EMOTIONS IN LEGAL PRACTICES: HISTORICAL AND MODERN ATTITUDES COMPARED

DATE: 26-28 September 2016
VENUE: Holme Building Refectory, Science Rd, The University of Sydney, 2006
ENQUIRIES: Jacquie Bennett (jacquie.bennett@adelaide.edu.au)

Engraving of Gilbert and Sullivan’s Trial by Jury. Courtesy of Wikimedia Commons.

Throughout history, attitudes towards emotions in legal contexts have been conflicted. In the first book of his *Rhetoric*, Aristotle cautions that the orator must not distort the jurymen into feelings of envy or pity. Aristotle recognised that the cognitive dimension of emotions had the potential power to shape judgements, effecting the integrity of legal processes and undermining normative expectations about what justice looked like. In the Middle Ages, Parisian scholars including John of Jandun (d.1328) and John Buridan (d.1358) grappled with the moral question of how emotional appeals might influence the opinion of a judge (Copeland, 2014). The former encouraged rhetoricians to ‘avoid and neutralise’ emotional discourses whilst acknowledging that some lawyers ‘habitually proffer such discourses to judges so as to achieve their purpose’.

Today, many assume that Western legal practice was embedded firmly in the perception that upholding the law required dispassion and that undisciplined emotions could dangerously undercut the ability for judges and juries to make rational decisions. Emotion had no role in the creation, interpretation, reception or practice of the law. However, in the last two decades there has been an ever-increasing volume of academic work by legal historians, philosophers, social scientists and legal practitioners that paints a very different picture of the role of emotions in the law. This work

In 2015, Justice Peter Openshaw urged the jury of a murder case in the United Kingdom to judge the case coldly, calmly and dispassionately while, in that same year, Mr Justice Dingemans advised the jury of another young woman’s murder to arrive at their decision without emotion. In both cases the judges referred to the presence of emotion and drew a clear distinction between decisions arrived at emotionally and those arrived at dispassionately. Given the high profile nature of both of these cases, and the media interest that surrounded them, the judges’ instructions publically set out an image of the courtroom as a space where heightened emotions are present but also as a space where emotions should be set aside.
both questions whether this picture was true historically by investigating historical legal systems and also looks to modern courtrooms and the role that emotion does and should – or should not – play there today. At the same time, there has been a much wider movement in the social sciences, humanities and cognitive sciences to acknowledge the importance of human experience and to understand emotion not simply as a departure from rationality. Legal scholarship has taken note of this and is increasingly arguing that emotions should be accepted as proper tools in legal processes and decision-making. Indeed, scholars of both law and emotion have shown that emotions do influence law (Bandes, 1996; Kahan and Nussbaum, 1996) and that law, in turn, influences emotion (West, 2014).

However, the case is not so clear-cut that legal practitioners and all scholars have increasingly accepted the legitimate place of emotions in legal disputes. Many historians and legal scholars may now recognise that emotions permeate and enhance legal decision-making, but is there still a disjuncture between academic theory and the practice of the law? Has the pendulum managed to swing far enough into actual courtrooms and legal spaces? In 2010, Abrams and Keren noted how the study of law and emotions is often treated as a ‘novel pastime’ rather than an instrument for addressing practical problems. Why do those in the legal sphere often struggle to relinquish their rationalist premises? What is at stake in upholding one stance over another? Given the ‘emotional turn’ in scholarship, are we in danger of according emotions too great a place in legal practice? Are we dangerously privileging emotions as ‘right’ or sincere because they are ‘human’?

This two-day conference at The University of Sydney, hosted by the ARC Centre of Excellence for the History of Emotions, will gather academics and legal practitioners to debate their findings and to engage critically with each other about their perspectives on whether the law can recognise, acknowledge and encompass affective response and, if so, how. To generate constructive discussions, each paper will be followed by a response from someone either from a different discipline or who holds a different perspective on the topic. The conference will incorporate a dynamic combination of keynote addresses, traditional 20-minute papers, roundtable discussions and responses.

While the courtroom has been the focus of much of the work on emotional practices, this conference will extend the investigation of emotions across legal practices to include the sentencing of convicted criminals and the parole process. The conference aims to stimulate genuine debate and encourage serious reflection on the enduring problem of rationality and emotions. Our aim is for scholars and legal practitioners to bring their different disciplinary expertise to reconsider collectively the role of emotions in legal practices both historically and today and, potentially, to inform new legal policies.
### Program

#### Monday 26 September 2016

**PUBLIC LECTURE, IN CONJUNCTION WITH SYDNEY IDEAS, LAW SCHOOL FOYER, THE UNIVERSITY OF SYDNEY**

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| 6.00–7.30 pm  | **Speaker:** Annalise Acorn (University of Alberta)  
**Title:** ‘Punishment as Help and the Blaming Emotions’ |

#### Tuesday 27 September 2016

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| 8.45–9.15 am  | Registration and coffee  
Refectory, Holme Building, The University of Sydney |
| 9.15–9.30 am  | Welcome |
| 9.30–11.00 am | **PANEL 1: DEMEANOUR AND EMOTIONAL BEHAVIOUR**  
- Katie Barclay (University of Adelaide), 'Women’s Emotions in the Irish Court, c.1800-1845'  
- Alecia Simmonds (University of Technology Sydney), 'Love’s Losses: Breach of Promise of Marriage and the Medicalisation of Heartbreak (1910-1950)'  
- Sarah Sorial (University of Wollongong), 'Anger and the Problem of Self-Control: The Defence of Provocation'  
  **Respondent:** Sascha Callaghan (Sydney Law School, The University of Sydney) |
| 11.00 – 11.30 | MORNING TEA |
| 11.30–12.30 am | **KEYNOTE ADDRESS**  
**Speaker:** Hugh Dillon (Deputy State Coroner, NSW)  
**Title:** ‘A Conversation with Hugh Dillon about Emotions in the Australian Legal System’  
**Q&A:** Kimberley-Joy Knight (The University of Sydney) and Kate Rossmanith (Macquarie University) |
| 12.30 – 1.30 pm| LUNCH |
| 1.30–3.00 pm  | **PANEL 2: EMOTIONS AND THE DEVELOPMENT OF LAW**  
- Jason Taliadoros (Deakin University), ‘Iniuria and the Role of Emotions in the Development of the Early English Common Law’  
- Kathryn Temple (Georgetown University), ‘Just Emotions: William Blackstone and the Enlightenment Paradigm’  
- Renata Grossi (Australian National University), ‘Does Law and Emotion Scholarship Change the Meaning of Law?’  
  **Respondent:** Jill Hunter (University of New South Wales) |
| 3.00 – 3.30 pm | AFTERNOON TEA (WITH VIEWING OF POSTERS)  
**POSTER SESSION**  
- Greg Dale (The University of Queensland), ‘Proceeds of Crime: Its Affective Foundation’  
- Antonia Finnane (The University of Melbourne), ‘Feeling Sorry for Murderers: Race, Gender and Empathy in the Judgements of Justice Robert Furse Macmillan’  
- Gabrielle Wolf (Deakin University), ‘Hartnett, Epstein, Van der Hope: Emotion and the Regulation of Unconventional Doctors’  
- Mark Neuendorf (The University of Adelaide), ‘Disinterested Justice? Alleged Lunatics” and the Law in Late-Georgian Britain’  
- Steven Anderson (The University of Adelaide), ‘Dangerous Connections: Exploring the Role of Emotions in the Abolition of Public Executions in Colonial Australia’  
  **Respondent:** Kathleen Neal (Monash University) |
| 4.15–5.15 pm  | **PANEL 3: COURTROOM CONTRITION: REMORSE AND THE ABSENCE OF REMORSE IN AUSTRALIAN SENTENCING DECISIONS: JOINTLY PRESENTED PAPER**  
- Michael Proeve (The University of Adelaide), Kate Rossmanith (Macquarie University), Steven Tudor (La Trobe University)  
  **Respondent:** Amy Milka (The University of Adelaide) |
| 7.00          | SYMPOSIUM DINNER, CITY LOCATION |

