

Editorial

Good judgment?

The current issue of NoFo comprises two interesting articles that approach, from different angles, the issue of establishing and maintaining ethically just relationships in societies. In the first article, ‘Negotiating the paradoxical nature of human rights: Newspaper debate on human rights violation for Roma asylum seekers’, Chloë Delcour and Lesley Hustinx analyse the discursive struggle over the human rights of Roma asylum seekers in Belgium in 1999. The second article by Patricia Cochran, ‘Not Judging: Jurisdictional Hubris and Building a Common Legal World’, engages with relational theories of judgement to address challenges regarding legal pluralism in settler-colonial societies, in particular Canadian society.

The expulsion of Roma asylum seekers from Belgium in 1999 resulted in heated media debates and the case of *Čonka v. Belgium* in the European Court of Human Rights. Applying narrative analysis to 212 Flemish newspaper articles, Delcour and Hustinx analyse what they call discursive struggles over diverse meanings of not only human rights but also national interests and nationhood. The cogent argument Delcour and Hustinx propose is that the paradoxical relationship between human rights and national interests is negotiated over and over again in this discursive struggle, and that there are no clear-cut oppositions or alliances but that such alliances, oppositions and re-alignments are constantly being re-created within the struggle. The well-known paradoxical and indeterminate nature of human rights is thus a continuous resource for negotiations over the meaning of nation state.

Grounding their analysis in the work of those human rights scholars who have attempted to nuance ‘the commonly assumed progressive role of human rights’ by, for example, showing how human rights are subject to discursive battles, Delcour and Hustinx are able to contribute to this field of scholarship by demonstrating how ideas are being used for various purposes and often with unpredicted results.

In her article, Cochran employs the concept of not-judging to think through challenges that arise when state law renders the indigenous legal and conceptual framework invisible and provides little if any tools to ‘judge across legal worlds’. In doing so Cochran addresses what she calls ‘jurisdictional hubris’; the profound challenge the colonial framework of the law poses on judging and judgement, and suggests that ‘in the context of diversity and inequality, perhaps justice will require, not judgement, but the suspension of judgement’. On the other hand, though, she suggests that not-judging does not mean the absence of judgement – or the possibility of it – because unjust relationships are, in addition to judgment, sustained through dis-engagement and silencing. Cochran asks whether “our” practices of judging and not-judging work to support or undermine the kinds of relationships called by reconciliation’. Taking the case of *Kahkewistahaw First Nation v. Taypotat* (2015) as an example, she argues that sometimes judges resort to not-judging precisely when judging is required, which results in de-contextualisation and ‘wilful blindness to the reality of social context in which [judging] is exercised’.

Cochran’s article raises an important question on to what extent, and how, is it possible for the settler state to impose its law on indigenous people in a just manner – let alone in a manner that would endorse reconciliation. Compellingly she argues that ‘[w]e risk assuming that non-judging leaves space for pluralism, without thinking through the relationships that are created, maintained, undermined or consolidated through that non-judgment’. Cochran calls for ‘reflective judgement’ and the judges’ profound responsibility in applying the ‘overreaching, over-confident’ colonial law ‘[i]n the face of the Arendtian claim that the failure to judge undermines the very conditions on which shared life may be possible’.

In addition to the two fascinating articles, this issue encompasses two extremely topical and interesting book reviews, which link with the articles at least in two respects. First, Jared Del Rosso reviews Bruno Latour’s recent *Down To Earth: Politics in the New Climatic Regime*. Perceptively, Del Rosso depicts Latour as a pluralist thinker, which to Del Rosso means a call for the readers to ‘to reimagine, even re-describe, their relations with their allies, their opponents, non-human life, and the very soil itself’. This pluralism, according to him, is a political project which requires new ways to think about our local environments as ‘sites of lives living, teeming lives, lives dependent on one another and the earth too’. This call to embrace pluralism, one could say, requires a capacity to build worlds where relations matter. This is central to the second theme of this issue, that of judging, which emerges in the second review by Ukri Soirila of Jeanne Gaaker’s *Judging from Experience: Law, Praxis, Humanities*.

