

Emotions in German law

Phillip Hellwege

Angaben zur Veröffentlichung / Publication details:

Hellwege, Phillip. 2024. "Emotions in German law." In *Law and interdisciplinarity*, edited by Phillip Hellwege and Marta Soniewicka, 353–95. Tübingen: Mohr Siebeck.
<https://doi.org/10.1628/978-3-16-163882-4>.

Nutzungsbedingungen / Terms of use:

CC BY-SA 4.0

Dieses Dokument wird unter folgenden Bedingungen zur Verfügung gestellt: / This document is made available under these conditions:
CC-BY-SA 4.0: Creative Commons: Namensnennung - Weitergabe unter gleichen Bedingungen
Weitere Informationen finden Sie unter: / For more information see:
<https://creativecommons.org/licenses/by-sa/4.0/deed.de>



Law and Interdisciplinarity

Edited By
PHILLIP HELLWEGE
and MARTA SONIEWICKA

Mohr Siebeck

Law and Interdisciplinarity



Law and Interdisciplinarity

Edited by

Phillip Hellwege and Marta Soniewicka

Mohr Siebeck

Phillip Hellwege, holds the Chair of Private Law, Commercial Law, and Legal History at the University of Augsburg.
orcid.org/0000-0001-9012-2682

Marta Soniewicka, is associate professor at the Department of Philosophy of Law and Legal Ethics, Faculty of Law and Administration, Jagiellonian University.
orcid.org/0000-0003-3409-7819

The publication has been supported by a grant from the Faculty of Law and Administration under the Strategic Programme Excellence Initiative at Jagiellonian University.

ISBN 978-3-16-163881-7 / eISBN 978-3-16-163882-4
DOI 10.1628/978-3-16-163882-4

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available at <https://dnb.dnb.de>.

Published by Mohr Siebeck Tübingen, Germany, 2024. www.mohrsiebeck.com

© Phillip Hellwege, Marta Soniewicka (ed.); chapter: respective author.

This publication is licensed under the license “Creative Commons Attribution – ShareAlike 4.0 International” (CC BY-SA 4.0). A complete Version of the license text can be found at: <https://creativecommons.org/licenses/by-sa/4.0/>.

Any use not covered by the above license is prohibited and illegal without the permission of the respective author.

The book was printed by Laupp & Göbel in Gomariningen on non-aging paper and bound by Buchbinderei Nädele in Nehren.

Printed in Germany.

Emotions in German Law

Phillip Hellwege

I.	Introduction.....	353
II.	An irrelevance of law and emotions scholarship in Germany?	355
	A. A search in the catalogue of the Bavarian Library Network	355
	B. Distinguishing three different kinds of discourse on emotions in law	356
	1. Emotions and the study of the foundations of law	357
	2. Emotions and the doctrinal study of law.....	358
	3. Emotions and discourse on the reform of law	359
	4. Adding a further variable	359
	C. Conclusion	359
III.	The relevance of emotions in German law	361
IV.	References to emotions in legal texts	362
	A. The reference to emotion as a legal concept.....	363
	B. The reference in legislation to emotion as a factual phenomenon	363
	C. The reference in case law and literature to emotion as a factual phenomenon ..	367
	D. The absence of references to emotions in legal texts	370
V.	Interdisciplinarity or a division of labour?	371
VI.	Emotions and the doctrinal study of law	372
	A. Emotions and standards of practices	372
	B. Emotions and public policy	373
	C. Emotions and the judicial review of contracts in terms of fairness	378
	D. Emotions, liability, and non-pecuniary harm	378
	1. Emotions excluding or modifying personal guilt in criminal law	379
	2. Liability for emotional distress in private law	383
	3. Assessing damages in cases of emotional distress	386
VII.	Conclusion	387

I. Introduction

Marta Soniewicka and *Julia Wesolowska* argue for a greater relevance of emotions in law, claiming that law and emotions scholarship will increase our understanding of legal reasoning and that it will improve legislation and jurisprudence. They base their arguments primarily on US but also on Polish scholarship on law and emotions. First, they discuss the role of emotions from the perspective of legal theory, reminding their readers that legal positivism is

based on the “paradigm of [an] objective and rational law”¹ leaving, *prima facie*, no room for emotions. Legal positivism was challenged first by legal realism, then by critical legal studies, and most recently by law and emotions scholarship. These schools of thought not only take into account that legal actors are also driven by their emotions but in addition claim that the “law should address real individuals”,² including their emotions. Thereby, they open the door to interdisciplinary studies, including law and emotions scholarship.

Soniewicka and *Wesołowska* observe that the discourse on the role of emotions in law has to distinguish three sets of questions. First, there are the questions regarding the psychological mechanisms of emotions, their manifestations, their functioning, and their biological evolution. These questions are foremost the domain of evolutionary psychology, neurobiology, and affective science. Secondly, there are the questions as to the social functions of emotions and their cultural aspects. These questions are addressed in the humanities and the social sciences. Thirdly, there is the question of how jurisprudence, legislation, and legal scholarship may benefit from these extra-legal insights.

It follows that we have different levels of interdisciplinarity: When analysing the social functions of emotions, the humanities and the social sciences may take the findings of evolutionary psychology, neurobiology, and affective science into consideration. Lawyers, too, may directly draw on the findings of these latter disciplines. However, lawyers may also base their reflections on the findings of the humanities and the social sciences, which themselves may have taken into account the results of evolutionary psychology, neurobiology, and affective science. Law and emotions scholarship, thus, does not simply link two disciplines together. Rather, the scholarship on law and emotions appears to be a single knot in a complex net woven from different disciplines – a picture that will be qualified further below.³

With respect to the third set of questions – that is, the “legal knot” in the net of disciplines – *Soniewicka* and *Wesołowska* refer to the well-known research on judicial decision-making and, more generally, to “the impact of emotions on legal actors, such as judges, juries, lawyers, and on witnesses and victims”,⁴ but they also refer to the growing research on “the role of emotions in [...] criminal law, family law [...], contract law [...], [and] international relations”.⁵ They argue that “the interaction between emotions and law” is multidimensional, as “some emotions are necessary for [the] creation of an effective, responsive and legitimate law”, and on a different level “legal institutions may

¹ *Soniewicka/Wesołowska*, p. 320, above.

² *Soniewicka/Wesołowska*, p. 320, above.

³ See p. 359, below. See also *Susan A. Bandes*, Introduction, in: eadem (ed.), *The Passion of Law* (1999), 1–15, 8.

⁴ *Soniewicka/Wesołowska*, p. 321, above.

⁵ *Soniewicka/Wesołowska*, p. 321, above.

not only regulate or affect emotions but also encourage the emergence of socially valuable emotions and produce specific emotions”.⁶

The concept of emotion used by law and emotions scholars is, as *Soniewicka* and *Wesolowska* point out, wide and, one may add, contested.⁷ It may include “disgust, shame, anger, fear, empathy, mercy, hope, and love” as well as “passions, affects, appetites, desires, drives, sentiments, feelings, upheavals, and impulses”,⁸ and these concepts are again vague and open to different meanings. *Soniewicka* and *Wesolowska* introduce their readers to two fundamentally different concepts of emotions in philosophy: dualism and holism. Whereas traditional mainstream dualism looks upon emotions as something negative, equating them with irrationality, modern holism overcomes the antagonism of reason and emotion. Thereafter *Soniewicka* and *Wesolowska* turn to empathy, again discussing its different concepts, its possible components, its relation to (or difference from) emotion, and its role in law, for example, in judicial decision making.

In the last part of their paper, *Soniewicka* and *Wesolowska* analyse in detail the impact and importance of emotions in the field of non-pecuniary harm in both criminal law and the law of delict. In the last part of this comment, I will, as well, discuss this aspect from the perspective of German law.⁹

II. An irrelevance of law and emotions scholarship in Germany?

A. A search in the catalogue of the Bavarian Library Network

Whereas the scholarship on law and emotions is thriving in the US and gaining ground in other countries, such as Poland, the same is, at first glance, not true for Germany. A title search in the catalogue of the Bavarian Library Network (*Bibliothekverbund Bayern*)¹⁰ using a combination of the words *Recht* (law) along with *Emotion*, *Emotionen*, *Gefühl*, or *Gefühle* (emotion, emotions, feeling, feelings) produces only three relevant hits.¹¹ The first two hits are edited volumes published in 2016 and 2018. They have been edited not by legal scholars but by philosophers. Of the 15 authors contributing to the first volume, only

⁶ *Soniewicka/Wesolowska*, p. 322, above.

⁷ A narrower approach is, for instance, taken by *H. Landweer/D. Koppelberg*, *Der verkaante Zusammenhang von Recht und Emotion*, in: eadem/idem (eds.), *Recht und Emotion I. Verkannte Zusammenhänge* (2016), 13–47, 24–26. See also *Bandes* (n. 3), 10.

⁸ *Soniewicka/Wesolowska*, p. 323, above.

⁹ See pp. 378 f., below.

¹⁰ <https://www.bib-bvb.de/>. The search was carried out on 9 January 2023.

¹¹ *Landweer/Koppelberg* (n. 7); *H. Landweer/F. Bernhardt* (eds.), *Recht und Emotion II. Sphären der Verletzlichkeit* (2018); *H.P. Bull*, *Gefühle der Menschen in der „Informationsgesellschaft“ – Wie reagiert das Recht?* (2011).

one is a German-speaking lawyer, and of the 14 authors participating in the second volume, two co-authors of a single contribution are lawyers. The third hit – a booklet of 36 pages that appeared in 2011 – is the published version of a lecture held by a lawyer on how the law should respond to emotions in our modern information society. There is a further volume published in 2023 on *Rechtsgefühle*.¹² Of the eight participating authors, three are legal scholars at a German university. A keyword search applying the same words brings four further relevant hits published between 1978 and 2017.¹³ Two hits are doctoral dissertations on emotional advertising in competition law that were published, respectively, in 1978 and 1983. Another hit is a dissertation in legal sociology on the concept of *Stimmungsdemokratie* (emotion-driven democracy) as coined by the Danish-German sociologist *Theodor Geiger* (1891–1952). It was published in 2012. The final hit is an edited volume on *Gerechtigkeitsgefühle* (senses of justice) and the affective and emotional legitimization of norms, published in 2017. It has been edited by two anthropologists, one of whom also holds a law degree. Among the seven further authors, there are only two additional lawyers. Finally, a title search and a keyword search using other word combinations, such as *Hass* (hate) and *Recht, Angst* (fear) and *Recht, or Empathie* (empathy) and *Recht*, produce two further relevant hits.¹⁴ The first is a conference volume on empathy and law edited in 2012 by two lawyers. In total, the volume has 13 contributors, of whom seven hold a law degree. The second hit was published in 2012 by a criminal lawyer and was titled “Angst als juristische Kategorie” (“Fear as a Legal Category”).

B. Distinguishing three different kinds of discourse on emotions in law

For the purpose of the present volume, we cannot stop with the simple observation that there seems to be at least a nucleus if not burgeoning body of law and emotions scholarship in German-speaking literature: The present volume wishes to add a comparative perspective to the existing debates on interdisciplinarity and law.¹⁵ More specifically, the present volume wishes to explore how the diverse doctrinal contexts of different national legal systems affect

¹² *Thorsten Keiser/Greta Olson/Franz Reimer* (eds.), *Feelings about Law/Justice: The Relevance of Affect to the Development of Law in Pluralistic Legal Cultures. Rechtsgefühle: Die Relevanz des Affektiven für die Rechtsentwicklung in pluralen Rechtskulturen* (2023).

¹³ *M. Bernet*, *Die wettbewerbsrechtliche Beurteilung der gefühlsbetonten Werbung* (1978); *A. Mylaeus*, *Die “gefühlsbetonte Werbung” als Erscheinungsform der “unsachlichen Werbung” und ihre Beurteilung nach § 1 UWG* (1983); *B.W. Czok*, *Theodor Geigers Stimmungsdemokratie. Eine rechtssoziologische Untersuchung des Legitimationsdefizits im 21. Jahrhundert*. (2012); *J. Bens/O. Zenker* (eds.), *Gerechtigkeitsgefühle. Zur affektiven und emotionalen Legitimität von Normen* (2017).

¹⁴ *M.C. Gruber/S. Häußler*, *Normen der Empathie* (2012); *J. Dallmeyer*, *Angst als juristische Kategorie* (2012).

¹⁵ *Hellwege/Soniewicka*, p. 13, above.

interdisciplinary discourse in law, and it wishes to do so by comparing interdisciplinary discourse in Polish and German law. Research findings on emotions in evolutionary psychology, neurobiology, and affective science should be the same regardless of where – the US, Poland, or Germany – the research has been conducted. The findings of these disciplines will presumably claim to have universal validity. A non-lawyer may be led to believe that, consequently, such findings have, or at least should have, the same impact on the law regardless of the specific legal system. Yet we have to distinguish between three different kinds of legal discourse. The distinctions drawn here reflect German legal commentary and differs from those made in English-speaking law and emotions scholarship.¹⁶

1. Emotions and the study of the foundations of law

First, there is research in those legal sub-disciplines which German legal scholarship refers to as *Grundlagenfächer*: research on the foundations (*Grundlagen*) of law. Legal *Grundlagenfächer* are, for example, legal history, legal philosophy, legal theory, legal methodology, legal sociology, legal anthropology, comparative law, and law and economics. Research on the foundations of law transcends a single legal order because arguments are not developed from within a single legal system.¹⁷ Rather, this kind of research adopts a perspective whereby law is viewed from the outside. Thus, where scholarship on law and emotions engages in research on the foundations of law, it will transcend a single legal order. It follows that the findings of such research will be valid for more than one legal system and that references to a specific legal system will usually be of an exemplary nature only. Nevertheless, the findings of such research will not be able to claim universal validity. Rather, such research may reflect the specifics of different legal systems and legal cultures. Research “on the impact of emotions on legal actors, such as judges, juries, lawyers, and on witnesses and victims”,¹⁸ to which *Soniewicka* and *Wesołowska* refer, is an example of such research. It transcends a single legal order, but its findings still cannot claim universal validity. Juries do not exist in every legal system, and where they exist, their roles may differ. Furthermore, the training of judges in different legal systems, their social background, or the divergent procedural

¹⁶ On these distinctions, see *T.A. Maroney*, Law and Emotion: A Proposed Taxonomy of an Emerging Field, *Law and Human Behaviour* 30 (2006), 119–142, 125–133; *R. Grossi*, Understanding Law and Emotion, *Emotion Review* 7 (2015), 55–60, 57.

