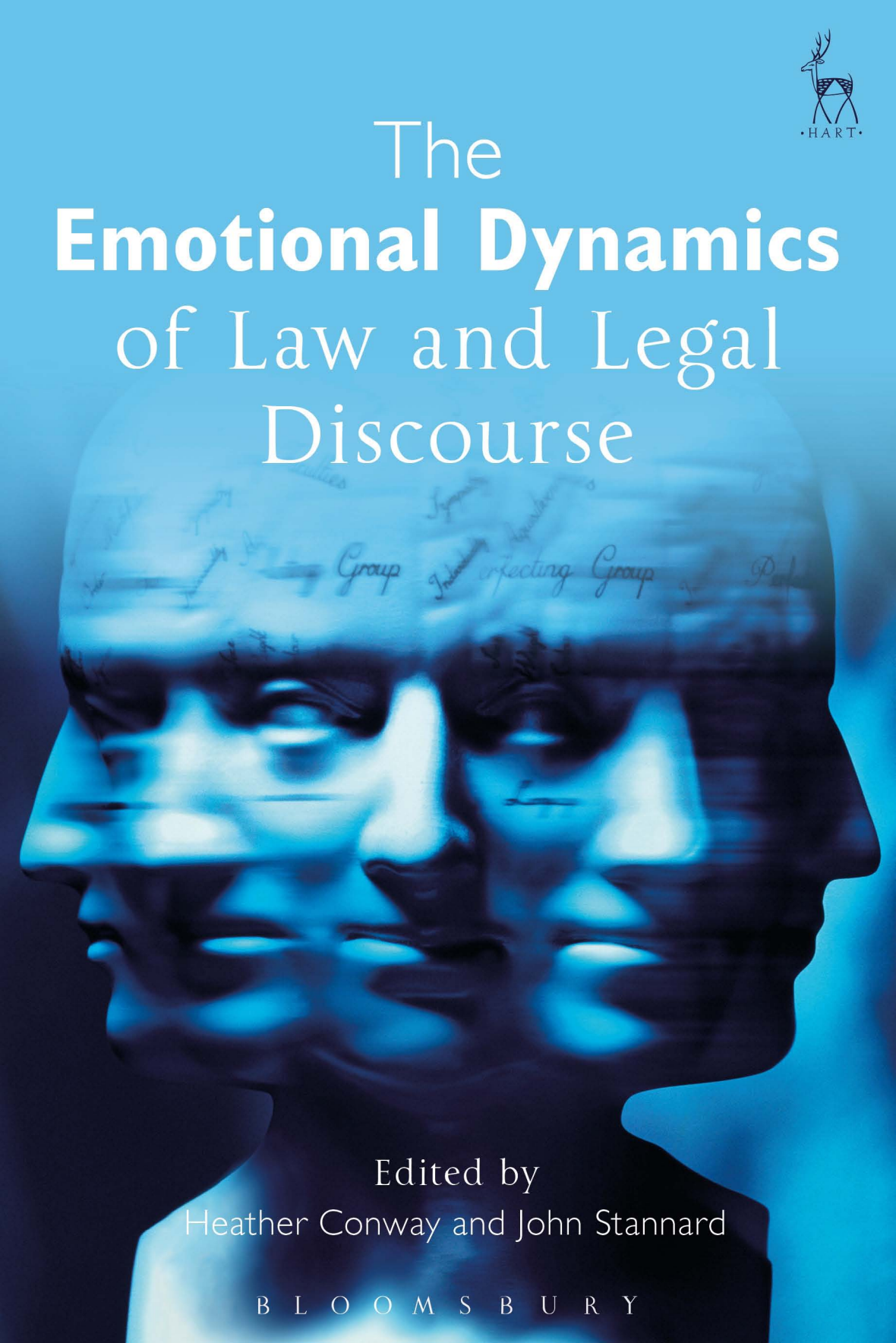
# The Emotional Dynamics of Law and Legal Discourse



Edited by
Heather Conway and John Stannard

BLOOMSBURY

# THE EMOTIONAL DYNAMICS OF LAW AND LEGAL DISCOURSE

In his seminal work, *Emotional Intelligence*, Daniel Goleman suggests that the common view of human intelligence is far too narrow and that emotions play a much greater role in thought, decision-making and individual success than is commonly acknowledged. The importance of emotion to human experience cannot be denied, yet the relationship between law and emotion is one that has largely been ignored until recent years. However, the last two decades have seen a rapidly expanding interest among scholars of all disciplines into the way in which law and the emotions interact, including the law's response to emotion and the extent to which emotions pervade the practice of the law. In *The Emotional Dynamics of Law and Legal Discourse* a group of leading scholars from both sides of the Atlantic explore these issues across key areas of private law, public law, criminal justice and dispute resolution, illustrating how emotion infuses all areas of legal thought. The collection argues for a more positive view of the role of emotion in the context of legal discourse and demonstrates ways in which the law could, in the words of Goleman, become more emotionally intelligent.

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OXFORD AND PORTLAND, OREGON
2016

**Hart Publishing**
An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

**www.hartpub.co.uk**
**www.bloomsbury.com**

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

**www.isbs.com**



First published 2016



**British Library Cataloguing-in-Publication Data**
A catalogue record for this book is available from the British Library.

ISBN: HBK: 978-1-84946-787-2
ePDF: 978-1-50990-246-0
ePub: 978-1-50990-247-7

**Library of Congress Cataloging-in-Publication Data**

Names: Conway, Heather (Law teacher), editor. | Stannard, John E., editor.

Title: The emotional dynamics of law and legal discourse / edited by Heather Conway and John Stannard.

Description: Oxford [UK] ; Portland, Oregon : Hart Publishing, 2016. | Includes bibliographical references and index.

Identifiers: LCCN 2016034319 (print) | LCCN 2016034946 (ebook) | ISBN 9781849467872 (hardback : alk. paper) | ISBN 9781509902477 (Epub)

Subjects: LCSH: Law—Psychological aspects. | Jurisprudence—Psychological aspects. | Emotions (Philosophy) | Intentionality (Philosophy) | Empathy.

Classification: LCC K346 .E46 2016 (print) | LCC K346 (ebook) | DDC 340/.19—dc23

LC record available at https://lccn.loc.gov/2016034319

Typeset by Compuscript Ltd, Shannon

# PREFACE

In March 2013, the School of Law at Queen's University Belfast hosted a two-day colloquium entitled 'The Emotional Dynamics of Law and Legal Discourse'. One of the first specialist conferences on law and emotion to be held in the UK, participants were treated to a range of thought-provoking papers from legal academics, a high court judge, a clinical psychologist and a professor of psychology. Our thinking behind the colloquium was fairly straightforward: to bring together a diverse range of people working in the area of law and emotion, and to stimulate further research collaboration. The current edited collection is the first of what we hope will be many by-products of that gathering.

The authors owe a huge debt of gratitude to all those who were instrumental in bringing the collection to fruition. The School of Law at Queen's University provided the funding for the initial colloquium, which ultimately allowed us to invite speakers from England, Scotland, Europe and the United States, and to bring them to Belfast—in some instances for the first time.[1] Thanks also to each of the contributors involved in the collection for producing such a diverse and insightful array of scholarship, and for putting up with our numerous emails when we were probably driving them to the proverbial point of distraction. Every paper in this collection has been subject to a triple peer-review process, with individual chapters reviewed by the co-editors, another contributor to the collection and by an anonymous referee. The editors are extremely grateful to all those individuals who gave their valuable time and expertise to this, and who enhanced the collection as a result.