Drawing on studies in law and literature, Gaaker’s book presents a rich and fresh take on the practice of judging. It argues, convincingly, that

reading and literature is intrinsic for judging well, for 'law is matter of constant movement between legal rules and the narrative construction of the facts of the case'. One cannot be a good judge without the ability to understand the world and the work of narratives in it. Phronèsis, practical wisdom, called for in Gaaker's book, is a matter of character and morality. It is about the ability to understand the complexity of the human condition beyond thinking in terms of binaries and contrasts.

Call for papers

Law & Emotion special issue

We would like to take this opportunity to invite articles for Nofo's special issue 'Law and Emotions' due in 2020. As scholars interested in the ways in which law and emotion/affect intertwine in the mundane legal practices, we have initiated a research project *Law and Emotions* concentrating on questions such as how emotion/affect is experienced and communicated in legal processes and how they construct and move between (legal) subjects (see e.g. Dahlberg 2009; Damsholt 2015; Grossi 2015; Lanas 2011; Moran 2001). We invite articles that discuss law and emotion/affect from any perspective and in any context.

Law and emotion research

While law and emotions -scholarship has been relatively recently revived, it would be more accurate, according to Pasquetti (2013), to 'speak of a renewed analytic focus on the link between law and emotion' since 'it is above all the works of Durkheim that theorize the emotional foundations of legal procedures, punishment, and penal institutions'. Law and emotion scholars have challenged the exclusion of emotion in law and studied the relationship between law and emotion from different perspectives, researching topics such as the effect of emotions on different legal actors and emotion in legal decision making; (Bandes 1996; 2006; Bornstein 2010; Douglas, Lyon, & Ogloff 1997; Feigenson 1997; Little 2001; Myers, Lynn, & Arbuthnot 2002; Nussbaum 1996; Sanger 2013)¹ emotional experiences of law in legal proceedings; (e.g. Deflem 2017) and emotions in different legal fields such as criminal law,

¹ Legal realists have long since recognized that sometimes legal decision making is coincidental and affected by different kinds of emotional biases (law in books vs. law in action). Thus emotions have not been completely disregarded as unimportant, but nonetheless considered as nonlegal factors which impact legal decision making in unsuspected and legally unfounded ways. (See Mindus 2015.)

family law and transitional justice (Abrams 2009; Becker 2002; Goodrich 1998; Huntington 2008; Nussbaum & Kahan 1996; Seuffert 1999; Van Roekel 2016). Also the role of particular emotions, such as fear, shame, empathy, love, disgust and hope, have been studied in the context of law (Abrams & Keren, 2007; Bandes 2004; Goodrich 1996, 1998, 2002, 2006; Henderson 1987; Kahan 1998; 1999; Massaro 1991; Nussbaum 1999; Peterson 1998; Seuffert, 1999). (See also Abrams 2009; Abrams & Keren 2010; Maroney 2006.)

New paths for law and emotion research?

Law and emotion research can be linked with the revived focus on feeling as a scholarly concern. Although evident across disciplines, feminist theory has addressed the ‘turn to affect’ with most analytical scrutiny, describing it as being ‘both against the and within the poststructuralist, social constructionist theories of subject and power’ (Koivunen 2010). (See also Greyser 2012; Hemmings 2015; Seigworth & Gregg 2010; Sharma & Tygstrup 2015.)²

Is the age old dichotomy of body/soul reproduced in the renewed interest in emotion/affect? (See Leys 2011; Clore 2015; Hardt 2007; Von Scheve 2018.) Despite many insist that affects are pre-discursive, language, too, can be understood in terms of affect, since discourses consist not only of language, but also of images, symbols and objects (see e.g. Butler 1997). Furthermore, discourses contribute to practices, which are always bodily, and to the formation of bodies themselves: bodies can be understood resulting in interaction, in which ‘affect is a main facilitator of this “bodily becoming”’. (Von Scheve, 2018; see also Kusenbach & Loseke 2013; Wetherell 2012.)