**MONDAY 26 SEPTEMBER 2016**

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| 7.00          | SYMPOSIUM DINNER, CITY LOCATION |
WEDNESDAY 28 SEPTEMBER 2016

TIME                SPEAKERS
9.00–9.30 am        Tea and Coffee

KEYNOTE ADDRESS
9.30 – 10.45        Speaker: Payam Akhavan (McGill University)
                    Title: ‘Reducing Genocide to Law: Emotional Jurisprudence and the Boundaries of Reason’
                    Respondent: A. Dirk Moses (The University of Sydney)

10.45 – 11.15       MORNING TEA

PANEL 4: EMOTION AND THE JUDICIAL ROLE
11.15–12.45

- Sharyn Roach Anleu and Kathy Mack (Flinders University), ‘Impartiality and Emotion in Everyday Judicial Practice’
- Maggie Hall (Western Sydney University), ‘Legal Sentencing vs The Lived Sentence’
- Respondent: Kathryn Temple (Georgetown University)

12.45 – 1.30        LUNCH

PANEL 5: EMOTIONS AND JUDICIAL BEHAVIOUR
1.30–3.00

- David Lemmings and Amy Milka (The University of Adelaide), ‘Emotions in the Eighteenth-Century Criminal Courtroom’
- Jill Hunter (University of New South Wales), ‘Judging by the heart? Understanding the Twentieth-Century Exclusion of Women Jurors’
- Respondent: Sharyn Roach Anleu (Flinders University)

3.00 – 3.30         AFTERNOON TEA

KEYNOTE ADDRESS
3.30–4.30

Speaker: Hila Keren [Southwestern University]
Title: ‘The Affective Role of Law in a Neoliberal Age’
Respondent: Renata Grossi [Australian National University]

4.30–5.00         DISCUSSION, WRAP UP AND CLOSE

ABSTRACTS

Punishment as Help and the Blaming Emotions

ANNALISE ACORN
University of Alberta, Canada

In this paper I argue that criminal punishment, devoid of all emotions of blame, is inhumane in relation to the offender and contrary to a morally robust justification for the criminal law. Increasingly, progressive philosophers of punishment, such as Hannah Pickard, Nicola Lacey and Martha Nussbaum, claim that emotions such as anger and resentment have no place in criminal punishment. Lacey and Pickard in particular argue that punishment should be carried out through an ethic of forgiveness.

I argue that these rejections of the emotions of blame in punishment, though they claim to be new and improved, are grounded in the ancient and Aristotelian idea that punishment, to be different from revenge, must be for the benefit of the wrongdoer. This conceptualisation of punishment as help has also long been connected to a view of wrongdoing as illness and punishment as cure. I argue that Lacey and Pickard’s view is a distinctively twenty-first-century therapeutic version of these age-old ideas. I argue that the impulse to punish an offender with the expression of affective blame is not at all inconsistent with the intention to help the offender. Further, I question the assumption that being on the receiving end of affective blame is necessarily unhelpful to a wrongdoer. From there I argue that an ethic that eschews affective blame in favour of detached forgiveness deprives human relations of the Strawsonian good of unreserved mutuality and moral engagement. While such unreserved moral mutuality may be difficult within the relation between the state and the criminal wrongdoer, a criminal sentence intended to convey no affective blame would be morally unintelligible to both the offender and society.

ANNALISE ACORN is Professor of Law at the University of Alberta. She is the author of Compulsory Compassion: A Critique of Restorative Justice (Vancouver: UBC Press, 2004). In 2009 she was a H.L.A. Hart Fellow at the Oxford Centre for Ethics and Legal Philosophy, University College, Oxford. She has been a Visiting Professor at University of Michigan Law School, University of Siena Department of Economic Law and University of Hawaii Richardson School of Law. She is a frequent visitor at the Einstein Forum in Potsdam, Germany. Professor Acorn’s main area of research interest is the theory of the emotions in the context of conflict and justice. She has published numerous articles in journals such as The Oxford Journal of Legal Studies, Osgoode Hall Law Journal, Valparaiso Law Review and the UCLA Women’s Law Journal. In 1998–1999 she was President of the Canadian Association of Law Teachers. In the same year she was a McCalla Research Professor.
Women’s Emotions in the Irish Court, c.1800-1845

KATIE BARCLAY
The University of Adelaide

As I have argued elsewhere, how men and women emoted as witnesses on the stand shaped the power dynamics of the courtroom, influencing how their testimonies were understood by the court and whether they were viewed as truthful or authentic, sympathetic or hardened, worthy of leniency or in need of harsh punishment. Displays of emotion then were central to formation of truth and the making of justice. How people should emote in court, and thus how their performances of emotion were interpreted, was strongly influenced by wider constructions of gender and the ways gender should shape people’s emotional behaviours. This paper focuses on women’s performances of emotion in court, asking how they differed from men’s, and the implications for courtroom dynamics. It is significant that, during the period under study, the capacity for women to play a role in court was limited to the witness box or their position as defendants. Thus, female emotional performances were largely for a male judiciary, jury and legal team, and whilst courtroom audiences could be mixed, they were weighted towards men, who were given precedence as lawyers and who were not, unlike women, cleared from the room when sensitive testimony was given. Female emotional performances then were for a male court, which shaped how their evidence was interpreted and the justice they received.

