

The Emotional Dynamics of Law and Legal Discourse

Edited by
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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 scholars¹⁴—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 psychopath¹⁶ 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 Kings¹⁷ 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 collections²⁴ 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 ago³² 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 Brunnschwig, '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.