And what about another age-old dichotomy, that of emotion/reason? Ahmed (2004; 2014) has famously analysed the production of appropriately feeling subjects for specific political purposes, reminding us that insistence on a fixed hierarchy between emotion and reason may easily be displaced ‘into a hierarchy between emotions’, The ‘story of the triumph of reason’ may thus well be one about appropriate feelings. When a minister, for example, urges the public not to feel any compassion for the family members of ISIL fighters, women and children held in captivity in camps in Syria, he is arguing for a specific set of emotions – intertwined with a specific form of reason – which may

² The work of Deleuze and Massumi are seminal for those approaches to affect and affectivity that concentrate on corporeal social relations and emphasize the relationality of affect (see Deleuze 1998; Massumi 1993; 2002.) Psychological approaches to emotion/affect, on the other hand, mostly understand affect to be ‘an essential motivational force for humans’ and emphasises the ‘interiority of individuals over relationality’ (Norton 2015; see e.g. Gregg & Seigworth 2010; Alexznder & Kosofsky Sedgwick 1995; Sharma & Tygstrup, 2015).

have profound and vast ramifications as to how arguments of justice become constructed.³

Despite the rise of law and emotion research and affect studies, law's uneasiness with emotion, which can be traced back to early positivism, persists (see e.g. Grossi 2015). While insisting removing emotion from rational legal decision making (emotion as bias, emotion as irrational) is no longer sustainable, emotion as a simple add-on to practical reasoning is not necessarily a satisfactory step either. (See Little 2001; Mindus 2015.)

From the outset, then, the theme - law and emotion - offers a fascinating field for inquiry from a plethora of angles and perspectives, from judging to interpretation, from production of knowledge in diverse legal, juridical or more vaguely justice-related processes to investigations over methodology and epistemology in addressing emotion in law. We encourage everyone interested in the theme to submit an abstract by 30.10.2019. The deadline for articles for the special issue is 31.2.2020.

³ Emotion/reason (cognition) dichotomy is discussed from the cognitive perspective e.g. by Damasio (1994) and Shapiro (2011).

Bibliography

Abrams, Kathryn: 'Barriers and boundaries: Exploring emotion in the law of the family'. 16 *Virginia Journal of Social Policy and the Law* (2009) 301–321.

Abrams, Kathryn & Keren, Hila: 'Law in the cultivation of hope'. 95 *California Law Review* (2007) 319–382.

Abrams, Kathryn & Keren, Hila: 'Who's afraid of law and the emotions?' 94 *Minnesota Law Review* (2010) 1997–2074.

Ahmed, Sara: 'Affective Economies'. 22 (2 79) *Social Text* (2004) 117–139.

Ahmed, Sara: *The cultural politics of emotion* (Second edition.) Edinburgh University Press, Edinburgh 2014.

Alexander, Irving E., Frank, Adam & Kosofsky Sedgwick, Eve: *Shame and Its Sisters: A Silvan Tomkins Reader*. Duke University Press, Durham 1995.

Bandes, Susan: 'Empathy, narrative and victim impact statements'. 63 *University of Chicago Law Review* (1996) 361–412.

Bandes, Susan: 'Fear factor: The role of media in covering and shaping the death penalty'. 1 *Ohio State Journal of Criminal Law* (2004) 585–598.

Bandes, Susan: 'Repression and denial in criminal lawyering'. 9 *Buffalo Criminal Law Review* (2006) 339–390.

Becker, Mary: 'The passions of battered women: Cognitive links between passion empathy and power'. 8 *William & Mary Journal of Women & Law* (2002) 1–72.

Bornstein, Brian H., & Richard L. Wiener: *Emotion and the Law: Psychological Perspectives*. New York; London, Springer 2010.

Butler, Judith: *Excitable Speech: A Politics of the Performative*. Routledge, New York 1997.