KATIE BARCLAY is a DECRA Fellow in the Australian Research Council Centre of Excellence for the History of Emotions at The University of Adelaide. She is the author of Love, Intimacy and Power: Marriage and Patriarchy in Scotland, 1650–1850 (Manchester University Press, 2011), winner of both the Women’s History Network Book Prize and the Senior Hume Brown Prize in Scottish History. She has written widely on family relationships, gender and the history of emotions in Scotland and Ireland, recently editing with Deborah Simonton, Women in Eighteenth-Century Scotland: Intimate, Intellectual and Public Lives (Ashgate, 2013). She is currently working on an ARC-funded project on intimate relationships amongst the Scottish lower orders between 1660 and 1830.

Courtroom Contrition: Remorse and the Absence of Remorse in Australian Sentencing Decisions

MICHAEL PROEVE
The University of Adelaide

KATE ROSSMANITH
Macquarie University, Sydney

STEVEN TUDOR
La Trobe University, Melbourne

Remorse plays a major role in the sentencing of criminal offenders in Australia and in many other jurisdictions. However, there are few studies about it anywhere. While some studies have been published recently, our understanding of remorse’s role in sentencing is still emerging.

In Australia, there has been no comprehensive and systematic study of remorse in sentencing. Consequently, there is much that we do not know. We do not know how judges define remorse, in terms of emotional responses or behaviours. We do not know what meaning judges assign to remorse, as an expected response to crime, or as an indicator that an individual is unlikely to reoffend. We do not know whether different judges interpret offender remorse and its absence differently. We do not know whether there are inconsistencies among different judges regarding the acceptable evidence of remorse and its absence, including what the proper evidence is and who should provide it. Does proper evidence of remorse come from the offender, witnesses, psychologists or psychiatrists, or from the judge’s own observations of the offender in court? We also do not know exactly what happens when a judge finds that an offender is or is not remorseful for what they have done. The law says remorse is a mitigating factor, but we do not know exactly how judges apply this vague legal principle. Do judges always reduce sentence when there is genuine remorse? Do they quantify the reduction? Do judges increase sentence when there is no remorse? How do they justify decisions about sentence length or severity because of findings about remorse?

Drawing on legal philosophy, forensic psychology and ethnographic fieldwork in the criminal courts, this paper will begin to explore some of the key issues concerning remorse in the courts, including how judges decide if offenders are truly remorseful for what they have done; and, for offenders, what might be involved in having your contrition evaluated.

MICHAEL PROEVE is a senior lecturer in the School of Psychology at The University of Adelaide. His professional practice experience in forensic psychology includes assessment and treatment of mentally ill or sexual offenders. His research has focused on the emotions of remorse, shame and guilt and their interpersonal effects, as well as on assessment and treatment issues for sexual offenders. He is the co-author, with Steven Tudor, of Remorse: Psychological and Jurisprudential Perspectives (Ashgate, 2010).

KATE ROSSMANITH is a senior lecturer in Cultural Studies at Macquarie University, Sydney. Her background is in Performance Studies, which combines theatre and anthropology to examine the way we perform ourselves in everyday life. Kate’s ethnographic research on remorse in the New South Wales justice system has influenced the working practices of justice system professionals and has been used to educate the community about sentencing and parole. Kate is also a creative nonfiction writer, with essays appearing in The Monthly and Best Australian Essays 2007.

STEVEN TUDOR is a senior lecturer in the School of Law at La Trobe University, Melbourne. He has worked as a barrister, a judge’s associate and a public servant in criminal law policy. He mainly researches in the philosophical regions of the law, and has a particular interest in emotions and law. He has published articles on these topics in various academic journals and is the author of Compassion and Remorse: Acknowledging the Suffering Other (Peeters, Leuven, 2001) and co-author, with Michael Proeve, of Remorse: Psychological and Jurisprudential Perspectives (Ashgate, 2010).

Does Law and Emotion Scholarship Change the Meaning of Law?

RENE TROSSMANITY
Australian National University, Canberra

Law and emotion scholarship constitutes an important new field of scholarship with important consequences for the administration of the law, and the delivery of justice. It has also been argued that law and emotion scholarship changes how we understand law itself. In other words, it has had both a practical and a theoretical impact on the discourse of law.
In this paper I wish to analyse in more detail whether, in fact, law and emotion scholarship changes our theoretical understanding of law very much at all. In other words, despite its apparent subversive nature, does including an emotional discourse to law change the foundational questions of what we understand law to be? How does it relate to morality and justice? And does it challenge ideas of objectivity?


Narratives of Feeling and Majesty: Mediated Emotions in the Eighteenth-Century Criminal Courtroom

DAVID LEMMINGS AND AMY MILKA
The University of Adelaide

This paper is part of a larger project, entitled ‘Professors of Feeling: Emotion in the English Criminal Courts, 1700-1830’. The project considers the role of emotion in the courtroom, during a period which saw significant changes in the practice and reporting of criminal law. It seeks to reconstruct emotions which have often been excised from official Old Bailey trial reports, from gestures and physical displays on the part of litigants, to laughter and shouts from the public galleries. This picture is pieced together using not only trial reports, but newspapers, pamphlets, criminal life stories, ballads and fictional accounts of criminal trials in poems, plays and novels. The courtroom space, and the actors within it, were not only informed by these various media, but were in constant dialogue with them, employing the techniques of print culture and literary productions, but also influencing them. The project develops a theory which marries notions of a narrative jurisprudence with the emotional valence of stories told by different courtroom actors. Litigants, legal professionals and onlookers were influenced not only by their understanding of what constituted a solid legal narrative, but by the emotional styles of newspaper reporting, popular fiction, oral culture, burgeoning sensibility and contemporary debates about the nature of truth and justice.

This paper focuses on the role of judges, magistrates and other participants in constituting and upholding what we call a ‘grand narrative’ of English criminal law. This narrative began with the successful detection of criminals, continued through a rapidly evolving due legal process and, where necessary, concluded with just punishment for crime and the protection of the community. This overarching understanding of law and the process of justice contributed to the ideology of English order, stability and liberty in the eighteenth century. But the ideology also opened a space for stories that challenged its promise of justice. As one contemporary commentator put it, ‘we all know that our lives and fortunes, our liberty and property, and everything else that is dear and valuable, are secured by Law, but it is not the Law alone that makes a right Government, but upright Justice, and the equal Distribution of it’. The paper investigates the responsibility of judges to uphold this grand narrative of the law, and to privilege their oaths over their personal understanding of right and wrong. But what happened when the emotional labour required of judges came into conflict with their personal feelings? And how far did the proliferation of print culture and the language of sensibility blur the image of English justice? This paper suggests that during the course of the eighteenth century, the representation of the criminal courts encompassed a wide range of emotions which complicated this prevailing narrative.


