

The enigmatic ground

On the genesis of law out of emotion in the writings of Savigny and Uhlend

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The historical ground

Emotion and law are not irreconcilable opposites. To be sure, according to a dominant »cultural script« of Western discourse since the eighteenth century, they are supposed to be incompatible (Maroney 2011, 657–64). There are many reasons for the dominance of this cultural script. Among them is the one-sided privileging of the Enlightenment as an age of reason, a privileging which forgets that the eighteenth century was also the age of emotion. Another would be the claim that law is universally valid and binding, which in the logic of the eighteenth century could only be based upon reason. A more precise look at contemporary as well as historical debates, however, shows that there indeed has been an at once enduring and sophisticated scholarly discussion about the function and relevance of emotion in law. The debate about law and emotion conducted in the USA but also in Germany since the 1980s has put the question of emotion once again back in the focus of investigations in legal studies and has spurred an interdisciplinary openness of the law towards research on emotion.¹ In accordance with current transdisciplinary emotions research, emotions are now conceived as complex processes

1 For a representative volume on the debate in the US, see Bandes (1999), for the debate in the 1980s in Germany, see Lampe (1985). For a more detailed account of current concepts of emotion as well as of the current law-and-emotion debate, see the introduction to this issue, 1–15.

that involve cognitive, corporeal, evaluative, and volunative aspects that, moreover, are socially and culturally formed (Bandes and Blumenthal 2012, 163). In the interplay of emotion and cognition, according to one underlying assumption, the former is just as irreducible as it is indispensable: »Emotion reflects reason, motivates action, enables reason, and is educable. This evolved view of human emotion provides a new baseline from which evaluation of judicial emotion may proceed« (Maroney 2011, 632). Alongside the conceptual determination of emotion, the current law-and-emotion debate has attempted to systematize the interface of the two. In addition to the fundamental epistemological relevance of emotion, Bandes and Blumenthal identify in their overview three points of intersection: first, the influence of emotion on behavior; for instance, when a crime is committed out of affect, such as rage or vengeance, which then has to be normatively adjudicated in the form of a verdict. Here emotions appear, secondly, as institutionally shaped by the law, insofar as in law certain emotions (such as remorse) are allowed or encouraged while others are sanctioned. Thirdly, emotions ultimately intervene in the formation of a judgment. This can be viewed as a threat to the non-partisanship of the judge, but also, as an assumed feel for the law, and hence an intuitive cognition and judgment, can lead back to the question of the epistemological connection between law and emotion. In dispute is »the appropriate role of emotion in the identification and implementation of legal norms in the deliberative process« (Bandes and Blumenthal 2012, 162). In the German-speaking context, such an epistemology of emotion and law is conveyed by the term *Rechtsgefühl*.

The debate in German legal studies over *Rechtsgefühl* and its methodological relevance is usually said to start in legal history with the pertinent writings by Gustav Rümelin and Rudolf von Jhering in the 1870s (Rümelin 1948; Jhering 1963).² Yet the notion of an epistemological relevance of emotion for the law is considerably older. First references to this term can be found in the writings of the criminal law expert Ernst Ferdinand

2 See the essay in this volume by Sandra Schnädelbach: »German debates on *Rechtsgefühl* in the late 19th and early 20th century as sites of negotiating the juristic treatment of emotion.«

Klein (1799) (*Ueber die Natur und den Zweck der Strafe*), in Johann Heinrich Pestalozzi's anthropological tract *Meine Nachforschungen über den Gang der Natur in der Entwicklung des Menschengeschlechts* from 1797, and in Heinrich von Kleist's play *Die Familie Schroffenstein* (1803). Yet, as we will show in what follows, even beyond its concrete terminological usage, Rechtsgefühl is variously present at the turn of the nineteenth century in legal, political, and literary texts, for instance, whenever a feeling for the law and its premises, a sensation of the law, or even a sense for legal forms is concerned. Accordingly, our argument is that the formation and conceptualization of Rechtsgefühl already starts at the end of the eighteenth century, and this takes place, as in the interdisciplinary perspective of the law-and-emotion debate adumbrated above, in an interdiscursive field of law, philosophy, anthropology, aesthetics, and literature.

The turn of the nineteenth century represents the period between Revolution and Restoration. Two tasks entered the focus of the law at this juncture: For one, there was the matter of the codification of positive law and the question of how to create a constitution, hence of the juridical forming of German territorial states as modern legal entities. Furthermore, legal studies began to conceptualize itself as an independent and systematic discipline. Both issues were linked to the overarching discussion about the nation (which did not yet exist in Germany as a political entity). Moreover, the self-reflection of legal studies as well as the question of how to interpret the national identity and law of the German states, arose out of the new understanding of history in the eighteenth century as a continual and primarily organic process. Complementarily, a new concept of emotion arose in the eighteenth century, most decisively in the discourse of philosophy. Conceived as an inner sense, emotion began to be regarded as an independent faculty (Franke 1981; Scheer 2001). In contrast to deterministic conceptions of affect, this concept of emotion was treated as not contrasted to but compatible with freedom. Similar to contemporary research on emotions, feeling in the eighteenth century began to involve cognitive, physiological, and voluntative parts and to be seen as equally informed by a socio-cultural process—although the eighteenth century did not yet have a fixed terminology. There was a

coexistence of designations such as *Empfindung* (sensation), *Sinn* (sense) or *Gefühl* (emotion) in German, of »sentiment,« »passion,« »inner sense« or »feeling« in English.³ However, emotion became a central category of aesthetics and cultural anthropology as they conceptualized individual and collective processes of *Bildung*, in the double sense of formation and education (Vierhaus 1972, 508–23).

In light of this, it might not be a coincidence that *Recht* (law) and *Gefühl* (emotion) met around 1800 in the concept of *Rechtsgefühl*. Its formation is located at a more fundamental level: it reaches beyond the very concrete horizon of jurisprudence and the formation of legal judgment that is at the core of criminal law. At issue, we contend, is the genesis of law out of emotion, whether in public law (criminal or constitutional law) or in civil law. Since, around 1800, law is always conceptualized as referring to a political state and emotion as a faculty is conceived anthropologically, the focus thus becomes the relationship between the human being, the state, and the law. By means of *Rechtsgefühl*, the human being gets cast as always already related to the state, or more precisely, is projected as a citizen—with important ramifications. For alongside and against the assumption of an absolute sovereign, who is, as legislator, at the same time the author of the law, there emerges a notion of the law as generated out of the »emotion« of man. As a consequence, *Rechtsgefühl* can also serve as a political argument about law-making.

