Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte
Journal of the Max Planck Institute for European Legal History

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.rg.mpg.de

http://www.rg-rechtsgeschichte.de/rg25
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 25 (2017)
http://dx.doi.org/10.12946/rg25/252-262

Rg 25 2017 252 – 262

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Negotiating Justice and Passion in European Legal Cultures, ca. 1500–1800

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Abstract

This article explores two interrelated facets of early modern law and emotions. It first examines the emotional dynamics of negotiated justice in early modern Europe, tackling one of the clearest characteristics of European legal culture in this period. In so doing, it underscores how the complex emotional worlds connected with justice practices that were transactional, negotiable and often explicitly based on the reproduction of society's hierarchies and relationships through settlements and arbitration. Secondly, it moves to consider such changes in legal thought that occurred as critiques of practices of Old Regime justice. Reconsideration of the relations between emotion and law in the Enlightenment occurred as part of a twinned project of the critique of existing practices of law and speculative imaginings of the potential of legislation to influence behaviour and feelings. Innovative accounts of the relation between passions and law were the product of this reconsideration of the status quo. Laws were reconsidered as tools to channel human passions in certain directions. This article explores the place of emotions in legal change in the seventeenth and eighteenth centuries by looking both at the defining practices of early modern justice and how they were the spur for new conceptions of the relationship between legislation and the passions.

Keywords: justice, emotions, reconciliation, passions, enlightenment

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The cross-disciplinary investigation of law and emotions has often described itself as mounting a challenge to notions that the law is passionless. Some contributions to this debate – such as Susan A. Bandes' scholarship on victim impact statements – highlight instances where emotions are or have been central to legal practice but require more critical treatment. These investigations have often been a project of recovery or recognition, showing that presumptions of law's emotionlessness are unfounded in one manner or another. Historical approaches to these questions have shown numerous constellations of relations between concepts of emotions, practical legal arrangements and the experiences of people passing through or working within judicial systems. Critical assessment of the links between human emotions and legal arrangements go back much further than this scholarly project and a historical perspective on these problems reveals different, historically contingent, relations between these two spheres. Certain transitions in legal thought and practice from the early modern to modern period in Europe can be shown to be, in part, changes in the analysis of the interrelations between human feelings and human law.

The research that makes up »law and emotions« scholarship has a modern emphasis. This concentration on the twentieth and twenty-first centuries is explained by the current legal relevance and practical ambitions of much of this research.[1] Looking back farther and tracing the early modern histories of laws' encounters with the emotions provides valuable perspectives. A considerable amount of existing pre-modern research has drawn from the interdisciplinary field of law and literature.[2] The vast number of detailed accounts of the use of trial records to reveal subjective feeling or cultural patterns in the early modern period have often not been explicitly concerned with the history of the emotions. A major reference point for the explicit pre-modern study of legal emotions has been Daniel Lord Smail's study of how emotions were expressed or expunged in legal contexts in late medieval Marseille.[3] Despite the clear remaining potential there are two prominent challenges for early modern law and emotions scholarship, one from each of its twinned disciplinary fields. First, as these centuries pre-date the rise of the modern psychiatric language of emotions identifying the place of emotions is not always obvious or analytically straightforward. Another related challenge is that this period predates the high era of legal codification and therefore stands before the obvious incorporation of many ›emotional‹ subjects into legal regulation. Rather than discouragement, both of these challenges offer reasons to turn to this period. Turning to the seventeenth and eighteenth centuries promises ample returns for new histories of how emotions interacted with legal thought and practice before the rise of modern scientific concepts of the emotions in the nineteenth century.

This article explores two interrelated facets of early modern law and emotions, demonstrating some of the possible new approaches in this vein. The first section tackles the emotional dynamics of negotiated justice in early modern Europe, analyzing one of the clearest characteristics of European legal culture in this period through the lens of emotions history. This reveals the complex emotional worlds connected with justice practices that were transactional, negotiable and often explicitly based on the reproduction of society's hierarchies and relationships. In particular it deals with how those defined as offended parties (especially the kin of the murdered) had the right to forgive or arrange settlements with offenders in many early modern jurisdictions. Enlightenment critics would come to see these arrangements as compromised