On the publishing side, thanks to Richard Hart for encouraging the submission of this proposal, and to Hart Publishing for agreeing to publish the book and for their professionalism and endless patience along the way. In particular, we are grateful to Annie Mirza who advised us and reassured at all stages of the submission process, even when it was yet another request for more time! Thanks also to everyone involved in the production process, and especially to Tom Adams as Production Manager.

Heather Conway and John Stannard
School of Law, Queen's University Belfast
March 2016

[1] Though neither the colloquium organisers nor the School of Law can take credit for the heavy snowfall which greeted everyone on arrival, and prompted a very distinctive emotional response from Professor Kathy Abrams who travelled from the University of California at Berkeley and had never seen real snow before!

# EDITORS AND CONTRIBUTORS

**Editors**

**Dr Heather Conway** is a Senior Lecturer in the School of Law at Queen's University Belfast. She has written a number of articles on emotion in selected aspects of property law, and in the areas of property law and succession law more generally. Her main research interest is in the law governing the fate of the recently dead and associated decision-making responsibilities, with particular emphasis on the laws around the post-mortem treatment of bodies, corpse disposal and disputes within families over their dead (including funeral disputes, and family tensions around exhumation and commemoration). She has presented and published extensively in this area, and is the author of *The Law and the Dead* (Routledge, 2016).

**Dr John Stannard** is a Senior Lecturer in the School of Law at Queen's University Belfast where he has worked since 1977. His interest in law and emotion dates back to a conference paper written in 1992, and since then he has published on the subject in a range of journals, including the *Journal of Criminal Law*, the *Northern Ireland Legal Quarterly* and the *University of New South Wales Law Journal*. He has also delivered papers at numerous conferences, including the Society of Legal Scholars, the Irish Association of Law Teachers, the Association for the Study of Law, Culture and the Humanities, the International Association for Law and Mental Health, and the Multisensory Law Colloquium. In 2009 he was a Visiting Scholar at the Center for Law and Society in Berkeley, California, and he is keen on encouraging contacts between different groups of scholars working in the field of law and emotion on both sides of the Atlantic.

**Contributors**

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recently she has become interested in the role of emotion in rights claiming and social movement mobilisation, 'Emotions in the Mobilization of Rights' (*Harvard Civil Rights–Civil Liberties Law Review*, 2011). Her current research project is an empirical study of the immigrant justice movement in the State of Arizona.

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**Dr Mary Neal** is Senior Lecturer in Law at the University of Strathclyde, where she teaches and researches in the fields of Healthcare Law and Bioethics, Property Law Theory, and Jurisprudence. She holds degrees from the Universities of Glasgow (LLB Honours, LLM) and Cardiff (PhD). Her research focuses on beginning and end-of-life issues, and in particular, on meta-disciplinary concepts such as dignity, sanctity, love, and vulnerability. Her most recent publications have addressed the conceptual structure and content of dignity, and rights of conscience in the healthcare context. Her current projects include articles on: assisted dying; conscience rights; and the role of dignity in human rights discourse. She is currently writing a monograph (for Routledge) on pregnancy, property, and personhood.

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**Dr Timothy D Ritchie** joined the Department of Psychology at Saint Xavier University as Chairperson in 2014. From 2009 to 2014, he earned tenure at the Department of Psychology, University of Limerick; and, from 2007 to 2009, he was a Research and Teaching Fellow at the Centre for Research on Self and Identity, School of Psychology, University of Southampton. In 2006, he earned a PhD in Social and Industrial-Organisational Psychology from Northern Illinois University; a MA in Clinical Psychology from Roosevelt University Chicago (1999); and a BS in Psychology with a Philosophy minor from Loyola University Chicago (1997). Dr Ritchie collaborates with scholars locally and internationally. He is a peer reviewer for over 30 scientific journals, an action editor for three journals, a lead author and a co-author on more than 40 peer-reviewed journal articles, encyclopaedia entries and book chapters; he frequently presents at conferences, colloquia and as a guest lecturer. He promotes students and colleagues to endeavour research, teaching and service that span multiple academic, scientific and applied disciplines across cultures, languages and geographical locations.

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**Dr Stuart Turner** is a Consultant Psychiatrist, practising in London. He has an extensive background in the field of traumatic stress, having led a national treatment service, having been past president of both European and International Societies for Traumatic Stress Studies, having co-founded the Centre for the Study of Emotion and Law, and in 2015 being the recipient of the Wolter de Loos award for Distinguished Contribution to Psychotraumatology in Europe.

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# 1

# Contextualising Law and Emotion: Past Narratives and Future Directions

HEATHER CONWAY AND JOHN STANNARD*

## I. Introduction

In his seminal work, *Emotional Intelligence*, the psychologist Daniel Goleman suggests that the common view of human intelligence is far too narrow, and that emotions play a far greater and more positive role in thought, decision-making and individual success than is commonly acknowledged.[1] But what has emotion got to do with the law? Very little, according to the traditional view of the matter which decrees that law is, first and foremost, the province of reason. As Maroney pointed out in 2006, the law has tended to operate on the assumption that there is a world of difference between reason and emotion; that the sphere of law admits only of reason; and that, in this sphere, it is essential to keep emotional factors out of the picture.[2] Though the law has always had to take account of human emotion,[3] the conventional explanation has given it a very restricted scope;[4] and, while judges and lawyers may have emotions, one of the key skills that they are expected to exercise is setting those emotions aside, to ensure that emotion does not intrude on reason as the true preserve of law.[5]

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[1] D Goleman, *Emotional Intelligence* (New York, Bantam Books, 1995).

[2] TA Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 *Law and Human Behavior* 119. See also ML Nelkin, 'Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School' (1996) 46 *Journal of Legal Education* 420; DM Kahan and MC Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Columbia Law Review* 269; and J Schweppe and JE Stannard, 'What is So "Special" About Law and Emotions?' (2013) 64 *Northern Ireland Legal Quarterly* 1.

[3] Various examples are noted below.

[4] SA Bandes (ed), *The Passions of Law* (New York, New York University Press, 1999) 2.

[5] Ibid.

## II. The Philosophical Tradition

The perception of law and emotion as essentially mutually exclusive realms has its roots in a broader philosophical tradition whereby, in the words of Robert Solomon, reason and emotion stand in what is essentially a master–slave relationship, the implications being that reason and emotion are essentially distinct; emotion is inferior to reason; and it is the function of reason to keep emotion under control.[6] For the Greek philosopher Democritus, one of the functions of wisdom was to free the soul from emotions;[7] for the Epicureans and Stoics, the extirpation of emotion was the key to the rational life.[8] As late as the seventeenth century, philosophers such as Descartes still held to a rigid distinction between passion and reason,[9] their goal being a model of philosophy based on the deductive method developed by Euclid.[10] However, others have questioned both the existence of a rigid distinction between emotion and reason, and the subordination of the former to the latter. For Aristotle emotions were not, in the words of Martha Nussbaum,[11] blind animal forces, but intelligent and discriminating parts of the personality, closely related to beliefs of a certain sort and therefore responsive to cognitive modification.[12] More recently, Oatley, Keltner and Jenkins have argued that emotions are rational in a number of respects; in particular, they are generally grounded in real events, they help individuals to function in a social world, and they inform and guide cognitive processes.[13] This 'cognitive' theory of emotion—picked up and developed throughout the second half of the twentieth century by a number of scholars[14]—has now spawned an extensive field of literature in its

[6] R Solomon, 'The Philosophy of Emotions' in M Lewis, JM Haviland-Jones and L Feldman Barrett (eds), *Handbook of Emotions*, 3rd edn (New York, Guilford Press, 2008).