Thus, at the beginning of the nineteenth century, the connection between law and emotion was especially discussed at two particular sites: in legal studies and in the context of the political debates around 1815. This essay focuses therefore first on Savigny as an exemplary protagonist of legal studies and then turns to the romantic poet Ludwig Uhland, who, in a highly regarded lyrical cycle, commented on the dispute over the constitution of Württemberg. Although the constitutional dispute in Württemberg was a regional problem, it was discussed across regions. Moreover, in the nineteenth century, Uhland was considered to be the

3 With a view to current terminology, the German term *Gefühl* is in general translated as »emotion.«

third classical author of German literature alongside Goethe and Schiller. Savigny's and Uhland's positions on Rechtsgefühl can thus be read as representative for the period around 1800. Despite all their differences, they share, as we will show, central aspects of the discursive formation of Rechtsgefühl, including the origin of »emotion« in moral philosophy and aesthetics as well as the new conception of history as a continuous and organic process (Fröschle 1973, 122).⁴ Prefacing these two parts is a discussion of the conceptualization, in the eighteenth century, of a normative feeling which is the condition for the emergence of Rechtsgefühl. We will start with Shaftesbury and Hume as two authors of the moral-sense debate to »discover« the relevance of emotion for moral judgment. Their take on moral philosophy reveals the decidedly normative orientation of emotion in the eighteenth century. We then describe Rousseau's coupling of law and emotion. For him, the love of laws goes by the name of a project for civic education that is necessary for the preservation of the republic. Finally, with Herder we find a concept, so important for the period around 1800, of a historically grounded cultural anthropology that enables the genesis of normative feeling to be thought as a collective process of cultural and historical formation.⁵

4 The link between law and emotion in the eighteenth century is a near desideratum in the humanities research informed by cultural studies. No comprehensive study exists to date. With regard to the period around 1800, almost all prominent German-language authors can be studied in this connection (for instance, Kleist, Adam Müller, Schiller, Goethe, Jean Paul, etc.), as can central debates in jurisprudence, such as the debate over juries. On the debate about Rechtsgefühl around 1800 from the perspective of literary studies, see Köhler and Schmidt (2015), Köhler (2013), Schmidt (2016).

5 The above-cited authors represent exemplary positions and stations that have contributed to the discursive history of the formation of Rechtsgefühl. However, listing them in this sequence implies neither a necessary development nor an uninterrupted continuity.

Normative feeling

»*I feel! I am!*« (Herder 1994b, 236; italics in the original).⁶ In this programmatic reformulation of the Cartesian *cogito ergo sum*, an important discursive strand found its culmination in Johann Gottfried Herder's essay *Zum Sinn des Gefühls* (1769). This discussion started in the moral-sense debate of the first half of the eighteenth century and in its course promoted emotion to an inner faculty in its own right. As a sense of self, it became a primary mode of self-perception, and concurrently the point of origin and basis of subject formation.

An important juncture in the moral-sense debate is provided by Shaftesbury's conception of emotion as an inner sense between sensibility and reason. In *An Inquiry Concerning Virtue, Or Merit* (1699), Shaftesbury locates emotion in a space between nature and culture that casts emotion as a natural predisposition but also as open to socio-cultural and institutional (and hence also normative) molding (Baum 2001, 185–86). Striking in Shaftesbury's conception of inner sense is its self-referentiality. Inner sense, at times designated by Shaftesbury as »reflected sense« or »reflex affection« (Shaftesbury 1984, 66), describes an intuitive capacity for perceiving and ordering internal moods and affections. It thereby generates for the human being a representation or emotion of itself and is accordingly to be distinguished from concrete emotions such as love or sympathy. Essential for Shaftesbury, but also for the moral-sense debate as a whole, is the wish to separate morality from religion in order to ground it in emotion. *Moral sense* does not thereby merge with inner sense, but is to be understood as moral consciousness. In addition to emotion, it involves cognitive elements as well, namely the ability to judge. Emotion nevertheless retains a constitutive function, because the motivation to act morally first arises out of the emotions of pleasure or aversion. So without it, according to Shaftesbury, judgment would be rational and not moral (Sprute 1980, 228).

6 Unless otherwise indicated, quotes from the primary texts (by Herder, Rousseau, Savigny and Uhland) are translated by the authors and/or translator.

The conceptualization of a moral sense undertaken by Shaftesbury is then extended to the law by other authors of the moral-sense debate, for example Francis Hutcheson, Adam Smith, and of course David Hume. In his *Treatise of Human Nature* (1739–40), Hume initially regards emotions, in his terminology *passions*, as »reflective impressions« (Hume 2003, 181). In other words, emotion is understood, as it was with Shaftesbury, as a mental or reflexive achievement of the subject (Klemme 2007, 100–103), which is always intersubjectively conditioned and morally oriented (Demmerling and Landweer 2012). Remarkably, Hume assumes the existence of a »sense of justice and injustice« which he treats as a special instance of *moral sense* (Hume 2003, 311; see also Haakonssen 1989). This sense is not a natural but an *artificial* emotion, insofar as it presupposes the existence of a normative man-made order that, for instance, vouches for the security of property and the binding force of a promise. The point of reference for the sense of justice is thus less fairness and more the rules of positive law that human beings have given themselves (»*rules of justice [...] establish'd by the artifice of men*« [Hume 2003, 311; italics in the original]). Compliance or violation of that order is sanctioned by the emotions of pleasure or aversion, which are more than mere private emotions. Through the conformity of actions to legal norms, legal norms themselves also become an object of intuitive knowledge.

The moral-sense debate was discussed intensively in the eighteenth century, also in political philosophy, and prominently in the work of Jean-Jacques Rousseau. The central point in Rousseau's political thought revolves around the question of how a state can be thought that provides for the natural freedom and self-determination of the human being. His famous answer in *Du contract social* (1762) points to a sovereignty grounded in the *volonté générale*. For Rousseau, the will of the sovereign is nevertheless tied to existing morals or a communal ethos, which is to say that, in the ideal case of a well-ordered state, moral tenets and positive law are congruent (Kersting 1994, 165–70). This becomes clear in Rousseau's classification of the different kinds of law (in a wider sense), which, alongside public, civil, and criminal law, includes, as the most important categories of all, morals or mores and custom. The laws

of custom are »graved in the hearts of the citizens« and form »the real constitution of the State« (Rousseau 1964b, 394). The »laws of the heart« are understood as a force that enlivens positive laws, i.e. morals and customs, and hence the hearts of citizens. They should also provide the foundation of law: in the ideal republic, legislation is invested with the task of transcribing felt law into positive law; it positivizes »what all have already felt« (Rousseau 1964b, 437). Thus regarded, the normative feeling of citizens advances to a source of the law. Yet for this to happen it must undergo socio-cultural forming. That is, human beings are ascribed a predisposition to feel law, but they nonetheless require education as national citizens (Riley 2001). Aim is to establish a positive affective relationship to community and to the legal order that makes citizens »love the fatherland and its laws« (Rousseau 1964a, 955).