1 Bandes / Blumenthal (2012).
2 See, for example, Kim (2015), Barclay (2015) and Lemmings (2017).
3 Smail (2003) 94–95.

by both »private hatred« and undue clemency – fundamentally misguided emotional orientations that, rather than extinguishing negative feeling, produced cruelty and unhappiness. Their new approaches saw an active role for prosecution and punishment at the service of public rather than, as many saw it, private interest. The second section moves therefore to consider such changes in legal thought that occurred as critiques of practices of Old Regime justice. Reconsideration of the relations between emotion and law in the Enlightenment occurred as part of a twinned project of the critique of existing practices of law and speculative imaginings of the potential of legislation to influence behaviour and feelings. Innovative accounts of the relation between passions and law were the product of this reconsideration of the status quo. Laws were reconsidered as tools to channel human passions in certain directions. As a whole this article explores the place of emotions in legal change in the seventeenth and eighteenth centuries by looking both at characteristic practices of early modern justice and how they were the spur for different modern conceptions of the relation between legislation and the passions. Understandings of the reasons for punishment shifted heavily in this period. Both punishment and justice were shaped by retributive understandings of divine justice at the start of the period but were increasingly challenged by alternative accounts of the ends of justice.

I. Negotiated Justice and the Emotions in Early Modern Europe

In Europe the early modern period saw the success of both civil and criminal law as profession and intellectual discipline.[4] The vast increase in litigation in the sixteenth century underpinned the rise of law as profession.[5] The courts were increasingly attractive venues for the pursuit of satisfaction, both for material and reputational losses.[6] In different parts of Europe the late period of feudalism and the emergence of commercial society drove the expansion of the legal profession.[7] Southern Europe saw a boom of legal education, with a rise in students studying law and the number of law faculties.[8] In the Kingdom of Naples, for example, both aristocratic litigation and policy choices expanded the power and number of lawyers.[9] Montesquieu estimated there were around 50,000 lawyers in Naples in 1729.[10] By the close of the eighteenth century, in 1793, another likely more accurate survey estimated that there were 26,000 who lived off the business of law »supported by funds provided by the litigious nature of the nation«.[11] One of the major commonplaces of the age was that litigation generated hatred.[12] This period saw not only a rise in the usage of civil law but it was also an era in which states increasingly attempted to rule through law and to extend their control over the practice and priorities of criminal law.[13]

Some accounts of legal change in early modern Europe have drawn on an overly neat division between an older popular justice that was increasingly replaced by the yoke of official justice through coercion.[14] The expansion of the state system of criminal justice in fact required extensive local collaboration and used the emotions of the populace to claim legitimacy.[15] Underlying simplistic accounts are evolutionary visions of law in which criminal law replaces revenge. Passions are replaced by reason; the use of justice replaces the taking of vengeance. Yet the history of early modern judicial development was not simply the restraint of vengeance or the closure of extrajudicial paths to settlement. Rather, across early modern Europe, justice remained not only marked by negotiation, but positively embraced negotiation. Throughout Europe there were different continuations of settlement and pardon. The written and documented justice of early modern states did not equate to a new mechanical bureaucracy. Justice's manoeuvring relied on social relations and material exchanges.[16] The importance of arbitrated and mediated settlements well into the eighteenth

4 Kagan (1981).
5 Brooks (1989) 360.
6 Brunelle (2004) 66.
7 Rao (2000) 97.
8 Kagan (1975) 38–72 and Kagan (1983) 158.
9 Musi (1991) 35–36.
10 Rao (2000) 97.
11 Ibid.
12 De La Roche (2002) 185.
13 Hindle (2005) 209–33.
14 Lenman / Parker (1980).
15 Kingston (2003) 37.
16 Breen (2016).

century has been well-established.[17] Blood-money remained a reality in certain jurisdictions. The space of discretion in justice and the widespread use of extrajudicial settlements marked Old Regime encounters with law.

The interaction between law and vengeance was in fact far more complex than law overtaking vengeance. A number of medieval historians have traced the effects of the growth of legal systems on forms of organized vengeance and the emotions that surrounded vengeance, showing the ways in which strategies of revenge were shaped by the growing presence of courts and legal solutions. Daniel Lord Smail has traced the incorporation of the language of hatred that structured systems of revenge into the burgeoning state judicial apparatus of Angevin Marseilles noting that what developed was a »hybridizing system, one in which the act of vengeance would eventually merge with the act of litigation«.[18] For fourteenth century Florence, Andrea Zorzi has tracked the »publicization« of *vendetta*.[19] Both have noted the general European trend of the increasing costs of pursuing organized vengeance, in financial terms as well as the growing risk of capture and punishment. Marco Gentile has depicted the decline of a »vindicatory system« in fifteenth century Italy.[20] Early modern England saw a widespread decline of violence while in early modern Italy physical violent revenge remained a common option.[21] Across Europe, however, the use of courts was increasingly associated with revenge. In 1618 the Spanish reformer Lope de Deza criticized the way in which lawyers were playing on the fear and envy amongst peasants to convince them to waste time and money on lawsuits.[22] Courts were venues for practices of vengeance and their success is not simple evidence for the restraint of revenge or growing self-control.