[7] Cited by K Oatley, *Emotions: A Brief History* (Oxford, Blackwell Publishing, 2004) 42. See also R Sorabji, *Emotion and Peace of Mind: From Stoic Agitation to Christian Temptation* (Oxford, Oxford University Press, 2000).

[8] Oatley (n 7) 43. See also MC Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton, NJ, Princeton University Press, 1994).

[9] Cited by Solomon (n 6) 6.

[10] J Haidt, 'The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment' (2001) 108 *Psychological Review* 814, 815. This distinction is well-illustrated in a myth (cited by Haidt) from Plato's dialogue *Timaeus*, in which the gods create human heads to house reason, but then have to supply emotional bodies to help the heads move around—ibid, 815.

[11] MC Nussbaum, 'Aristotle on Emotions and Rational Persuasion' in A Rorty (ed), *Essays on Aristotle's Rhetoric* (Berkeley, CA, University of California Press, 1996).

[12] Ibid, 303.

[13] K Oatley, D Keltner and JM Jenkins, *Understanding Emotions*, 2nd edn (Oxford, Blackwell Publishing, 2006) 259–60.

[14] See for example, MB Arnold and JA Gasson, 'Feelings and Emotions as Dynamic Factors in Personality Integration' in MB Arnold and JA Gasson (eds), *The Human Person: An Approach to an Integral Theory of Human Personality* (New York, Ronald Press Company, 1954) and cited by Oatley (n 7); HA Simon, 'Motivational and Emotional Controls over Cognition' (1967) 74 *Psychological Review* 29 and cited in Oatley, Keltner and Jenkins (n 13); and RS Lazarus, 'Thoughts on the Relations Between Emotion and Cognition' (1982) 37 *American Psychologist* 1019.

own right.[15] No longer are emotions seen as a hindrance to human behaviour and interaction; on the contrary, a person without emotion is now reviled in popular culture as a psychopath[16] rather than revered as a philosopher.

## III. Emotion in Law

As in the realm of philosophy, the traditional neglect of emotion in law has not been consistent. In certain contexts, most notably that of criminal law, engaging with questions of emotion is unavoidable, and the same is true for other branches of the law. Emotions play a key role in family law disputes, for instance, and one of the main functions of the law of evidence is to avoid the risk of juries drawing conclusions which might be based on emotional prejudice. Meanwhile, practices such as restorative justice and therapeutic jurisprudence are designed to point the way towards the resolution of disputes in a manner so as to avoid leaving those concerned with a sense of grievance and injustice. Nor has emotion necessarily been regarded as something alien to the practice of law; the famous biblical account of the judgment of Solomon in the First Book of Kings[17] is a perfect example, and challenges the assertion that the exercise of emotional empathy has no place in the judicial function.[18]

Despite this, the actual relationship between law and emotion is one that has largely been ignored until recent years. There have always been those who have argued for a more nuanced view of the subject, ranging from members of the American realist movement, such as Jerome Frank, in the early part of the twentieth century,[19] to the advocates of therapeutic jurisprudence in the 1990s.[20] However, the last two decades have witnessed a growing interest in the relationship between law and emotion at a more general level. The agenda was set in 1999 with the publication of *The Passions of Law*,[21] an anthology of original essays

[15] For a general overview see Oatley, Keltner and Jenkins (n 13) ch 10. There is also a journal dedicated to the topic—*Cognition and Emotion* (Routledge), first published in 1987.

[16] See for instance, William Hirstein, 'What is a Psychopath?': www.psychologytoday.com/blog/mindmelding/201301/what-is-psychopath-0. Fans of the US television show *Dexter* (HBO, 2006–13), whose central character worked as a blood-splatter analyst for the Miami Police Department while moonlighting as a vigilante serial killer, will recall Dexter's ongoing struggle to simulate human emotions in order to create the appearance of being a 'normal' person.

[17] 1 Kings 3: 16–28.

[18] We return to this theme in the final chapter.

[19] Noted in TA Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99 *California Law Review* 629.

[20] DB Wexler and BJ Winick, *Essays in Therapeutic Jurisprudence* (Durham, NC, Carolina Academic Press, 1991); and DB Wexler and BJ Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Durham, NC, Carolina Academic Press, 1996). See also C Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy, and Law* 193; and D Rottman and P Casey, 'Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts' (1999) 240 *National Institute of Justice Journal* 12.

[21] Bandes, *The Passions of Law* (n 4).

looking at the role that emotions play, do not play and ought to play in the practice and conception of law and justice. Edited by Susan Bandes, the collection opened with the same author's ringing declaration that 'emotion pervades the law'.[22] Since then, the relationship between the two has been developed further, and systematic attempts have been made to map out the role of emotion in the law and legal decision-making.[23] The relevant literature has also expanded in a variety of directions, with special journal collections[24] and other discrete publications, covering a range of diverse fields such as criminal law;[25] emotion in judging;[26] victims' rights;[27] refugee law;[28] hate crimes;[29] family law (most notably, divorce and child custody proceedings);[30] and aspects of property law.[31]

Yet, as Maroney herself pointed out a decade ago[32] there is still some way to go before law and emotion becomes established as a discipline in its own

[22] Ibid, 1.

[23] As well as the sources immediately below, see BH Bornstein and RL Wiener, *Emotion and the Law: Psychological Perspectives* (New York, Springer, 2010); and SA Bandes and JA Blumenthal, 'Emotion and the Law' (2012) 8 *Annual Review of Social Science* 161.

[24] See for example, the collection of articles published in 'Symposium: Law, Psychology and the Emotions' (2000) 74 *Chicago–Kent Law Review*; 'Special Issue on Emotion in Legal Judgment and Decision-Making' (2006) 30 *Law and Human Behavior*; J Schweppe and J Stannard (eds), 'Special Issue: Law and Emotions' (2013) 64 *Northern Ireland Legal Quarterly*; and TA Maroney and SA Bandes (eds), 'Special Section: Law and Emotion' (2016) 8 *Emotion Review*.

[25] Kahan and Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (n 2) (revisited some 15 years later in DM Kahan, 'Two Conceptions of Two Conceptions of Emotion in Criminal Law: An Essay Inspired by Bill Stuntz' in M Klarman, D Skeel and C Steiker (eds), *The Political Heart of Criminal Procedure: Essays on the Themes of William J Stuntz* (New York, Cambridge University Press, 2011)); V Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense (1997) 106 *Yale Law Journal* 1331; and E Spain, *The Role of Emotions in Criminal Law Defences: Duress, Necessity and Lesser Evils* (Cambridge, Cambridge University Press, 2011).

[26] Maroney has written extensively in this field—see for example, Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (n 19); TA Maroney, 'Angry Judges' (2012) 65 *Vanderbilt Law Review* 1207; TA Maroney, 'Judges and their Emotions' (2013) 64 *Northern Ireland Legal Quarterly* 11; and TA Maroney and JJ Gross, 'The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective' (2014) 6 *Emotion Review* 142.

[27] J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Oxford, Hart Publishing, 2009); SA Bandes, 'Victims, "Closure", and the Sociology of Emotion' (2009) 72 *Law and Contemporary Problems* 1; and J Doak and L Taylor, 'Hearing the Voices of Victims and Offenders: The Role of Emotions in Criminal Sentencing' (2013) 64 *Northern Ireland Legal Quarterly* 25.