AMY MILKA is a postdoctoral research fellow at the Australian Research Council Centre of Excellence for the History of Emotions, based at The University of Adelaide. Her current project is a collaboration with David Lemmings entitled ‘Professors of Feeling: Emotion and the English Criminal Courts, 1700-1830’. In addition to this project, Amy is working on a monograph of her thesis project, which considers the communications and relationships between English and French Jacobins in the 1790s, and their impact upon English literature.

Impartiality and Emotion in Everyday Judicial Practice

SHARYN ROACH ANLEU AND KATHY MACK
Flinders University, Adelaide

Empirical research undertaken as part of the Judicial Research Project at Flinders University demonstrates the primary emphasis the judiciary places on impartiality as a core legal value. This paper examines how judicial officers articulate impartiality, particularly investigating the ways they frame this value in light of the everyday work of courts. Impartiality is conventionally cast as requiring judicial practices to be without emotion; the judicial oath of office provides for the administration of the law ‘without fear or favour, affection or ill-will’. Emotion is assumed to be political, unstable, personal and irrational, therefore jeopardising the impartial exercise of judicial authority. Recent scholarship on the judiciary, as well as institutional changes within courts, points to the important role of emotions and emotion management in everyday judicial work. A judicial officer may have to undertake considerable emotion work to conform to the conventional model of dispassionate, detached and impersonal judging. Judicial officers must manage their own emotions in order to display a demeanour that accords with formal institutional requirements. They may also have to anticipate and manage the emotions of others in the interactive environment of the courtroom. The recognition of a place for emotions in judicial work is explicit in the new paradigms
of procedural justice and therapeutic jurisprudence. Surveys and interview findings demonstrate the extent to which judges and magistrates acknowledge a role for emotions and emotion work in their everyday practices. However, this recognition of emotion does not displace the judiciary’s central commitment to impartiality.

SHARYN ROACH ANLEU, BA (Hons) University of Tasmania, MA University of Tasmania, LLB (Hons) The University of Adelaide, PhD University of Connecticut, is Matthew Flinders Distinguished Professor in the School of Social and Policy Studies at Flinders University, and a Fellow of the Australian Academy of the Social Sciences in Australia. With Emerita Professor Kathy Mack, Flinders School of Law, she is currently engaged in socio-legal research into the Australian judiciary and their courts. She has contributed to the Masters Program at the International Institute for the Sociology of Law, Öháti, Spain. Contact: judicial.research@flinders.edu.au, website: http://www.flinders.edu.au/law/judicialresearch/.

KATHY MACK, BA magna cum laude Rice University, JD Law School, Stanford University, LLM Law School, The University of Adelaide, is Emerita Professor of Law at Flinders Law School. She is the author of a monograph, book chapters and articles on Alternative Dispute Resolution (ADR), and articles on legal education and evidence. With Sharyn Roach Anleu, she has conducted empirical research involving plea negotiations. Since 2000, they have been engaged in a major socio-legal study of the Australian judiciary. Contact: judicial.research@flinders.edu.au, website: http://www.flinders.edu.au/law/judicialresearch/.

Love’s Losses: Breach of Promise of Marriage and the Medicalisation of Heartbreak (1910-1950)

ALECIA SIMMONDS
University of Technology Sydney

In 1918, Eliza Broadhurst told the court in her breach of promise of marriage trial that she was admitted to hospital suffering ‘shock and neurasthenia’ after being jilted by her perfidious lover. Eliza Flynn and Joyce Ambler, in similar actions in the 1920s, also claimed to have experienced nervous breakdowns resulting in six-month hospital treatments. Each of these women was diagnosed with the same medical condition: heartbreak. Doctors gave testimony verifying the symptoms, lawyers translated amorous suffering into legally comprehensible narratives, and courts quantified these women’s losses through the assessment of pecuniary damages. That these women claimed financial compensation for emotional injury was not unusual. As feminist legal historians have noted, women in nineteenth-century Australia, Canada, America and Britain actively pursued their former lovers in court for real economic and emotional injuries suffered as a consequence of broken engagements. What distinguishes these early twentieth-century litigants from their nineteenth-century counterparts is that they authenticated their suffering through medical and psychological discourses. They drew upon a new repertoire of trauma narratives legitimised by men in the aftermath of war, and translated a psychological vocabulary developed for male returned soldiers into a feminised language of love.

Drawing upon a database of 959 breach of promise of marriage cases from 1823-1972, this paper examines the medicalisation of heartbreak in the early twentieth century as a peculiar aspect of the modernisation of romantic love. I trace this phenomenon back to a gendered mistrust of women’s evidence that was first given legislative form in the 1871 Evidence (Further Amendment) Act, which required corroboration for female testimony. Harnessing female experience to the truth-claims of medical experts and psychologists was a new articulation of old doubts about female dissimulation in the realms of love. In everyday legal practice it shifted the burden of demonstrating grief to an expert witness and, in so doing, relieved the women from the perils of gendered emotional performance: too much anger would sacrifice their claims to virtuous character; too little would negate their claims to loss. Beginning with a ‘bottom up’ analysis of the women who brought doctors to court to verify their heartbreak, this paper examines shifts in the language of suffering occasioned by war, and the gendered performances that were required to convert private amorous grief into public legal truth-claims at a time when law, romance and medicine were modernising.

ALECIA SIMMONDS is an interdisciplinary scholar in law and history. She is the Chancellor’s Postdoctoral Research Fellow in law at UTS and a lecturer in Pacific History and Australian Cultural History at New York University, Sydney. Her postdoctoral research at UTS focuses on the action of breach of promise of marriage in order to tell a wider story about the legal regulation of intimacy in Australia from 1823-1975. This project draws upon work completed during her doctorate on the relationship between love, friendship, law and imperialism in the Pacific during the long eighteenth century, which has been published in a range of national and international scholarly journals. Simmonds also writes columns and articles for the popular press and her first book, Wild Man: The True Story of a Police Killing, Mental Illness and the Law has been short-listed for the Davitt Prize for the best crime non-fiction book in 2016.