¹⁷ On the concept of legal *Grundlagenfächer* as distinguished from the doctrinal study of law, see, e.g., *O. Muthorst*, *Grundlagen der Rechtswissenschaft. Methode – Begriff – System* (2nd edn., 2019), § 2 para. 24; *J. Krüper*, Für wen dieses Buch geschrieben ist, wie und warum, in: *idem* (ed.), *Grundlagen des Rechts* (4th edn., 2021), 17–21, 19.

¹⁸ *Soniewicka/Wesołowska*, p. 321, above.

laws may, but do not have to, impact how judges are influenced by their emotions in the judicial decision-making process.

2. Emotions and the doctrinal study of law

Secondly, there is what German legal scholarship calls *Dogmatik*, that is, the doctrinal study of law.¹⁹ It engages in the analysis of a given national legal system as it is in force, i.e. positive law. The doctrinal study of law does not transcend the national legal system, it does not adopt a perspective whereby law is viewed from the out-side, instead, it argues from within the legal system. In the process of understanding and explaining a legal norm, the doctrinal study of law starts with its wording (*wörtliche Auslegung*), then analyses its *ratio* (*teleologische Auslegung*), places it in its systematic legal context (*systematische Auslegung*), and takes into account its historical genesis (*historische Auslegung*): Each legal norm of a given legal system is explained and applied, using the tools of legal methodology.²⁰ It is the interplay of such doctrinal study of law and extra-legal research on emotions that is of particular interest for the present volume. A judge is, according to the rule of law, bound to a specific national law, but not to the findings of extra-legal research on emotions.²¹ However, she may be confronted with the findings of such extra-legal research and may feel that she should take these findings into account when solving the specific case in front of her. Then she has to link these extra-legal findings on emotions to the specific national law, to which she is bound, in a way that is “state of the art” from the perspective of legal methodology. Or to put it differently: A judge is bound to a specific legal system; she may not ignore the law to which she is bound in order to give effect to the findings of law and emotions scholarship; yet she may consider such findings if state-of-the-art legal methodology allows her to incorporate such findings in her legal arguments. The interplay of the doctrinal study of law and extra-legal research on emotions is of particular interest for the present volume because the present volume wishes to add a comparative perspective to our understanding of law and interdiscip-

¹⁹ On the concept of *Dogmatik*, B. Rüthers/C. Fischer/A. Birk, *Rechtstheorie mit Juristischer Methodenlehre* (12th edn., 2022), paras. 309–330; A. Kaufmann, *Rechtsphilosophie, Rechtstheorie, Rechtsdogmatik*, in: W. Hassemer et al. (eds.), *Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart* (9th edn., 2016), 1–22, 1.

²⁰ Examples of standard textbooks on legal methodology in the German language include E.A. Kramer, *Juristische Methodenlehre* (6th edn., 2019) and R. Wank, *Juristische Methodenlehre. Eine Anleitung für Wissenschaft und Praxis* (2019).

²¹ On what follows, A. Beckers, *Empathie im Wettbewerbsrecht: Gesellschaftliche Rationalitätskonflikte statt Emotionen des Verbrauchers*, in: Gruber/Häußler (n. 14), 93–114, 95. See, with different foci, also S.A. Bandes, *Empathetic Judging and the Rule of Law*, *Cardozo Law Review de novo* (2009), 133–148; *eadem*, *Compassion and the rule of law*, *International Journal of Law in Context* 13 (2017), 184–196; L.N. Henderson, *Legality and Empathy*, *Michigan Law Review* 85 (1987), 1574–1653.

linarity: it wishes to analyse how the specificities of a national legal system affect our approaches to interdisciplinary discourse in law.

3. *Emotions and discourse on the reform of law*

When the findings of extra-legal research on emotions and positive law contradict each other – when, in other words, a judge does not find a way to link the extra-legal findings on emotions to the specific law to which she is bound – then the question needs to be asked whether the law is in need of reform in the light of these extra-legal findings. This third kind of legal discourse is again of interest for the present volume that wishes to compare the interplay between law and extra-legal research in Poland and Germany.

4. *Adding a further variable*

Evolutionary psychology, neurobiology, and affective science may claim that their findings have universal validity. However, *Soniewicka* and *Wesołowska* remind us that the scholarship on emotions also addresses questions as to their social functions and cultural aspects. These questions are addressed in the humanities and social sciences. Their findings do not necessarily have universal validity. The findings of research on the cultural aspects of emotions may, for example, depend on the specific cultural context that is analysed. It follows that there is a further variable in the three aforementioned types of legal discourse – a variable that a lawyer needs to be aware of: When a lawyer conducts research on the foundations of law, undertakes a doctrinal study of law, or reflects on the reform of law, and when – in so doing – she wants to take into account findings on emotions in the humanities and social sciences, she first has to assess whether these findings are also valid for the specific context in which she works. In summary, we need to qualify the above description of law and emotions scholarship as a knot in a net woven from different disciplines.²² It rather seems that evolutionary psychology, neurobiology, and affective science are the mountings from which hangs the net woven of various disciplines researching emotions in the humanities, the social sciences, and the legal sciences; however, the legal sciences also have a further mounting: the specific national legal system to which lawyers are bound.

C. *Conclusion*

Let us revisit the above-mentioned literature: Most of the mentioned titles belong to the so-called *Grundlagenfächer* and involve research on emotions in legal history, legal sociology, or legal anthropology.²³ That explains the in-

²² See p. 354, above.

²³ *Landweer/Koppelberg* (n. 7); *Landweer/Bernhardt* (n. 11); *Bens/Zenker* (n. 13); *Czok* (n. 13); the contributions of *M.-C. Gruber*, *K. Brückamp*, *F. von Harbou*, *S. Häußler*,

volvement of non-lawyers in these volumes. Consequently, these publications do not link together the doctrinal study of law and research on emotions. This observation is not a qualitative statement. These publications are innovative and have the potential of stimulating new research. Nevertheless, for the purpose of the present contribution, they are of little relevance. The two dissertations on emotional advertising published in 1978 and 1983 are doctrinal studies of law.²⁴ Both authors seem to understand emotional advertising to be a legal concept, even though they do take notice of extra-legal research, especially in economics. It follows that both dissertations are again of little relevance for the present volume. Of the above-mentioned titles, only a few link together the doctrinal study of law and scholarship on law and emotions. In 2012, *Anna Beckers* took on the problem of emotional advertising and embedded her analysis in law and emotions scholarship.²⁵ And in his monograph on “Angst als juristische Kategorie” (“Fear as a Legal Category”) of 2012, *Jens Dallmeyer* engages in an interdisciplinary analysis of law and emotions.²⁶ He first presents the findings on fear in neuroscience, psychoanalysis, and neuropsychology and then discusses the relevance of fear in § 20, § 21, § 33, and § 46 of the German Penal Code (*Strafgesetzbuch* – StGB).

In conclusion, scholarship on law and emotions seems to be only a marginal field of research in German legal literature.²⁷ This observation may be put into historical perspective. *Soniewicka* and *Wesołowska* claim that the “paradigm of [an] objective and rational law”,²⁸ which leaves no room for emotions, was first challenged by legal realism, later by critical legal studies, and finally by law and emotions scholarship. Furthermore, law and emotions scholars claim that “the study of law and emotions has historically been very much a North American phenomenon” and that only recently are there signs of “a growing interest amongst scholars elsewhere”.²⁹ However, *Sandra Schnädelbach* has recently presented a study analysing the German interdisciplinary discourse on emotions in the process of legal decision-making between 1870 and 1933,³⁰ and in August 2022, at the 43. *Rechtshistorikertag* (Forty-Third Conference of

K. Mathis/F. Diriwächter, M. Uebelhart, S. Müller, M. Doll, L. Belkin and V. Hildebrand-Schat, in: Gruber/Häußler (n. 14); *Keiser/Olson/Reimer* (n. 12).

²⁴ *Bernet* (n. 13); *Mylaeus* (n. 13).

²⁵ *Beckers* (n. 21), 93–114.

²⁶ *Dallmeyer* (n. 14). See also the contribution of *M. Schulte*, *Strategien der posttraumatischen Behandlung – Psychoanalytische Randnotizen zur Regulierung der Finanzmärkte*, in: Gruber/Häußler (n. 14), 165–190.

²⁷ *Landweer/Koppelberg* (n. 7), 13.

²⁸ *Soniewicka/Wesołowska*, p. 320, above.

²⁹ *H. Conway/J. Stannard*, *Contextualising Law and Emotions: Past Narratives and Future Directions*, in: eadem/idem (eds.), *The Emotional Dynamics of Law and Legal Discourse* (2016), 1–8, 5.

³⁰ *S. Schnädelbach*, *Entscheidende Gefühle. Rechtsgefühl und juristische Emotionalität vom Kaiserreich bis in die Weimarer Republik* (2020).

Legal Historians) held at the University of Zurich, *Hans-Peter Haferkamp* presented a paper on irrational elements in legal decision-making in nineteenth-century Germany.³¹ Is German legal literature perhaps not lagging behind US scholarship on law and emotions? Rather, are German commentators in fact ahead of their US colleagues, having already moved beyond law and emotion scholarship? I will return to this question further below.³²

III. The relevance of emotions in German law

The provisional conclusion that law and emotions seems to be only a marginal field of research in German academic literature does not mean that emotions are of no relevance in German law or in the German legal scholarship. A search in the German legal database *juris*³³ using the word *Emotion* (emotion) results in 3,856 hits: 1,924 from case law, 148 from legislation, 327 from commentaries and books, 1,426 from journals, and 31 from further sources. A search using the word *Empathie* (empathy) produces 1,865 hits: 888 from case law, 162 from legislation, 144 from commentaries and books, 662 from journals, and 9 from further sources. And a search using the word *Gefühl* (feeling) results in 40,256 hits: 24,465 from case law, 2,697 from legislation, 2,626 from commentaries and books, 10,190 from journals, and 278 from further sources. A search using other emotions will reveal further hits. *Dan M. Kahn's* and *Martha C. Nussbaum's* observation on American criminal law, thus, holds equally true for German law: "Emotions are ubiquitous in [...] law, as they are in life."³⁴ A closer look into the results, however, reveals that not every hit is, at least at first sight, of relevance for the present contribution. § 138(1) of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB), for example, reads:

"Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig."

"A legal transaction which is contrary to good morals [public policy] is void."

The case law and legal literature define *gute Sitten* (good morals, public policy) as the "Anstandsgefühl aller billig und gerecht Denkenden" ("sense of decency of all those who think fairly and equitably").³⁵ The definition includes the word

³¹ *H.-P. Haferkamp*, Entspricht das jetzt dem Volksgeist? Geltungsfragen im "Heutigen Römischen Recht", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Germanistische Abteilung* 140 (2023), 307–332.

³² See p. 393, below.

³³ <https://www.juris.de/jportal/>. The search was carried out on 9 January 2023.

³⁴ *D.M. Kahn/M.C. Nussbaum*, Two Conceptions of Emotion in Criminal Law, *Columbia Law Review* 96 (1996), 269–374, 270.

³⁵ Compare *H.P. Haferkamp*, in: M. Schmoeckel et al. (eds.), *Historisch-kritischer Kommentar zum BGB*, vol. 1 (2003), § 138 para. 1.

Gefühl (sense, feeling, emotion). Yet *gute Sitten* are mostly understood to be a *legal* concept reflecting fundamental values in the constitutional and legal order and furthermore to be a concept referring to the moral order as an extra-legal value system.³⁶ The definition does not refer to any sort of emotion that could be the research object of interdisciplinary scholarship on emotions. Of the 40,256 hits for the search using the word *Gefühl*, 984 relate to § 138 BGB and are thus mostly irrelevant to law and emotions scholarship. Nevertheless, the sheer number of hits signals that German case law, legislation, and legal scholarship do not ignore emotions. It seems that *Renata Grossi*'s general observation is not true for German law: "While law names emotions it deals with them only obliquely [...]." ³⁷ Rather, *Eric A. Posner*'s nuanced observation on US law, echoing the conclusion reached by *Kahan* and *Nussbaum*,³⁸ holds true also for Germany: "The role of the emotions is much neglected in legal theory. This should be puzzling, because emotions play an important role in many areas of the law."³⁹

IV. References to emotions in legal texts

Even though this simple search in the legal database *juris* signals that German case law, legislation, and legal literature do not ignore emotions, we should not too hastily conclude that all hits equally invite for law and emotions scholarship, as the example of § 138(1) BGB has already proven. For the purposes of the present comment, it is helpful to distinguish two possible uses of the word emotion (and related concepts) in legal texts: emotion as a legal concept, on the one hand, and emotion as a "factual" phenomenon on the other hand. If a lawyer uses the word emotion as a legal concept, then there is – from the perspective of the doctrinal study of law – no room for law and emotions scholarship in the sense of an interdisciplinary undertaking. In such case, a lawyer will define the word emotion autonomously. Law and emotions scholarship may of course question that it is correct to use the word emotion as a purely legal concept. It is only when a lawyer uses the word emotion as a "factual" phenomenon which could be a research object of extra-legal disciplines that scholarship on law and emotions becomes conceivable in the sense of an interdisciplinary undertaking. The word "factual" is used in the present context as a shorthand for

³⁶ *J. Neuner*, Allgemeiner Teil des Bürgerlichen Rechts (12th edn., 2020), § 46 para. 12; *R. Bork*, Allgemeiner Teil des Bürgerlichen Gesetzbuchs (4th edn., 2016), para. 1180; *D. Medicus/J. Petersen*, Allgemeiner Teil des BGB (11th edn., 2016), para. 680; *F. Faust*, Bürgerliches Gesetzbuch. Allgemeiner Teil (8th edn., 2023), § 10 para. 1.

³⁷ *Grossi* (n. 16), 55.

³⁸ *Kahan/Nussbaum* (n. 34), 270.