[28] See J Herlihy, 'The Psychology of Seeking Protection' (2009) 21 *International Journal of Refugee Law* 171; and J Herlihy and S Turner, 'What Do We Know So Far about Emotion and Refugee Law?' (2013) 64 *Northern Ireland Legal Quarterly* 47.

[29] K Abrams, 'The Progress of Passion' (2002) 100 *Michigan Law Review* 1602.

[30] See for example, S Moldonado, 'Cultivating Forgiveness: Reducing Hostility and Conflict after Divorce' (2008) 43 *Wake Forest Law Review* 441; and C Huntingdon, 'Repairing Family Law' (2008) 57 *Duke Law Journal* 1245.

[31] See H Conway and J Stannard, 'The Emotional Paradoxes of Adverse Possession' (2013) 64 *Northern Ireland Legal Quarterly* 75; and H Conway and J Stannard, 'Property and Emotions' (2016) 8 *Emotion Review* 38.

[32] Maroney, 'Law and Emotion' (n 2). See also SJ Morse, 'New Neuroscience, Old Problems' in B Garland (ed), *Neuroscience and the Law: Brain, Mind and the Scales of Justice* (New York, Dana Press, 2004); and K Abrams and H Keren, 'Who's Afraid of Law and the Emotions' (2009) 94 *Minnesota Law Review* 1997.

right,[33] and the current edited collection addresses some of the main gaps in the existing scholarship. A number of issues can be identified, the first of which is the somewhat disjointed nature of the work in this field, with different groups approaching the topic from different angles instead of taking a more holistic approach. Mention has already been made of the American realist and therapeutic jurisprudence movements; other groups are also interested in law and emotion from a range of perspectives such as multisensory law, the restorative justice movement, community justice and collaborative law, all operating independently and largely in ignorance of each other.[34] Second, though attempts have recently been made to look at the topic from a wider perspective, much of the earlier work on law and emotion tended to focus on criminal justice aspects,[35] as well as being somewhat speculative in nature.[36] Third, the study of law and emotion has historically been very much a North American phenomenon, and though there is now a growing interest amongst scholars elsewhere, few concerted efforts have been made to raise its profile to a wider audience. Last but not least, a lot more needs to be known about law and emotion in the context of legal discourse. Some work has been done in this area,[37] but this is still one of the major gaps in law and emotion scholarship, and an area which needs to be explored.

## IV. The Current Collection

*The Emotional Dynamics of Law and Legal Discourse* addresses these issues in a number of ways, building on a colloquium hosted by the School of Law at Queen's University Belfast in March 2013 and attended by a number of international scholars who are also contributing here. The aim is to raise the profile of law and emotion outside North America, with a theoretically grounded collection of essays

[33] One underlying reason is the fact that there are so many ways in which the topic can be approached—something which we return to below.

[34] See for example, CR Brunschwig, 'Law Is Not or Must Not Be Just Verbal and Visual in the 21st Century: Toward Multisensory Law' (2010) *Internationalisation of Law in the Digital Information Society: Nordic Yearbook of Law and Informatics* 231; LR Spain, 'Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law' (2004) 56 *Baylor Law Review* 141; J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford, Oxford University Press, 2002); and G Bazemore and M Schiff, *Restorative Community Justice: Repairing Harm and Transforming Communities* (Abingdon, Routledge, 2015).

[35] A point made in Abrams (n 29) and again in K Abrams and H Keren, 'Law in the Cultivation of Hope' (2007) 95 *California Law Review* 319, 319–20.

[36] More recently, the point has been made that, for law and emotion to have any credibility it must—as with any other interdisciplinary field—have a proper theoretical grounding: Maroney, 'Law and Emotion' (n 2); and Schweppe and Stannard, 'What is So "Special" about Law and Emotions?' (n 2). Some of the challenges that this poses are discussed in JA Blumenthal, 'Law and the Emotions: The Problem of Affective Forecasting' (2005) 80 *Indiana Law Journal* 155.

[37] See for example, Abrams and Keren, 'Law in the Cultivation of Hope' (n 35) and Maroney, 'Angry Judges' (n 26).

which draws on a range of scholarship and takes the discipline to a wider audience. The collection looks at law and emotion in a much broader legal context, focusing on a range of discrete areas of law across the spectrum of private law, public law, criminal justice and dispute resolution, to show how emotion infuses all areas of legal thought while arguing for a more positive view of the role of emotion in the context of legal discourse. Emotions tend to be noticed in law when they are creating a problem—for example, in the context of crimes of passion, family disputes over the dead and damages for emotional distress.[38] However, emotions can also be a solution, and a common thread running through the collection is an acceptance of the way in which emotions can legitimately infuse and pervade the world of law.

So, how do we go about exploring these various themes? In an influential article published in 2006, Terry Maroney suggested at least six possible approaches to law and emotion:[39] (1) the 'doctrine-centered' approach (the ways in which emotions are or should be reflected in different areas of legal doctrine); (2) the 'emotion-centered' approach (the way in which the law responds to or reflects particular discrete emotions); (3) the 'actor-centered' approach (the way in which emotion can or should affect the work of particular legal actors such as judges, solicitors and barristers); (4) the 'emotional phenomenon' approach (describing particular emotional phenomena and analysing how these should be reflected in law); (5) the 'emotion-theory' approach (examining legal doctrines and practices in the light of particular theories of emotion); and (6) the 'theory-of-law' approach (analysing the emotional theories and presuppositions reflected in particular legal theories). Another way of looking at it is to divide the study of law and emotion into three broad, but interlinking, strands. The first looks at the law's response to emotion (moving beyond the traditional paradigm of a calm and dispassionate law having to deal with complex and unruly emotions coming before it); the second at the ways in which the law can create an emotional response in others (both participants in legal actions and the wider public); and the third at the role of emotion in the practice of the law. Obviously, the extent to which these emotional dynamics come into play will vary from case to case, as the individual chapters in this collection illustrate.

Drawing on these core themes, chapters two, three and four of the collection begin by looking at a number of issues within the private law setting, focusing on legal disputes which are driven by emotion and which require an emotionally-responsive approach. Huntington initiates the discussion in chapter two by looking at family law's response to emotion in disputes surrounding close personal

[38] See for example, J Horder, *Provocation and Responsibility* (Oxford, Clarendon Press, 1992); and H Conway and J Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34 *University of New South Wales Law Journal* 860.

[39] Maroney, 'Law and Emotion' (n 2).

relationships and child welfare, and at attempts within the US legal system to move towards a more reparative model. In chapter three, Conway explores another type of emotionally-charged family conflict: that of adult siblings fighting over a dead parent's estate where assets are not divided equally, and the unique and inherently complex emotional matrix that this creates. Staying within the private law realm, Stannard uses chapter four to suggest how an understanding of the emotional dynamics of the relationships involved can help to illustrate and inform the law of undue influence, where it is claimed that one person has used a position of dominance to persuade another individual to enter into a disadvantageous legal transaction.

Chapter five sees a change in emphasis, as Neal unpacks the emotional context of end-of-life narratives in the field of healthcare law and ethics, focusing on the concept of dignity and how emotion-shaping language triggers certain reactions. Similar broad themes are explored in chapter six, as Pemberton examines victims' emotions in the criminal justice context, and the importance of empathy and narrative in shaping an appropriate legal response. McAlinden then focuses on a distinct aspect of contemporary criminal justice debates in chapter seven, exploring the complex relationships between emotions, cognition and appraisal and the 'degrees of emotion' evidenced in public responses to sex offenders against children. The role of emotion in legal decision-making assumes centre stage again in chapter eight, as Herlihy and Turner examine the role of emotion in UK asylum cases, using the examples of claims by survivors of torture and victims of sexual assault. Abrams explores another topical issue in chapter nine: how emotion functions and changes in the context of social justice movements, focusing on the US movement for immigrant rights and how existing laws and policies have also elicited a specific emotional response.