Negotiated justice provided situations in which emotions could be expressed and the contexts for crimes committed or endured could be described. The French pardon letters famously studied by Natalie Zemon Davis display the scope available for the narration of emotional states and arguments for exculpation in early modern legal bureaucracy.[23] Such cultures of pardoning were widespread in early modern European criminal systems and created occasions for the composition of highly emotional pleas.[24] Royal pardons could be collective, for political purposes, or to mark celebrations and they were an integral part of how justice was conceived.[25] The hope for pardon ran throughout early modern societies and motivated uncertain gambits or negotiations. The language of »poor supplicants« who humbly begged and sought redress was common throughout early modern Europe. Trust and favours were vital yet could be costly and perilous. The judicial system was a source of income for early modern states and individual office-holders or legal entrepreneurs. Clemency and mercy were at the heart of what a good ruler was meant to express. Various analyses of early modern justice have shown how the harshness of the system and the difficulties imposed on rule due to the stultifying lengths of the paths through baroque justice provided practical stimulus for the ideology of mercy.[26] Tensions tended to emerge between the morality of mercy on the one hand and the pragmatics of effective governance or corruption on the other. Such practices of mercy had long pedigrees, with reference to amnesties or indulgences in both the Bible and in Roman law. They were flexible instruments of policy, with the exercise of grace opening up a space for negotiation. Across early modern Europe, the ability of parliaments and other representative bodies to obtain general pardons from the sovereign was regarded as a mark of achievement.[27]

In some jurisdictions, notably early modern Italian states, pardons were wedded to reconciliation with the victim or their family.[28] Acts of peace-making as legal solutions offer important examples for scholars of law and emotions. They emphasize the informality of much legal practice in early modern Europe, especially at lower levels. Such settlement varied in terms across Europe and could be arranged legally, quasi-legally or fully

17 Carrol (2016) 282.
18 Smail (1996) 59.
19 Zorzi (1995) 53.
20 Gentile (2007) 209–241.
21 Eisner (2003) 12.
22 Casey (2002) 167.
23 Davis (1987).
24 Rodriguez Flores (1971); Garnot (2005).
25 Pike (1985) 379.
26 Kesselring (2003); Niccoli (2007); Lacey (2009); Carroll (2006) 186–191, 232–233.
27 Herrup (2002) 124–142.
28 Rose (2012).

privately and they were redacted by many different sorts of agents from priests, local notables to notaries. Ritual peace-making saw a remarkable growth in the medieval period and became incorporated into legal practice.[29] In many German lands practices of composition remained in usage.[30] Rituals of peace were often markedly emotional, requiring embraces, kisses and other outward signs of reconciled hearts. But before such rituals occurred and were translated into legally binding agreements considerable negotiation was necessary. Arbitrating skills were part of the domain of rhetoric and were consciously aimed at managing human passions. Bonifacio Vannozi, a career secretary in Rome and Florence, advised in his *Della supellettile degli avertimenti politici* (1609) that »the man who has to arrange peaces, if he doesn't want to make a mess of the undertaking, needs to be very well taught in the affects, human passions and perturbations«. In order to be better placed to give advice, he tells the aspiring peacemaker to »go and read Bartolomeo Cavalcanti« who, in his opinion, had exceeded classical authors in these subjects.[31] Cavalcanti's *Retorica* makes adequate knowledge of the human »affects« fundamental to attempts to persuade parties to make peace.[32] According to Alexandre de la Roche's *The Charitable Arbitrator*, »arbitration is a holy and sacred thing, and something more venerable than mere judgement. Because as well as judging, you are trying to reconcile their hearts«.[33] Arbitrated settlements drew upon the conceptual grammar and emotional force of Christianity. When early modern Europeans encountered justice it was rarely abstracted, in the first instance, from their local social relations and was regularly coloured by standards of compromise and settlement. This is far from arguing for a positive assessment of arbitrated settlement for crimes: that hearts were regularly reconciled and hatred was defeated through these acts. Rather it points to the force of face-to-face social hatred and the emotionally fraught processes of pacification that accompanied them. It is also important to see how such processes created extortion and pressure to forgive and that such arbitrations could be emotionally fraught events.