³⁹ *E.A. Posner*, Law and the Emotions, *Georgetown Law Journal* 89 (2001), 1977–2012, 1977.

all non-legal uses of the word. Furthermore, it is helpful to distinguish between two categories of texts in which these two concepts are used: legal norms on the one hand and other legal texts, including case law and academic legal literature, on the other hand. In a codified system such as German law, case law belongs, in principle, to the second category of texts because it interprets and applies legal norms as they are codified.⁴⁰

A. The reference to emotion as a legal concept

Legal texts may use the word emotion as a legal concept. An example of such use of the word emotion has already been discussed:⁴¹ In the context of § 138(1) BGB, *gute Sitten* are defined as the “Anstandsgefühl aller billig und gerecht Denkenden”. In this definition the word *Gefühl* does not refer to a factual phenomenon – real emotions of real people – that could be the research object of law and emotions scholarship. This is a conclusion that may, however, be questioned by law and emotions scholars. I will return to this point later in this comment.⁴²

B. The reference in legislation to emotion as a factual phenomenon

Legal norms may refer to emotions as factual phenomena. They may do so in two fundamentally different ways. First, the word emotion may already point to the extra-legal importance of emotions without the need to engage in law and emotions scholarship for understanding or analysing these norms. Rather the fact that these norms refer to emotions is the result of extra-legal scholarship on emotions. A large number of the 148 hits from legislation that were found with the database search using the word *Emotion* refer to the training regulations for certain professions or come from regulations on schools and education. Annex 1 to § 1(1) of the Federal Training and Examinations Regulations for Occupational Therapists (*Ausbildungs- und Prüfungsverordnung für Ergotherapeutinnen und Ergotherapeuten*) issued by the Federal Ministry of Health (*Bundesministerium für Gesundheit*), for example, requires that occupational therapists are also trained on “motivation and emotions” (“Motivationen und Emotionen”). And the Bavarian Guidelines for Family and Sex Education in Bavarian Schools (*Richtlinien für die Familien- und Sexualerziehung in den bayerischen Schulen*) issued by the Bavarian Ministry of Education and Cultural Affairs, the Sciences and the Arts (*Staatsministerium für Bildung und Kultus, Wissenschaft und Kunst*) require that the “possible emotional consequences of rationally communicated factual information have to be

⁴⁰ On the controversy regarding how to categorize case law in the German legal order see, e.g., *Neuner* (n. 36), § 4 paras. 9–16.

⁴¹ See, p. 362, above.

⁴² See, pp. 375 f., below.

taken into account” (“Mögliche emotionale Auswirkungen rational vermittelter Sachinformationen werden mit bedacht”) when engaging in family and sex education. These regulations and guidelines point directly to the extra-legal scholarship on the importance of emotions in the contexts of family and sex education in schools and occupational therapy, and they require schoolteachers as well as those who train occupational therapists to apply state-of-the-art methods. The cited passage from the Bavarian Guidelines for Family and Sex Education in Bavarian Schools allows for another observation. In 2015, *Grossi* wrote:⁴³

“Indeed the history of ideas has been dominated by a seemingly impenetrable distinction between reason and emotion, which not only sharply distinguishes between the two, but values the former over the latter.”

When the Bavarian Guidelines require that “possible emotional consequences of rationally communicated factual information have to be taken into account”, they indeed sharply distinguish between reason and emotion. However, the Guidelines require that emotions be taken into consideration even where they are irrational, and the Guidelines, thus, do not value reason over (irrational) emotions. However, is the approach adopted by these Guidelines perhaps outdated because modern holism overcomes, as *Soniewicka* and *Wesołowska* argue, the antagonism of reason and emotion as promoted by traditional dualism?⁴⁴ I do not think so. The Bavarian Guidelines for Family and Sex Education in Bavarian Schools simply address a possible conflict which is best solved by reference to traditional dualism. If a teacher thinks that he may simply present to his class factual information, he may cause great harm. He has to take into consideration any emotional (even irrational) consequences that factual information may have on children. This conflict is best addressed by identifying the two opposing poles (factual information v. emotional consequences) and not by any sort of holism. Or in other words: Modern trends in philosophy will hinder rather than facilitate the drafting of legal norms in the fashion of the Bavarian Guidelines for Family and Sex Education in Bavarian Schools.

We have just analysed two examples in which legislation uses the word emotion as referring to a factual phenomenon and in which legislation points to the extra-legal importance of emotions without, however, the need to engage in law and emotions scholarship for a further understanding the respective norm. However, legal norms may refer to emotion as a factual phenomenon also in a second fashion. Legislation may use the word emotion as referring to a factual phenomenon, and the application of the respective legal norm benefits from extra-legal findings, as three examples will prove. § 211 StGB on murder reads:

⁴³ *Grossi* (n. 16), 55.

⁴⁴ *Soniewicka/Wesołowska*, pp. 323 ff., above.

“(1) Der Mörder wird mit lebenslanger Freiheitsstrafe bestraft.

(2) Mörder ist, wer aus Mordlust, zur Befriedigung des Geschlechtstriebes, aus Habgier oder sonst aus niedrigen Beweggründen, heimtückisch oder grausam oder mit gemeingefährlichen Mitteln oder um eine andere Straftat zu ermöglichen oder zu verdecken, einen Menschen tötet.”

“(1) A murderer incurs a penalty of imprisonment for life.

(2) A murderer is someone who kills another person out of a lust to kill, for sexual satisfaction, out of greed or otherwise base motives, insidiously or cruelly or by means constituting a public danger or to facilitate or cover up another offence.”

By contrast, § 212(1) StGB on manslaughter reads:

“Wer einen Menschen tötet, ohne Mörder zu sein, wird als Totschläger mit Freiheitsstrafe nicht unter fünf Jahren bestraft.”

“Whoever kills a person without being a murderer [according to § 211 StGB] incurs a penalty of imprisonment for a term of at least five years.”⁴⁵

The characteristic elements that define murder according to § 211(2) StGB and that distinguish it from manslaughter in the meaning of § 212 StGB are usually divided into three groups, the first of which pulls together those characteristics elements that point to the motivational reprehensibility.⁴⁶ Emotions will play an important role for the overall assessment of whether the accused fulfils any of the characteristic elements of the first group. Indeed, lust to kill, sexual satisfaction, and greed may themselves be categorized as emotions. Furthermore, “otherwise base motives” may be fury, anger, jealousy, hate, or revenge.⁴⁷ For the purpose of this paper, it is important to note that German law has always followed an evaluative approach and not a mechanistic approach:⁴⁸ the murderer’s motive has to be base.⁴⁹ Finally, it is important to note that German case law and literature have developed numerous competing theories on how to evaluate the motives as being base.⁵⁰

§ 81d(1)(1) of the Code of Criminal Procedure (*Strafprozeßordnung* – StPO) refers to the sense of shame (*Schamgefühl*) of those who are exposed to physical examinations in criminal proceedings:

⁴⁵ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_stgb/ (last visited on 17 February 2023).

⁴⁶ A. Eser/D. Sternberg-Lieben, in: Schönke/Schröder. Strafgesetzbuch (30th edn., 2019), § 211 paras. 14–20; M. Heger, in: Lackner/Kühl/Heger. Strafgesetzbuch (30th edn., 2023), § 211 paras. 4–5c; H. Schneider, in: Münchener Kommentar zum Strafgesetzbuch, vol. 4 (4th edn., 2021), § 211 paras. 48–124; R. Eschelbach, in: B. von Heintschel-Heinegg (ed.), BeckOK StGB (55th edn., 2022), paras. 15–35; T. Fischer, Strafgesetzbuch mit Nebengesetzen (69th edn., 2022), § 211 para. 7.

⁴⁷ Schneider (n. 46), § 211 para. 73.

⁴⁸ See p. 379, below.

⁴⁹ See, e.g., BGH, judgment of 11 May 2022, 2 StR 445/21, Neue Zeitschrift für Strafrecht 2022, 541–543.

⁵⁰ See e.g. the discussion of Schneider (n. 46), § 211 paras. 73–82.

“Kann die körperliche Untersuchung das Schamgefühl verletzen, so wird sie von einer Person gleichen Geschlechts oder von einer Ärztin oder einem Arzt vorgenommen.”

“If a physical examination may offend the sense of shame, then it shall be performed by a person of the same sex or by a female or male medical practitioner.”⁵¹

Finally, § 90(1)(1) of the Youth Courts Act (*Jugendgerichtsgesetz* – JGG) refers to the sense of honour (*Ehrgefühl*). The Youth Courts Act implements special provisions of criminal law and criminal procedure for delinquents who are still juveniles, foremost introducing a wider range of responses to an offence, stressing the importance of educational aspects.⁵² § 90(1)(1) JGG reads:

“Der Vollzug des Jugendarrestes soll das Ehrgefühl des Jugendlichen wecken und ihm eindringlich zum Bewußtsein bringen, daß er für das von ihm begangene Unrecht einzustehen hat.”

“The execution of youth detention should awaken the juvenile’s sense of honour and make him fully aware that he must take responsibility for the wrong he has committed.”

Youth detention combines both punitive and educational aspects.⁵³ § 81d StPO and § 90 JGG invite for extra-legal scholarship on the sense of honour (*Ehrgefühl*) and the sense of shame (*Schamgefühl*), and they point to the importance of extra-legal expertise.⁵⁴ Those who apply these legal provisions should know how, for example, a juvenile’s *Ehrgefühl* is best addressed when implementing a measure of youth detention. Youth detention is, for example, to be immediately executed, as it is known that overly lengthy time gaps between the offence, the sentence, and the execution impair the educational effects of youth detention.⁵⁵ Furthermore, the Youth Courts Act explicitly acknowledges the importance of extra-legal expertise. In 2020, § 37 JGG was reformed to reflect the special expertise that a judge working in a youth court should have. § 37(1)(1) and (2) JGG read:

⁵¹ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_stpo/ (last visited on 17 February 2023).

⁵² See, in general, *W. Beulke/S. Swoboda*, *Jugendstrafrecht. Eine systematische Darstellung* (16th edn., 2020), para. 1; *F. Streng*, *Jugendstrafrecht* (5th edn., 2020), para. 14.

⁵³ *H. Diemer/H. Schutz/B.-R. Sonnen*, *Jugendgerichtsgesetz mit Jugendstrafvollzugsgesetzen* (7th edn., 2015), § 90 paras. 2 f.; *H. Schöch/K. Höffler*, *Vollstreckung, Vollzug und Registrierung jugendstrafrechtlicher Entscheidungen*, in: B.D. Meier et al. (eds.), *Jugendstrafrecht* (4th edn., 2019), 298–322, 303. Criticizing the concept of *Ehrgefühl* as being antiquated, *R. Wulf*, in: B.D. Meier et al. (eds.), *Jugendgerichtsgesetz. Handkommentar* (2nd edn., 2014), § 90 para. 6; *H. Ostendorf/K. Drenkhahn*, in: H. Ostendorf (ed.), *Jugendgerichtsgesetz* (11th edn., 2021), § 90 para. 3.

⁵⁴ On the importance of training judges in Youth Courts in forensic psychology, see, e.g., *Streng* (n. 52), para. 14.

⁵⁵ See *Ostendorf/Drenkhahn* (n. 53), § 90 para. 4a; *Streng* (n. 52), para. 417. See also § 4 of the *Verordnung über den Vollzug des Jugendarrestes* (Regulation on the Execution of Youth Detention); § 87(4)(1) JGG; *U. Eisenberg*, *Jugendgerichtsgesetz* (20th edn., 2018), § 87 para. 10a.

“Die Richter bei den Jugendgerichten und die Jugendstaatsanwälte sollen erzieherisch befähigt und in der Jugenderziehung erfahren sein. Sie sollen über Kenntnisse auf den Gebieten der Kriminologie, Pädagogik und Sozialpädagogik sowie der Jugendpsychologie verfügen.”

“Judges sitting in the youth courts, and youth public prosecutors handling matters involving juveniles, are to have appropriate education skills and training, as well as experience in the education and upbringing of juveniles. They are to have knowledge in criminology, education, and social education as well as youth psychology.”⁵⁶

Finally, according to § 38 JGG, *Jugendgerichtshilfe* (youth courts assistance service) will add further extra-legal expertise in the court room. § 38(2) JGG reads:

“Die Vertreter der Jugendgerichtshilfe bringen die erzieherischen, sozialen und sonstigen im Hinblick auf die Ziele und Aufgaben der Jugendhilfe bedeutsamen Gesichtspunkte im Verfahren vor den Jugendgerichten zur Geltung. Sie unterstützen zu diesem Zweck die beteiligten Behörden durch Erforschung der Persönlichkeit, der Entwicklung und des familiären, sozialen und wirtschaftlichen Hintergrundes des Jugendlichen und äußern sich zu einer möglichen besonderen Schutzbedürftigkeit sowie zu den Maßnahmen, die zu ergreifen sind.”

“The representatives of the youth court assistance service shall highlight the supervisory, social and other aspects that are significant with regard to the goals and tasks of youth welfare in proceedings before the youth courts. For this purpose, they shall support the participating authorities by researching into the personality, the development, and the family, social and economic background of the juvenile, and they shall make a statement with regard to any potential particular vulnerability, as well as to the measures that are to be taken.”⁵⁷

The extra-legal expertise of judges in youth courts and of the youth courts assistance service will allow judges and members of the service to assess, among other things, the personality and emotional maturity of the accused juvenile.⁵⁸

C. The reference in case law and literature to emotion as a factual phenomenon

Finally, the case law and legal literature may use the word emotion in reference to a factual phenomenon although the legal norm at issue conceptualizes the issue without reference to emotion, as three examples from different areas of law will illustrate. The first example relates again to § 138(1) BGB, according

⁵⁶ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_jgg/ (last visited on 17 February 2023).

⁵⁷ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_jgg/ (last visited on 17 February 2023).

⁵⁸ In general, with reference to the many reform discussions and the European framework of Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, Official Journal of the European Union 2016 L 132/1, see *J. Schady*, in: Ostendorf (n. 53), § 37 paras. 3–5; *M. Sommerfeld*, in: Ostendorf (n. 53), § 38 paras. 15–25a; *B.D. Meier*, in: idem (n. 53), 286–288; *Streng* (n. 52), paras. 103 f, 106–121.

to which a “legal transaction which is contrary to public policy [good morals] is void”.⁵⁹ § 138(1) BGB is a so-called general clause (*Generalklausel*) relying on an open-textured concept requiring concretization: good morals (*gute Sitten*). The standard definition of *gute Sitten* – “sense of decency of all those who think fairly and equitably” – is equally in need of concretization. The case law and legal scholarship usually concretizes general clauses such as § 138(1) BGB by developing specific requirements for different groups of cases (*Fallgruppen*).⁶⁰ One of these groups of cases involves surety contracts (*Bürgschaftsverträge*) in family relations. Accordingly, a surety contract is void when the following requirements are met:⁶¹

1. The first family member (e.g., a child) gives a surety for the debts of a second family member (e.g., the child’s father) to a third party (e.g., a bank) in order, for example, to secure a loan which the second family member has applied for with the third party.
2. The first family member has no economic reason of her own to give the surety.
3. The first family member is grossly overburdened financially by the surety.
4. The third party knew of the family ties and of the fact that the first family member is grossly overburdened by the surety.