Anger and the Problem of Self-Control: the Defence of Provocation

SARAH SORIAL
University of Wollongong

The defence of provocation is a partial defence to murder. If successful, it reduces a potential murder conviction to one of manslaughter. At the heart of the defence is the idea of ‘loss of self-control’. There are two tests used to establish whether the accused did ‘lose control’: the objective test of the reasonable or ordinary person; and the subjective test, which takes into account specific features of the case and the circumstances of the accused. In this paper, I focus on the idea of self-control and what it means to lose it with reference to the emotion of anger. In what ways does anger undermine an agent’s self-control? Defendants often describe the experience as one where they ‘snap’ or ‘crack’ in response to provocation, and ‘explode’ into violence. They also claim that following the provocation, they ‘came to their senses’ to find themselves with a gun or a knife in their hand and the victim dead before them. With reference to specific cases where this defence has successfully been used, this paper challenges this legal narrative about the undermining effects of anger on self-control and suggests that often these agents did not, in fact, have the relevant self-control to begin with in domain-specific areas of their lives.
SARAH SORIAŁ is a senior lecturer in the Philosophy Program in the Faculty of Law, Humanities and Arts at the University of Wollongong. Between 2008 and 2011, she was an ARC Postdoctoral Research Fellow at Macquarie University (2008) and the University of Wollongong (2009–2011). Sarah completed her undergraduate degrees in philosophy and law at Macquarie University. She was awarded her PhD in philosophy from the University of New South Wales in 2004. Sarah has also taught at Macquarie University and UNSW. Sarah’s research specialisation is primarily at the intersection of political philosophy and the philosophy of law. The focus of her current project is on emotions and the law. She has also published extensively on the limits of free speech and deliberative democracy. Other recent publications are concerned with issues in rights theory and feminism.

Iniuria and the Role of Emotions in the Development of the Early English Common Law

JASON TALIADOROS
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This paper aims to place the role of emotions in the development of the English common law by taking as its historical lens the notion of ‘iniuria’. Iniuria, in its classical Roman law meaning, signified ‘non-lawfulness’ but also, as a delict or wrong, captured the idea of contumelia [insult or outrage] rather than economic loss. The paper traces, on the one hand, the reception of this Roman law concept of iniuria into the early English Common Law via the law of defamation. On the other hand, historians of the English Common Law trace the emergence of a conceptual distinction between crimes and non-criminal wrongs, called ‘torts’, between roughly 1100 and sometime in the thirteenth century; although in their accounts the notion of iniuria is largely absent. I have argued in a recent article that it played a more prominent role than previously recognised. This absence is in part due to John S. Beckerman’s thesis of the mere temporary influence of iniuria on the English Common Law between about 1166 and 1300. This paper puts forward the tentative thesis that the conceptual influence of iniuria as a pre-modern analogue to the exemplary, retributory or punitive elements that call for punitive or exemplary damages in tort did not end in 1300 – as Beckerman posits – but continued to influence the English Common Law beyond that time, albeit through a different means: the statutes of the mid- to late thirteenth century that provided for multiple damages, which employed Roman law concepts of iniuria.

JASON TALIADOROS is Senior Lecturer in the Deakin Law School, Deakin University, where he teaches torts and personal injuries law and researches in the area of pre-modern comparative legal histories of the English Common Law, canon law and Roman law, as well as religious and theological ideas. Jason completed undergraduate degrees in law and arts and a PhD in history at The University of Melbourne, and has worked as a lawyer in commercial practice, as well as a teacher and researcher in both arts and law faculties at The University of Melbourne, Siena College (NY, USA) and Monash University. He has published in both law and history, including a monograph on the Roman law theologian Vacarius (Brepolis, 2006) and a textbook on restitution law (Thomson Reuters, 2015), as well as articles in the Cleveland State Law Review (2016), Journal of Law and Medicine (2015), History Compass (2014), Journal of Religious History (2013), Sortz (2009), Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung (2009) and the Haskins Society Journal (2006). Jason has also been a contributor to collections published by the Pontifical Institute of Medieval Studies (forthcoming), Proceedings of the International Congress of Medieval Canon Law (forthcoming 2016), and the Brepols ‘Europa Sacra’ and ‘Disputatio’ series (2011, 2009 and 2008).

Legal Sentencing vs The Lived Sentence

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Western Sydney University

The tendency of positivist legal discourse to dominate sentence analysis means that sentencing is analysed as if it were a temporally limited, one-off process, and the subsequent serving of the sentence is considered quite separately, as if there were no relationship between them. This lack of congruence leads to a bizarre disconnection between the aims of sentencing and the sentence as it is served by the prisoner. The manipulation of emotion prominent in the criminal sentencing process is marked by strong punitive and denunciatory rhetoric. As the sentence unfolds, the emotions engendered by this ritual of humiliation and shaming are expected to be transformed by the prisoner into willing and enthusiastic attention to fulfilling the aims of the sentence. Prisoners are expected to perform what we call ‘rehabilitation’ throughout the sentence, often without really understanding what this means and how to go about it.

The requirement that the prisoner, during and often after imprisonment, attach himself or herself to the official, constructed legal and psycho-correctional narrative, including the appropriate performance of remorse and rehabilitation, is worthy of attention in any analysis of the role of emotion in the criminal process. By failing to consider the emotional effect of denial of self-knowledge and belief on the prospects of rehabilitation of offenders, we ignore an opportunity for a true appraisal of the efficacy of our criminal justice processes. The disconnection between the legal sentence and the sentence served by the prisoner is not only confusing to the prisoner but is also damaging to the legitimacy of the process.

Extracts from an ethnographic study of 30 long term prisoners in NSW are used to illustrate the barriers to the fulfilment of the aims of the sentence created by the processes of correctional managerialism.

MAGGIE HALL is a criminologist, criminal lawyer and social worker with a national and developing international reputation for her path-breaking research on prisons and prisoner rights. In her role as a public intellectual she regularly responds to media, official and academic requests for expert advice and commentary on key issues in criminal justice and penalty. She is author of The Lived Sentence (Palgrave Macmillan, forthcoming 2017).

Reducing Genocide to Law: Emotional Jurisprudence and the Boundaries of Reason

PAYAM AKHAVAN
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Even since its inception in the 1948 Genocide Convention, the crime of genocide has been crowned in international law as the ultimate crime, the pinnacle of evil. While it emerged from the paradigmatic
Nazi crimes of the Holocaust, its universalisation in legal taxonomy as ‘genocide’ has made it capable of appropriation by others and led to a contest over its ownership among victim groups. But could the prevailing view that genocide is the ultimate crime be wrong? Is it possible that it is actually on an equal footing with war crimes and crimes against humanity? Is the power of the word genocide derived from something other than the rational confines of jurisprudence? And why should a hierarchical abstraction assume such importance in conferring meaning on suffering and injustice? Could reducing a reality that is beyond reason and words into a fixed category undermine the very progress and justice that such labelling purports to achieve? For some, these questions may border on the international law equivalent of blasphemy. Reflecting on the reality of this ostensibly legal discourse, however, reveals much about how contemporary global culture addresses radical evil through rituals of rationalism rather than genuine empathy and reflective emotion.