One of the central theorists of emotion in the German-language context in the second half of the eighteenth century is the aforementioned Johann Gottfried Herder. While the issue of law, and thus the question of the connection between law and emotion, does not exactly occupy the center of his attention, the juncture between history and aesthetics does all the more. He takes up the thread of the moral-sense debate at the point at which inner sense combines the subject and emotion, and he treats intersubjective formation primarily as a temporal process, and thereby conceives temporality organologically as natural growth and change. Serving as a model for this thought is the contemporary concept of the organism, which takes as its point of departure a sensible and excitable body, and ascribes to that body a formative power (Matala de Mazza 1999). The process of cognition, as Herder demonstrates in his important text *Vom Erkennen und Empfinden der menschlichen Seele* (1778), occurs in the body, through a complex interplay of the subject's sensory/aesthetic and rational faculties that are systemically connected as a »feines Gewebe« (fine tissue) (Herder 1994a, 392).⁷ This process originates in a »dunkeln Grund« (dark ground) (ibid., 355) of emotion. Herder's metaphor here reiterates the semantics, prevalent in eighteenth-century

7 On the aspect of the systemic in Herder, see Gaier (1998).

aesthetics, of the senses as a »dark« or »enigmatic« faculty of cognition that cannot be analytically accounted for but only phenomenologically described in its effects. Nevertheless, it stands at the origin of cognition on its way to »clarity« (ibid., 354).⁸ This foundation is as indispensable as it is irrecoverable for cognition. Through emotion, the human gets identified as a cognitive being in a way that is always already aesthetic.⁹

The temporal moment in the formation of cognitive faculties comes into play when Herder describes this process as an interaction between the individual and the environment. To this end, he resorts to the theory of climate popular in the eighteenth century. In *Ideen zur Philosophie der Geschichte der Menschheit* (1784–91), he writes that all *Bildung* is »always and everywhere organic and climatic« (Herder 1989, 294). However, Herder operates with a very broad concept of climate that includes the cultural environment of the human being together with his/her upbringing and traditions (Fink 1987; Beller 2005). Individual *Bildung* is hence always adapted to collective formation, on both the synchronic and diachronic axes. Through the individual development of the faculties of cognition, collective history thus becomes internalized and perpetuated. Herder condenses this conception of a historically growing collective identity, in the sense of a communal feeling and thinking and the resultant morals and ways of life, in terms like »*Geist der Völker*« (*spirit* of peoples) (Herder 1994a, 368; italics in the original), »genius of peoples« (Herder 1989, 304), or »national character« (Herder 1989, 369). Herder's cultural anthropology comes to a head in these formulations, and they entail a political dimension that appears in Herder's reflections on the state: For the »most natural state« is »a people with one national character« (Herder 1989, 369). The juridico-political forms of cohabitation should, therefore, harmonize with the national (emotional) sense of self respectively

8 Herder's discussion of the dark foundation harkens back to Alexander Gottlieb Baumgarten (1714–62), who is considered the founder of aesthetics. For a situating of Herder in the anthropological-aesthetic discussions of the dark or enigmatic, see Adler (1988).

9 »All volition begins sure enough with cognition, but all cognition in turn only through sensation« (Herder 1994a, 361).

national character. According to Herder it is »futile« and »injurious« to want to »impose a *new doctrine and manner of thought* upon the unchanged stem of a nation's sensations« (Herder 1994a, 368; italics in the original).

The »legal capacity« of emotion (Savigny)

The connection between historical becoming and national law is explicitly at the center of the Historical School's understanding of the law. Under-scoring the historicity of law, its authors criticize proponents of natural law for what they regard as arbitrarily seeking to deduce the law from reason, whether in the sense of systematic scholarly descriptions of the law, or through codifications based on precepts of natural law. The Historical School's treatment of law marks an essential milestone in the conceptualization of law as an autonomous scholarly discipline.

The most prominent representative—and relevant for the link between law and emotion—is Friedrich Carl von Savigny (1779–1861). Although his name stands paradigmatically for the systematic interweaving of law and emotion in the Historical School, he is only one among others to do so (Haferkamp 2009). The term »Rechtsgefühl« does not itself appear in his writings. And yet Savigny presupposes the necessity of a law that can be *felt*. That this emotion results in the conceptual assumption of a Rechtsgefühl becomes apparent, at the latest, when in the second half of the nineteenth century authors such as Gustav Rümelin or Otto Gierke use the term »Rechtsgefühl,« drawing on the Historical School and Savigny in particular, in order to grasp precisely this connection between emotion and necessity of law (Rümelin 1948, 5; Gierke 1983, 7–10). Emotion thus holds for the Historical School and Savigny a thoroughly privileged position, first of all with a view to the genesis of law, but also for the activity of jurists, i.e. in the »interpretation« of the law.

Savigny's writings are in multiple ways intertwined with their discursive context. His proximity to Romanticism has become a commonplace in the scholarly literature, not least because of the eminent significance of emotion (Rückert 1984; Nörr 1994). The epistemological potential of emotion, however, can only be distinguished in all its relevance when considered, as above, in a historical trajectory alongside the central theo-

rists of emotion in the eighteenth century. The other discursive strand that is constitutive of Savigny's conceptualization of law and stems from the eighteenth century is the organological thought linked to historicity. This concept of the organism enables the idea of the autonomous development of social sub-systems which remain at the same time members of an organic whole. As a consequence, an organic naturalness can be imputed to historical processes, resulting in a philosophy of history that models human history in stages. It thereby assigns emotion a special place in the faculties of cognition, which is itself situated prior to differentiation. Likewise, the notion of the organism enables history to be conceived in terms of diverse national developments, which are manifested in various »national characters,« but without renouncing the idea of a unitary humanity. Herder's concept of »national characters« is thus present in Savigny's thought, where peoples and nations are regarded as autonomous members of humanity that develop their own characters and emotions to the point of a national »Selbstgefühl« (sense of self) (Savigny 1959, 96).

The argument for the historical becoming of law nevertheless raises anew the question concerning the beginning of the law. Answers from natural law, which think the origin of law as an arbitrary postulate of a social contract, are ultimately unacceptable according to this new logic. The special status ascribed to emotion indirectly answers the question. For law emanates from emotion. Human beings, according to Savigny, have a need for order. Law corresponds to a »feeling of inner necessity« (Savigny 1840, 15). It is co-originary with morality and therefore translates the human need for normative order into legal provisions. In this way, it is closely interwoven with the »nature of human beings,« yet is not anthropologized in the process. It is, so to speak, an artificial prosthesis that is inherent to the seed of human »imperfection« (Savigny 1840, 332). For Savigny, too, the beginning of the law cannot be historically or analytically accounted for. Significantly, Savigny resorts to a semantics comparable to Herder's, when he describes this beginning as a »dark secret« [dunkles Geheimnis] (Savigny 1993, 182). Just how much these semantics became a topos of that time is revealed by the metaphoric

of authors such as the legal scholar Georg Friedrich Puchta or the Romantic Joseph von Eichendorff. Both place the beginning of the law in a »dark workshop« [dunkle Werkstatt] (Puchta 1893, 18; Eichendorff 1958, 357), in which emotion operates. In view of the semanticization of the lower cognitive faculties as »dark« by eighteenth-century aesthetics, it stands to reason that in the first half of the nineteenth century the law acquires an aesthetic basis in the dark or enigmatic beginning of emotion. Yet, and this is a central distinction, this aestheticization of law does not for Savigny result in a potent Rechtsgefühl for the individual. On the contrary, according to Savigny's organology, law can only be thought as communally produced. It has its »seat« (Savigny 1840, 19) in the spirit of the people (*Volksggeist*), and the actions of individuals are only expressions of it.

