for addressing individual court decisions on the background of increasing social diversity, and can also be vehicles for ensuring that the process of reflecting on norms and laws continues in a period that is increasingly dominated by algorithms and what has been called Legal Tech.

Reimer traces the origins of the juxtaposition of the “law of men” and the letter of law, beginning with the Socratic dialogues and moving up through the twentieth century. The concepts of law as decision-making body and of law as a surrogate for the ruler are introduced in addition to the ideal of law as a form of protection against human arbitrariness. Law’s role in providing prototypes for how to deal with conflicts leads to the claim that law should be free of subjective sentiments. Yet rationality is not a necessary criterion for the development of new laws. In fact, an emphasis on rationality would negatively impact on lawmakers’ ability to create laws that make emotional appeals. These include the already mentioned “Gute-Kita-Gesetz” (The Good Day Care Center Law, 2018) and the “Starke-Familien-Gesetz” (The Strong Family Law, 2019) and includes the use of preambles in laws to convey their appellative function.

The third section of the essay argues for an understanding of the rule of law and ‘the rule of men’ as complementary. Laws require people to enforce them. In enforcing legal norms, people learn to empathize with those affected by them. Importantly, Reimer does not posit empathy as an emotion but as a form of introspection that demands a person’s abandoning their subjective standpoint. The German legal system demands a disciplining of emotions, which precludes any form of affective sensation with the notable exception of empathy. This disciplining follows out of the institutionalization process and the attendant cementing of the difference between persons and their office. While in office, the office holder has to withdraw subjective views so that law can rule objectively.

The final section argues that the ‘rule of algorithms’ cannot replace the ‘rule of men’ in the future. Judicial power has to be entrusted to human actors for some legal cases like those involved in parental custody decisions. *Rechtsgefühle* play a decisive role in how such cases are decided, since the emotional effects of these decisions have to be accounted for by judges – a point that Britz and Gaakeer make as well. Further, emotions may prompt renewed reflections on the applicability of legal norms, on possible gaps in existing laws, and on their constitutionality. Such reflections lead to corrections of legal processes, something that algorithms, as seeming instances of the pure ‘rule of law,’ cannot accomplish. Reimer concludes that human emotionality, including perceptive, empathetic, and evaluative decision-making capabilities, do not constitute a deficient mode of realizing law but are rather law’s greatest assets.

### *Part III) The Impact of Rechtsgefühle on Political Developments*

#### *Jhering’s Struggle for Law (Der Kampf ums Recht, 1872) in the Context of Right-Wing Extremist Gamesmanship in Legal Processes*

As previously mentioned, Britz’s lecture contains a significant political-historical insight. Where legal reforms cannot be achieved through democratic means, they will be sought after in other ways, for instance, through appeals to intrinsic (and implicitly valid) feelings for law and justice (RG). Frans-Willem Korsten’s essay on the trials relating to a charge of defamation against the right-wing populist Dutch politician Geert Wilders between 2014 and 2020 renders the political aspect of Jhering’s work on *Rechtsgefühl* even more explicit. *Rechtsgefühl* belongs to what Jhering sees as an inevitable and ongoing “struggle for law,” and Korsten opens up Jhering’s 1872 text to political philosophy as well as to a materialist reading of law.

In 2014, Wilders was charged with group defamation for having made incendiary remarks about Dutch Moroccans at a victory party following elections. While the court found him to be guilty in 2016, it imposed no fine or sentence and this judgement was repeated by the higher Court of Justice (The Hague) after Wilders appealed. In a series of affectively loaded legal moves, Wilders and his defense insisted that presiding judges in both courts had been biased and that the case should never have been brought to court. Wilders publicly contended that the judiciary did not wield authority over him and would fail to represent the Dutch people if it decided against him.

Korsten reads Wilders's and his defense's legal and medial moves as an illustration of the "battle for" and the "game of" law as a struggle for authority that Jhering described as being inherent to legal developments. In this context, Korsten highlights what I also believe would be a better translation of the original text in which Jhering thematized *Rechtsgefühl*, noting that it should be entitled "The Battle" rather than "The Struggle for Law." He points out that "*Kampf*" denotes both "battle" and "competitive contest" in German to demonstrate how Wilders utilized strategies of competitive gamesmanship within law to undermine its authority.

Reading law as a 'cultural technique,' in the sense that German media theorist Bernhard Siegert uses the term,<sup>75</sup> Korsten submits that law can only function by virtue of its collectively agreed upon authority. Law's force is derived through material means, for instance, the authority that is suggested by pronouncing judgements "in the name of the King" in Dutch courtrooms. Law's materiality also extends to the repository of its seemingly timeless authority in court records or files. According to Korsten, these forms of materially manifested authority have now been challenged by the dominance of online social media platforms in the creation of legal feelings (RG). These platforms speak to like-minded groups, reinforcing their beliefs and discrediting traditional sources of fact and authority through disinformation, thus leading to a collapse of a sense of collectively granted belief in law.