PAYAM AKHAWAN LLM SJD (Harvard) is Professor of International Law at McGill University in Montreal, Canada, with prior appointments at Oxford University, the University of Paris, and Yale Law School. He was formerly a United Nations prosecutor at The Hague and was recently appointed as a Member of the Permanent Court of Arbitration at The Hague. He has published extensively on international criminal law, including ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’ in *American Journal of International Law* 95.1 (2001), selected by the International Library of Law and Legal Theory as one of ‘the most significant published journal essays in contemporary legal studies’; and *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge University Press, 2012).

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**Just Emotions: William Blackstone and the Enlightenment Paradigm**

**KATHRYN TEMPLE**  
Georgetown University, USA

In the best-selling *Commentaries on the Laws of England* (1765-1769), William Blackstone famously took the ‘ungodly jumble’ of English law and transformed it into an elegant and easily transportable four-volume summary. Soon after publication, the work became an international monument not only to English law, but to English conceptions of justice – to what Blackstone called ‘the immutable laws of good and evil’. The *Commentaries* was celebrated in London, carried on horseback throughout the American colonies and relied upon across what was fast becoming the British Empire. It spawned numerous annotated editions, becoming the first text assigned in America’s first law school at William and Mary. Still used as a reference work, in recent years it has newly been taken up by the U.S. Supreme Court, being cited in at least eight percent of Supreme Court cases.

Most considered the *Commentaries* a brilliant application of Enlightenment reason to English legal history. But this emphasis on ‘reason’ and ‘history’ does not fully explain the *Commentaries*’ popularity, nor the crucial role it played in disseminating conceptions of justice throughout the British Empire. Blackstone was a poet who believed that ‘the only true and natural foundations of society are the wants and fears of individuals’. Making art of English law, he gave readers a well-written, generically situated and emotionally saturated treatise that encouraged them to feel as much as reason their way to justice.

In my longer discussion of the *Commentaries*, I focus on affective schemas like desire/disgust, melancholia, terror/tenderness, shame and happiness, in generic and aesthetic context. But my study takes us not only to Blackstone’s text and its literary context, but also to what Peter Goodrich has called ‘other scenes of law’. I locate affective, emotionally expressive human bodies in the context of the legal sounds, spaces, rituals and customs that govern responses to justice. In these vivid ‘other scenes’ – found in fiction, poetry and drama as well as in legal texts and in historical accounts of courtroom life – we find gendered and racialised figures put into play to test access to justice, to represent justice and sometimes to signify it as other. These scenes were in turn folded back into the *Commentaries*; what appeared a seamless analysis of English law and justice contained much emotionally saturated cultural conflict. The *Commentaries* – unbound here from traditional readings and re-read in affective, aesthetic and real world contexts – offers a complex map of our affective relationship to juridical culture, one that illuminates both individual and communal understandings of our search for justice.

To illustrate how a reading of the *Commentaries*’ emotional content might work, I’d like to focus on the relationships among melancholia, the graveyard poets and Blackstone’s representation of the laws of inheritance. The elegiac poetry of the graveyard poets and their imitators (Gray’s ‘Elegy Written in a Country Churchyard’ and Macpherson’s ‘Fingal’, to offer only two examples, but also Blackstone himself) lingers on themes of loss, particularly of the losses made permanent by the death of the body in the absence of writing. Reading Blackstone’s work on the laws of inheritance in this context alerts us to the melancholic references to loss in the *Commentaries* and to the ways that an intensified nexus of complex assertions and counter-assertions attempts to stand in for the lost bodies of the past. The attempted precision in Blackstone’s discussion of the laws of inheritance substitutes for the embodied wishes of the voiceless dead who find themselves spoken for throughout the inheritance sections of the *Commentaries*. And this dynamic speaks to the larger movement of the *Commentaries* itself, a work erected on the remnants of an oral culture that Blackstone repeatedly marks as tragically ‘lost’ throughout the *Commentaries*. Working through incorporation then, Blackstone writes not so much a technical exposition of English inheritance laws, but an extended elegy for an ancient oral (and poetic) tradition imagined as communal and harmonious, one that was in the process of being undone by statutory innovations even as he completed his work.

KATHRYN TEMPLE, JD, PhD, recently completed six years as chair of the Department of English at Georgetown University, where she has taught since 1994. Her first book, *Scandal Nation*, examined the relationship between legal regulations concerning authorship and national identity. Her second book, *Loving Justice: William Blackstone and the Origins of Anglo-American Law* (forthcoming), examines the ways that affect undergirds our understanding of legal institutions. The recipient of NEH, ACLS, Mellon and ARC fellowships, she has published essays in such venues as *Eighteenth Century Fiction*, *Eighteenth-Century Theory and Interpretation* and *Law, Culture and the Humanities*. For the past 20 years, she has offered writing workshops for graduate students, grant writers, non-traditional college students and veterans at universities in Washington DC, across the United States and internationally.
Judging by the Heart? Understanding the Twentieth-Century Exclusion of Women Jurors

JILL HUNTER

The University of New South Wales

Apex courts honour the jury trial because it injects democratic ideals into criminal justice. Yet for most of the twentieth-century Australian juries were male. This gendered inequality dominated until the 1970s. In some states it lasted longer. Women’s advocacy groups strove to build on universal suffrage but found equal rights to jury service far more elusive than the vote.

It is clear that women’s exclusion was by design, not by oversight. For close to a century, imaginative regulatory trickery barred women from the jury room. Emotion-laced arguments prevailed. These arguments followed a number of themes, including that without experience in public life women were ill-equipped for rational decision-making. Where this claim faltered, in trials about family life or involving women witnesses’ accounts, exclusionary arguments typically shifted to romanticising women in the family idyll, claiming that children and breadwinners should not lose mothers and wives to jury service. But what of the young unmarried woman? Her exclusion relied on fears that exposure to grime crime might destroy her innocence. Yet, unlike ‘delicate’, ‘unworldly’ women kept from the courtroom for their protection, no one shielded rape complainants. They were presumptively cast as temptresses, fantasisers and fabricators, and the rationalist imperative was said to justify these women’s testimonial destruction by uncontrolled cross-examination. On many levels the arguments for excluding women from the jury were fundamentally irrational. In particular they pivoted around unproven (in)capacities, ignored the basal role of citizenship and flew in the face of the lauded rationale for the jury in the public law landscape – representativeness.

This history of the jury straddles the common law world yet it is poorly recorded, inaccessible and distinctly under-theorised. In truth, women’s exclusion from the justice system was founded on a misshapen allegiance to rationalism. Further while exclusion lasted, it conveniently hid deep-seated fears that women judging men’s criminality would, with other forces, undermine a crucial status quo, namely the criminal law’s rampant denial of protection to women victims of male violence.