The place of reconciliation or negotiated settlement in early modern European justice was never simply accepted without debate. In countries where money for blood spilt remained common, it was criticised by some as an immoral transaction. The existence of the ability for accusers to retract accusations in some jurisdictions created debate over whether such »peaces« were more likely to benefit offenders than the offended. One of the most criticised iterations were acts of settlement that emerged from missionary peace-making, most common in Italy, although widespread in much of Catholic Europe.[34] Paolo Segneri, the famed Jesuit preacher and missionary responded to unnamed critics of missionary peace-making in his *Il Parocco Istruito* (1693). With rhetorical flourishes he noted how it offended him to hear such »blaspheming« of the peaces made during the missions from the mouths of those who claim to believe in the Gospels. He ventriloquized the complaints of such »hardened politicians« that such settlements provoked more crimes in the future because of the anger generated from such unjust settlements. What was left after reconciliation, according to the critics, was resentment. Such attempts to wash away crimes with a kiss, hug and tears merely created feelings of injustice and hatred. Segneri's response was that the problem was inadequate legal governance of the practical terms of such peaces. If a forgiven man's presence in a certain town was likely to provoke revenge attacks then they should be forbidden to live in the town. If the statutes that govern peace-making, he says, lead to inequity then it is the statutes that should be changed, not the practice of making peace.[35] Peace-making does seem central to the continuation of social hatred, as the scholarship on the peace in the feud teaches us.[36]

Early modern justice's space for interpolation with extra- or infra-judicial settlement and harsh

29 Petkov (2003) 18.
30 Carroll (2011) 87.
31 Vannozzi (1613) 500: »E perche chi hà da trattar paci, se non vuol acciabatar il mestiere, bisogna, che sia istruttissimo, de gli affetti, & dell'humane passioni, e perturbationi per mandarlo à un maestro, che ne sà assai, vada e legga Bartolomeo Cavalcanti nella sua dottissima Retorica, il quale per testimonio di tutti i dotti hà superato gli antichi in quella materia«.
32 Cavalcanti (1559).
33 De La Roche (2002) 201.
34 Bossy (1998) 27.
35 Segneri (1695) 400–401.
36 Gluckman (1955).

impositions of punishment had the potential to be dissolved with forgiveness or clemency. Forgiveness was legalized both as a legal function that certain people could exercise (whether the directly offended parties of the King) and required certain emotional performances. The most famous early modern literary account of emotionally-moderated justice comes from *The Merchant of Venice* where Portia describes the »quality of mercy« as one that should be »enthroned in the heart of kings« and makes the claim that »earthly power doth then show likest God's / When mercy seasons justice«.[37] It was precisely the central place for mercy and reconciliation, the need for justice to be seasoned and sweetened, that would become the target for criticism in the latter part of the early modern period.

II. Eighteenth-Century Revisions of Law's Passions

In the eighteenth century a variety of thinkers developed new visions concerning the practical purposes of laws and the ways in which government could influence feeling and behaviour through law-making. The century saw the development of a range of new visions of how legislation could shape human behaviour and the sorts of feelings that predominated in a given society. The rise of commercial society spurred many branches of this thought, encouraging the generation of new ideas about the relation of human passions to economic development and the subsequent effects this had on society. Understanding the motivating force of self-love was one of the formative challenges of these varying schools of thought.[38] Such new thinking also shaped practice, for example, the influence of the interpreters of commerce's influence on human passions has been directly traced in English courtrooms.[39]

In eighteenth-century Italy criticisms of Old Regime justice created the context for these innovative accounts of the relation between legislation and human passions. In certain parts of the peninsula, such as the Kingdom of Naples, a range of reformist writers produced starkly critical assessments of the political history of the Kingdom and what this history had done to its inhabitants. The elements of this critique included experiences of »feudal tyranny«, the absence of self-governance for centuries and the irrationally accumulated legislation that resulted from multiple foreign dynasties. A turn to historical analysis was equally present in Spain. Antiquarian investigation of legal arrangements was not a minor curiosity but of central importance for understanding present situations.