The case law has identified criteria to determine when the first family member gives a surety for economic reasons of her own and is grossly overburdened by the surety. If these four requirements are met, then it is presumed that the third party has exploited the first family member’s factual emotional bond to the second family member.⁶² In certain situations, the third party may, however, be able to rebut the presumption. In this example, § 138(1) BGB uses a normative concept (public policy, good morals) which is in certain groups of cases concretized by reference to, among other factors, emotions. Nevertheless, for reasons of legal certainty, the first family member who wishes to claim that the legal transaction is void does not need to prove that she was driven by her emotional bond to the second family member. Rather, when the four above-mentioned requirements are met, it is presumed that she entered the surety contract because of the emotional bond and that the third party exploited the emotional bond. In all, for the application of these requirements it is not necessary to engage in law and emotions scholarship because the emotional bond is presumed. Nevertheless, I will return to this example further below for a different reason.⁶³

⁵⁹ https://www.gesetze-im-internet.de/englisch_bgb/ (last visited 9 January 2023).

⁶⁰ *Neuner* (n. 36), § 46 para. 29.

⁶¹ *C. Armbrüster*, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 1 (9th edn., 2021), § 138 paras. 154–160; *Medicus/Petersen* (n. 36), para. 706; *Faust* (n. 36), § 10 para. 5; *Bork* (n. 36), para. 1197.

⁶² *Armbrüster* (n. 61), § 138 para. 156; *Faust* (n. 36), § 10 para. 5; *Bork* (n. 36), paras. 1196 f.

⁶³ See p. 375, below.

The second example in which the case law and legal literature use the word emotion in reference to a factual phenomenon despite the discussed legal norm conceptualizing/framing the issue differently comes from family law. § 1684 BGB concerns a child's contact with its parents. § 1684(4)(1) BGB reads:

“Das Familiengericht kann das Umgangsrecht oder den Vollzug früherer Entscheidungen über das Umgangsrecht einschränken oder ausschließen, soweit dies zum Wohl des Kindes erforderlich ist.”

“The family court may restrict or exclude the right of contact or the enforcement of earlier decisions on the right of contact, to the extent that this is in the best interests of the child.”⁶⁴

Even though § 1684 BGB refers not to emotions but the “best interests of the child”, the emotional ties between the child and its parents, the child's emotional wellbeing, and its fears are, among other aspects, important factors when applying § 1684 BGB.⁶⁵ However other than in the context of void surety contracts under § 138(1) BGB, in which emotions are presumed, in the context of § 1684 BGB the child's true emotions are of relevance and need to be assessed for the application of the norm. Let us return to the two fundamentally different concepts of emotions in philosophy: dualism and holism. Traditional mainstream dualism looks upon emotions as something negative, equating them with irrationality. By contrast, modern trends follow the holistic approach. We have already observed that the Bavarian Guidelines for Family and Sex Education in Bavarian Schools rightly follow a dualistic approach.⁶⁶ By contrast, § 1684 BGB rightly follows a holistic approach. For the assessment of what is in a child's best interests, all relevant factors – regardless of whether they belong to the sphere of reason or whether they represent (irrational) emotions – have to be taken into account. § 211 StGB rightly follows an evaluative approach:⁶⁷ the offender's motives have to be base for the offender to be punished for murder rather than for manslaughter.⁶⁸ By contrast, § 1684 BGB does not follow an evaluative approach⁶⁹ or, rather, it follows a different evaluative approach: The judge who has to decide what is in the best interests of the child does not evaluate the child's emotions as morally desirable. The child's own best interests are decisive. Finally, § 23b(3)(3) of the Federal Judicature Act

⁶⁴ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_bgb/ (last visited on 16 January 2023).

⁶⁵ See, e.g., the comprehensive discussion by *H. Hennemann*, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 10 (8th edn., 2020), § 1684 paras. 70–92; *J. Gernhuber/D. Coester-Waltjen*, *Familienrecht* (7th edn., 2020), § 58 paras. 32–34, § 67 para. 6; *D. Schwab*, *Familienrecht* (29th edn., 2021), paras. 967–970, 982 f.

⁶⁶ See p. 364, above.

⁶⁷ See pp. 379 f., below.

⁶⁸ See p. 365, above.

⁶⁹ See pp. 379 f., below.

(*Gerichtsverfassungsgesetz* – GVG) again explicitly acknowledges the importance of extra-legal expertise of judges working in family courts:

“Richter in Familiensachen sollen [...] über belegbare Grundkenntnisse der Psychologie, insbesondere der Entwicklungspsychologie des Kindes, und der Kommunikation mit Kindern verfügen.”

“Family court judges must have [...] proven basic knowledge of psychology, particularly in terms of developmental psychology of, and communication with, children.”⁷⁰

The third and last example in which the case law and legal commentary use the word emotion as a factual phenomenon, despite the discussed legal norm framing the issue differently comes from criminal law. § 20 StGB reads:

“Ohne Schuld handelt, wer bei Begehung der Tat wegen einer krankhaften seelischen Störung, wegen einer tiefgreifenden Bewußtseinsstörung oder wegen einer Intelligenzminderung oder einer schweren anderen seelischen Störung unfähig ist, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln.”

“Whoever, at the time when the offence is committed, is incapable of recognizing the unlawfulness of his actions or of acting in accordance with such appreciation due to a pathological mental disorder, a profound disturbance of consciousness or intellectual disability or any other serious mental disorder is deemed to act without guilt.”⁷¹

Emotional aspects may be an ingredient when assessing whether the requirements of § 20 StGB are met: Anger, fear, shock, and desperation may – but do not necessarily – cause a “profound disturbance of consciousness”.⁷²

Previously, I have already pointed to the complex interplay between the doctrinal study of law and extra-legal findings on emotions. A legal actor such as a judge is bound to a specific national law, but not to the findings of extra-legal research on emotions. If a legal actor wants to apply such findings, she must find an anchor in the law to do so. § 1684 BGB and § 20 StGB indeed allow the consideration of extra-legal findings on emotions.

D. The absence of references to emotions in legal texts

There is a fourth possibility as well: The concept of emotions is not used in legal texts, but the introduction of law and emotions scholarship to that specific legal question would in fact facilitate sound legal reasoning and improve legislation, jurisprudence, and legal literature.

⁷⁰ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_gvg/ (last visited on 18 February 2023).

⁷¹ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_stgb/ (last visited on 17 January 2023).

⁷² See, e.g., H. Schöch, *Schuldfähigkeit*, in: E. Hilgendorf et al. (eds.), *Handbuch des Strafrechts*, vol. 2 (2020), 755–789, paras. 32–39; Dallmeyer (n. 14), 123–162.

V. Interdisciplinarity or a division of labour?

Thus far it has become clear that interdisciplinary scholarship on law and emotions is, at first glance, only a marginal field of research in Germany, but that German case law, legislation, and legal scholarship nevertheless do not ignore emotions. The discussed examples raise a further question: Are these examples invitations to engage in interdisciplinary law and emotions scholarship? Or are they rather examples of a division of labour between actors positioned in different disciplines? To assess what, in the context of § 1684 BGB, is in the child's best interests, the court will in many cases obtain an expert opinion.⁷³ § 163(1) of the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* – FamFG) requires the consulted expert to have certain qualifications:⁷⁴

“In Verfahren nach § 151 Nummer 1 bis 3 ist das Gutachten durch einen geeigneten Sachverständigen zu erstatten, der mindestens über eine psychologische, psychotherapeutische, kinder- und jugendpsychiatrische, psychiatrische, ärztliche, pädagogische oder sozialpädagogische Berufsqualifikation verfügen soll. Verfügt der Sachverständige über eine pädagogische oder sozialpädagogische Berufsqualifikation, ist der Erwerb ausreichender diagnostischer und analytischer Kenntnisse durch eine anerkannte Zusatzqualifikation nachzuweisen.”

“In proceedings according to § 151 numbers 1 to 3, the expert opinion has to be submitted by somebody who has a professional qualification at least in psychology, psychotherapy, child and juvenile psychiatry, psychiatry, medicine, pedagogy, or social pedagogy. If the expert has a professional qualification in pedagogy or social pedagogy, the acquisition of sufficient diagnostic and analytical skills has to be certified by an accredited additional qualification.”

§ 151 FamFG includes proceedings in matters concerning parental care, and this in turn includes matters relating to § 1684 BGB.⁷⁵ Similarly in the context of § 211 StGB and § 20 StGB, courts will almost always obtain an expert opinion in order to assess whether, in the case of § 20 StGB, the accused really suffered from “a pathological mental disorder, a profound disturbance of consciousness or intellectual disability or any other serious mental disorder” that made him “incapable of recognizing the unlawfulness of his actions or of acting in accordance with such appreciation”.⁷⁶ As expert opinions are evidence, the principle of the judge's free evaluation of evidence (*Grundsatz der freien rich-*

⁷³ See, e.g., *Hennemann* (n. 65), § 1684 paras. 56 and 114.

⁷⁴ See, e.g., *N. Dethloff*, *Familienrecht. Ein Studienbuch* (33th edn., 2022), para. 211.

⁷⁵ *D. Zorn*, in: A. Dutta et al. (eds.), *FamFG. Kommentar zum Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (4th edn., 2022), § 151 para. 5.

⁷⁶ *J. Kaspar*, *Strafrecht – Allgemeiner Teil* (4th edn., 2023), para. 355; *K. Rogall*, in: *Systematischer Kommentar zur Strafprozessordnung*, vol. 1 (5th edn., 2018), § 73 para. 27.

terlichen Beweiswürdigung) as laid down in § 37(1) FamFG and in § 261 StPO applies. § 261 StPO, for example, reads:

“Über das Ergebnis der Beweisaufnahme entscheidet das Gericht nach seiner freien, aus dem Inbegriff der Verhandlung geschöpften Überzeugung.”

“The court shall conclude as to the result of taking evidence at its free persuasion based on the entire trial.”

Thus, it is in the power of the court to decide whether to find the expert opinion convincing and whether to draw from the expert’s findings the legal/normative conclusion that the accused acted, in the case of § 20 StGB, without guilt.⁷⁷ Nevertheless, § 20 StGB – as well as § 211 StGB and § 1684 BGB – are examples of a division of labour and not of true interdisciplinarity.

VI. Emotions and the doctrinal study of law

However, there is room for law and emotions scholarship in German law – not only in the sense of a division of labour, with legal actors taking, where necessary, extra-legal findings on emotions in the form of expert opinions into consideration – but also in the sense of true interdisciplinary scholarship. It is, for example, possible to link the behavioural economics embodied in consumer law with law and emotions discourse.⁷⁸ In this last section, I will link law and emotions scholarship to the doctrinal study of German law.

A. *Emotions and standards of practices*

Interdisciplinary scholarship, including law and emotions scholarship, may help to critically assess standards of practice that have developed concerning the application of legal provisions. Let us return to § 81d(1)(1) StPO.⁷⁹ Unlike in the case of § 1684 BGB, § 211 StGB, and § 20 StGB, where a judge will obtain expert opinions in many if not most cases, the same is not true in the case of § 81d(1)(1) StPO. Individuals conducting physical examinations will apply objective standards that should reflect when a sense of shame may typically be offended by an examination. However, those conducting physical examinations will not first assess the examined person’s individual sense of shame. It falls on the examined person to articulate her personal sense of shame. A literal interpretation of § 81d(1) StPO supports this understanding:

⁷⁷ On the many problems, see, e.g., *Schöch* (n. 72), para. 23 f., 35, 37; *C. Roxin/B. Schnümann*, *Strafverfahrensrecht. Ein Studienbuch* (30th edn., 2022), § 45 para. 46; *H.H. Kühne*, *Strafprozessrecht* (9th edn., 2015), paras. 872–874; *C. Pegel*, in: H. Radtke/O. Hohmann (eds.), *Strafprozessordnung. Kommentar* (2011), § 261 paras. 72–76.

⁷⁸ *Posner* (n. 114), 1977–2012.

⁷⁹ See p. 366, above.

“Kann die körperliche Untersuchung das Schamgefühl verletzen, so wird sie von einer Person gleichen Geschlechts oder von einer Ärztin oder einem Arzt vorgenommen. Bei berechtigtem Interesse soll dem Wunsch, die Untersuchung einer Person oder einem Arzt bestimmten Geschlechts zu übertragen, entsprochen werden. Auf Verlangen der betroffenen Person soll eine Person des Vertrauens zugelassen werden. Die betroffene Person ist auf die Regelungen der Sätze 2 und 3 hinzuweisen.”

“If a physical examination may offend the sense of shame, then it shall be performed by a person of the same sex or by a female or male medical practitioner. Where there is a legitimate interest, the request to have a person or a physician of a particular sex appointed to perform the examination shall be granted. Upon the request of the person concerned, a trusted person is to be admitted. The person concerned is to be instructed as to the provisions of sentences 2 and 3.”⁸⁰

Sentence 1 provides for the application of certain objective standards, though it is important to note that these standards have to take the examined age into account and have to distinguish between different communities that may have divergent senses of shame based on, for example, the examined individual's religion or cultural background.⁸¹ Sentence 2 allows the examined person to invoke her personal sense of shame. However, sentence 2 adopts an evaluative approach,⁸² as the examined person's request needs to be legitimate in order to be granted. Finally, sentence 4 ensures that the examined person knows of her rights under sentence 2 (and sentence 3). Nevertheless, § 81d(1) StPO leaves room for interdisciplinary scholarship on emotions. The applied objective standards of practice have to withstand a critical review, and research may conduct a critical analysis of these standards of practice.

B. Emotions and public policy

Guten Sitten (good morals, public policy) in the meaning of § 138(1) BGB are defined as the “Anstandsgefühl aller billig und gerecht Denkenden” (“sense of decency of all those who think fairly and equitably”). Even though this definition includes the word *Gefühl* (emotion, feeling), it does not refer to a factual phenomenon. It follows that there is no room for interdisciplinary law and emotions scholarship. However, could law and emotions scholarship claim that factual emotions should have relevance for our understanding of § 138(1) BGB? Could law and emotions scholarship increase our understanding of § 138(1) BGB? *Beckers* has indeed argued that there is room for a judge to take empathy

⁸⁰ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_stpo/ (last visited on 17 February 2023).