This notion of a natural, organic genesis of the law out of communal emotion has far-reaching consequences: for the status of law and legal studies, for legislation, and ultimately for the scholarly methods of legal studies. It leads to the assumption of the autonomy of law. Law does not only arise out of natural necessity, but perpetuates and renews itself in the course of social differentiation. The state in its function as sovereign legislator thereby becomes obsolete, in theory. Indeed, for Savigny it is the state's privilege to legislate, though not in the sense of an arbitrary act of sovereignty, but as the organic advancement of the law on the basis of interpretation. The generation of norms is conducted by the law itself. Savigny explicitly advocates this position in his text published on the occasion of the codification debate, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814). As arbitrary postulates and determinations by the legislator in the form of statutes, codifications are deleterious for the natural development of the law. The task of the state should rather be to ensure that the law »herrscht« (rules), that is, to »make the idea of the law regnant in the visible world« (Savigny 1840, 25).

The assertion that interpretation is the proper activity of the legislator leads to Savigny's methodological considerations. As it so happens, he does not distinguish categorically between the act of legislation, disciplinary reflections, and the application of the law, because they all proceed,

all differences notwithstanding, from hermeneutic acts. Savigny no longer considers the latter a mere exegesis of text passages, but rather a »freie« (free) and »geistige Tätigkeit« (spiritual activity) (Savigny 1840, 207; 210; 216), which, despite the systematic description furnished by Savigny himself, can be neither completely rationalized nor described. Hermeneutic understanding hence becomes for Savigny—even before the publication of pertinent writings by Schleiermacher—a comprehensive method that is concerned with grasping a part of an overall context that is both assumed and must be reconstructed. Thus, even a legal case or a single law are always to be considered against the background of the entire legal system and can only be understood within it (Meder 2004). Never can this overall context as a matter of principle be fully deciphered; it can only be »felt« (Savigny 1959, 84). Interpretation of law is, in this sense, for Savigny always also »Anschauung« (intuition) (Savigny 1840, 214), and thus an aesthetic or artistic activity. Considered systematically, what he had assessed for the original genesis of the law is repeated in his methodology: the operation of an emotion that cannot be further rationalized. Yet in the face of social differentiation, the universal validity of Rechtsgefühl can no longer be taken for granted, as Savigny does with regard to the genesis of law. He subsequently assigns it to the jurists, because in the socially differentiated world of law, they become the »representatives of the whole« (Savigny 1840, 46). On account of their profession, but especially thanks to their art of interpretation, they are regarded as the well-nigh »experts of emotion« in law.

With the empowerment of the juridical profession in matters of Rechtsgefühl, Savigny effectively completes the expulsion of Rechtsgefühl from the other subdomains of society. Just how much he makes a feeling for the normative order into an affair of specialists is revealed *ex negativo* in his systematization of civil law, which for him supplies the kernel of law (Haferkamp 2008). For the main function of law, according to Savigny, is to provide a territory for individual moral action. Without explicitly naming Kant, his moral philosophy serves as the model insofar as Savigny conceives moral action as free and autonomous action. This is then expressed in individual *Herrschaft* (rulership) (Savigny 1840, 333) over an

area of law and leads Savigny, in the logic of his system of civil law, to property law. A rulership of the law grounded in collective Rechtsgefühl and the spirit of the people is replaced by the perspective of individualistic interest. It is owing to this conception that Savigny's system of civil law is considered an expression of liberalistic bourgeois thought (Lahusen 2013, 122) that caters to individual wealth. With a somewhat differently oriented concept of morality, Savigny later explicitly entrusts the state, in his *System des heutigen Römischen Rechts* (1840), with the care for the indigent, because »in property relations the law rules fully, and indeed without concern for the moral or immoral exercise of a law.« The rich might »let the poor perish through a failure to offer support or through severe exercise of the right of the creditor« (Savigny 1840, 371). No longer does the idea of the law nor even the feeling for the common normative order guide action for those conducting civil law. The (socio-)political potential inherent to Rechtsgefühl—in the sense of a community-forming and regulating principle that could aim to serve as a base for popular sovereignty—literally gets lost in Savigny's writings in the process of social differentiation.

Sovereignty and Rechtsgefühl (Uhland)

In contrast, this dimension of Rechtsgefühl is entirely present in the writings of Ludwig Uhland (1787–1862), even despite the fact that, as a contemporary of Savigny's, he shares the connections to Romanticism and hence also thinks the genesis of law and state organologically (Fröschle 1973, 122). In Ludwig Uhland, we find an historical person who personally occupied the fields of law, literature/aesthetics, and politics interwoven in Rechtsgefühl insofar as he was an educated jurist and literary author, later also a literary scholar, and of course a prominent politician, at first during the Württemberg constitutional dispute as speaker of the political opposition, later as representative of the Assembly of Estates and of the National Assembly in 1848. His lyrical cycle *Vaterländische Gedichte* (Patriotic Poems), highly regarded not only by contemporaries, should be read against this background as a literary intervention that constructs out of Rechtsgefühl a political argument against authoritarianism and political arbitrariness. With the foundation of law in an aesthetics of

emotion, the subject—or in the emphatic diction of that time, »man«—becomes the point of departure and foundational moment of political and juridical community. Uhland's lyrical cycle articulates a bourgeois self-conception and engagement for political emancipation at the beginning of the nineteenth century that is generated out of Rechtsgefühl.¹⁰

The *Vaterländische Gedichte* were published successively between 1815 and 1819.¹¹ They explicitly inscribe themselves into the political context of their time, i.e. into the Württemberg constitutional dispute and the realignment of political relations after the wars of liberation. At the center of this manifesto-like cycle is the invocation of the »old right« as well as the admonition to an unnamed prince that law is a »common good« which flows in every human being as »the source of its lifeblood« (Uhland 1980, 64–65, 75). While, to be sure, the patriotism of the *Vaterländische Gedichte* applies to the »German« in general, the concrete frame of reference is tightly bound with Württemberg, namely the attempt by Friedrich I to introduce a new constitution for Württemberg in 1815.