JILL HUNTER is Professor in the Law Faculty at the University of New South Wales. She has published widely on criminal trials, juries, human rights and the criminal process, and Australian evidence and procedural law, especially from sociological, historical and comparative perspectives. Her most recent publication, with P. Roberts, S. M. N. Young and D. Dixon, is Integrity of Criminal Process From Theory into Practice (Hart Publishing, 2016).

The Affective Role of Law in a Neoliberal Age

HILA KEREN

Southwestern University, USA

Despite its hyper-rational image, in reality law influences the emotions whether we like it or not. To mention only two recent decisions of the U.S. Supreme Court, numerous people were made extremely happy and proud by the court’s approval of gay marriage after years of legal battles while countless people were made awfully sad, fearful and hopeless due to the same court’s decision to strike down President Obama’s executive action aimed at offering temporary relief from deportation to millions of immigrants. Given this undeniable power of the law it is imperative to account for the affective consequences of both legal acts and legal refusals to act. It is also important to do that not only ex post but also ex ante and in a deliberative manner.

Indeed, for the last few decades and especially during the twenty-first century, law and emotions scholars have been working to bring an emotion-centered perspective into law. And yet, the integration project has had limited success, leaving emotions fairly marginal in the analysis and application of law by different legal actors. In ‘Who’s Afraid of Law and the Emotions’ (Minnesota Law Review 94), Kathryn Abrams and I mapped out some of the reasons for the slowness of the process and argued that law and the emotions approach has immense pragmatic potential. Continuing our joint effort, I would like to raise one more significant challenge to a legal engagement with emotions: the growing dominance of neoliberal ideas. I would also argue that in a neoliberal world suffering from global economic crisis, a rise of terror and intensified social ruptures – to name some of the current threats on our communities – the task of theorising the role of law vis-à-vis the emotions has become more urgent than ever. In fact, I would propose that we ought to start treating affective work as an integral part of the role of law and thus as a matter of a legal duty owed by the state to all members of society.

The neoliberal project and particularly the increasing affinity between law and neoliberalism operate to delegitimise legal engagement with the emotions. Understood as a political project that aspires, to use Margaret Thatcher’s words, ‘to change the soul’, neoliberalism operates not only at the economic level but also at the social and affective levels. Accordingly, the neoliberal view of people as human capital, and neoliberalism’s individualisation and reponsibilisation of people, tears the social fabric in many ways, including by commodifying the emotions and impairing their societal value. Consider empathy – a moral emotion designed to hold communities together – as an example. According to the neoliberal logic, empathy is an asset or a skill necessary for individual success and as such it can and should be bought and sold by individuals in the market in the form of books, courses or therapy sessions. Whether or not people relate to each other with empathy and are willing, for example, to help each other is thus not a legal issue. Similar logic dictates that money expresses empathy more than any other social mechanism. When individuals cope with a death of a loved one or an illness that requires special resources, others who feel empathy can use crowdfunding platforms to convey their emotions; expressing empathy has nothing to do with the law. Furthermore, empathy should not be a legal concern because, according to neoliberalism, subjects are assigned with responsibility for their fate and thus are to be blamed in times of trouble while being expected to self-solve their problems. All in all, neoliberalism assigns the law no affective role.

However, law cannot fulfil its share of the social contract without careful attention to emotions and particularly without supporting the social emotions that conserve communities. This essential affective role of the law, I argue, can be divided into four levels of
engagement with the emotions and can, again, be demonstrated by considering the relationship between law and empathy. First, and at the very minimum, the law has to refrain from ignoring the emotions. In the case of empathy, the law should not classify acts stemming from empathy as legally irrelevant – as it currently does – when, for instance, it refuses to enforce promises to give gifts while enforcing promises to give something in exchange for material consideration. Second, and at a higher level of engagement, legal actors have a duty to learn as much as possible about the emotions. Accordingly, they cannot assume – against all non-legal knowledge – that altruistic acts of empathy are transient and reflect a whim rather than a cognitive process, or that empathy is merely a self-promoting skill. Third, and pursuant to having completed the learning task, the law should be utilized to express important emotions with particular attention to social or moral emotions. To use empathy again, counter to the neoliberal logic, legal actors should fight hard the inclination to blame victims for bringing a harm on themselves and instead engage in articulating the shared humanity of all members of society. Along these lines, exploited borrowers of payday loans should not be presented by the legal system as economically irresponsible and harassed women must not be portrayed as wearing the wrong clothes. Fourth, and at the highest level of engagement, the law should actively cultivate socially valuable emotions. While empathy is squashed when the legal system denies the interconnectedness of humans – as in the case of forbidding people to join forces via aggregate legal procedures such as class action and class arbitration – this important social emotion ought to be fostered by law. Thus, for example, instead of rejecting the claims of thousands of female employees who sued together their corporate employer (Walmart) for gender-based discrimination, the court should have told their stories while stressing that they had been stereotyped despite their human uniqueness.

All in all, I conclude, the law cannot fulfill its role in society without comprehensive integration of the emotions. However, the turning of neoliberalism into the new common sense stands in the way of such a project, and law and emotions proponents ought to prioritize coping with this significant difficulty.

HILA KEREN is Professor at Southwestern Law School, where she teaches contracts and business associations. She studies the interaction of law and the emotions and writes in an effort to enrich traditional legal analysis with knowledge about human beings and their vulnerabilities. In her interdisciplinary work she brings the perspective of the ‘other’ into law with a hope for a more egalitarian world in which the law contributes to fostering social change. Hila Keren earned her PhD from the Hebrew University of Jerusalem and completed a two year postdoctoral fellowship at UC Berkeley’s Center of Law and Society. Prior to joining Southwestern University, she practised law in Israel for many years and was a faculty member of the Hebrew University School of Law. She lives in Los Angeles with her family and dances as much as she can.

To this day the law continues to personify instruments of crime through in rem legal actions, where the object is the defendant in the legal proceedings. The second way in which property became charged with emotion was through the law’s symbolic tainting of an object. Through the legal process of attainder both the offender and his or her property became stained by a symbolic hue. The notion of ‘tainted property’ survives, pervading contemporary POC statutes which openly target ‘dirty money’ and ‘tainted goods’. Disgust toward such items helps to account for the law’s fixation on such property. However, it remains to be seen whether POC laws can ever successfully ‘de-animate’ or rehabilitate property that has become a repository for such ill feeling.

GREGORY DALE is currently undertaking a doctorate at The University of Queensland that examines the role of emotions in proceeds of crime legislative regimes. He is a sessional lecturer and tutor at the TC Beirne School of Law at The University of Queensland. He is admitted to practise in the Supreme Court of New South Wales, Supreme Court of Queensland and the High Court of Australia. He has also worked as the Associate to the Chief Justice of Western Australia for two years, a Senior Legislation Officer and Assistant Parliamentary Counsel within Queensland Government, and as a Legal Officer on the Queensland Child Protection Commission of Inquiry.