⁸¹ *S. Beukelmann*, in: Radtke/Hohmann (n. 77), § 81d paras. 2 f.; *T. Trück*, in: Münchener Kommentar zur Strafprozessordnung, vol. 1 (2nd edn., 2023), § 81d paras. 1, 5–8; *Rogall* (n. 76), § 81d paras. 1 f., 6–9.

⁸² See pp. 379 f., below.

into consideration when positive law uses open-textured concepts in general clauses (*Generalklauseln*):⁸³

“Grundlage der Rechtsentscheidung ist jedenfalls zunächst, dass Richter an ‘Gesetz und Recht’ [...] gebunden sind. Sie haben sich bei ihrer Entscheidung daher an die kodifizierte Norm zu halten, das Gesetz nach juristischer Methodik auszulegen und ihre Entscheidung durch rechtliche Argumentation zu begründen [...]. Hiernach dürfte für eine empathische Rechtsentscheidung kein Raum bleiben. Empathie ist jedoch vor allem dann möglich, wenn Gesetze unbestimmt und abstrakt gefasst sind. Besonders offensichtlich ist dieser weite Auslegungsspielraum bei der Generalklausel, [...]”⁸⁴

“The starting point of any legal decision is that judges are bound to the law [...]. They have to adhere to the codified law when deciding a case, they have to interpret the law in accordance with legal methodology and they have to base their decision on legal arguments [...]. Accordingly, there will be no room for a legal decision based on empathy. Empathy may, however, play a role when the law is formulated in a general and abstract fashion. This wide scope of interpretation is most evident in the case of a general clause, [...]”

Beckers develops her argument in favour of a wider consideration of empathy when applying general clauses in the context of competition law, more specifically in the context of assessing whether emotional advertising is prohibited under § 3(2) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb* – UWG), which reads:⁸⁵

“Geschäftliche Handlungen, die sich an Verbraucher richten oder diese erreichen, sind unlauter, wenn sie nicht der unternehmerischen Sorgfalt entsprechen und dazu geeignet sind, das wirtschaftliche Verhalten des Verbrauchers wesentlich zu beeinflussen.”

“Commercial practices targeting or reaching consumers are unfair if they are not in compliance with professional diligence and are suited to materially distorting the economic behaviour of consumers.”⁸⁶

Beckers then distinguishes different forms of empathy. First, she identifies a tendency whereby judges rely on their personal experiences, on their own empathy, *pars pro toto* for assessing the effects of emotional advertising on consumers, and she convincingly argues against such a way of considering emotions in applying the law.⁸⁷ Secondly, she raises the question whether the way forward is “empirische Empathie” (empirical empathy), where courts rely on the opinions of non-legal experts. Again, she is critical because different non-legal disciplines will reach different conclusions as to the effects of emotional advertising on consumers. The court’s decision will depend on which expert

⁸³ On the concept of a general clause, see p. 368, above.

⁸⁴ *Beckers* (n. 21), 95.

⁸⁵ *Beckers* (n. 21), 96. *Beckers* refers to an older version of the UWG. For the purpose of the present paper, this is of no relevance, and I cite here to § 3 UWG as it is currently in force.

⁸⁶ https://www.gesetze-im-internet.de/englisch_uwg/ (last visited 5 February 2023).

⁸⁷ *Beckers* (n. 21), 100 f.

the court has resorted to or which expert the court follows.⁸⁸ *Beckers* concludes that it is impossible for the law to identify the factual emotions of consumers.⁸⁹ She argues in favour of a third possibility, which she calls “*Empathie für die Gesellschaft*” (“empathy for society”):⁹⁰

“Wenn der Verbraucher, seine Motive bei der Kaufentscheidung und seine Präferenzen für das Recht nicht erreichbar sind, so ist die Forderung nach empathischer Entscheidung im Wettbewerbsrecht umzudenken. Empathie heißt dann nicht, ‘Partei ergreifen’ für den schutzbedürftigen Verbraucher, sondern das Verständnis über den sozialen Bereich, in dem er agiert, offenzulegen und an veränderte Verhältnisse anzupassen. Es muss darum gehen, in die rechtliche Entscheidung die divergierenden Interessen und Rationalitäten im Wettbewerb einzubeziehen und diese abzusichern, damit das Individuum in diesem sozialen Bereich frei entscheiden kann.”

“When it is impossible for the law to grasp the consumer, his motives for a specific purchase decision and his preferences, then the call for empathic decision in competition law has to be rethought. In such a situation empathy should not mean taking sides in favour of the consumer who is in need of protection. Rather, our understanding of the social sphere in which the consumer acts has to be made transparent and has to be adapted to the changed general framework. It is necessary to consider the divergent interests and rationalities in competition in the process of judicial decision-making so that the individual is able to act freely in this social sphere.”

With respect to § 138(1) BGB, I am doubtful, but for a different reason. Understanding social morals as something that may be uncovered by empirical studies is problematic.⁹¹ Doctrinal scholars of law interpret *gute Sitten* to reflect primarily the fundamental values of the constitutional and legal order, and they then analyse how these fundamental values are of importance in the different groups of cases (*Fallgruppen*).⁹² This approach has proven to be workable. Of course, from the perspective of the *Grundlagenfächer*,⁹³ there is room for law and emotions scholarship. It may, for example, reflect on the affective and emotional legitimatization of moral norms as understood by doctrinal scholars of law in the context of § 138(1) BGB.

The appreciation of the importance of emotions may also help to further our understanding of the groups of cases (*Fallgruppen*) which case law and legal literature have developed in order to handle the general clause of § 138(1) BGB. One such group of cases has already been discussed above.⁹⁴ It involves surety contracts in family relations. The above-mentioned requirements which

⁸⁸ *Beckers*’ critique refers to a general problem that exists when courts wish to rely on an expert opinion. See *Kühne* (n. 77), para. 861; *Roxin/Schünemann* (n. 77), § 27 para. 12.

⁸⁹ *Beckers* (n. 21), 101–104.

⁹⁰ *Beckers* (n. 21), 104.

⁹¹ See, e.g., *Neuner* (n. 36), § 46 para. 9.

⁹² See p. 362 and p. 368, above.

⁹³ See p. 357, above.

⁹⁴ See p. 368, above.

have to be met for the surety contract to be void under § 138(1) BGB do not explicitly refer to emotions. However, if these requirements are met, it is presumed that the third party has exploited the first family member's emotional ties to the second family member, and this is the reason for the contract being deemed void. However, comparative law scholars and legal historians have criticized the case law on void surety contracts in family relations. They do not criticize the outcome of these cases, but rather that these cases are discussed as a *Fallgruppe* within § 138(1) BGB. In English and Scots law these cases are discussed as involving an "undue influence", allowing the first family member to rescind the contract.⁹⁵ Comparative law scholars and legal historians argue that German law should *de lege ferenda* recategorize this *Fallgruppe* following the examples of English and Scots law.⁹⁶

Indeed: (1) It is incoherent to argue first that *gute Sitten* are a normative concept which is concretized to reflect fundamental values of the constitutional and legal order but then to argue subsequently that in a specific group of cases a contract is void because of the presumed exploitation of emotions. There is no fundamental value of the constitutional and legal order forbidding the exploitation of emotions. (2) Furthermore, the fact that the validity of the contract may be contested for an exploitation of emotions rather aligns this *Fallgruppe* with cases of error, misrepresentation, deceit, and duress. (3) Moreover, the recategorization of this *Fallgruppe* would lead to an improvement with respect to the legal consequences: According to § 138(1) BGB, a contract is *ipso iure* void. However, if the validity of the contract may be contested for an exploitation of emotions, it should fall onto the first family member whose emotions were exploited to decide whether the contract should be avoided. Voidability is, just as in cases of error, misrepresentation, deceit, and duress, the more rational legal consequence in this *Fallgruppe*. (4) Finally, the recategorization of this *Fallgruppe* may allow law and emotions scholarship to openly reassess and fine-tune the requirements that need to be met in order to presume that emotional family ties have been exploited.

By contrast, *Gunther Teubner* focuses not on the exploitation of emotions but on the institutional dimension: The surety contract is void because the third

⁹⁵ An analysis of undue influence from the perspective of law and emotions scholarship is offered by *J. Stannard*, *The Emotional Dynamics of Undue Influence*, in: *Conway/Stannard* (n. 29), 59–82.

⁹⁶ *S. Martens*, *Undue influence*, in: *J. Basedow et al. (eds.), Handwörterbuch des Europäischen Privatrechts*, vol. 2 (2009), 1534–1537. See also *R. Zimmermann/J. du Plessis*, *The Relevance of Reverence. Undue Influence Civilian Style*, *Maastricht Journal of European and Comparative Law* 10 (2003), 345–379.

party economically instrumentalizes the family as an institution governed by solidarity.⁹⁷

“Wenn Kredite aus erwerbswirtschaftlicher Tätigkeit durch Personalsicherheiten aus der Familiensphäre abgesichert werden, dann ist dies kein Problem der Verletzung individueller Grundrechte durch private Macht. Vielmehr kollidieren unverträgliche Handlungslogiken. [...] Familienbürgschaften sind deshalb unter verfassungsrechtlichen Gesichtspunkten problematisch, weil sie solidarisches Handeln innerhalb der Familie ökonomisch instrumentalisieren. Trotz der kaum noch übersehbaren Literatur zum Thema werden nur wenige Autoren dieser speziellen Konfliktproblematik gerecht. Und wenn sie sie ansprechen, dann zielen sie meist am Kern der Sache vorbei. Formulierungen wie ‘Kommerzialisierung von Liebe und Dankbarkeit’ weisen zwar in die richtige Richtung, sind aber viel zu vage und unbestimmt. Es gibt Myriaden von strukturellen Kopplungen von wirtschaftlich-instrumentalem und emotional-expressiven Handeln, in denen Gefühle kommerzialisiert werden, ohne dass dies Grundrechtsprobleme aufwürfe.”

“When a loan that has been granted in an entrepreneurial context is secured by personal surety coming from the family sphere, then the problem is not that individual basic rights may be infringed by private power. Rather incompatible logics of actions collide. [...] Surety contracts in family relations are problematic from the perspective of the fundamental values of the constitutional order for the reason that family solidarity is economically instrumentalized. Even though there is abundant literature on the problem, only few authors correctly identify the true problem. And when they touch upon the true problem, they nevertheless are not on point. Formulations such as ‘the commercialization of love and gratitude’ point in the right direction, but they are too vague and uncertain. There are myriads of situations in which economic-instrumental action is coupled with emotional-expressive action, in which emotions are commercialized, without any problems being raised from the perspective of basic constitutional rights.”

Read in such way, voidness under § 138(1) BGB would be the correct legal response. *Teubner*’s analysis recalls an important point: The doctrinal study of law rationalizes legal decisions by arguing from within a legal system.⁹⁸ However, the doctrinal study of law has different points of reference in the legal system to which a decision may be linked. Those scholars stressing the importance of emotions being exploited will link the case law on void surety contracts to the rescission of contracts and will argue *de lege ferenda* in favour of a recategorization of this *Fallgruppe*. By contrast, *Teubner*’s doctrinal explanation of the case law links the issue to fundamental constitutional values. Consequently, his analysis can do without any reference to emotions. The question of which analysis is to be followed cannot be answered by law and emotions scholars. The question which analysis is to be followed depends on the doctrinal persuasiveness of each analysis.

⁹⁷ G. Teubner, Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken (BVerfGE 89, 214 ff.), *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 83 (2000), 388–404.

⁹⁸ See p. 358, above.

C. Emotions and the judicial review of contracts in terms of fairness

In 2019, *Matthias Wendland* has offered a new theoretical approach to the judicial review of contracts as regards the fairness of a given term.⁹⁹ He bases his approach first on the negotiation model that was developed in 1981 by *Roger Fisher* and *William Ury* in the framework of the Harvard Negotiation Project¹⁰⁰ and that has since been further developed by others; secondly, he incorporates the theory of the stages of moral development as formulated by *Lawrence Kohlberg*.¹⁰¹ *Wendland* thus draws on research that discusses the importance of emotions. I have reservations against *Wendland's* approach.¹⁰² First, as I have stated previously, he offers no “reasoning that the model – which [he] has derived above all from empirical research on negotiations, from developmental psychology, and from the philosophy of law – is the model on which the German Civil Code is based” (“Begründung, daß das Vertragsmodell, das *Wendland* vor allem aus der empirischen Verhandlungsforschung, aus der Entwicklungspsychologie und aus der Rechtsphilosophie herleitet, auch gerade das Modell ist, das dem BGB zugrunde liegt”).¹⁰³ In other words, he has not been able to link the research on negotiations to German positive law on the review of contracts for fairness.¹⁰⁴ Secondly, it should follow from *Wendland's* approach that such a judicial policing of contracts for fairness is legitimate whenever a contract has not been negotiated in accordance with the negotiation model as first developed by *Fisher* and *Ury*. However, *Wendland* himself does not draw this conclusion, instead simply trying to justify the fairness review as practised by German courts, limiting it to a fairness review of standard contract terms.

D. Emotions, liability, and non-pecuniary harm

In the last part of their paper, *Soniewicka* and *Wesołowska* discuss the interaction between emotions and liability. They distinguish different questions.

⁹⁹ *M. Wendland*, Vertragsfreiheit und Vertragsgerechtigkeit. Subjektive und objektive Gestaltungskräfte im Privatrecht am Beispiel der Inhaltskontrolle Allgemeiner Geschäftsbedingungen im unternehmerischen Geschäftsverkehr (2019), especially 234–277.

¹⁰⁰ *R. Fisher/W. Ury*, Getting to Yes. Negotiating Agreement without Giving in (1981). *Soniewicka/Wesołowska*, p. 321, above, also refer to research on the role of emotions in negotiations when claiming that law and emotions scholarship has started to expand to contract law. They cite *H. Keren*, Considering the affective consideration, *Golden Gate University Law Review* 40 (2010), 165–234.

¹⁰¹ *L. Kohlberg*, The Philosophy of Moral Development. Moral Stages and the Idea of Justice (1981).

¹⁰² *P. Hellwege*, Archiv für die civilistische Praxis 221 (2021), 279–285.

¹⁰³ *Hellwege* (n. 102), 283.

¹⁰⁴ See p. 358, above.