Clore, Gerald L.: 'For Love or Money: Some Emotional Foundations of Rationality' 80 *Chicago-Kent Law Review* (2005) 1151–1165.

Dahlberg, Leif. 'Emotional Tropes in the Courtroom: On Representation of Affect and Emotion in Legal Court Proceedings'. 21 *Nordic Theatre Studies* (2009) 128–152.

Damsholt, Tine: 'Staging Emotions: On Configurations of Emotional Selfhood, Gendered Bodies, and Politics in the Late Eighteenth Century' In Devika Sharma and Frederik Tygstrup (ed.): *Structures of Feeling: Affectivity and the Study of Culture*. De Gruyter; Berlin 2015, 98–115.

Damasio, Antonio: *Descartes Error: Emotion, Reason, and the Human Brain*. Avon Books, New York 1994.

Deflem, Mathieu: *Race, Ethnicity and Law*. Bingley: Emerald Publishing 2017.

Deleuze, Gilles: *Spinoza: Practical Philosophy*. City Lights Books, San Francisco 1988.

Douglas, Kevin S., Lyon, David R., & Ogloff, James R.: 'The impact of graphic photographic evidence on mock jurors' decisions in a murder trial: Probative or prejudicial?' 21 *Law and Human Behaviour* (1997) 489–509.

Feigenson, Neal R.: 'Sympathy and legal judgement: A psychological analysis'. 65 *Tennessee Law Review* (1997) 1–78.

Goodrich, Peter: *Law in the courts of love: Literature and other minor jurisprudences*. Routledge, London 1996.

Goodrich, Peter: 'The laws of love: Literature, history and the governance of kissing'. 24 *New York University Review of Law & Social Change* (1998) 183–234.

Goodrich, Peter: 'Erotic melancholia: Law literature, and love'. 14 *Law & Literature* (2002) 103–129.

Goodrich, Peter: *The laws of love: A brief historical and practical manual*. Palgrave Macmillan, London 2006.

Greyser, Naomi: 'Beyond the "Feeling Woman": Feminist Implications of Affect Studies'. 38 (1) *Feminist Studies* (2012).

Grossi, Renata: 'Understanding Law and Emotion'. 7 (1) *Emotion Review* (2015) 55-60.

Hardt, Michael: 'Foreword: What Affects are Good For'. In Ticineto Clough, Patricia & Halley, Jean: *The Affective Turn*. Duke University Press, Durham & London 2007, ix–xii.

Hemmings, Clare: *Affect and feminist methodology, or what does it mean to be moved?* In Devika Sharma and Frederik Tygstrup (ed.): *Structures of Feeling: Affectivity and the Study of Culture*. De Gruyter; Berlin 2015, 147–158.

Henderson, Lynne N.: 'Legality and empathy'. 85 (7) *Michigan Law Review* (1987) 1574–1653.

Huntington, Clare: 'Repairing family law'. 57 *Duke Law Journal* (2008) 1244–1319.

Kahan, Dan: 'The Anatomy of Disgust in Criminal Law'. 96:6 *Michigan Law Review* (1998) 1621–1684.

Kahan, Dan M. 'The Progressive Appropriation of Disgust'. In Bandes, Susan A. (ed) *The Passions of Law*. NYU Press 1999, 63–79.

Koivunen, Anu: 'An affective turn? Reimagining the subject of feminist theory'. In Marianne Liljeström and Susanna Paasonen (ed.): *Working With Affect in Feminist Readings: Disturbing Differences*. Routledge, London: Routledge 2010, 8–28.

Kusenbach, Margarethe & Loseke, Donileen R.: 'Bringing the Social Back in: Some Suggestions for the Qualitative Study of Emotions'. 9 (2) *Qualitative Sociology Review* (2013).

Lanas, Maija: 'How Can Non-Verbalized Emotions in the Field Be Addressed in Research?' 34 (2) *International Journal of Research & Method in Education* (2011) 131-145.