One of the main targets for critique in Italy and Spain was the typically early modern system of pardons and graces. Many enlightened reformers wanted to move to a system in which pardoning would become obsolete, if possible. In the most famous work of Enlightenment legal reformism, *Dei delitti e delle pene*, Cesare Beccaria argued for a legal system built by a »wise architect who erects his edifice on the foundation of self-love, and contrives that the interest of the public shall be the interest of each individual, who is not obliged, by particular laws and irregular proceedings, to separate the public good from that of individuals, and erect the image of public felicity on the basis of fear and distrust«.[40] The status quo of widespread arbitrary rearrangement of punishment was reinterpreted as built on fear. Mercy was extraneous, evidence of a poorly planned system which required cruelty to operate. Yet the wholesale adoption of Beccarian critiques was antithetical to the social relations of Old Regime countries.

In lines of thought such as these, which counselled legal reform, an important connection was drawn between customs, passions and legislation. One of the most important influences in eighteenth-century Europe was Montesquieu's *L'esprit des lois* (1748) which stimulated comparative, historical and connected investigations into the relationships between political orders, human passions and social customs. Montesquieu separated forms of government and identified what human passions undergirded each different type of regime and provided the laws with vitality.[41] He argued that human nature was versatile and changeable, with certain political regimes unleashing jealousy, hatred and envy with others creating different emotional effects. An example, for Montesquieu,

37 Shakespeare *The Merchant of Venice* Act IV Scene 1. See the important analysis of this in Niccoli (2007).
38 Hirschman (1997).
39 Rudloph (2013) 217.
40 Beccaria (1767) 176.
41 Rahe (2000).

was England where liberty means that »all the passions there are free: hatred, envy, jealousy, the ardor to enrich & distinguish oneself appear to their full extent; & if things were otherwise, the state would be like a man struck down by a malady who has no passions because he has no strength«.[42] The passions of the inhabitants provided England's political culture with the vitality it needed to survive. Montesquieu's work made comprehensive arguments for the connection between states of mind and sentiment, the arrangement of particular laws, the influence of climate and the ways in which different political regimes possessed reciprocal connections between these variables. He argued that »laws should be relative to the difference in passions«.[43]

Montesquieu's work was swiftly taken up as part of the wider and multi-faceted European movement to make laws more ›rational‹. This saw the taking up and development of ideas from seventeenth-century natural law theory.[44] The major line of argument, as John Davis has summarized it, was that »[b]etter governance and better laws were the secret to moral and economic progress«. This central position for legislation, therefore, lead to a new and profound appreciation of »the restorative power of rational laws and rational institutions«.[45] Amongst the most influential in Italy were Gaetano Filangieri and Beccaria. In Spain, Cesare Beccaria's *Dei delitti e delle pene* was translated in 1774. The Neapolitan Filangieri's *La scienza della legislazione* was published between 1787 and 1789.[46] Spanish reformists such as Gaspar Melchor de Jovellanos argued for similar internal reforms of Old Regime societies to rid them of feudal abuses and arguing for »the eradication of a decrepit legal and institutional past in order to resurrect a long-defunct agrarian society, and accompanying moral order«.[47] Legislation took centre stage as a tool to create progress and, what is more, this progress was conceived as precisely the alteration of the dominant passions of the population. Reformers argued that the legal-constitutional history of European countries had shaped the feelings of those peasants and other ordinary people, who were at the front-line of confrontations with old legal orders, and who were also not, without intervention, able to use the new sensibility of the commercial age to overcome such older patterns.

What developed amongst many thinkers across Europe were new conceptions of the purpose and function of law and legislation and high hopes for root-and-branch change in the legal situation of Old Regime countries. Filangieri's *La scienza della legislazione* was one of the most ambitious and lengthy considerations of this topic.[48] This work must be understood in large part as an account of how law and passions interacted. In this view, passions were shaped by geographical, moral and political causes and these in turn produced customs. In turn, customs then were undergirded by passions. This mutual influence between inner drives and their social expression was explored by many different eighteenth-century thinkers. The social constitution of the passions and the ways in which society could influence personal manners and customs as well as feeling was explored in the eighteenth century debates over »national character«.[49] The interdependent nature of individuals and every aspect of society was a marker of much eighteenth century thought. Gaetano Filangieri followed his teacher Genovesi in his argument that: »[t]he passions are the elasticity of human nature‹.[50] Filangieri noted »the impotence of the laws without customs«; and as Vincenzo Ferrone has analysed he argued that along with good laws it »was necessary to recognize the essential function of customs and think of targeted legislative measures able to reform obsolete aspects gradually«, this would lead to resolving the paradox of self-love and social goods, creating a »society where individual interests and passions are combined with the interest of society itself, so that one cannot search for his happiness without contributing to that of others«.[51] Education was one of the main ways in which this legislation was viewed as creating changes and a subject of voluminous discussion. Gaetano Filangieri's hopes for a rational and philosophical law code would remain unfulfilled. But there is another way of viewing these unfulfilled legal speculations than mere untaken roads by considering the perspective it provided on the