1. Emotions excluding or modifying personal guilt in criminal law

“Firstly, emotions may modify the legal responsibility for a crime. The widely known term ‘crime of passion’ refers in common usage to cases when anger overpowers someone’s self-control and logical thinking to the point where they cannot be held responsible for their actions.”¹⁰⁵

Soniewicka and *Wesołowska* question, however, whether “the law [does] actually assume that emotions are wild, uncontrollable impulses that excuse crimes”, they point out that this “perception has been increasingly questioned by researchers working in the law and emotions movement”, and they claim that the approach developed by law and emotions scholars “is much more sophisticated, coherent, adequate for the legal context, and accords with current discoveries in cognitive science and psychology”.¹⁰⁶ They draw on a distinction that is rooted in law and emotions scholarship:

“Emotions, therefore, may mitigate punishment or even excuse one’s actions, but they need to be contextually sound, adequate, and appropriately expressed according to moral or social norms – in other words, one has to be reasonably angry, or understandably scared, for the law to approve these emotions as modifiers of responsibility. Thus, the law should acknowledge the evaluative and cognitive components of emotions in order to adequately address these issues. The mechanistic conception of emotions is inadequate and misleading.”¹⁰⁷

German law follows neither a purely mechanistic conception of emotions nor a purely evaluative approach. § 20 StGB reads:

“Ohne Schuld handelt, wer bei Begehung der Tat wegen einer krankhaften seelischen Störung, wegen einer tiefgreifenden Bewußtseinsstörung oder wegen einer Intelligenzminderung oder einer schweren anderen seelischen Störung unfähig ist, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln.”

“Whoever, at the time when the offence is committed, is incapable of recognizing the unlawfulness of his actions or of acting in accordance with such appreciation due to a pathological mental disorder, a profound disturbance of consciousness or intellectual disability or any other serious mental disorder is deemed to act without guilt.”¹⁰⁸

Furthermore, the punishment may be mitigated according to § 21 StGB for the same reasons as mentioned in § 20 StGB:

“Ist die Fähigkeit des Täters, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln, aus einem der in § 20 bezeichneten Gründe bei Begehung der Tat erheblich vermindert, so kann die Strafe nach § 49 Abs. 1 gemildert werden.”

¹⁰⁵ *Soniewicka/Wesołowska*, p. 335, above.

¹⁰⁶ *Soniewicka/Wesołowska*, p. 336, above.

¹⁰⁷ *Soniewicka/Wesołowska*, p. 337, above. See, e.g., *Kahan/Nussbaum* (n. 34), 275–301.

¹⁰⁸ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_stgb/ (last visited on 17 January 2023).

“If the offender’s capacity to appreciate the unlawfulness of the act or to act in accordance with any such appreciation is substantially diminished at the time of the commission of the offence due to one of the reasons indicated in § 20, the punishment may be mitigated pursuant to § 49(1).”¹⁰⁹

German law does not follow a mechanistic conception according to which an offender acting under emotions is without guilt or according to which emotions diminish the punishment automatically. § 20 and § 21 StGB do not even mention emotions. Emotions may, however, be relevant for assessing whether the offender suffered from “a profound disturbance of consciousness”. This disturbance is only of relevance if the offender was, due to such disturbance, “incapable of recognizing the unlawfulness of his actions or of acting in accordance with such appreciation” or if this capability was “substantially diminished”. As pointed out above, in assessing whether these requirements are met, a court will obtain an expert opinion,¹¹⁰ thereby guaranteeing that the court’s findings are in accordance with current psychological and psychiatric research. Literature points out that, when examining the accused, German courts and experts will regularly follow the WHO’s International Classification of Diseases or the Diagnostic and Statistical Manual of Mental Disorders edited by the American Psychiatric Association.¹¹¹ Finally, § 20 and § 21 StGB simply leave no room for an evaluative component assessing whether the offender’s emotions were “contextually sound, adequate and appropriately expressed [...] according to moral or social norms”,¹¹² and there is rightly no room for such evaluative assessment. § 20 and § 21 StGB concern the offender’s personal guilt, which may be diminished or excluded due to the aforementioned disorders, disturbances, or disability. Disorders, disturbances, and disabilities simply cannot be judged against moral or social norms. Finally, § 20 and § 21 StGB do not follow modern holism.¹¹³ It seems best to understand those emotions that may establish a disturbance in the meaning of § 20 and § 21 StGB as something distinct from reason and, thus, to follow traditional dualism. The offender’s personal guilt may also be excluded according to § 35(1)(1) StGB:

“Wer in einer gegenwärtigen, nicht anders abwendbaren Gefahr für Leben, Leib oder Freiheit eine rechtswidrige Tat begeht, um die Gefahr von sich, einem Angehörigen oder einer anderen ihm nahestehenden Person abzuwenden, handelt ohne Schuld.”

¹⁰⁹ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_stgb/ (last visited on 28 January 2023).

¹¹⁰ See p. 371, above.

¹¹¹ *Schöch* (n. 72), para. 23, who in 2020 referred to the now outdated editions of the respective classification and manual.

¹¹² *Soniewicka/Wesołowska*, p. 337, above.

¹¹³ See p. 355, above.

“Whoever, when faced with a present danger to life, body or freedom of movement which cannot otherwise be averted, commits an unlawful act to avert the danger from himself, a relative or another close person acts without guilt.”¹¹⁴

§ 35(1)(1) StGB is limited to relatives and other close persons because only then does the law presume that the offender acted under emotional/motivational pressure in order to save his relative or other close person and only then does the law acknowledge this pressure to be of relevance. In order to decide who counts as “another close person”, an evaluative assessment is made.¹¹⁵ If the other person counts as being close, then it is again presumed that the offender acted under emotional pressure. Thus, in the context of § 35(1)(1) StGB, a kind of mechanistic conception is combined with an evaluative approach. However, the foundations of § 35(1)(1) StGB are contested.¹¹⁶ Some argue that the individual emotional/motivational pressure cannot explain § 35(1)(1) StGB as the law does not exclude guilt in other, equivalent situations of emotional pressure. For the present contribution, it is important to note that this academic controversy is not linked to law and emotions scholarship, and such scholarship is not of any help in resolving the controversy. It is uncontested that the law should take note that people may act under emotional pressure when they try to avert a present danger threatening people to whom they feel close. The problem faced in § 35 StGB is how to best phrase this idea. The drafters of § 35(1) StGB apparently wanted to limit this notion to certain situations: They require the danger to be objectively present, with the consequence that an emotional pressure based on a merely assumed situation of danger will not do. Furthermore, even though § 35(1)(1) StGB is based on emotional pressure, the drafters do not require the judge to assess the offender’s motivational pressure as long as he acted with the intention to avert the danger faced by a relative or another close person. However, the concept of presumed emotions seems to be at odds with the concept of personal guilt. § 35 StGB, thus, raises primarily doctrinal problems.

Finally, emotions may be a relevant factor in fixing the measure of punishment. § 46(1) and (2) StGB read:

“(1) Die Schuld des Täters ist Grundlage für die Zumessung der Strafe. Die Wirkungen, die von der Strafe für das künftige Leben des Täters in der Gesellschaft zu erwarten sind, sind zu berücksichtigen.

¹¹⁴ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_stgb/ (last visited on 28 January 2023).

¹¹⁵ See, e.g., *F. Zieschang*, Entschuldigungs- und Strafausschließungsgründe, in: Hilgen-dorf (n. 72), 791–848, para. 49.

¹¹⁶ Compare, for instance, the discussions by *Heger* (n. 46), § 35 para. 1; *C. Momsen/L.I. Savić*, in: von Heintschel-Heinegg (n. 46), § 35 paras. 2–7; *W. Perron*, in: *Schönke/Schröder* (n. 46), § 35 para. 2; *B. Müssig*, in: *Münchener Kommentar zum Strafbuch*, vol. 1 (4th edn., 2020), § 35 paras. 36 f.

(2) Bei der Zumessung wägt das Gericht die Umstände, die für und gegen den Täter sprechen, gegeneinander ab. Dabei kommen namentlich in Betracht:

die Beweggründe und die Ziele des Täters, besonders auch rassistische, fremdenfeindliche, antisemitische, geschlechtsspezifische, gegen die sexuelle Orientierung gerichtete oder sonstige menschenverachtende,
 die Gesinnung, die aus der Tat spricht, und der bei der Tat aufgewendete Wille,
 das Maß der Pflichtwidrigkeit,
 die Art der Ausführung und die verschuldeten Auswirkungen der Tat,
 das Vorleben des Täters, seine persönlichen und wirtschaftlichen Verhältnisse sowie sein Verhalten nach der Tat, besonders sein Bemühen, den Schaden wiedergutzumachen, sowie das Bemühen des Täters, einen Ausgleich mit dem Verletzten zu erreichen.”

“(1) The offender’s guilt provides the basis on which the penalty is fixed. The effects which the penalty can be expected to have on the offender’s future life in society are to be taken into account.

(2) When fixing the penalty the court weighs the circumstances which speak in favour of and those which speak against the offender. The following, in particular, may be taken into consideration:

- the offender’s motives and objectives, in particular including racist, xenophobic, antisemitic, gender-related, motives against the sexual orientation or other motives evidencing contempt for humanity,
- the attitude reflected in the offence and the degree of force of will involved in its commission,
- the degree of the breach of the offender’s duties,
- the *modus operandi* and the consequences caused by the offence to the extent that the offender is to blame for them,
- the offender’s prior history, personal and financial circumstances, and
- the offender’s conduct in the period following the offence, in particular efforts to make restitution for the harm caused as well as efforts at reconciliation with the victim.”¹¹⁷

Each offence of the German Penal Code (StGB) defines a range of sentences – the range of sentences for manslaughter is, for example, imprisonment between five and fifteen years: § 212 and § 38 StGB. The court will fix a specific sentence, and § 46 StGB guides the court how to do so. According to § 46 StGB, the offender’s emotions may, again, be of relevance.¹¹⁸ § 46 StGB seems to be based on modern holism, not on traditional dualism: The court has to identify all relevant factors and weigh them against each other.¹¹⁹ At the same time § 46 StGB follows not a mechanistic but rather an evaluative approach: A court will only be able to weigh the different factors, including the different emotions involved, against each other if it evaluates them. Finally, the judgment of the court has to openly state how it reached the specific sentence.¹²⁰

¹¹⁷ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_stgb/ (last visited on 30 November 2023).

¹¹⁸ *J. Kinzig*, in: Schönke/Schröder (n. 46), § 46 paras. 13, 16; *Dallmeyer* (n. 14), 163–185.

¹¹⁹ *Kinzig* (n. 118), § 46 paras. 6 f., 58.

¹²⁰ *Kinzig* (n. 118), § 46 para. 65.

2. Liability for emotional distress in private law

Soniewicka's and *Wesołowska*'s focus is on delictual liability in private law for emotional harm. The starting points of Polish and German law seem to be similar: *Soniewicka* and *Wesołowska* observe that in Polish law "unpleasant emotions alone do not trigger liability".¹²¹ Unlike French or Austrian law, German law does not know a general clause (*Generalklausel*) of delictual liability; instead, it has different bases for claims, the most important of which are § 823(1), § 823(2), and § 826 BGB.¹²² § 823(1) BGB reads:

"Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet."

"A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this."¹²³

By contrast, the Austrian general clause of liability in damages as codified in § 1295(1) of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch – ABGB*) reads:

"Jedermann ist berechtigt, von dem Beschädiger den Ersatz des Schadens, welchen dieser ihm aus Verschulden zugefügt hat, zu fordern; [...]"

"Every person is entitled to claim compensation from the damaging person for the damage which the latter has caused to him through fault; [...]"

Prima facie, the damaged party may claim compensation for any damage whatsoever under § 1295(1) ABGB. By contrast, § 823(1) BGB is more restrictive: The damaging party must have injured one of the enumerated protected interests (life, body, health, etc.) and the so damaged party may then claim compensation for the damage caused by the infringement of such right.¹²⁴ Emotions are not specifically mentioned as a protected interest. Furthermore, emotions as such are not regarded to be "another right of another person" within the meaning of § 823(1) BGB. Nevertheless, the legal rights protected by § 823(1) BGB may have an emotional spin to them: An injury of the body may, for example, be accompanied by the feeling of being emotionally hurt. The emotional side to an infringement of an interest protected under § 823(1) BGB is most obvious in the general right to privacy counting as "another right of another person".¹²⁵ Furthermore, even though marriage is not regarded to be "another right of another person", so that a person does not have a claim in

¹²¹ *Soniewicka/Wesołowska*, pp. 340 f., above.

¹²² *D. Looschelders*, *Schuldrecht. Besonderer Teil* (17th edn., 2022), § 58 para. 7.

¹²³ https://www.gesetze-im-internet.de/englisch_bgb/ (last visited on 30 January 2023).

¹²⁴ *Looschelders* (n. 122), § 58 para. 5, § 59 para. 2.

¹²⁵ *Looschelders* (n. 122), § 61 para. 2.

damages against a person who is having an affair with her spouse, it is generally accepted that the “räumlich-gegenständlicher Bereich der Ehe” (“spatial aspect of marriage”) is protected by § 823(1) BGB, such that the betrayed spouse may apply for an injunction preventing that the extramarital affair is carried out in the matrimonial home.¹²⁶ In this case, the protected right is defined objectively (the spatial aspect of marriage), but what we truly mean is that the spouse does not have to experience the feeling that she has been betrayed in her own home.

Finally, the case law on damages for shock is of relevance in the present context. People may suffer emotionally distress upon witnessing, or hearing of, an accident. Has the emotionally distressed person himself a claim in damages against the person who unlawfully caused the accident intentionally or negligently? The case law starts with the premise that it is a general risk of life to experience situations that may cause emotions of sadness. Damages for shock are nevertheless allowed under restrictive requirements, and these requirements in essence react to two problems.¹²⁷ First, the claimant who suffers the shock must himself suffer an injury to a legal interest protected by § 823(1) BGB. It is not enough that the claimant feels sad. The shock must be of such a nature that it amounts to an injury of health as protected under § 823(1) BGB. Secondly, there is the problem that the shock is only an indirect consequence of the accident, i.e., that the shock is mediated through the shocked person’s psyche. Consequently, the case law requires that the shock must be a comprehensible reaction to witnessing an accident. If a person witnesses an accident in which a close person is severely injured or killed or if a person receives the information that a close person is so injured or killed in an accident, shock is a comprehensible reaction. In other words: German law follows in the present context an evaluative approach as promoted by *Soniewicka* and *Wesołowska*.¹²⁸ § 823(2)(1) BGB continues:

“Die gleiche Verpflichtung trifft denjenigen, welcher gegen ein den Schutz eines anderen bezweckendes Gesetz verstößt.”