After the alliance with Napoleon, Württemberg was elevated to a sovereign kingdom, which Friedrich I organized in an absolutist manner, in contrast to the previous constitution dating from the sixteenth century, when Württemberg was still a duchy. With the so called Treaty of Tübingen from 1514, the provincial estates (*Landstände*) had been guaranteed extensive privileges and above all a say in the raising of taxes, the military, and

10 As prominently received as Uhland's *Vaterländische Gedichte* were among contemporaries, they are all the less singular in the first half of the nineteenth century in their »activation« of Rechtsgefühl for political (and national) identity. Along with Uhland's historical dramas *Ernst Herzog von Schwaben* (1817) and *Ludwig der Baier* (1819), it can be found, for instance, in Wilhelm Hauff's historical novel *Lichtenstein* (1826) or in Ferdinand Freiligrath's lyrical cycle *Ein Glaubensbekenntnis* (A Confession of Faith; 1844), to name just a few authors and texts.

11 The sequence and compilation of the poems varies according to edition. In the edition of his writings used here, the poems are arranged in the order in which they were ascertained as having been written. The last poem, »Hike« (Wanderung), was not written until 1834 and is markedly distinct in both tenor and theme.

in juridical authority, so that the reigning duke could not rule independently.¹² The Treaty of Tübingen thus established a dualism of territorial ruler and estates which lasted into the eighteenth century. In contrast to the other two large states of the Confederation of the Rhine, Bavaria and Baden, enlightened absolutism was not able to make its way into the Württemberg of the eighteenth century. Rather, a strong (urban) bourgeois civic tradition dominated the Württemberg corporative state, as the nobility had been for the most part subordinate directly to the Kaiser since the sixteenth century, and alongside the bourgeois estate only the prelates were part of the corporative representation. By drafting a constitution, Friedrich I sought to undermine the Vienna Congress' aspirations of once again establishing provincial estate constitutions as part of a federal constitution. The new constitution aimed to modernize the state in its administrative structures and, in the process, to abolish the corporative organization. Friedrich's plans for modernization would have eliminated the participation of the bourgeois-dominated estates in matters of government, which had been legally guaranteed for centuries (Grawert 1988; Fröschle 1992; Fröschle and Scheffler 1980). It did not take long for the political resistance to mount and take up the cause formulated as a demand for a re-instating of »old right.«¹³ Yet the position of the proponents of old right should not to be interpreted as solely anti-modern and reactionary on the basis of its recourse to historical law and opposition to Friedrich's modernizing aspirations, as Uhland's response, among others, shows (Fröschle 1992; Arbeiter 2006).

12 Strictly speaking, the Treaty of Tübingen is not a contract but an imperial arbitration verdict, which sets forth that the disputing parties must again agree. On the historical legal context and significance of the Treaty of Tübingen, see Sydow (1991) and Schmauder (2008).

13 For the significance of the »old right« in the political history of Württemberg, see Hölzle (1931). In the dispute over the constitution of Württemberg, the argumentative recourse to the »old right« was able to gain such relevance because in Württemberg, in contrast to the majority of other states in the Rhineland Confederation, the Code Civil was never introduced, not even temporarily or in modified form. See Fehrenbach (1978, 13).

Uhland's *Vaterländische Gedichte* are thus to be situated in this historical and political context. Not only do they articulate a politically motivated critique of the constitution and the attendant disempowering of the provincial estates, but, as will now be shown, they also base this critique on an aesthetically grounded popular sovereignty that emanates from Rechtsgefühl. The genesis and publication of the individual poems are aligned with concrete events and make use of relevant contemporary medial possibilities for their dissemination, most of all, the song as an oral form, as well as the newspaper, the pamphlet, and of course the letter, as written forms. From today's perspective, these poems appear as part of a transregional media debate that transpires in the form of counter-poems and replies in newspapers and letters.

The *Vaterländische Gedichte* are comprised of fifteen poems. The first one is titled »Am 18. Oktober 1815« (On the 18th of October 1815). The date, which indicates a day of commemoration, sets the agenda. In an almost narrative tone, the first stanza sketches the historical situation: the »battle of nations« has been »fought,« the country is liberated, the »foreigner« has yielded, etc. With the exception of the date marked by the title, the dedication, and the locating of events on »the German plain« (Uhland 1980, 63), more precise indications of historical reference are not provided. Following this miniature history is an appraisal of the situation marked by the absence of »old right.« »Oppression's traces still remain« (Uhland 1980, 63) in the country: »And many a sacred right of ours/That breathes 'mid ruin, we must save« (Uhland and Platt 1848, 109). This is of course an implicit allusion to the constitutional dispute. The second stanza then clarifies the context: how it came to be that the old right has not been reinstated. The relationship between people and ruler, which had been built on trust and reverence, is fractured, according to the first and short part of the answer. With the second part of the stanza at the latest, it becomes clear that the relation of people to prince is based on mutual recognition, that it must be made in »love and faith,« and not one-sidedly decreed by the prince, because the »German« is by nature »free.«

Wo Liebe fehlet und Vertrauen
 Und Eintracht zwischen Volk und Herrn.
 Der Deutsche ehrt' in allen Zeiten
 Der Fürsten heiligen Beruf,
 Doch liebt er frei einherzuschreiten
 Und aufrecht, wie ihn Gott erschuf. (Uhland 1980, 63)¹⁴

In the »historical depiction« of the first and second stanzas, a political partisanship comes to word that claims the law for itself, that is, for the side of the people, because it is based on freedom. If the relationship between prince and people is revealed as one of voluntary recognition, then it would seem to be modeled on the social contract of natural law.

After, in a manner of speaking, recent history has been »told« and the present situation has been diagnosed, the third stanza forcefully raises the question concerning the future. This occurs in the form of an appeal to those present, who are addressed as representatives of the people: They should step forward as »champions of the law,« erect it once again »auf dem alten Grund« (upon the old foundation) and in this way act »im festen Bund« (in firm association). To be sure, in the context of law and the constellation of freedom and harmony laid out in the previous stanzas, this talk of association (*Bund*) is semantically reminiscent not only of a communal act, but again of the juridical institution of contract. However, through the arrangement of the stanza, the rhyme establishes a narrative logic linking the association or *Bund* to the old *Grund* (foundation), so that this proves to be not merely a theoretical concept of natural law, but a historical right:

14 Translation: »When love and faith unite not truly / The people and the people's lords. / On princely rights, the boon of heaven, / The German ne'er profanely trod; / But still he loves the freedom given / The form erect bestow'd by God« (Uhland and Platt 1848, 109).

So wirkt auch ihr im festen Bunde
 Ihr guten Hüter unsres Rechts!
 Ihr bauet auf dem alten Grunde
 Das Wohl des künftigen Geschlechts. (Uhland 1980, 63)¹⁵

The old law evoked in the poem, which was at issue in the constitutional dispute and would have again contractually guaranteed the representation of the provincial estates, was ultimately based on the Treaty of Tübingen. At the same time, the reference to »association« summons a specific community of a »we,« which is projected nationally in the first stanza in demarcation to foreigners (France), and is in the second pit against the disloyal and arbitrarily operating princes, as a community of free bourgeois citizens.