Proceeds of Crime: Its Affective Foundation

GREGORY DALE

The University of Queensland

Proceeds of crime (POC) statutes serve to deprive offenders of instruments used in the commission of an offence, derived through the commission of an offence or identified as ‘unexplained wealth’. To aid in the successful recovery of crime-related property, POC laws are increasingly seen as civil remedies designed to ensure that ‘crime does not pay’. Is this doublespeak for punishment, or is there alternate narrative driving POC laws?

This short talk discusses the role that disgust and resentment have played in the historical development of POC laws. POC laws feed upon a societal disgust or aversion to crime-related objects. The law ‘animates’ these objects (or charges them with emotions) and then sanctions the state’s forcible acquisition of them.

Property becomes animated in two ways. Historically, legal proceedings such as deodand [instruments which occasioned death] personified property. The property itself was literally treated as the guilty party, drawing ideological support from the biblical passage that ‘if an ox gored a man...then the ox shall surely be stoned’.

Feeling Sorry for Murderers: Race, Gender and Empathy in the Judgments of Justice Robert Purse Macmillan

ANTONIA FINNANE

The University of Melbourne

The poster presents a fragment from the story of Ruby Lee Wood, a young woman from a Chinese family who met a violent death at the hands of her husband, Leong Yen, in July 1925. The case caused a sensation in Perth, and received saturation coverage in the local papers. Found guilty of manslaughter, Leong was sentenced by Justice Macmillan to two years imprisonment. This presentation illustrates the grounds for the sentence, showing that empathy for the defendant was not only evident in the response of the all-white jury but was also frankly expressed by Macmillan from the bench. The light sentence is consistent with leniency towards white perpetrators of domestic abuse in the post-war years, as documented by Judith Allen and Elizabeth Nelson, but also echoes an earlier (pre-war) case judged by Macmillan, in which the guilty party, Japanese, was sentenced to just 18 months. To the extent
that such cases are relevant to the question of race in the courts of the White Australian era, they seem favourable to a conclusion of colour-blind justice, although the fact of race also seems to weigh positively in the judge’s mind, suggesting empathy or even sympathy rather than neutrality. Any such conclusion, however, is complicated by consideration of the victims of the crimes, who were both women. Was empathy evident in the court for them? The findings suggest that responses to racial differences in court were inflected by gender.

ANTONIA FINNANE is an historian of China, with research interests spanning the period between the sixteenth and twentieth centuries, and a focus on urban history and material culture. Her publications include: Speaking of Yangzhou: A Chinese City, 1500–1800 (Harvard Asia Centre, 2004), winner of the 2006 Levenson Book Award for a work on pre-modern China; and Changing Clothes in China: Fashion, History, Nation (Columbia University Press, 2008). She has also published on immigration history, most notably Far from Where? Jewish Journeys from Shanghai to Melbourne (Melbourne University Press, 1999). Among her current research projects, the most relevant to the poster presented here is a study of life in the Chinese community of Perth in the first half of the twentieth century. The first published outcome of that research is a microhistorical essay ‘Missing Ruby’, to be published in a volume on women of the Chinese diaspora in the Pacific and Australasia, edited by Kate Bagnall and Julia Martinez.

Disinterested Justice?
‘Alleged Lunatics’ and the Law in Late-Georgian Britain

MARK NEUENDORF
The University of Adelaide

When called upon to summarise the evidence in the trial of John Bellingham, for the assassination of British Prime Minister Spencer Perceval in 1812, Chief Justice James Mansfield was driven to tears reflecting on the violence committed against his ‘dear and respected friend’. In directing the jury to assess the validity of Bellingham’s insanity plea, he cautioned them against allowing such personal sentiments to sway their judgement, asserting that the defendant’s moral accountability should be evaluated against the rule of law only. Though this was a particularly provocative trial, Mansfield’s concern – that sympathetic identification threatened to undermine objectivity – is indicative of a wider anxiety about the place of sentimental emotions in public life at this historical moment. At a time when rationalist critics were vocally challenging the then-customary association between sympathetic responsiveness and ethical reflection, judgements of charity, mercy and justice were increasingly subject to probing analysis by concerned onlookers, who sought to protect public authorities from what they considered to be the vagaries of ‘private feeling’.

Through a focused study of legal cases centred on the issue of the mental capacity of ‘alleged lunatics’ in late Georgian Britain, this project seeks to determine the extent to which appraisals of ‘disinterested’ judgement were shaped by society’s changing emotional norms. It explores the ways that legal actors responded to the theatrical appeals made to them in courtrooms at the turn of the nineteenth century, plotting changing attitudes towards emotional expression in these legal settings against the wider shift in emotional standards in the period. Ultimately, it is argued that claims to disinterestedness or objectivity in these cases were fundamentally grounded in the individual’s mastery of the nascent feeling rules of society or the institution, and their capacity to project and sustain a temperament suitable to the context.

MARK NEUENDORF is a PhD candidate with the Australian Research Council Centre of Excellence for the History of Emotions, based at The University of Adelaide. His research examines the early history of mental health advocacy in Britain, focusing on the role of collective emotions in shaping public opinion, and stimulating legislative reform.

Dangerous Connections: Exploring the Role of Emotions in the Abolition of Public Executions in Colonial Australia

STEVEN ANDERSON
The University of Adelaide

During the 1850s the Australian colonies abolished public executions and replaced them with private hangings, to be held within the walls of prisons. Often penal reform can be attributed to ideas of improving the effectiveness of the punishment itself – to make it more consistent or enhance its capacity to deter, for example. Other scholars like to place the evolution of punishment at the feet of an individual reformer, broader economic trends, changes in state formation or the contingencies of national culture. The history of emotions opens up another possibility in this debate, centred on the notion that changes in punishment are created, limited and constrained by appropriate standards of feeling. For instance, the dangerous emotional connection between the crowd and the dying criminal on the scaffold was particularly worrisome to the dignified and restrained colonial elite. This paper will attempt to explore the role that emotions played in the transition from public to private executions in Australia, and see what avenue any future research could take in this area.

STEVEN ANDERSON researches the history of capital punishment in colonial Australia with a specific focus on the transition from public to private executions that occurred during the 1850s. His recently completed PhD thesis at The University of Adelaide was awarded the Dean’s Commendation for Doctoral Thesis Excellence and his work appears in the Journal of Australian Colonial History, the Journal of the Royal Australian Historical Society and Aboriginal History.