“A person who commits a breach of a statute that is intended to protect another person has the same obligation [as under § 823(1) BGB].”¹²⁹

In the present context, § 185 StGB on insults and § 238 StGB on stalking are of relevance, as there will often be an emotional aspect to insults and stalking.¹³⁰ Furthermore, § 825 BGB introduces a specific liability in damages for

¹²⁶ *Looschelders* (n. 122), § 60 para. 22.

¹²⁷ *Looschelders* (n. 122), § 60 para. 7.

¹²⁸ See p. 379, above.

¹²⁹ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_bgb/ (last visited on 30 January 2023).

¹³⁰ With respect to § 238 StGB see *J. Gericke*, in: *Münchener Kommentar* (n. 46), § 238 para. 1.

inducing other people to sexual acts – an offence that has again strong emotional consequences even though the protected interest is defined as sexual self-determination.¹³¹ Finally, the German legislature has recently reformed § 844 BGB:

“(1) Im Falle der Tötung hat der Ersatzpflichtige die Kosten der Beerdigung demjenigen zu ersetzen, welchem die Verpflichtung obliegt, diese Kosten zu tragen.
 (2) Stand der Getötete zur Zeit der Verletzung zu einem Dritten in einem Verhältnis, vermöge dessen er diesem gegenüber kraft Gesetzes unterhaltspflichtig war oder unterhaltspflichtig werden konnte, und ist dem Dritten infolge der Tötung das Recht auf den Unterhalt entzogen, so hat der Ersatzpflichtige dem Dritten durch Entrichtung einer Geldrente insoweit Schadensersatz zu leisten, als der Getötete während der mutmaßlichen Dauer seines Lebens zur Gewährung des Unterhalts verpflichtet gewesen sein würde; [...].
 (3) Der Ersatzpflichtige hat dem Hinterbliebenen, der zur Zeit der Verletzung zu dem Getöteten in einem besonderen persönlichen Näheverhältnis stand, für das dem Hinterbliebenen zugefügte seelische Leid eine angemessene Entschädigung in Geld zu leisten. Ein besonderes persönliches Näheverhältnis wird vermutet, wenn der Hinterbliebene der Ehegatte, der Lebenspartner, ein Elternteil oder ein Kind des Getöteten war.”

“(1) In cases where death is caused, the person liable in damages must reimburse the costs of a funeral to the person under a duty to bear these costs.
 (2) If the person killed, at the time of the injury, stood in a relationship to a third party on the basis of which he was obliged or might become obliged by operation of law to provide maintenance for that person and if the third party has as a result of the death been deprived of his right to maintenance, then the person liable in damages must provide the third party damages by payment of an annuity to the extent that the person killed would have been obliged to provide maintenance for the presumed duration of his life; [...].
 (3) The person so liable has to pay to a surviving person, who at the time of the injury was in a special personal relationship with the person killed, an adequate compensation in money for the emotional distress caused to the surviving person. A special personal relationship will be presumed if the surviving person was the spouse, life partner, parent, or child of the person killed.”¹³²

Again, § 844(3) BGB explicitly follows an evaluative approach as promoted by *Soniewicka* and *Wesołowska*. By contrast, in the context of damages for nervous shock, such an evaluative approach has been developed by the case law.

In summary, the German law of delict does not in most cases directly protect emotions. German (case) law rather defines objective legal interests and factual situations that may involve emotions. Thus, emotions are in most cases protected indirectly only. It is only § 844(3) BGB that directly refers to “seelisches Leid” (“emotional distress”). It seems that German law adopts a piecemeal approach that can best be explained as being the result of historical development and not as the result of coherent analysis.

¹³¹ *Looschelders* (n. 122), § 66 para. 12.

¹³² The translation of § 844(1) and (2) BGB is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_bgb/ (last visited on 30 January 2023).

It is against this backdrop that law and emotions scholarship may help in critically assessing the German law of delict. Consider the question of whether marriage is “another right of another person” in the meaning of § 823(1) BGB.¹³³ Marriage as such is not such right, with the consequence that a person does not have a claim in damages against another person who is having an affair with her spouse. Marital problems do involve strong emotions, yet an evaluative assessment may tell us that the law of delict does not provide the correct answers to such emotional problems. On the other hand, an evaluative approach as promoted by *Soniewicka* and *Wesolowska* may equally tell us that one’s own home should be an emotionally safe space, so that the betrayed spouse may rightly apply for an injunction so as to prevent that the extramarital affair is carried out in the matrimonial home. To analyse these questions from the perspective of the involved emotions would open the door to interdisciplinary scholarship. At the same time, to openly acknowledge that the law of delict protects one’s own home as an emotionally safe space seems to be more rational than to protect such emotions in the guise of an objectively framed interest, i.e. the “räumlich-gegenständlicher Bereich der Ehe” (“spatial aspect of the marriage”). Finally, to openly acknowledge that the law of delict protects one’s own home as an emotionally safe space would allow a further development of the law: Why may the betrayed spouse only apply for an injunction which prevents that the extramarital affair is carried out in the matrimonial home? Why does the betrayed spouse not have a claim in damages for emotional distress when the affair has already been carried out in the matrimonial home?¹³⁴ This question leads to the next subsection.

3. Assessing damages in cases of emotional distress

In the preceding section, the relevance of emotions for the different causes of actions in delict has been discussed. However, emotional distress suffered by the victim may also be of importance in assessing damages which the wrongdoer has to pay to the victim. German law takes a restrictive approach to the recoverability of non-pecuniary damage. § 253 BGB reads:

“(1) Wegen eines Schadens, der nicht Vermögensschaden ist, kann Entschädigung in Geld nur in den durch das Gesetz bestimmten Fällen gefordert werden.

(2) Ist wegen einer Verletzung des Körpers, der Gesundheit, der Freiheit oder der sexuellen Selbstbestimmung Schadensersatz zu leisten, kann auch wegen des Schadens, der nicht Vermögensschaden ist, eine billige Entschädigung in Geld gefordert werden.”

“(1) Compensation in money may be demanded for a non-pecuniary damage only in the cases stipulated by law.

¹³³ See p. 384, above.

¹³⁴ See also *J. Hager*, in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch* (new edn., 2017), § 823 para. B180.

(2) If damages have to be rendered for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for non-pecuniary damage.”

Beyond the situations of § 253(2) BGB, non-pecuniary damage may be compensated in the case of § 844(3) BGB¹³⁵ and in the case of infringement of the general right to privacy under § 823(1) BGB.¹³⁶ Law and emotions scholarship may again open the door to a critical evaluation of this restrictive approach. Extra-legal research on the importance of the matrimonial home as an emotionally safe space may, for example, suggest that a betrayed spouse should have a claim in damages for emotional distress when an affair has already been carried out in the matrimonial home and that the betrayed spouse’s rights should not be limited to applying for an injunction. Furthermore, extra-legal research may find that in our modern society pets are of a greater important emotional value to, for example, elderly people who live alone than are their closest relatives who may live far away or who may not even exist. Why should such a person not be able to claim compensation for the emotional distress caused to her by the loss of her pet in addition to the pecuniary damage that is already recoverable under § 823(1) BGB. As the law stands, damages for emotional distress are in such a situation not granted.¹³⁷ The evaluative approach as proposed by *Soniewicka* and *Wesolowska* may again help to go beyond the situations defined in § 253(2) and § 844(3) BGB without opening the floodgates to the compensation of non-pecuniary damage for any manner of emotional distress. Legal commentators have already identified the present state of German law as being unsatisfactory and inconsistent, and authors have proposed an evaluative approach that is similar to that promoted by *Soniewicka* and *Wesolowska* without, however, subscribing to law and emotions scholarship.¹³⁸

VII. Conclusion

I am not a law and emotions scholar. Nevertheless, I happily took on the opportunity to comment on *Soniewicka*’s and *Wesolowska*’s contribution from the perspective of German law. My plan was to comment on their contribution from the perspective of the doctrinal study of German law. However, as I am approaching law and emotions scholarship for the first time and as scholarship on law and emotions is seemingly only a marginal field of research in German

¹³⁵ *Looschelders* (n. 122), § 71 para. 12.

¹³⁶ *Looschelders* (n. 122), § 61 paras 3 f., 13.

¹³⁷ *Looschelders* (n. 122), § 60 para. 7.

¹³⁸ *G. Wagner*, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 1 (8th edn., 2020), § 823 paras. 218 f.

legal scholarship, I feel that it is necessary to put my comments into greater context. My tentative conclusions are as follows.

A. *Soniewicka* and *Wesołowska* refer to *Posner* stating that “legal methodology is not well adjusted to work on emotions”.¹³⁹ And *Grossi* writes: “While positivism [...] bars emotion from law, critical jurisprudence [...] makes room for it.”¹⁴⁰ Yet, the fact that positivists claim that the law is “purely rational”¹⁴¹ does not mean that positivism bars emotions from law and that positive law has to ignore that the world is largely irrational/emotional. If positive law ignored the fact that the world is irrational/emotional for the simple reason that positive law is “purely rational”, there would be no such thing as criminal law. However, emotions in law are, as some have argued, not limited to criminal law: “In the conventional story, emotion has a certain, narrowly defined place in law. It is assigned to the criminal courts. It is confined to those – like witnesses, the accused, the public – without legal training.”¹⁴² The debate would greatly benefit from distinguishing the following layers (B–E, below).

B. Lawgivers must act rationally when drafting positive law. However, that does not imply that they must blind themselves to the fact that people are led by emotions, and the numerous examples taken from German law which I have discussed above prove that German legislators take emotions into account. Furthermore, German legislators acknowledge that emotions may have different relevance in real life and in law. (1) Emotions may need to be protected. In addition to the examples discussed above, § 383 of the Civil Procedure Act (*Zivilprozeßordnung* – ZPO) and § 52 StPO come to mind. They privilege – among other people – close relatives and spouses in court proceedings in criminal and private law matters by allowing them to refuse to testify as witnesses, and they thereby protect these individuals from a situation of emotional conflict. Nevertheless, for the application of these norms it is irrelevant whether the witness feels such a situation of conflict. It is enough that the requirements of § 383 ZPO and § 52 StPO are objectively met.¹⁴³ (2) Emotions may affect legal responsibility. (3) Emotions may allow a party to escape a contract. (4) Beyond the examples discussed above, emotions may corrupt legal decision-making. § 20 of the Administrative Proceedings Act (*Verwaltungsverfahrensgesetz* – VwVfG), for example, excludes a person from acting for a public authority in administrative proceedings if that person is a relative or a

¹³⁹ *Soniewicka/Wesołowska*, p. 320, above, referring to *Posner* (n. 114), 1977 f.

¹⁴⁰ *Grossi* (n. 16), 56. In a similar vein, e.g., *H. Petersen*, *The Language of Emotions in the Language of Law*, in: eadem (ed.), *Love and Law in Europe* (1998), 12–26, 12.

¹⁴¹ *Grossi* (n. 16), 56.

¹⁴² *Bandes* (n. 3), 2.

¹⁴³ *Roxin/Schünemann* (n. 77), § 26 para. 14; *Kühne* (n. 77), para. 812.1; *H. Kreicker*, in: *Münchener Kommentar* (n. 81), § 52 para. 1; *J. Damrau/A. Weinland*, in: *Münchener Kommentar zur Zivilprozessordnung*, vol. 2 (6th edn., 2020), 383 para. 1.

spouse to a party in the proceedings, thereby guaranteeing the impartiality of administrative proceedings.¹⁴⁴

C. The same is true for those who apply the law, such as judges: They must act rationally. Furthermore, they are bound to the law. However, that does not imply that they must close their eyes to the fact that people are led by emotions. To the contrary, positive law does allow them to consider emotions. To assess when judges may take emotions into consideration or when they are allowed to act with empathy, we have again to distinguish different layers: (1) In Germany, a first instance judge working in the field of private law will often try to convince the parties to enter into a settlement. Such settlement is for the parties often the emotionally sounder solution.¹⁴⁵ To reach such settlement, it may be helpful for the judge to be empathic towards both parties' situations, and in this context German literature refers to the Harvard Negotiation Project.¹⁴⁶ (2) Even if a judge is not successful in reaching a settlement, she will try to understand the parties' situation and act with empathy. After all, a judgment will fulfil its function of appeasing the parties only if the parties accept the judgment, and this requires that the judge understands both parties' positions. Above, we have seen two areas of practice where legislators even expressly require judges to act with empathy and require judges to have extra-legal expertise in psychology: judges sitting in youth courts and family court judges. Furthermore, the former are assisted by the youth courts assistance service, and special training is also required for public prosecutors handling criminal matters involving juvenile offenders. (3) In order to apply the law, a judge must first establish the relevant facts. The legal norm which the judge wishes to apply will guide her in this process. It tells her which facts are relevant for the case. When the judge hears witnesses, she may have to be empathic towards them in order to understand the witness and in order to assess the evidential value of the testimony.¹⁴⁷ (4) However, even when it comes to questions of law, a judge may take emotions into consideration when positive law directly or indirectly refers to emotions. All of this is unproblematic from the perspective of positivism.

D. Nevertheless, in positivism there are limits to a judge being empathic and taking emotions into consideration: (1) She must remain impartial, and (2) she cannot act *contra legem*. (3) Furthermore, she may only take evidence that is

¹⁴⁴ U. Ramsauer, in: Kopp/Ramsauer. Verwaltungsverfahrensgesetz. Kommentar (23th edn., 2022), § 20 para. 1.

¹⁴⁵ H.J. Musielack/W. Voit, Grundkurs ZPO (16th edn., 2022), para. 518.

¹⁴⁶ T. Husemann, Der moderierte Vertrag (2021), 115. On the Harvard Negotiation Project see p. 378, above.

¹⁴⁷ Pegel (n. 77), § 261 para. 55–59; R. Bender/A. Nack, Tatsachenfeststellung vor Gericht, vol. 2 (1995), passim; C. Balzer/B. Walther, Beweisaufnahme und Beweiswürdigung im Zivilprozeß (4th edn., 2018), paras. 152–171. Expert opinion may be necessary to assess the credibility of the witness, see Rogall (n. 76), § 73 para. 26; Kühne (n. 77), para. 851–855.

relevant for resolving the case. She cannot investigate the parties' situation and emotions any further. After all, a judge is a judge and not a therapist.