Korsten discovers efforts to dismantle the collectivity in the attack on the U.S. Capitol in January 2021, which I mentioned at the beginning of this Introduction, as well as in Wilders's September 2020 insistence that "the Dutch *Rechtsstaat* is 'broken and corrupt,'" <sup>76</sup> because it had found him guilty of group defamation. Korsten expresses that "people's affective attachment to law" has to be constantly fostered through material means and that *Rechtsgefühle* have now become "material for populists to play with," thereby threatening the rule of law and democracy more widely.

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75 Bernhard Siegert, "Cultural Techniques: Or the End of the Intellectual Postwar Era in German Media Theory," *Theory, Culture & Society* 30 (6) (2013), 48-65.

76 PVVpers, "Geert Wilders: 'De rechtsstaat is failliet en corrupt premier Rutte'," *YouTube*, last modified 17 September 2020, last accessed 21 July 2022, <https://www.youtube.com/watch?v=mauSy2PPO2U>.

## 6. Outlook: Theses and Open Questions

The editors of this volume understand this collection of essays to be part of a general interest in thematizing emotion and affect in critical legal studies, on the one hand, and a delayed assessment of the role of *Rechtsgefühl* in German legal history and current legal practices, on the other. The volume can therefore be seen as a complement to *Recht fühlen* (feeling law, 2017) as well as *Rechtsästhetik in rechtsphilosophischer Absicht* (Legal aesthetics in legal philosophical context, 2020), which deals with the role of affect in aesthetic approaches to law.<sup>77</sup>

The themes that come up repeatedly in the essays collected here also point the way towards future research on the centrality and importance of *Rechtsgefühle*. To summarize these themes and the theses they entail in brief:

- 1) The history of law and of human rights discourse has to now attend to the role of *Rechtsgefühl* (Keiser, Kesper-Biermann).
- 2) The assertion of *Rechtsgefühle* that are adjudged to be culturally appropriate belongs to the discursive process of nation-building and the creation of nationalistic emotional communities. The assertion of *Rechtsgefühle* therefore also contributes to exclusionary practices (Kesper-Biermann, Olson).
- 3) *Rechtsgefühle* are intrinsic and necessary aspects of current legal practices and the process of judging (Gaakeer, Britz, Reimer).
- 4) A reassertion of the centrality of *Rechtsgefühl* can be found in new neuroscientific approaches to law (Keiser, Gaakeer).
- 5) *Rechtsgefühle* need to be defended given the current calls for automated legal processes. They belong to the humanness of law (Reimer) and to law's indivisibility from the Humanities (Gaakeer).
- 6) The assertion of what are adjudged to be intrinsically correct *Rechtsgefühle* plays a central role in political developments (Olson, Britz, Korsten). The new importance of articulations of *Rechtsgefühle* also has to be seen in the context of populist calls for new forms of *lived law* (Olson, Korsten).
- 7) The need to further differentiate the roots and various divergent interpretations of Jhering's and other thinkers' understandings of *Rechtsge-*

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77 Sigrid G. Köhler, Sabine Müller-Mall, Florian Schmidt and Sandra Schnädelbach (eds.), *Recht fühlen* (München: Brill | Fink, 2017); Eva Schürmann and Levno von Plato (eds.), *Rechtsästhetik in rechtsphilosophischer Absicht: Untersuchungen zu Formen und Wahrnehmungen des Rechts* (Baden-Baden: Nomos, 2020).

*föhle*. First, how one defines the affect and/or emotion that underlines a *Rechtsgeföh*l or multiple *Rechtsgeföhle* determines the resultant understanding of the legal feeling (RG). Second, how narrow or wide the definition of law is will determine whether one considers legal affects (RG) to be an intrinsic part of legal history and theory or to belong to a wider conversation about normative orders and ideology.

These theses raise a number of questions, for instance, about the historical role of *Rechtsgeföhle* in political processes, and the degree to which these impassioned feelings about law and justice are democratic or not. Further, the question remains open of whether *Rechtsgeföhle* will be acknowledged as legitimate aspects of legal processes, since as the legal practitioners and the legal theorists in this volume all agree, they play an inevitable part in them. Third, a historicization of changes in dominant legal emotions (RG) may alter our understanding of normative orders and the ways in which they legitimate themselves.

We leave it to future researchers to continue to assess the importance of impassioned feelings about law and justice (RG) in social developments more widely.