42 Montesquieu (1989) 575.
43 Montesquieu (1989) 231.
44 Albi (2009) 239.
45 Davis (2006) 42.
46 Herr (1958) 60.
47 Paquette (2016) 23.
48 Ferrone (2014) 116.
49 Hume.
50 Genovesi (1835) 23.
51 Ferrone (2014) 115.

current state of European societies. Even if reform was not achieved, new ways of thinking about the relationship between laws and human behaviour, mentality and, and emotions were developed. At the very heart of new approaches to legislation and its possible practical effects were understandings of passions and their social effects. In 1776 the jurist Manuel de Lardizábal y Uribe was commissioned to examine Spanish criminal law and argued that current European law was more fitted to a time when light penalties would have encouraged more lawlessness; now was the time to move towards a kinder arrangement of justice.[52] A generation later in 1822, the new Spanish Penal Code, was influenced by Beccaria's work.[53]

As noted with Filangieri, the vocabulary used by legal thinkers often centred primarily on customs. Habitual behaviour seems far from a modern understanding of feeling as personal and primarily tied to interiority. But the connections between passions and customs were a topic of explicit debate in the eighteenth century. These overlapping debates are necessary to understand the historical development of European visions of the relation of law to wider social attitudes and feelings. Gaetano Filangieri discussed how »[t]he differing physical, moral and political circumstances of different peoples weaken or proscribe the materials of some passions, invigorating and multiplying those of others, they weaken, restrain, or proscribe with this means some passions and they introduce, stabilize, extend, invigorate others«. From this complex process, he argued, »more than any other proceeds the destiny of peoples, and the state of their customs«.[54] Filangieri argued that it was best »when the passions introduced, stabilized, extended, invigorated, are able to produce the combination of will with duty; the people languish, and customs are corrupted, when the passions introduced, established, extended, invigorated, are those not able to combine will with duty«.[55] This view provided legislation with a very important role in shaping the feelings of social groups.

Another important figure in the history of this reformist legislative thought is Giuseppe Maria Galanti. Born in a small town of Molise, Santa Croce di Morcone in 1743, he was sent to study law in Naples, although he found greater enjoyment in his studies of philosophy under Antonio Genovesi who had also been Filangieri's teacher.[56] He composed works on moral philosophy and economics as well as pursuing a successful career in law. He turned to exploring sentimentalism after suffering personal disappointment in love.[57] In 1781 he published his *Osservazioni intorno a' romanzi, alla morale e a' diversi generi di sentimento, con un Saggio sulla condizione delle donne e sulle leggi coniugali*. Galanti became renowned for his wide-ranging surveys of the economic, demographic and social realities of the provinces of southern Italy. In 1780 he composed his first foray into this genre, namely the *Descrizione del Contado di Molise*, in order »to illustrate my native province«.[58] Later in his life he described the historical portion of this work as »nothing more than a rough sketch of political ideas, that had always been distant from our historians and jurists«.[59] In this description he presented a negative account of the effects that Neapolitan history had left upon contemporary law, customs and passions. In this work he outlined how all »our political and civil laws, and our customs had their origin in feudal government«.[60] This had no positive valence: »corruption and ferocity of customs, unregulated passions, and above all the abuse of power, constituted … the general spirit of those times«.[61] He systematically assessed the impact of each different period of foreign rule. Longobard rule had numerous negative effects. This period of Barbarian rule »made everything confused, customs, government, religion«.[62] There was a level of social inequality that »produced a general corruption in customs«.[63] The Longobards were a militaristic and ferocious people who did not separate civil and military government. In particular, they were responsible for a negative attitude towards agriculture, which Galanti argued was of lasting consequence for the

52 Barreneche (2006) 22.
53 Uribe-Uran (2015) 262.
54 Filangieri (1789) 22.
55 Ibid.
56 Napoli (2012) 25.
57 Galanti (1996).
58 Galanti (1996) 17.
59 Ibid.
60 Galanti (1781) »Poiché le nostre leggi politiche e civili, ed i nostril costumi hanno avuto origine dal governo feudale, pare necessario, per l'intelligenza delle cose che dobbiamo dire, dar un'idea di questo sistema, come fu nella sua primitiva istituzione.«
61 Galanti (1787) 99.
62 Galanti (1781) 169.
63 Galanti (1781) 170.

