



Beyond public punitiveness: The role of emotions in criminal law policy

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ABSTRACT

The article examines the existing and potential role of emotions in the criminal law-making and criminal policy. It aims to inspect which emotions, if any, are more acceptable for influencing criminal policy and to what extent emotions could legitimately intervene in criminalisation processes. It first analyses the ways in which emotion has already penetrated into the criminal law, criminal justice and criminalisation. Next, it inspects the various characteristics of emotions, specifically those that are central in distinguishing between good and bad candidates for influencing criminal law policy, demonstrating that certain negative, highly intense, irrational and unstable or short-lived emotions can make bad law, as do atypical cases. The article then sketches a theoretical framework, composed of the requirements that should be fulfilled before any emotion could justifiably influence criminal law-making and of the further limits to such an enterprise. It concludes with recommendations and some thoughts on further research.

1. Introduction

Across many academic fields, including history, economics, neuroscience, sociology, literature and criminology, scholars have come to agree on the importance of understanding emotion (Clare and Huntsinger, 2007; De Haan and Loader, 2002). The increasing awareness of the influence of emotions on decision making and consequently on the final decisions taken, including crime, laws, policies, court judgments and jury deliberations, has spurred scholarly engagement with the topic in the last two decades. Notwithstanding the steady progress, the study of emotions in crime and in legal decision making cannot be said to have fully penetrated into the criminological mainstream yet, revealing a certain ‘unbearable rationality of criminology’ (Yar, 2009: 3), let alone into the legal studies and legal doctrine, at least on the European Continent, which seems to predominantly ignore the topic or continue to display ambivalence towards emotion as an element of law-making and adjudication (Bandes and Blumenthal, 2012; Feigenson and Park, 2006).

Previous studies in the area of emotions, law and crime have inspected emotionalism and the role of emotions in criminal justice (e.g. Freiberg, 2001; De Haan and Loader, 2002; Karstedt, 2002; Karstedt et al., 2011), emotions in law, and in criminal law in particular (Bandes and Blumenthal, 2012; Kahan and Nussbaum, 1996; Maroney, 2006; Mihai, 2011; Weiner et al., 2006), emotion in legal judgement and decision making (Bornstein and Wiener, 2006; Bright and Goodman-Delahunty, 2006), emotions in the study of criminology and criminological research (Yar, 2009), emotions involved in moral reasoning around crime and anti-social behaviour (Cromby et al., 2010), emotional biases in the courtroom (Horowitz et al., 2006), emotions in restorative justice processes (e.g. Van Stokkom, 2002; Braithwaite, 1989), credibility of emotional testimony (Rose et al., 2006; Kaplan et al., 2016), as well as focused on

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