In chapters ten, eleven and twelve the emphasis shifts to emotions in the practice of law and the shared experiences of key personnel within the legal system. Irvine and Farrington begin by focusing on the role of the mediator in chapter ten, and the need for such persons to be 'emotionally literate' in dealing with emotions and displaying empathy in particular. In chapter eleven, Spain and Ritchie look at the emotions experienced by members of the legal profession, and the impact of emotional suppression and emotional dissonance on their health and wellbeing. Maroney then uses chapter twelve to examine the role of emotion in judging, challenging the traditional view that judges should not feel emotion or allow it to influence their judgments, and arguing that certain emotions should be embraced. Finally, reflecting on the collection overall, Stannard and Conway use chapter thirteen to sketch out ways in which the practice of emotional intelligence can help the law to be more receptive to emotions and their consequences, while positing ways in which this might be achieved.

## V. Conclusion

Of course, *The Emotional Dynamics of Law and Legal Discourse* will not be the last word on the subject. Much remains to be done in terms of bringing together the different groups involved in the study of law and emotion, and aligning the often disparate literature on the topic. The various chapters in this collection have also signposted potential directions for future developments and interactions, which other works might explore.[40] Our goal in producing this collection, however, is to present a range of insights into what is still a relatively new and emerging field, but one which promises to bear much fruit as both legal scholarship and interdisciplinary research within the humanities and social sciences pursue more meaningful lines of enquiry. In 2007, Abrams and Keren acknowledged that '[l]egal thought has been slow to engage the emotions'.[41] Almost a decade later, things have certainly moved on as legal academics and those involved in the practice of law increasingly accept that the role of emotion can neither be avoided nor neglected. *The Emotional Dynamics of Law and Legal Discourse* is another attempt to counteract many of the negative assumptions which have attached to law and emotion scholarship in the past.[42] Winning over a sceptical audience is never easy, as those who have been writing in the area for years will testify; but in highlighting the ways in which emotions and their consequence can enrich both law and legal discourse, the collection ultimately points the way towards a more emotionally intelligent system of law.

[40] Other areas of future study have also been signposted elsewhere—see for example, Bandes and Blumenthal (n 23).

[41] Abrams and Keren, 'Law in the Cultivation of Hope' (n 35) 319.

[42] In particular, the distinction between emotions and reason, and the idea of a dispassionate law which must not yield to displays of emotion.

# 2

# Affective Family Law

CLARE HUNTINGTON*

## I. Introduction

A casual observer of the US legal system (or any legal system for that matter) might think that if any area of the law is attuned to emotion it would be family law. It does not take a degree in psychology to understand that divorcing spouses may feel anger and resentment; that children in foster care may experience abandonment and fear; and that parents who lose custody of a child to the state may suffer a deep loss. Despite this intuitive understanding, family law fails, for the most part, the emotional intelligence test. That is, the US family law system is not well attuned to the emotional needs of the litigants. Rather than recognising a range of emotions, and rather than trying to work with these emotions productively, too often family law embraces a thin understanding of the emotional lives of families and fails to cultivate positive emotions within families. This chapter explores these themes, demonstrating that the emotional valence of family relationships presents both challenges and opportunities for family law. There are subjects within family law, but this chapter chooses the creation and dissolution of legal ties—whether through marriage, divorce, separation, adoption, or the removal of a child from the home—to illustrate the value of a law-and-emotion analysis.

In examining the role of emotion in these areas of family law, this chapter does not argue that family law has a unique claim on emotion. As the other chapters in this volume demonstrate, emotion runs through nearly all legal disputes. But there are distinct considerations in family law—as evidenced by this chapter as well as Conway's chapter on siblings and inheritance[1]—that require attention to the role of emotion and make family law a fruitful site for exploring the themes in this collected volume. In particular, this chapter examines family law's response to existing emotions and the appropriate place for emotion in family law.

* This chapter draws on earlier work by the author, most notably C Huntington, 'Repairing Family Law' (2008) 57 *Duke Law Journal* 1245.

[1] See Conway, ch 3.

The chapter focuses on US law, but the broad lessons are applicable to other family law systems, especially countries that, like the US, rely on a court-based system of dispute resolution for family matters.

As elaborated below, the central argument of the chapter is that family law must be particularly careful not to introduce or exacerbate existing acrimony but that it also has an opportunity to cultivate more positive emotions in family members. Paying close attention to the emotional aspects of disputes within the family holds the potential for creating a more effective legal system that benefits both litigants and society more broadly. After establishing these principles, this chapter looks at one of the most important issues facing family law in the US: the treatment of non-marital families. These families present particular challenges for the family law system because parents often do not use the court system following the end of the relationship; thus, parents are left on their own to negotiate changes in their families. The chapter argues that a law-and-emotion analysis points to alternative strategies to help non-marital families restructure their families following the end of a relationship.

## II. Family Law's Response to Emotion

A starting point for examining the role of emotion in family law is what Terry Maroney has called the 'emotion-theory approach'.[2] This takes a discipline, such as psychoanalysis or cognitive neuroscience, and then focuses on a theory within that discipline. Investigating one theory of emotion—here, the cyclical nature of emotion within relationships, particularly as articulated by psychoanalytic theorist Melanie Klein[3]—demonstrates the severe shortcomings of family law.

The current system of family law reflects a shallow and binary understanding of the affective family. Families are either solidaristic and altruistic, filled with love and care, or families are filled with anger and jealousy and prone to violence. This binary model of family law infuses the substance, process and practice of family law in contexts as far ranging as marriage, child welfare and adoption. Yet, it stands in stark contrast to the reality of dynamic, fluid familial relationships with a range of emotions felt across and fluctuating across time. Understanding Klein's theory of the cyclical nature of human emotions and the reparative drive offers powerful insights across the breadth of family law.

This chapter offers Klein's insights into human intimacy not as a scientific theory that can be empirically proven, but rather as a point of entry for thinking about the cyclical nature of emotions in familial relationships.

[2] TA Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 *Law and Human Behavior* 119, 128.

[3] M Klein, Love, Guilt and Reparation: And Other Works 1921–1945 (New York, The Free Press, 1975).

## A. The Dynamic Cycle of Intimacy

Klein, an early follower of Sigmund Freud and a pioneer in the field of child psychoanalysis, articulated an understanding of the cycle of intimacy.[4] At its broadest level of generality, the theory is that close human relationships move through a cycle of emotions. A person feels love for another. This is almost always followed by negative feelings (which Klein usually calls 'hate', but which is better captured for a modern reader in her other term for these negative feelings—'aggression'),[5] leading to a breach in the relationship. The person then feels guilty about the breach and so seeks to repair the relationship.