The first stanzas of the opening poem thus lay out, with allusion to the historical situation, the theme of a threatened right, which is decisive for the entire lyrical cycle, together with its semantic context of patriotism and natural as well as historically warranted freedom. Moreover, the missing referentialization implies an exaltation, which universalizes the notion of law evoked in the poems. A law is constructed that exceeds the immediate context and that receives its legitimation from history as well as from human nature. The poem »Am 18. Oktober 1815« is dominated by metaphors drawn from the fields of architecture and archeology, describing cities, ruins, building, digging, etc. When in the last stanza the »seeds are swelling« (Uhland 1980, 64), it becomes clear that for Uhland, too, the law is »living« and likewise has its metaphorical »roots« (Uhland 1980, 68) in the organism concept already identified for Herder and Savigny. No longer are the historical and natural evolutions of the law in opposition. On the contrary, this law »will take root / In German domains all over« (Uhland 1980, 75–76)—and it arises in an almost Savigny-like fashion out of the spirit of the people: »I follow the honest sense / The people dare avow« (Uhland 1980, 68).

15 Translation: »’Tis thus, in firm association, / Ye faithful champions onward press / To rear upon the old foundation / A future race’s happiness« (Uhland and Platt 1848, 110).

For Herder and above all for Savigny, the organism concept stands in for the assumption of a process of differentiation and autonomization that was taking place around 1800, and of course included the law. It corresponds for Uhland in the talk of a »good old right,« which takes on a life of its own and to which the second poem of the same name is dedicated. Considered rhetorically, »Das alte gute Recht« (the good old right) makes use of personifications that enable the law to become an agent who levies taxes, organizes the military, etc.: »The law which modestly imposes taxes [...] / The law which gives to every freeman / Weapons in the hand« (Uhland 1980, 65). The poem lists precisely those rights of co-determination which were guaranteed to the provincial estates by the Treaty of Tübingen. It thus proceeds exactly as the opening poem: the historical constellation is evoked through allusions on the level of content but without concrete indications of historical reference. When the right then also »decrees laws / that no arbitrary power may break« (Uhland 1980, 65), it teams up conceptually with Savigny's autonomously normative force that is inherent to the law and is fed by necessity. For Uhland though, a community-founding potential resides in this normative force of law that transforms Savigny's collective »sense of self« into patriotism: »The right [...] / which by one sweet bond of love / Unites him to his own« (Uhland 1980, 65).

The subsequent poems offer variations on this theme in form and content: as prayer, as address to the representatives of the people, as New Year's wish, etc. The provisional conclusion of the lyrical cycle is supplied by the prologue to Uhland's tragic drama *Ernst Herzog von Schwaben*, dated 1819, which was performed on the occasion of the celebration of the establishment of the Württemberg constitution. In October of 1819, an agreement over the constitutional dispute was made, and a constitutional monarchy with a bicameral system was instated. Unlike in many other German states, the constitution was not decreed from above, but was based on a contract in conformity with the »old right,« and it again guaranteed important rights to the provincial estates (Grawert 1988, 155; Fröschle 1992, 306).

The apex of the cycle, from the perspective of Rechtsgefühl, is provided by the poem »Nachruf« (Obituary), which appeared two years before as a reaction to the provisional dissolution of the Assembly of Estates by King Wilhelm I. Manifesto-like, the position of the absolute sovereign, together with his monopoly of law, is called into question in order to then recall that the right to legislate is only ever transferred contractually to a sovereign (Uhland 1980, 75). And yet law does not originate in contract, but in the human being:

Noch ist kein Fürst so hochgefürstet,
 So auserwählt kein ird'scher Mann,
 Daß, wenn die Welt nach Freiheit dürstet,
 Er sie mit Freiheit tränken kann,
 [...]

Die *Gnade* fließet aus vom Throne,
 Das *Recht* ist ein gemeines Gut,
 Es liegt in jedem Erdensohne,
 Es quillt in uns wie Herzensblut.¹⁶ (Uhland 1980, 75)¹⁷

As already was the case with Rousseau and Savigny, law is here grounded in the nature of the human being. Conversely, every individual participates in the production of the law. This constellation, consisting of individual Rechtsgefühl as source of the law on the one hand, and of the equality and freedom valid for all on the other, leads to law only being able to

16 Like many other verses by Uhland, the last one of this stanza has become a dictum that could be cited without verification—by among others Gustav Rümelin (Rümelin 1948, 20).

17 Translation: »No prince is so supremely first, / No king so high a stand can take, / That if the land for freedom thirst, / Unaided he that thirst can slake. [...] Though from the throne sweet *Mercy* flows, / Yet *Justice* [Recht/law] is a common good, / In every son of earth it glows, / It runs in every vein like blood« (Uhland and Skeat 1864, 99). Platt's translation of *Vaterländische Gedichte* does not include the poem »Nachruf.« Therefore, we rely here on the translation by Skeat which translates the poems rather freely. The poem »Nachruf« is entitled »The Charter« in Skeat's translation.)

enter into life through agreement. It is an agreement, however, that comes from emotion. The connection between emotion and law is already couched in the metaphor of the heart in the poem »Nachruf,« and it finds its continuation in the image of the handshake undertaken »treulich« (faithfully), in which the production of the law by the heart becomes its communal foundation:

Und wann sich Männer frei erheben
 Und treulich schlagen Hand in Hand,
 Dann tritt das Recht ins Leben
 Und der *Vertrag* gibt ihm Bestand. (Uhland 1980, 75)¹⁸

Unlike for Savigny, the production of law does not harken back to a communal force, but remains individualized for Uhland. That human beings resemble one another in their Rechtsgefühl is provided by their organically-grown collective identity, in Herder's terms, their »national character.« Yet they do not fully converge with the latter. From a juridical perspective, the notion of a »contract« in which individual civil rights are preserved, ensures the integrity of the individual. By means of the contract, in fact, law is always bound to the community through the Rechtsgefühl of the individual. For Uhland, Rechtsgefühl proves to be an eminently political category, which ultimately relocates legislative competency, and hence sovereignty, from the prince to the people, or more precisely to the individual citizen. At stake in the *Vaterländische Gedichte*, and hence in the constitutional dispute read through the lens of the cycle, is thus a popular sovereignty that is founded on Rechtsgefühl and harbors a democratic principle. It is only consistent that this aesthetic foundation of sovereignty finds expression in a lyrical cycle, which in turn presents itself in the style of a lyrical manifesto. In Savigny's writings, this political dimension is not so obvious. He first assigns Rechtsgefühl the function of a guiding principle of cultural history in his reflections on

18 Translation: »And when for freedom heroes [Männer/men] strive / And faithfully join hand in hand, / The justice [Recht/law] proves itself alive— / A Charter [*Vertrag*/contract] makes it surely stand« (Uhland and Skeat 1864, 99).

the genesis of law and then a systematic function in his expositions of the methods of jurisprudence. Nevertheless, when he entrusts jurists with the further development of the law, this implies a political position that should not be underestimated with regard to the sovereignty of the state and the importance of the juridical profession. Despite all the differences, both Savigny and Uhland propagate *Rechtsgefühl* as a productive and irreducible moment of the genesis and practice of law which is typical for the debate around 1800. Both correspondingly conceive the human being as always already a citizen, and in relation to the state. For both Savigny and Uhland, the state must, for its part, take this *Rechtsgefühl* into account and accommodate it, whether by entrusting the further development of the law to the »expert emotion« of jurists, or by institutionalized participation of citizens.

