



Emotional Judgment: On Law and Ethics

James Loeffler

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|----|---------------------------------------------------------------------------------------|---|
| 1. | Is Emotion the Enemy of Judgment? Felix Frankfurter's Opinion, 1962 | 1 |
| 2. | The Need for Feeling:
Gershom Scholem Accuses Hannah Arendt of Heartlessness, 1963 | 1 |
| 3. | The Danger of Emotions: Hannah Arendt Responds, 1963 | 1 |
| 4. | The Trap of Emotional Closure: Scholem Opposes Eichmann's Execution, 1962 | 2 |
| 5. | The Search for Balance between Emotion and Reason:
Arendt on Judgment, 1970 | 2 |
| 6. | Max Radin's Law as Logic and Experience, 1940 | 3 |

*This source sheet was prepared for **A Day of Learning for Our Hostages** on September 30, 2024, a day of learning together as a community to honor the shloshim of the six hostages murdered in August, show solidarity with the hostages still in captivity, and call on the Israeli government and the international community to prioritize their return.*

Dr. James Loeffler, a Senior Fellow of the Kogod Research Center at the Shalom Hartman Institute of North America, is Felix Posen Professor of Modern Jewish History at Johns Hopkins University. His current research explores the ties between law and politics in twentieth- and twenty-first century Eastern Europe and the United States, with a focus on human rights, Jewish political thought, and antisemitism.

He is the author of the award-winning books *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* (2018) and *The Most Musical Nation: Jews and Culture in the Late Russian Empire* (2010), and two edited volumes, *The Law of Strangers: Jewish Lawyers and International Law in the Twentieth Century* (2019) and *A Jew in the Street: New Views on European Jewish History* (2024). He recently completed a four-year term as co-editor of the *Association for Jewish Studies Review*.

At present he is writing a book entitled *Exceptional Hatred: Antisemitism and Free Speech in Modern America*, the first historical study of how American constitutional law handles the problem of antisemitic hate speech, the book grows out of [his reporting](#) for *The Atlantic* magazine on the 2021 trial of White Supremacist leaders behind the deadly 2017 “Unite the Right” event in Charlottesville, Virginia. He is also at work on a biography of [Raphael Lemkin](#), the father of the Genocide Convention. That research traces the origins of the concept of genocide to the struggle for Jewish rights in pre-Holocaust Eastern Europe. It features newly discovered [Hebrew](#) and [Yiddish](#) writings, which are available at [The Lemkin Project: A Digital Archive of Law, Literature and Global Thought](#).

Another area of research is the history of Zionism, in which he has published multiple studies on Zionism and liberal internationalism, and Zionism and Jewish culture. He is part of an international team researching the life and work of pioneering musician and scholar Avraham Zvi Idelsohn conducted under the auspices of the Jewish Music Research Centre at the Hebrew University of Jerusalem. This work can be found at [The Idelsohn Project: A Digital Humanities Historical Initiative](#).

He earned his BA in Social Studies from Harvard University and received his MA and PhD with distinction in Jewish History from Columbia University, with postgraduate studies at the Pardes Institute and the Hebrew University. He has served as Dean’s Visiting Scholar at Georgetown University Law Center, Kluge Fellow at the Library of Congress, and Robert A. Savitt Fellow at the United States Holocaust Memorial Museum. He lives in Washington, DC with his wife and children.

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1. Is Emotion the Enemy of Judgment? Felix Frankfurter's Opinion, 1962

Fragile as reason is, and limited as law is... that's all we have between us and the tyranny of mere will, and the cruelty of unbridled, undisciplined feeling.

2. The Need for Feeling: Gershom Scholem Accuses Hannah Arendt of Heartlessness, 1963

[Your book is written in a] heartless, often even derisive tone... There is in the Jewish language something that cannot be defined and is entirely concrete, which the Jews call *ahavath yisrael*, love for the Jews. In you, dear Hannah, as in so many intellectuals who come from the German Left, I find little trace of this... **[In the face of such difficult] emotions** aroused by this matter, this matter of the destruction of one-third of our people—and I regard you wholly as a daughter of our people... **[you display such] lack of heart** [*Herzentakt*]...

3. The Danger of Emotions: Hannah Arendt Responds, 1963

I am not one of the “intellectuals who come from the German Left.” ... I have always regarded my Jewishness as one of the indisputable factual data of my life, and I have never had the wish to change or disclaim facts of this kind... You are quite right—I am not moved by any “love” of this sort...I have never in my life “loved” any people or collective—neither the German people, nor the French, nor the American, nor the working class or anything of that sort. I indeed love “only” my friends and the only kind of love I know of and believe in is the love of persons...I do not “love” the Jews, nor do I “believe” in them; I merely belong to them as a matter of course, beyond dispute or argument...

Generally speaking, the role of the “heart” in politics seems to me altogether questionable. You know as well as I how often those who merely report certain unpleasant facts are accused of lack of soul, lack of heart, or lack of what you call *Herzentakt*. **We both know, in other words, how often these emotions are used in order to conceal factual truth...**when emotions are displayed in public and become a factor in political affairs... **[we see] the disastrous results...**

4. The Trap of Emotional Closure: Scholem Opposes Eichmann's Execution, 1962

The application of the death penalty to Eichmann constituted an inappropriate ending. It falsified the historical significance of the trial by creating the illusion that it is possible to conclude something of this affair by the hanging of one human or inhuman creature. Such an illusion is most dangerous because it **may engender the feeling that something has been done to atone for the un-atonable...**

As Jews and as human beings, we have no interest in such a phony '*finis*' [ending]... One fears that instead of opening up a reckoning and leaving it open for the next generation, we have foreclosed it. What superficially seems severity of judgment is in reality its mitigation, a mitigation in no way to our interest. It is to our interest that the great historical and moral question, the question of probing the depths which this trial has forced all to face—How could this happen?— that this question should retain all its weight, all its stark nakedness, all its horror. The hangman who had to execute Eichmann's sentence added nothing to the situation, but took away a great deal... He introduced the misplaced suggestion that this marked "the end of the story."

5. The Search for Balance between Emotion and Reason: Arendt on Judgment, 1970

One can never compel anyone to agree with one's judgments... one can only 'woo' or 'court' the agreement of everyone else. And in this persuasive activity one actually appeals to the 'community sense'...

One judges always as a member of a community, guided by one's community sense, one's *sensus communis*. But in the last analysis, one is a member of a world community by the sheer fact of being human; this is one's 'cosmopolitan existence'. When one judges and when one acts in political manners, one is supposed to take one's bearings from the *idea*, not the *actuality* of being a world citizen and, therefore, also a *Weltbetrachter*, a world spectator...

Always act on the maxim through which ... [social experience] can be actualized into a general law.

6. Max Radin's Law as Logic and Experience, 1940

Justice is an idea. Because it is an idea which infuses a sort of glow, it is also an emotion... [T]he justice that will serve our purposes must also be a process of moral valuation tinged with a kind of humane emotion... **How is this sense of justice to be distinguished from an inveterate personal prejudice? How is it to be distinguished from a whimsical oddity of feeling? The answer can be based only on the extent to which it is shared by other persons.**

The law... can dispense with neither logic nor experience. But law will not be good law by becoming a consummately perfect technique in regard either to logic or experience. That can be achieved only when just men perform the technical task of the law within the ancient formula before them - "as humane men should act when they act humanely."

Humanity is, after all, the business of the law. When the law forgets that, it were well that its right hand should forget its cunning and its eloquent tongue cleave to the roof of its mouth. It will remain in permanent exile by the rivers of Babylon.