E. Where it is impossible to take emotions into consideration even though they should be of relevance, a positivist may engage in discourse on reforming the law. Finally, legal scholars may always consider emotions in research on the foundations of law. Summarizing points B–E, *Franz von Liszt's* (1851–1919) statement made in 1892 with respect to criminal law still holds true today.¹⁴⁸

“Wer aber das Verbrechen bekämpfen will, muß das Verbrechen kennen, er muß es studieren nicht als begriffliche Abstraktion, sondern als Erscheinung, als Ereignis des gesellschaftlichen sowohl, wie des individuellen Lebens.”

“He who wants to fight crime has to understand crime; he must study it, not as conceptual abstraction, but as a phenomenon, as incident of societal as well as individual life.”

And societal and individual life includes emotions. One may reformulate this idea on a more abstract level: He who wants to regulate life has to understand life; he must study it, not as conceptual abstraction, but as a phenomenon, both from the perspective of society and the individual, including emotions.

F. However, even if German law and legal scholarship already take emotions into account and even if they already address real individuals, does law and emotions scholarship have nevertheless something to offer? The answer very much depends on the agenda of law and emotions scholars. *Heather Conway* and *John Stannard* have recently argued – referring to earlier writings by *Terry A. Maroney* – that “there is still some way to go before law and emotion becomes established as a discipline in its own right [...]. A number of issues can be identified, the first of which is the somewhat disjointed nature of the work in this field, with different groups approaching the topic from different angles instead of taking a more holistic approach.”¹⁴⁹ If German law leaves, as I have argued, so much room for emotions, should German legal scholars follow the path mapped out by *Conway* and *Stannard*? For a number of reasons, I remain critical of the idea (G–L, below).

G. In German law, some norms are based on dualism, whereas others are phrased to reflect holism. Some legal provisions reflect a mechanistic conception of emotions, whereas others are based on an evaluative approach, and again others implement both. Some norms explicitly name emotions, others only indirectly refer to them, again others are phrased objectively but subcutaneously address emotions; and some legal texts explicitly refer to emotions but use the word as a normative concept. Often it is sufficient to take the findings

¹⁴⁸ *F. von Liszt*, Die Zukunft des Strafrechts. Vortrag, gehalten in der Budapester juristischen Gesellschaft, den 4. April 1892, in: idem, *Strafrechtliche Aufsätze und Vorträge*, vol. 2 (1905), 1–24, 3.

¹⁴⁹ *Conway/Stannard* (n. 29), 4 f.

of other disciplines into consideration (a division of labour), but in other cases true interdisciplinary work is necessary. In some cases, emotions are presumed; in other cases they have to be proven. Finally, in some cases legal actors will apply objective standards which take emotions into account in a typified fashion, and it falls on the individual to point to her individual emotions, as is the case in § 81d StPO. It seems that lawgivers, legal actors, and legal commentators each time adopt the approach that is most suitable for the problem to be resolved or analysed and that is most suitable to the role emotions play in the specific legal context. Law and emotions as a discipline in its own right adopting a holistic approach may wish to overcome such fragmented approach. To adopt a one-size-fits-all solution would, however, be overly simplistic. Nevertheless, law and emotions scholarship may critically analyse the different approaches in order to assess whether German law follows a piecemeal approach and in order to develop a rational matrix regarding when to implement which approach.

H. Furthermore, law and emotions scholarship may overemphasize the relevance of emotions. *Kahan* and *Nussbaum* correctly observe that “[e]motions are ubiquitous [...] in life”,¹⁵⁰ yet they are not always important for legal analysis. Often emotions are simply part of a greater bundle of criteria that positive law requires to be taken into consideration when resolving a case, as the examples of § 1684(4) BGB and § 46(2) StGB have proven. To limit the analyses of what is in a child’s best interests in the case of § 1684(4) BGB to the child’s emotions would simply be flawed.

I. In other cases, law and emotions scholarship may bring the wrong spin to legal analyses. Law and emotion scholars discuss emotions modifying the legal responsibility for crimes. In German law, § 20 and § 21 StGB do not even mention emotions. Yet emotions may be relevant for assessing whether the offender suffered from “a profound disturbance of consciousness”. Such disturbance is only of relevance if the offender is due to it “incapable of recognizing the unlawfulness of his actions or of acting in accordance with such appreciation” or if this capability is “substantially diminished”. Thus, emotions may be one ingredient in a complex normative analysis. And *Heinz Schöch* reminds his readers that a judge may not simply implement an expert opinion based on the WHO’s International Classification of Diseases or the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders.¹⁵¹

“Ob der sachverständige ICD-10-Befund unter ein Eingangsmerkmal des § 20 StGB subsumiert werden kann, ist eine juristische Frage, die letztlich allein das Gericht entscheidet.”

¹⁵⁰ *Kahan/Nussbaum* (n. 34), 270.

¹⁵¹ *Schöch* (n. 72), para. 23, who in 2020 referred to the now outdated editions of the respective classification and manual.

“Whether the findings of the expert based on the WHO’s International Classification of Diseases fulfils the requirements of § 20 StGB, is a purely normative question, which in the end the court has to answer autonomously.”

J. Furthermore, law and emotions scholars discuss questions that, to a German lawyer, simply have nothing to do with emotions. *Kahan* and *Nussbaum*, for example, want to analyse the excuse of self-defence in criminal law in terms of emotions.¹⁵² In German criminal law, such an approach would be untenable.¹⁵³

K. *Conway* and *Stannard* criticize “the somewhat disjointed nature of the work”¹⁵⁴ in law and emotions scholarship. However, it seems that discourse on emotions in law has to be disjointed. Each legal problem raises different questions requiring the help of different extra-legal disciplines to understand the problem. A holistic approach seems impossible.

L. Finally, *Beckers* reminds us of the limits of interdisciplinary research on emotions in law:¹⁵⁵

“[D]ie Vorstellung, dass die gesellschaftliche Kommunikation in der Lage ist, individuelles Handeln, die Bedürfnisse und Emotionen des Individuums in Gänze zu verstehen, [stößt] zwingend an eine Grenze [...]. Diese Einsicht hat insbesondere für das Empathieverständnis tiefgreifende Konsequenzen. Um einer Empathie des Rechts überhaupt wieder auf die Füße zu helfen, bedarf es der drastischen Einsicht, dass die juristische Personenbeschreibung – der verantwortliche Täter, der verständige Kaufmann oder eben der durchschnittliche Verbraucher – keinesfalls eine Abbildung der Wirklichkeit, sondern ihrerseits wiederum eine rechtliche Konstruktion ist. Sie wird vom Recht nur benutzt, um eine spezifische Operation, die normative Entscheidung, durchzuführen [...]. [...] Der Durchschnittsverbraucher, auf den sich das Recht festlegt, ist nicht der Mensch selbst, sondern eine wandelbare Rolle, die der Mensch innerhalb einer sozialen Institution spielen kann [...] und die ihm das Recht zuweist.”

“[T]he ability for societal communication to entirely comprehend individual action, individual needs, and individual emotions is limited [...]. This insight deeply impacts the understanding of empathy. In order to promote empathy in law one has to adopt the drastic insight that references to persons in law – the responsible offender, the reasonable merchant, or the ordinary consumer – are not images of reality. Rather, they are legal constructions which the law makes use of in order to put a specific operation into action: the normative decision [...]. [...] The ordinary consumer to which the law refers is not a person in a true sense. The ordinary consumer is a changing role which a person may take within a social institution [...] and which the law assigns to the person.”

M. Against this background, let us revisit *Conway*’s and *Stannard*’s claim that “the study of law and emotions has historically been very much a North

¹⁵² *Kahan/Nussbaum* (n. 34), 327–333.

¹⁵³ See only *V. Erb*, in: Münchener Kommentar (n. 116), § 32 paras. 1–260.

¹⁵⁴ *Conway/Stannard* (n. 29), 4 f.

¹⁵⁵ *Beckers* (n. 21), 103 f.

American phenomenon”.¹⁵⁶ Above, I have already referred to *Schnädelbach*’s recent study on the German interdisciplinary discourse on emotions in the process of legal decision making between 1870 and 1933,¹⁵⁷ and I have posed the question whether German legal scholarship perhaps does not lag behind US scholarship on law and emotions, and is perhaps ahead of it in terms of having already moved beyond law and emotion scholarship in the vein as it is promoted by US scholars.¹⁵⁸ There are further examples where German law has in the past stressed the importance of emotions in law. *Soniewicka* and *Wesołowska* correctly observe that in “some European countries (Austria, Ireland, Germany, Poland), there appeared from the eighteenth to the twentieth centuries laws which made ‘offense to religious sentiments’ a punishable offense”.¹⁵⁹ Today, § 166(1) StGB reads:

“Wer öffentlich oder durch Verbreiten eines Inhalts [...] den Inhalt des religiösen [...] Bekenntnisses anderer in einer Weise beschimpft, die geeignet ist, den öffentlichen Frieden zu stören, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.”

“Whoever publicly or by disseminating content [...] reviles the religion [...] of others in a manner that may cause a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding three years or a fine.”¹⁶⁰

§ 166(1) StGB does not any longer protect religious sentiments, instead preserving public peace.¹⁶¹ And *Beckers*’s claim that interdisciplinary research on emotions in law is of limited explanatory power reminds us that also in other legal contexts German law has moved away from an approach that directly acknowledges the importance of subjective aspects, including emotions, and has moved towards an approach that tries to frame the respective points of reference in a normative fashion. In all, a historical analysis may reveal that the law has extensively discussed emotions in different legal contexts already in the past but has for good reasons decided that emotions should be irrelevant in the specific context at issue. Even if emotions are in life ubiquitous, they should be of relevance in law only where they strengthen the explanatory persuasiveness of legal arguments. Thus, German law, German case law, and German legal scholarship have adopted a nuanced approach to emotions. Especially

¹⁵⁶ *Conway/Stannard* (n. 29), 5.

¹⁵⁷ *Schnädelbach* (n. 30).

¹⁵⁸ See p. 361, above.

¹⁵⁹ *Soniewicka/Wesołowska*, p. 337, above. On the history of the respective provisions in Germany, see, e.g., *U. Frevert*, Vom Schutz religiöser Gefühle: Rechtspraxis und -theorie in der Moderne, in: *Landweer/Koppelberg* (n. 7), 321–347.

¹⁶⁰ The translation is a modified version of the translation found on https://www.gesetze-im-internet.de/englisch_stgb/ (last visited on 28 January 2023).

¹⁶¹ See, e.g., the critical discussion by *T. Hörnle*, in: *Münchener Kommentar zum Strafgesetzbuch*, vol. 3 (4th edn., 2021), § 166 para. 2, referring to literature that calls for the total abrogation of criminal offences in the fashion of § 166 StGB.

German criminal lawyers have a very sophisticated approach to the relevance of emotions in law, taking note of the many problems emotions raise in law and taking note of extra-legal research on emotions. However, the treatment of emotions does not follow a holistic approach as promoted by law and emotions scholars. German law follows a contextual approach, according to which the relevance of emotions is discussed in specific legal contexts. I quote *Dallmeyer*'s general conclusion to precisely reflect this finding:

“Es drängt sich nach alledem die Schlussfolgerung auf, dass man die Frage, ob Angst eine juristische Kategorie ist, letztlich auf sich beruhen lassen sollte. Wichtig ist allein ein zutreffendes Verständnis des angstspezifischen Gehalts der Strafrechtsdogmatik, dessen Voraussetzung ein zutreffendes Verständnis der Angst als psychisches Phänomen ist.”

“The conclusion to be drawn from the present study is obvious: One may leave unanswered the question whether fear is a legal category. What is important is to understand where fear is relevant in the doctrinal study of criminal law and that where it is relevant a correct understanding of fear as a psychological phenomenon is essential.”

N. Even though I am, thus, sceptical towards law and emotions scholarship “as a discipline in its own right” and “with taking a more holistic approach”,¹⁶² I do acknowledge that interdisciplinary reflections on emotions in law are important (see already G, above) in order to test the way how the law deals with emotions. If one, for example, analyses how the German law of delict approaches the problem of emotional distress, it becomes clear that it adopts a piecemeal approach that is in need of reform. In the law of delict, the evaluative approach promoted by *Soniewicka* and *Wesołowska* seems to be the way forward. In order to openly implement such an evaluative approach, it is necessary to take note of the findings on emotions in extra-legal disciplines.

O. The present volume wishes to explore how the diverse doctrinal contexts of different national legal systems affect interdisciplinary discourse in law, and it wishes to do so by comparing interdisciplinary discourse in Polish and German law. The findings of research on emotions in evolutionary psychology, neurobiology, and affective science will claim for themselves universal validity. German criminal lawyers, for example, refer to the WHO's International Classification of Diseases or the Diagnostic and Statistical Manual of Mental Disorders edited by the American Psychiatric Association when applying § 20 and § 21 StGB.¹⁶³ And a non-lawyer may be led to believe that, consequently, such findings should have the same impact on the law regardless of the specific legal system. The social functions of emotions and their cultural aspects are the object of study in the humanities and the social sciences, and even though the findings of these disciplines may not claim to enjoy universal validity, the social functions of emotions and their cultural aspects are most probably converging in the Western World, so that a non-lawyer may again be led to believe

¹⁶² *Conway/Stannard* (n. 29), 4 f.

¹⁶³ See p. 380, above.

that the findings of the social sciences and the humanities on emotions should have the same impact on the law regardless of the specific legal system. However, the examples discussed in the present comment prove how positive law affects discourse on law and emotions. With respect to the application of the WHO's International Classification of Diseases or the Diagnostic and Statistical Manual of Mental Disorders edited by the American Psychiatric Association, *Schöch* stresses that the judge, at the end of the day, has to answer a normative question when applying these classifications and manuals.¹⁶⁴ Furthermore, my reading of *Soniewicka* and *Wesołowska* leads me to believe that Polish and German law are similar in their approaches to the liability for non-pecuniary harm in the law of delict. By way of final comparison, it is instructive to consider the article published in 1997 by *David F. Partlett*, in which he analyses the different approaches to the recoverability of damages for nervous shock.¹⁶⁵ He comes to the conclusion that US law has developed an approach that must be puzzling to law and emotions scholars, and he plausibly explained the US approach by pointing to the specific doctrinal framework of US law.

¹⁶⁴ See pp. 391 f., above.

¹⁶⁵ *D.F. Partlett*, Tort Liability and the American Way: Reflections on Liability for Emotional Distress, *American Journal of Comparative Law* 45 (1997), 171–193.