These are fundamental constellations that still define the link between law and emotion today—aside perhaps from the decidedly national anchoring of *Rechtsgefühl*. The anthropological argument in particular, which was so important for the eighteenth century, could pave the way for a transnational theory of *Rechtsgefühl* (Rorty 1966). Savigny and Uhland, however, do not provide one. Due to their historical and political circumstances, their focus understandably lies elsewhere.

References

- Adler, Hans. 1988. »Fundus Animae—der Grund der Seele: Zur Gnoseologie des Dunklen in der Aufklärung.« *Deutsche Vierteljahresschrift für Literaturwissenschaft und Geistesgeschichte* 62: 197–220.
- Arbeiter, Carsten. 2006. »Laßberg und Uhland: Konservative und Liberale im Vormärz.« *Droste-Jahrbuch* 6: 43–60.
- Bandes, Susan A., ed. 1999. *The Passions of Law*. New York: New York University Press.
- Bandes, Susan A., and Jeremy Blumenthal. 2012. »Emotion and the Law.« *Annual Review of Law and Social Science* 8: 161–81.
- Baum, Angelica. 2001. *Selbstgefühl und reflektierte Neigung: Ethik und Ästhetik bei Shaftesbury*. Stuttgart-Bad Cannstatt: Frommann-Holzboog.
- Beller, Manfred. 2005. »Johann Gottfried Herders Völkerbild und die Tradition der Klimatheorie.« In *Spiegelungen. Entwürfe zu Identität und Alterität*, edited by Sandra Kersten and Manfred Frank Schenke, 353–75. Berlin: Frank & Timme.
- Demmerling, Christoph, and Hilge Landweer. 2012. »Hume: Natur und soziale Gestalt der Affekte.« In *Klassische Emotionstheorien*, edited by Hilge Landweer and Ursula Renz, 395–412. Berlin: De Gruyter.
- Fehrenbach, Elisabeth. 1978. *Traditionale Gesellschaft und revolutionäres Recht: Die Einführung des Code Napoléon in den Rheinbundstaaten*. 2nd ed. Göttingen: Vandenhoeck & Ruprecht.
- Fink, Gonthier-Louis. 1987. »Von Winckelmann bis Herder: Die deutsche Klimatheorie in europäischer Perspektive.« In *Johann Gottfried Herder: 1744–1803*, edited by Gerhard Sauder, 156–76. Hamburg: Meiner.
- Franke, Ursula. 1981. »Ein Komplement der Vernunft: Zur Bestimmung des Gefühls im 18. Jahrhundert.« In *Pathos, Affekt, Gefühl*, edited by Ingrid Craemer-Ruegenberg, 131–49. Freiburg: Alber.
- Fröschele, Hartmut. 1992. »Ludwig Uhlands politische Gedankenwelt.« In *Aufbruch und Entsagung: Vormärz 1815–1848 in Baden und Württemberg*, edited by Otto Borst, 297–316. Stuttgart: Konrad Theiss.
- . 1973. *Ludwig Uhland und die Romantik*. Cologne: Böhlau.

- Fröschle, Hartmut, and Walter Scheffler. 1980. »Kommentar zu den »Vaterländischen Gedichten.« In *Werke*, vol. 1, by Ludwig Uhland, edited by Hartmut Fröschle and Walter Scheffler, 541–46. Munich: Winkler.
- Gaier, Ulrich. 1998. »Herders Systemtheorie.« *Allgemeine Zeitschrift für Philosophie* 23 (1): 3–17.
- Grawert, Rolf. 1988. »Der württembergische Verfassungsstreit 1815–1819.« In »O Fürstin der Heimath: Glückliches Stutgard«; *Politik, Kultur und Gesellschaft im dt. Südwesten*, edited by Otto Pöggeler and Christoph Jamme, 126–58. Stuttgart: Klett-Cotta.
- Haakonssen, Knud. 1989. *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith*. Cambridge: Cambridge University Press.
- Haferkamp, Hans-Peter. 2009. »Einflüsse der Erweckungsbewegung auf die »historisch-christliche« Rechtsschule zwischen 1815 und 1848.« In *Konfession im Recht: Auf der Suche nach konfessionell geprägten Denkmustern und Argumentationsstrategien in Recht und Rechtswissenschaft des 19. und 20. Jahrhunderts*, edited by Pascale Cancik, Thomas Henne, Thomas Simon, Stefan Ruppert, and Miloš Vec, 71–93. Frankfurt am Main: Klostermann.
- . 2008. »The Science of Private Law and the State in Nineteenth Century Germany.« In *Beyond the State: Rethinking Private Law*, edited by Nils Jansen and Ralf Michaels, 245–67. Tübingen: Mohr Siebeck.
- Hölzle, Erwin. 1931. *Das alte Recht und die Revolution: Eine politische Geschichte Württembergs in der Revolutionszeit 1789–1805*. Munich: Oldenbourg.
- Kersting, Wolfgang. 1994. *Die politische Philosophie des Gesellschaftsvertrags*. Darmstadt: Wissenschaftliche Buchgesellschaft.
- Klemme, Heiner F. 2007. *David Hume zur Einführung*. Hamburg: Junius.
- Köhler, Sigrid G. 2013. »Die Kunst des Vertrags: Adam Müllers Vermittlungstheorie zwischen Recht, Rhetorik und Ästhetik.« In *Philologie als Literatur- und Rechtswissenschaft: Germanistik und Romanistik 1730–1870*, edited by Claudia Lieb and Christoph Strosetzki, 205–22. Heidelberg: Winter.
- Köhler, Sigrid G., and Florian Schmidt. 2015. »Glück und Größe des Rechtsgefühls. Zur Ästhetik juristischen Handelns bei Kleist.« In *Ästhetik des Zufalls: Ordnungen des Unvorhersehbaren in Literatur und Theorie*, edited by