Klein developed this theory in the context of the relationship between mothers and infants, theorising that infants first experience love and hate in relation to their mothers. Infants love their mothers when their mothers are satisfying their needs, say during breastfeeding. But when their needs are not gratified, infants feel hatred and aggression towards their mothers.[6] This leads the infant to experience guilt about the negative feelings; the guilt, in turn, creates a powerful drive in the infant to repair the relationship and restore the feelings of love.[7]

This cycle—with feelings of love, then hatred and aggression giving birth to guilt and the reparative drive—is repeated throughout a lifetime, each time widening the scope of a person's ability to love and make reparations. Klein argued that wherever there is a feeling of love, the conflict between hate and love is aroused, which leads to feelings of guilt and then wishes to make good. Thus, according to Klein, making reparation is 'a fundamental element in love and in all human relationships'.[8] Klein concluded that 'these basic conflicts profoundly influence the course and the force of the emotional lives of grown-up individuals'.[9]

A key element of reparation is the acknowledgment of hate and aggression. As one of Klein's colleagues, Joan Riviere, wrote, 'we spend our lives in the task of attempting to keep a sort of balance between the life-bringing and the destructive elements in ourselves'—in other words, counterpoising love and hate.[10] Balancing these forces requires recognition of the universal force of hate. Without such recognition, hate and aggression are more likely to take extreme forms and the cycle of human intimacy is more likely to be forestalled. Recognising the negative emotions enables people to move to the guilt and reparation phases of intimacy.[11]

[4] M Klein and J Riviere, *Love, Hate and Reparation* (New York, WW Norton & Company, 1964). Each individual author wrote their own section of the book, but the theory used here is Klein's and is cited accordingly.

[5] Ibid, 58.

[6] Ibid, 61.

[7] Ibid, 117.

[8] Ibid, 68.

[9] Ibid, 62.

[10] Ibid, 45–46.

[11] Ibid.

Similarly, in Klein's view, guilt is a productive emotion, fuelling the reparative drive. Other scholars agree, noting that unlike empathy, which is a 'bystander emotion' experienced by someone who is not responsible for hurting another, guilt is the recognition that the person feeling it played a role in hurting another.[12] It thus becomes a signal to that person that a relationship is threatened and some action should be taken.[13] The reparation that follows can occur within a person's own internal, emotional landscape, but it takes its primary expression in a person's relationships with others and becomes a powerful force for constructive action in repairing those relationships.[14] Klein acknowledged that not everyone is able to realise the drive towards reparation, but she contended that it exists in everyone.[15]

Although Klein makes claims of innateness,[16] the reparative drive does not have to be universal to be relevant.[17] Instead, Klein's reparative theory is emblematic of a broader discourse on the importance of repair.[18] Moreover, the reparative drive is part of a larger group of relational instincts and motivations, such as tending[19] and altruism,[20] and parallels the enquiry of moral psychologists.[21]

In short, Klein articulated a cycle of intimacy, and argued that facilitating the flow from one phase to the next holds great potential both for individual development and wellbeing as well as for relationships between individuals. With Klein's theory in mind, the next section examines the implications of the theory for family law.

## B. Stasis and Opposition in Family Law

Despite its fundamental importance to the relationships that family law regulates, the substance, process and practice of family law too often fail to account for

[12] See, eg HW Bierhoff, *Prosocial Behaviour* (East Sussex, Psychology Press, 2002) 139.

[13] Ibid, 144.

[14] RD Hinshelwood, *A Dictionary of Kleinian Thought* (London, Free Association Books, 1989) 399–400.

[15] Klein and Riviere (n 4) 82–87.

[16] Ibid, 65–66.

[17] Claims of universality are always fraught. See, eg AP Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581, 585–86 (arguing that categorical unity is an illusion obtained through the sacrifice of silenced voices).

[18] An extended discussion of the broader discourse can be found in C Huntington, 'Repairing Family Law' (2008) 57 *Duke Law Journal* 1245.

[19] The 'tending instinct', has been described as 'a fundamental truth about human nature: The brain and body are crafted to tend … in order to attract, maintain, and nurture relationships with others across the life span'. SE Taylor, *The Tending Instinct: Women, Men, and the Biology of Relationships* (New York, Holt Paperbacks, 2002) 12.

[20] A partial survey of the robust literature on altruism can be found in RA Prentice, '"Law &" Gratuitous Promises' (2007) 3 *University of Illinois Law Review* 881, 884–90.

[21] L Kohlberg, *The Psychology of Moral Development: Essays on Moral Development*, vol 2 (San Francisco, Harper & Row, 1984) 174–76. See also L Kohlberg, 'Stage and Sequence: The Cognitive-Developmental Approach to Socialization' in DA Goslin (ed), *Handbook of Socialization Theory and Research* (Chicago, Rand McNally, 1969) 376; ML Hoffman, *Empathy and Moral Development: Implications for Caring and Justice* (Cambridge, Cambridge University Press, 2000) 3.

the cyclical nature of emotions in general and the reparative drive in particular. Family life is neither all about the positive (love, forgiveness, caring, altruism), nor all about the negative (anger, jealousy, envy). Rather, family life is a mixture of these emotions and many more. Perhaps most importantly, familial relationships are dynamic, cycling through emotions of love, anger, guilt and the drive to repair. And yet family law reflects a binary model of emotions—all positive or all negative—and does not reflect or encourage the reparative drive.

Beginning with substance, family law provides binary rules governing entry into and exit from close relationships. In the US, a couple is either married, with all the accompanying benefits and obligations, or unmarried, with very few of these obligations.[22] In the US child welfare system, parents must regain custody of their children or face termination of their parental rights.[23] In the adoption context, after giving birth, a biological parent either places the child for adoption, thus losing all parental rights, or retains custody of the child with parental rights completely intact.[24] Gestational surrogates and close intimates are either granted parental rights or not.[25] These binary rules are justified by the importance of certainty and stability for the child and the need to induce parents to undertake the difficult work of parenting,[26] but they admit of only two possibilities—deep connection or complete rupture.

This binary substance suffuses the process of family law. Courts seek to determine the 'truth' about a familial conflict by settling on a single account of a disputed incident or circumstance. Courts decide whether a parent abused or neglected a child, whether a putative father established a relationship with a child such that he should be entitled to full parental rights, and whether a gestational surrogate intended to relinquish the child upon birth. Although a court will hear evidence on contested facts representing multiple perspectives, the court will ultimately choose one set of facts to the exclusion of others. Once these Manichean narratives reach their conclusion, the family law system then discourages disputants from revisiting such judgments by establishing a higher standard for appealing the outcome.

More fundamentally, the process of family law pits one family member against another. As elaborated below, some procedural alternatives are developing in the

[22] AL Estin, 'Ordinary Cohabitation' (2001) 76 *Notre Dame Law Review* 1381, 1395. Of course, the position may be different in jurisdictions that embrace alternative mechanisms for recognising relationships, such as France's Pacte Civil de Solidarité. For a discussion, see, eg E Aloni, 'Registering Relationships' (2013) 87 *Tulane Law Review* 573.

[23] 42 USC s 671(a)(15) (2000).

[24] EJ Samuels, 'Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants' (2005) 72 *Tennessee Law Review* 509, 513–18.

[25] *Johnson v Calvert* 851 P 2d 776, 782 (Cal 1993) (holding gestational surrogates do not have parental rights).

[26] J Goldstein et al, *Before the Best Interests of the Child* (New York, The Free Press, 1979); J Goldstein et al, *Beyond the Best Interests of the Child*, 2nd edn (New York, The Free Press, 1979); J Goldstein et al, *In the Best Interests of the Child* (New York, The Free Press, 1986); ES Scott and RE Scott, 'Parents as Fiduciaries' (1995) 81 *Virginia Law Review* 2401, 2440.