Kingdom. A lack of written laws for 77 years was proof of the barbarity of Longobard rule for Galanti. The Norman Kings fared little better because they did not tackle the serious problem of reforming customs: »in vain they attempted to punish crimes, when they should have tried to shape customs«.[64] With rare exceptions most subsequent foreign rulers and the Habsburg rule of the early modern period were equally criticised. Looking around eighteenth-century Europe Galanti observed that the part-reformed legal systems »are handsome, but they only know how to give us hopes, that are then straight away destroyed by the particular passions of men. Good order in society is for the most part a wish, and for mankind the earth has been, and will be, mostly a theatre of miseries and horrors«.[65] In the eighteenth century legal history became a powerfully important discipline for many who sought to understand the contemporary state of humans living in political societies.

Galanti's publication of his thoughts on the province of the Molise's past and present state brought him to the attention of the king of Naples, Ferdinand IV, who read Galanti's work on the Molise and requested that Galanti used the same method to describe every province of the Kingdom.[66] He was employed as a visitor to other provinces in order to repeat the sort of general assessment of the economy and human geography of other regions. From April to July 1792 Galanti undertook a visit to Calabria. The provinces of Calabria had suffered a set of damaging earthquakes in 1783 which had killed tens of thousands and caused much social dislocation. A number of royal initiatives had been taken up to remedy the worst of the damage. Most important was the dissolution of all Calabrian religious houses and the redistribution of their wealth in a system termed the *cassa sacra*. Galanti's sought to understand why homicide was so high amongst the Calabrians and found that it came from their excessive hatred and jealousy. They were the perfect example for the impact of government upon behaviour for »as they are lively and flexible, they have become malicious due to being badly governed«[67] Calabrians had long been seen as the archetype of the malleable and restless southern Italian and as such particularly liable to disorder. His solution was to implement better laws that would encourage better discipline to change the passions and customs of the Calabrians. Some of his suggestions were taken up and used to reform justice in Calabria, although such reforms fell short of fundamental changes.[68] A general eighteenth-century tendency for legal reformists was to look back at the accumulated laws and try to sort out what they had done to human behaviour and how they could be reformed, abolished or replaced. In the Catholic Enlightenment there was a widespread vision that law should aim at the »well-being« or »happiness« of the people.[69] This was founded on a belief that governance, through law, could create human happiness.[70] It was also no accident that such projects overwhelmingly focused on provincial populations, such as the Calabrians, who were alleged to have not civilized at the same rate as the middling and upper classes of urban centres.

In the eighteenth century not only were legislative ambitions marked by thinking about the passions but new languages of emotions also entered legal practice. This can be evidenced in England where, for example, the existence of trial by peers met debates over sensibility and pity.[71] This is an important example that shows that eighteenth-century change did not flow in one direction only: a new place for sympathy in justice systems emerged at the same time as other reformers tried to imagine legal systems which would have no need for them. Those who argued for the co-extensiveness of justice and sensibility, such as Sir William Eden, claimed that criminal law was not meant to be cold and heartless and that the legislator should »expose himself to feel what wretches feel; and let him not seem to bear hardest on those crimes, which, in his elevated station, he is least likely to commit«.[72] Yet at the same time there was also stark criticism of the new culture of sensibility, with some critics seeing juries fatally undone by an excess of pity.[73] In states with jury-based criminal justice the wider emotional tenor of the population was of considerable concern. A lack

64 Galanti (1781) 184.
65 Galanti (1786) 174.
66 Galanti (1996) 18.
67 Galanti (1993) 172.
68 Maiorini (2000) 18.
69 Roberts (1960) 33.
70 Ibid.
71 Rabin (2004).
72 Rabin (2004) 57.
73 Rabin (2004) 53.

of appropriate emotional reaction entered more into the courts as reasons to convict, as a judge admonished a murderer: »you have shewn a hardness of heart, that has enabled you to view the unhappy victim of your cruelty without emotion«.[74] New concepts and appraisals of emotions began to percolate through to legal settings. On the other hand the southern European reformist legislative thought can also be associated with utilitarian understandings of punishment that moved away from retribution and reconciliation to an overwhelming public interest in fair punishment regardless of the circumstances or the willingness of those involved to make a deal amongst themselves.