- Christoph Pflaumbaum, Carolin Rocks, Christian Schmitt, and Stefan Tetzlaff, 177–92. Beihefte zum Euphorion 78. Heidelberg: Winter.
- Lahusen, Benjamin. 2013. *Alles Recht geht vom Volksgeist aus: Friedrich Carl von Savigny und die moderne Rechtswissenschaft*. Berlin: Nicolai.
- Lampe, Ernst-Joachim, ed. 1985. *Das sogenannte Rechtsgefühl*. Opladen: Westdeutscher Verlag.
- Maroney, Terry A. 2011. »The Persistent Cultural Script of Judicial Dispassion.« *California Law Review* 99:629–81.
- Matala de Mazza, Ethel. 1999. *Der verfaßte Körper: Zum Projekt einer organischen Gemeinschaft in der Politischen Romantik*. Freiburg: Rombach.
- Meder, Stephan. 2004. *Mißverstehen und Verstehen: Savignys Grundlegung der juristischen Hermeneutik*. Tübingen: Mohr Siebeck.
- Riley, Patrick. 2001. »Rousseau’s General Will.« In *The Cambridge Companion to Rousseau*, edited by Patrick Riley, 124–53. Cambridge: Cambridge University Press.
- Rorty, Richard. 1966. »Menschenrechte, Rationalität und Gefühl.« In *Die Idee der Menschenrechte*, edited by Stephen Shute and Susan Hurley, 144–70. Frankfurt am Main: Fischer.
- Scheer, Brigitte. 2001. »Gefühl.« In *Ästhetische Grundbegriffe. Historisches Wörterbuch in sieben Bänden*, vol. 2, edited by Karlheinz Barck, 629–60. Stuttgart: Metzler.
- Schmauder, Andreas. 2008. »Der Tübinger Vertrag und die Rolle Tübingens beim Aufstand des Armen Konrad 1514.« In *Tubingensia: Impulse zur Stadt- und Universitätsgeschichte; Festschrift für Wilfried Setzler zum 65. Geburtstag*, edited by Sönke Lorenz and Volker Schäfer, 187–208. Ostfildern: Jan Thorbecke.
- Schmidt, Florian. forthcoming. 2016. »Der Sieg des Rechtsgefühls: Subjektivierung und Selbstgenuss bei Foucault, Rousseau, Kleist und in der Jurliteratur.« In *Recht Fühlen*, edited by Sigrid G. Köhler, Sabine Müller-Mall, Florian Schmidt, and Sandra Schnädelbach. Munich: Fink.
- Sprute, Jürgen. 1980. »Der Begriff des Moral Sense bei Shaftesbury und Hutcheson.« *Kant-Studien* 71:221–37.

- Sydow, Jürgen. 1991. »Zum Problem kaiserlicher Schiedsverfahren unter Maximilian I: Der Tübinger Vertrag von 1514.« In *Cum omni mensura et ratione: Ausgewählte Aufsätze; Festgabe zu seinem 70. Geburtstag*, edited by Helmut Maurer, 377–98. Sigmaringen: Thorbecke.
- Vierhaus, Rudolf. 1972. »Bildung.« In *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 1, edited by Otto Brunner, Werner Conze, and Reinhart Koselleck, 508–51. Stuttgart: Klett.

Sources

- Eichendorff, Joseph Freiherr von. 1958. »Geschichte der poetischen Literatur Deutschlands.« In *Werke und Schriften in vier Bänden*. Vol. 4, *Literarhistorische Schriften—Historische Schriften—Politische Schriften*, 9–424. Stuttgart: Cotta.
- Gierke, Otto. 1883. *Naturrecht und deutsches Recht: Rede zum Antritt des Rektorats der Universität Breslau*. Frankfurt am Main: Rütten/Loening.
- Herder, Johann Gottfried. 1989. *Ideen zur Philosophie der Geschichte der Menschheit*, edited by Martin Bollacher. Frankfurt am Main: Deutscher Klassiker Verlag.
- 1994a. »Vom Erkennen und Empfinden der menschlichen Seele: Bemerkungen und Träume.« In *Schriften zu Philosophie, Literatur, Kunst und Altertum 1774–1787*, edited by Jürgen Brummack u. Martin Bollacher, 327–93. Frankfurt am Main: Deutscher Klassiker Verlag.
- 1994b. »Zum Sinn des Gefühls.« In *Schriften zu Philosophie, Literatur, Kunst und Altertum 1774–1787*, edited by Jürgen Brummack and Martin Bollacher, 233–42. Frankfurt am Main: Deutscher Klassiker Verlag.
- Hume, David. 2003. *A Treatise of Human Nature*, edited by David Fate Norton and Mary J. Norton. Oxford: Oxford University Press.
- Jhering, Rudolf von. 1963. *Der Kampf ums Recht*. Darmstadt: Wissenschaftliche Buchgesellschaft.
- Puchta, Georg Friedrich. (1841) 1893. *Cursus der Institutionen*. Vol. 1, *Geschichte des Rechts bei dem römischen Volke mit einer Einleitung in die Rechtswissenschaft und Geschichte des römischen Civilprocesses*. 10th ed. Leipzig: Breitkopf und Härtel.

- Rousseau, Jean-Jacques. 1964a. »Considérations sur le Gouvernement de Pologne et sur sa réformation projetée.« In *Œuvres complètes*, vol. 3, edited by Bernard Gagnebin and Marcel Raymond, 951–1041. Paris: Gallimard.
- 1964b. »Du contract social: Ou, Principes du droit politique.« In *Œuvres complètes*, vol. 3, edited by Bernard Gagnebin and Marcel Raymond, 347–470. Paris: Gallimard.
- Rümelin, Gustav. 1948. »Über das Rechtsgefühl.« In *Rechtsgefühl und Gerechtigkeit*, edited by Erik Wolf, 5–22. Frankfurt am Main: Klostermann.
- Savigny, Friedrich Carl von. 1993. »Einleitung zu den Pandekten 1812.« In *Vorlesungen über juristische Methodologie 1802–1842*, edited by Aldo Mazzacane, 182–88. Frankfurt am Main: Klostermann.
- 1840. *System des heutigen Römischen Rechts*. Vol. 1. Berlin: Veit und Comp.
- 1959. »Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft.« In *Thibaut und Savigny: Ein programmatischer Rechtsstreit auf Grund ihrer Schriften*, edited by Jacques Stern, 69–166. Darmstadt: Wissenschaftliche Buchgesellschaft.
- Shaftesbury, Anthony Ashley Cooper Third Earl of. 1984. »An Inquiry Concerning Virtue, or Merit.« In *Standard Edition: Complete Works, Selected Letters and Posthumous Writings*, vol. 2, bk. 2, edited by Gerd Hemmerich, Wolfram Benda, and Ulrich Schödlbauer, with the assistance of A. Owen Aldridge. English with German translation. Stuttgart-Bad Cannstatt: Frommann-Holzboog.
- Uhland, Ludwig. 1980. »Vaterländische Gedichte.« In *Werke*, vol. 1, edited by Hartmut Fröschle and Walter Scheffler, 63–80. Munich: Winkler.
- Uhland, Ludwig, and Alexander Platt. 1848. »Poems of my Country.« In *The Poems of Ludwig Uhland*, translated by Alexander Platt, 107–36. Leipzig: Volckmar.
- Uhland, Ludwig, and Walter William Skeat. 1864. »Patriotic Poems.« In *The Songs and Ballads of Uhland*, translated by W. W. Skeat, 82–107. London: Williams and Norgate.

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