US, and mediation is widely used in the divorce context,[27] but the adversarial system remains at the centre of family law. Most marital dissolution actions are settled,[28] but the court remains an important force, with the parties aware that they cede control if the court decides the issues for them.[29] And alternative dispute resolution has barely entered the world of child welfare cases, which are largely decided in courtroom proceedings.

Finally, the practice of family law both embodies and can reinforce the oppositionalism that this substance and process generates. Although it is important not to overstate the case, family law practitioners are often criticised for fuelling their clients' winner-take-all mentality in familial disputes.[30] This is unsurprising in light of the legal training provided to family law practitioners. Family law courses typically are not structured as an interdisciplinary study of family systems, with great attention paid to the emotional dynamics of family relationships. When teaching divorce, for example, most family law courses will examine the legal rules governing child custody and property distribution. The course may acknowledge the emotional stakes in these issues, especially child custody, but the class will not usually teach future lawyers how to work productively with clients who are feeling bitter and resentful towards the other party. Similarly, when teaching students about the child welfare system, the course will focus on the legal rules governing the removal of a child from the home and the standard for terminating parental rights. But very few courses will engage in an in-depth study of family-systems theory, exploring how the parent's behaviour needs to be understood and evaluated in the larger context of the family as a whole, often across generations.

In short, the substance of family law provides only two options for family members—connection or rupture. The process of family law fuels negative emotions by pitting one family member against another in a win or lose battle. And the practice that flows from this substance and process reinforces the binary, adversarial approach. As the next section demonstrates, this approach to family law exacts a tremendous human cost.

## C. Failings of the Binary Model

The law should not presume to interfere with private decisions about family relationships—such as whether to get divorced or give up a child for adoption—but the law does determine how those decisions are effectuated, and holds great

[27] JC Murphy and JH Singer, *Divorced From Reality: Rethinking Family Dispute Resolution* (New York, New York University Press, 2015) 32.

[28] Ibid.

[29] A Sarat and WF Felstiner, *Divorce Lawyers and Their Clients: Power & Meaning in the Legal Process* (Oxford, Oxford University Press, 1995) 120–26.

[30] RJ Gilson and RH Mnookin, 'Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation' (1994) 94 *Columbia Law Review* 509, 541–50.

potential to either exacerbate or alleviate emotional harm. By giving legal force to rupture but providing no room for repair, the binary model short-circuits the cycle of intimacy, thwarting the reparative drive and freezing relationships at the moment of conflict.

### *i. Hallmarks of Familial Disputes*

To understand the harm of the binary model, it helps to recognise how family law is different from other areas of law. There are three hallmarks that typify family law disputes: intense emotions; ongoing relationships; and the need for repair.

*Intense emotions.* Litigants in family disputes typically know one another at the deepest personal level and are likely to have complicated, emotional relationships with particular histories. Parties include spouses and other romantic partners, biological and adoptive parents, children, extended family members, birth parents, donors of eggs and sperm, gestational surrogates, and prospective parents. Their disputes generally involve intense, usually negative, emotions. Divorce, for example, is understood to be one of the greatest emotional upheavals in a lifetime. The emotional process typically is not linear but rather cyclical, with emotions moving back and forth between love, anger and sadness.[31]

In the child welfare context, the emotions accompanying abuse and neglect for the child victims are complex and can include fear, anger, anxiety, guilt, sadness and bewilderment. A child's emotional response to abuse is necessarily complex, and even though a child will almost certainly experience relief when away from the abuse or neglect, being removed from the home, even temporarily, can be deeply traumatising.[32] For parents who abuse or neglect their children, the emotions are similarly complex. Parents often experience guilt over the abuse, along with anger, denial and fear of losing a child permanently.[33]

Likewise, adoption can evoke complex and conflicting emotions—joy, guilt, loss, fear, anxiety and denial—for birth parents, adoptive parents and adopted children, both at the time of adoption and later.[34] A biological parent whose parental rights are terminated by a court may feel tremendous loss, grief and regret; and parents who voluntarily relinquish a child may feel ambivalent about the decision. During the adoption process, an adoptive parent is often on an emotional roller coaster, worried about the finality of the decision and unsure whether

[31] RE Emery, Renegotiating Family Relationships: Divorce, Child Custody, and Mediation (New York, Guilford Press, 1994) 42–48.

[32] See generally J Bowlby, *Separation: Anxiety and Anger* (New York, Basic Books, 1973) 13, 245–57; J Bowlby, *Loss: Sadness and Depression* (New York, Basic Books, 1980) 7–14, 397–411; J Bowlby, *Attachment*, 2nd edn (New York, Basic Books, 1982) 24–34; WL Haight et al, 'Parent–Child Interaction During Foster Care Visits' (2000) 46 *Social Work* 325, 337–38.

[33] CC Tower, *Understanding Child Abuse and Neglect*, 3rd edn (Boston, Allyn and Bacon, 1996) 255.

[34] AR Appell, 'The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption' (2008) 22 *Brigham Young University Journal of Public Law* 289, 295–96.

the child will be returned to a birth parent. And adopted children can experience a range of emotions towards their birth and adoptive parents.

These underlying emotions can lead family members to engage in a range of self- and relationship-destructive behaviours, which, in turn, often affect the legal proceedings. A divorcing couple, for example, may find it exceedingly difficult to set aside their own anger, resentment and disappointment about the ending marriage. Such parties will be more inclined to find fault with each other, rather than recognise the need to work together as co-parents (if the couple had children).

*Ongoing relationships.* More often than not, the relationships in a family law dispute will continue, even after significant shifts in legal status. When the legal relationship between the parties ends, an emotional relationship or tie is likely to continue. A divorcing couple with minor children will relate to one another for years to come, even if only about the children. A parent in the child welfare system whose parental rights are terminated may well continue to see that child, especially if the child is placed with a relative, as so many older children are. And in the adoption context, only 20 to 30 per cent of domestic adoptions are of infants by unrelated individuals.[35] In all other cases, it is far more likely that the adopted child will maintain a relationship with the birth parent. Even in infant, non-relative adoptions, adopted children may either remain in touch with their birth parents if their adoptions were 'open' (that is, the adoption preserves some relationship between the birth parent and child, ranging from a simple exchange of information to ongoing visitation), or they may reconnect with their birth parents at some later point in their lives.[36]

Changing a legal status may be the right decision for a family. Some marriages should end. Finalising an adoption gives both the adoptive parents and the child peace of mind. And terminating parental rights in some cases is appropriate. But these legal changes do not mean that the underlying relationships are over.

*The need to repair relationships.* This ongoing contact means that it is critical to repair relationships. Although the romantic relationship between a divorcing couple may be finished, the children still need a relationship with each parent. For this to happen, the parents will need to get along well enough to facilitate these relationships and function as co-parents. In the child welfare context, for the children who eventually return home, it is essential to repair their relationships with their parents. Even when children do not return home, their parents often (although not always) remain an important influence in their lives, and therefore repair is needed. And in the adoption context, although the issues are complex and vary with each case, it is important to pay attention to a child's relationships with both birth and adoptive parents.

[35] JH Hollinger, *Adoption Law and Practice* (Danvers MA, Matthew Bender, 2015) s 1.05[2].

[36] NR Cahn and JH Hollinger, 'Adoption and Confidentiality' in NR Cahn and JH Hollinger (eds), *Families by Law: An Adoption Reader* (New York, New York University Press, 2004).