One of the characteristics of eighteenth century legal thought's interpretation of history was the place of barbarism and civilization in framing what laws were appropriate and how legal change would interact with the stages of progress amongst peoples.[75] »Proportionality« was a watchword of many different parts of the movement for Enlightened legal reform and one of the scales used was barbarity to civilization: »[a]mong a people hardly yet emerged from barbarity, they should be most severe, as strong impressions are required; but, in proportion as the minds of men become softened by their intercourse in society, the severity of punishments should be diminished, if it be intended that the necessary relation between the object and the sensation should be maintained.« Barbarian or despotic societies were a constant point of reference for writers of the Enlightenment. Francesco Mario Pagano's *Saggi* are concerned, in large part, with the difference between the »barbarian« and the »cultivated« in terms of what laws are appropriate. Such distinctions about what sorts of laws were suited to what kinds of levels of cultivation were often framed in terms of the refinement of customs which, in turn, were made up of ideas about the qualities of sensibility and feeling. The notion that certain laws were needed for certain levels of progress would be used to bolster racist law-making in European colonies and paternalistic justifications for rule.[76] For example, Nasser Hussain has argued that it is »remarkable« that legal debates in nineteenth-century British India continued to draw the eighteenth-century discourse of despotism in an explicit manner.[77]
One of the most challenging issues for the interdisciplinary pursuit of law's interrelation with emotion is how to conceive of the relation between legal institutional arrangements, wider cultures of emotion and personal experiences of concrete encounters with law. Historical approaches to these problems reveal how the ways in which these particular elements are constituted and interact has been subject to variability themselves. Particularly useful are the comments of Peter Coss, who poses the problem (although not specifically for emotions) as the need to investigate: »[h]ow legal rituals, and the culture of the courtroom itself (including the mods of discourse permissible in it), differ from those of the rest of society; how these rituals are generated (whether by legal theory, legal practice, the cultural assumptions of the ruling class, or all three); whether they are internally consistent – for there are often several, competing, legal systems in a given society (canon versus civil law, Roman versus local law, »native« versus colonial law, and so on), all of which may be more or less opaque to outsiders; and how much coercive power they really have«.[78] These are the sorts of questions that detailed, focused studies face. Further investigation into the emotional dynamics of justice in the early modern to modern transition would require answering such questions with detailed empirical investigation.

Expansive eighteenth-century accounts of the power of legislation were combined with a reconsideration of pardoning in order to create arguments for creating systems that would have little space for discretionary mercy. There would be no clear resolution of these debates and pardoning continued to be at the centre of judicial practice across Europe as well as part of the fabric of new systems in America and elsewhere. But new emotional understandings of trial and punishment emerged nonetheless.[79] Understanding the particular emotional status of reconciliation within legal cultures is one of the major insights that the early modern period can offer the field of law and

74 https://www.oldbaileyonline.org/browse.jsp?id=t17860111-1&div=t17860111-1&terms=emotion#highlight.
75 Darwin (2007).
76 Pernau and Jordheim (2015) 8.
77 Hussain (2003) 55–56.
78 Coss (2000) 3.
79 Frevert (2016).

emotions. The modern incorporation of »therapeutic« emotional cultures into legal procedures has been one of the major lines of inquiry in the study of law and emotion.[80] It is not accurate simply to equate the place of early modern reconciliatory justice to modern restorative or therapeutic justice. Yet it remains an important point of comparison. Victim impact statements were one of the major spurs to the scholarly exploration of law and emotions in the 1990s.[81] Their controversial injection of emotional performance into the courtroom provided a spur for considering what the relation between the legal and the emotional was and how it ought to be governed. Susan Bandes has described the results of victim impact statements as the »confusion or conflation of cultures – the therapeutic and the legal; a mapping of the language of private grief onto an entirely different sort of emotion culture – collective, public, hierarchical, adversarial, coercive«.[82] Clearly when we look at what legal forgiveness meant in early modern Europe we see admixtures of cultures, although best rendered, in this case, as the religious and the legal. The separation and creation of the modern emotion culture of law must be traced, in part, to the construction of law as separate from interpersonal forgiveness in the transition from the early modern to modern period.

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