Leys, Ruth: 'The Turn to Affect: A Critique'. 37 (3) *Critical Inquiry* (2011) 434-472.

Little, Laura E: 'Negotiating the Tangle of Law and Emotion. The Passions of Law. Edited By Susan A. Bandes'. Book review, 86 *Cornell Law Review* (2001) 974-1386.

Maroney, Terry A.: 'Law and human emotion: A proposed taxonomy of an emerging field'. 30 *Law and Human Behaviour* (2006) 125–133.

Massaro, Toni M.: 'Shame culture and American criminal law'. 89 *Michigan Law Review* (1991) 1880–1944.

Massumi, Brian: *The Politics of Everyday Fear*. University of Minnesota Press, Minneapolis 1993.

Massumi, Brian: *Parables for the Virtual: Movement, Affect, Sensation*. Duke University Press, Durham 2002.

Mindus, Patricia: 'The Wrath of Reason and the Grace of Sentiment: Vindicating Emotion in Law'. *Law, Reason and Emotion* (2017) 202-237.

Moran Rachel F.: 'Law and Emotion, Love and Hate'. 11 *Journal of Contemporary Legal Issues* (2001) 747-903.

Myers, Bryan S., Lynn, Steven J., & Arbuthnot, Jack: 'Victim impact testimony and juror judgements: The effects of harm information and witness demeanour'. 32 *Journal of Applied Social Psychology* (2002) 2393-2412.

Norton, Bryan: 'Book Review: Structures of Feeling: Affectivity and the Study of Culture. Devika Sharma, Frederik Tygstrup (eds)'. 5 *Diffractions* (2015).

Nussbaum, Martha: 'Emotion in the language of judging'. 70 *St John's Law Review* (1996) 23-30.

Nussbaum, Martha & Kahan, Dan: 'Two conceptions of emotion in criminal law'. 96 *Columbia Law Review* (1996) 269-374.

Nussbaum, Martha: 'Secret sewers of vice: Disgust, bodies and the law. In Susan Bandes (ed): *The passions of law* New York University Press, New York, NY 1999, 19-62.

Pasquetti, Silvia: 'Legal Emotions: An Ethnography of Distrust and Fear in the Arab Districts of an Israeli City'. 47 (3) *Law & Society Review* (2013) 461-492.

Peterson, Hanne: 'The language of emotions in the language of law'. In Hanne Peterson (ed): *Love and law in Europe*. Dartmouth Publishing Co Ltd, Ashgate, 1998, 12-26.

Sanger, Carol: 'Legislating with Affect: Emotion and Legislative Law Making'. 53 *Nomos* (2013) 38-76.

Seuffert, Nan: 'Domestic violence, discourses of romantic love, and complex personhood in the law'. 23 *Melbourne University Law Review* (1999) 211-240.

Sharma, Devika & Tygstrup, Frederik: 'Introduction.' In Devika Sharma and Frederik Tygstrup (ed.): *Structures of Feeling: Affectivity and the Study of Culture*. De Gruyter; Berlin 2015, 1-19.

Seigworth Gregory J. & Gregg Melissa: 'An inventory of shimmers'. In Gregg, Melissa & Seigworth Gregory J. (eds) *The Affect Theory Reader*. Duke University Press, Durham, NC 2010, 1-26.

Shapiro, Lawrence: *Embodied Cognition*. Routledge, New York 2011.

Van Roekel, Eva: *Phenomenal Justice: State Violence, Emotion, and the Law in Argentina*. University of Utrecht 2016.

Wetherell, Margaret: 'Feeling Rules, Atmospheres and Affective Practice: Some Reflections on the Analysis of Emotional Episodes'. In Maxwell, Clare & Aggleton, Peter (eds) *Privilege, Agency and Affect: Understanding the Production and Effects of Action*. Palgrave Macmillan, London 2013, 221–239.

Von Scheve, Christian: 'A Social Relational Account of Affect'. 21 (1) *European Journal of Social Theory* (2018) 39-59.