### *ii. A Fundamental Mismatch*

The binary model works against these fundamental realities. The central harm of the model is that it reinforces rupture with no recognition of the need to repair relationships. In some family law cases—particularly those involving domestic violence or sexual abuse—a complete break is essential for the safety and well-being of the parties. Too often, however, family law takes a complete rupture approach and imposes it on all cases, rather than recognising that in many cases, relationships will and should continue even after a change in legal status.

By bringing legal relationships to what the legal system perceives to be closure, courts determine 'winners' and 'losers' and this can be internalised by the parties. Parents often share custody of a child, but the sense that the person with more time with the child has won persists.[37] Family law generally requires that marital assets are divided 'equitably', but parties often experience a sense of victory or defeat in this context as well.[38] There is little recognition in the legal system that 'winning' may create or further weaken a fragile relationship with an ex-spouse, who now is a co-parent and with whom the litigant must work out myriad issues. Instead, the binary model takes any instinct for reconciliation and compromise and directs it towards hard lines and conflict. Some practitioners try to help disputants reach amicable solutions, but in a fundamentally adversarial system, there are substantial constraints on the practice.

In short, the binary model thwarts the cycle of emotions in general and the reparative drive in particular. By recognising only love and transgression, family law freezes familial relationships at the moment of rupture. But because former family members so often continue to relate to one another, stopping at the moment of rupture hinders the ability of individuals to heal the rifts that initially led to the legal proceedings and engage in the reparative work necessary for the future.

## D. Partial Reforms

Sometimes drawing on models from other countries, such as New Zealand and Australia, US family law is slowly developing new rules and procedures that are beginning to move the system beyond the binary model. These reforms seem intuitively to embody the reparative drive, but this central organising instinct has not been well recognised and remains underdeveloped.

[37] See, eg B Barlow, 'Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion?' (2004) 52 *Cleveland State Law Review* 499, 510.

[38] KB Silbaugh, 'Money as Emotion in the Distribution of Property at Divorce' in RF Wilson (ed), *Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution* (Cambridge, Cambridge University Press, 2006) 234, 238–44.

Much of the innovation has occurred in the field of marital dissolutions.[39] States have adopted statutes encouraging shared parenting responsibility between parents after a divorce rather than awarding complete custody to one parent and only visitation rights to the other.[40] This sharing recognises the ongoing tie between a child and both parents, as well as the possibility that former spouses can co-parent after a divorce. Similarly, no-fault divorce, widely available since the 1970s in the US, is an attempt to acknowledge that relationships do not always persist and that couples can choose, amicably, to end their marriages.

Mediation has a well-established place in marital dissolution proceedings,[41] and studies have demonstrated its success, particularly in fostering a co-parenting relationship between the parents and an ongoing relationship between non-residential fathers and their children.[42] States are also experimenting with innovations focused on co-parenting after divorce. Many states, for example, have formal parenting co-ordinator programmes.[43] The parenting co-ordinator, typically a mental health professional paid by the hour by the parents (often on a sliding scale basis), helps parents work through issues related to the children. Although charged with decision-making responsibility, the co-ordinator more often helps the parents negotiate their own compromise. Another innovation is parenting programmes—education programmes, sometimes mandated by the court, designed to teach parents how to work together following a divorce or separation. In one study, a programme designed for non-custodial fathers showed that participants had a significant increase in co-parenting with a corresponding decrease in parental conflict after fathers participated in the programme.[44]

In another example of innovation in marital dissolutions, practitioners have led efforts to resolve disputes outside the adversarial system.[45] In the growing

[39] JB Singer, 'Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift' (2009) 47 *Family Court Review* 263.

[40] For a discussion of this trend, see, eg JL Grossman and LM Friedman, *Inside the Castle: Law and the Family in 20th Century America* (Princeton NJ, Princeton University Press, 2011) 221–23.

[41] AL Milne et al, 'The Evolution of Divorce and Family Mediation: An Overview' in J Folberg et al (eds), *Divorce and Family Mediation: Models, Techniques and Applications* (New York, Guilford Press, 2004) 6.

[42] RE Emery et al, 'Child Custody Mediation and Litigation: Custody, Contact, and Co-parenting 12 Years After Initial Dispute Resolution' (2001) 69 *Journal of Consulting and Clinical Psychology* 323, 325–31. See also J Pearson and N Thoennes, 'Mediating and Litigating Custody Disputes: A Longitudinal Evaluation' (1984) 17 *Family Law Quarterly* 497.

[43] NL Tooher, 'Parenting Coordinators Help Divorced Couples Who Won't Stop Fighting' *Lawyers USA* (20 November 2006) 12. For an example of a state statute, see Colo Rev Stat s 14-10-128 (2013).

[44] JT Cookston, 'Effects of the Dads for Life Intervention on Interparental Conflict and Coparenting in the Two Years After Divorce' (2007) 46 *Family Process* 123, 132–35.

[45] eg, Charles Asher, a practitioner in Indiana, has been making both local and national efforts at reform and in particular has been attempting to help parents understand the impact of adversarial proceedings on children. In a website he designed, Asher asks parents to enter into commitments regarding their behaviour towards each other and their children. C Asher and B Asher, 'Up To Parents' (*UpToParents.org*): www.uptoparents.org.

field of collaborative law,[46] both the parties and their lawyers agree to negotiate divorce settlements without litigation. To this end, the lawyers and parties decide that the attorneys will represent the clients only during settlement negotiations and, if settlement fails, the attorneys will be disqualified from taking the case to trial. The parties contract for this representation through a limited retention agreement between each attorney and client. The attorneys and clients also often sign a 'four-way' agreement setting forth the intention of the representation and understanding of the process.[47] Collaborative coaches trained in the field of mental health help couples address emotional issues underlying the divorce, issues that may undermine the collaborative process.[48] Practitioners who use collaborative law contend that the process is appropriate for a broad range of individuals, leads to far more creative and responsive settlements between the parties, is generally less expensive than traditional adversarial litigation conducted by attorneys, and can be more satisfying for clients and attorneys.[49] Although collaborative law is best known for its use in marital dissolution proceedings, it is starting to be used in other settings, such as estate planning and probate, in which maintaining or repairing family relationships is at a premium and traditional litigation may threaten those relationships.

In the field of child welfare, the US has drawn from an innovative process used in New Zealand: family group conferencing. Part of the restorative justice movement, family group conferencing is a legal process designed to help families solve problems and avoid court proceedings.[50] After substantiating a report of child abuse or neglect, the state convenes a conference with immediate and extended family members and other important people in the child's life, such as teachers or religious leaders, to decide how to protect the child and support the parents. The participants, who include the parents and, if old enough, the child, identify the underlying problems and develop a plan for working on the challenges facing the family. Members of the family group conference and the state then work together to provide the needed supports to the family.

In the adoption field, birth parents and adoptive parents can have crafted agreements (often called open adoptions) to ensure ongoing contact between the child and birth parent. Some states make such agreements legally enforceable, but typically only in limited circumstances where there is likely to be ongoing contact

[46] PH Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (Chicago IL, American Bar Association Publishing, 2001) xix, fn 1.

[47] PH Tesler and P Thompson, Collaborative Divorce: The Revolutionary New Way to Restructure Your Family, Resolve Legal Issues, and Move on with Your Life (New York, HarperCollins, 2006) 39–64.

[48] Ibid, 43–45.

[49] Tesler (n 46) xx–xxi, 14; Tesler and Thompson (n 47) 55–56.

[50] A more detailed description of family group conferencing can be found in C Huntington, 'Rights Myopia in Child Welfare' (2006) 53 *University of California Los Angeles Law Review* 637.