

What is so ‘special’ about law and emotions?

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We are grateful to the editors of the *Northern Ireland Legal Quarterly* for allowing us to put together this special edition on ‘Law and Emotions’. But what is so special about it? The very existence of such a field of study may appear at first sight to be counter-intuitive; as has been so often pointed out, law and emotion have traditionally been seen as polar opposites, the former being based on ‘reason’ and the latter on ‘feeling’.¹ However, this has been shown to be a false dichotomy in a number of respects, being an accurate reflection neither of the way the law is structured and administered,² nor of the way emotion works,³ nor indeed of the way humans live.⁴ Indeed, such is the influence of emotion on human behaviour that the relevance of emotion to law has been said to be ‘a point so obvious as to make its articulation seem almost banal’.⁵ Be that as it may, the study of law and emotions, though now reasonably well established in America, is less familiar to students and practitioners of law, or indeed academics working in the area, on this side of the Atlantic, and this collection is therefore designed to provide an insight into the subject.

The aim of this introduction is threefold. First of all, it will outline the history of law and emotion studies and the directions in which it has developed. Next, it will demonstrate how the present collection of essays fits into the overall picture. Finally, it will attempt to assess where the study of law and emotions stands at present, and to sketch out possible directions for future development with particular reference to the UK and Irish experience.

The intersection of law and emotions has never been entirely ignored by scholars, but up until recent years it has been addressed in a somewhat piecemeal fashion. Thus, for instance, the role of anger as a mitigating factor has always been of relevance to criminal

1 Terry Maroney, ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 30 *Law and Human Behavior* 119, at 120.

2 K Abrams, ‘The Progress of Passion’ (2002) 100 *Michigan Law Review* 1602.

3 In particular, it takes little or no cognisance of the important role of cognition in emotion: see Tim Dalgleish and Mick Power (eds), *Handbook of Cognition and Emotion* (John Wiley & Sons 1999); Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (CUP 2001); Robert Solomon, *Not Passion’s Slave: Emotions and Choice* (OUP 2006).

4 Daniel Goleman, *Emotional Intelligence* (Bloomsbury 1996).

5 Maroney (n 1) 20.

law in the context of the defence of provocation,⁶ and fear in the context of the defence of duress has been similarly recognised.⁷ The law of tort has its cases on so-called 'nervous shock',⁸ and the recovery of damages for disappointment has always been a topic of interest to contract lawyers.⁹ Much of the law of criminal evidence can be seen as a mechanism for controlling the emotional prejudices of juries,¹⁰ and the American Realist movement even touched on the role of emotion in judging.¹¹

However, it was not until the very end of the last century that an attempt was made to draw some of these topics together. Following a conference on law and emotions at the University of Chicago Law School in May 1998,¹² a collection of essays edited by Susan Bandes, *The Passions of Law*, was published in 1999,¹³ the aims being to demonstrate to readers the relevance of emotion to the study of law and to provoke further debate on the subject.¹⁴ In introducing the collection, Bandes drew attention to the curious paradox whereby emotion pervades the law, but convention demands that it be sidelined on the grounds that the true preserve of law is not emotion but reason. Though emotion might have a place in the conventional account, she observed, it was a very circumscribed one, the assumption being it was only of relevance in the criminal context and to laypeople without legal training.¹⁵ In seeking to challenge that conventional account, 13 essays were produced, ranging broadly over a number of different axes. Thus, a wide range of emotions were considered, including shame, disgust, remorse, revenge, anger, romantic love, fear and cowardice.¹⁶ Law and emotions were seen to relate together in a number of different ways, with the law not only reacting to emotion, but sometimes expressing it, or even creating it.¹⁷ Another strength of the collection was said to be the way in which some at least of the contributors were prepared to draw on a more sophisticated and scientifically based understanding of the emotions themselves, as opposed to the old view of emotions in terms of mere feeling or 'affect'.¹⁸ As might be expected from a pioneering work of this sort, there were a number of drawbacks identified: for example, there was still too much of a criminal flavour to the collection¹⁹ and too much emphasis on the negative emotions.²⁰ As well as that, it was argued that more could have been done to engage with the debates

6 Jeremy Horder, *Provocation and Responsibility* (Clarendon Press 1992). For an early study in the field drawing on contemporary physiological and psychological research, see Peter Brett, 'The Physiology of Provocation' [1970] *Criminal Law Review* 634.

7 Alan Wertheimer, *Coercion* (Princeton University Press 1989); Lawrence Newman and Lawrence Weitzer, 'Duress, Free Will and the Criminal Law' (1957) 30 *Southern California Law Review* 313, at 326–30.

8 Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Liability* (Hart Publishing 2009).

9 Nelson Enonchong, 'Breach of Contract and Damages for Mental Distress' (1996) 16 *Oxford Journal of Legal Studies* 617.

10 Victor J Gold, 'Limiting Judicial Discretion to Exclude Prejudicial Evidence' (1984) *UC Davis Law Review* 59; Geoffrey P Kramer et al, 'Pre-trial Publicity, Judicial Remedies and Jury Bias' (1990) 14 *Law and Human Behavior* 409.

11 Jerome Frank, *Law and the Modern Mind* (Brentano's 1930), ch 13, cited in Terry Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99 *California Law Review* 629.

12 Maroney (n 1) 22 fn 11.

13 Susan Bandes, *The Passions of Law* (New York University Press 1999).

14 *Ibid* 7 and 11, cited by Maroney (n 1) 42.

15 Bandes (n 13) 1–2.

16 Kathy Abrams, 'The Progress of Passion' (2002) 100 *Michigan Law Review* 1602, 1603–07.

17 *Ibid* 1608–12.

18 *Ibid* 1610.

19 *Ibid* 1613.

20 *Ibid* 1613–14.

taking place within primary emotions scholarship.²¹ Nevertheless, *The Passions of Law* deserves to be ranked as a seminal work, not least because for the first time it sought to present law and emotions as a wood rather than a mere collection of trees.

Since then the literature on law and emotions has expanded in many different directions,²² and has engaged with many different areas of the law, including criminal law,²³ tort,²⁴ property law,²⁵ family law,²⁶ constitutional law,²⁷ victims' rights,²⁸ refugee law,²⁹ judging³⁰ and even the law of burial disputes.³¹ A comprehensive review of this literature would now fill many volumes, but, even so, Maroney argues that it is still a moot point as to what extent law and emotions can be called a recognised 'discipline' in its own right.³² A number of reasons can be given for this: there is no consensus as to what counts as law and emotions scholarship;³³ approaches to the scientific and empirical study of emotions vary enormously;³⁴ and not all those who work within the field of law and emotions even realise that they are doing so.³⁵ Nevertheless, she concludes that, given the inevitability of emotion's influence on law, and vice versa, the topic is well worth continued investigation, not least in the hope that greater knowledge of the subject will enable it to put down firmer methodological and epistemological roots.

As the literature demonstrates,³⁶ and not least the present collection, there are a number of different ways in which the interrelationship of law and emotions can be studied. The first of these is the one adopted in the previous paragraph, which considers the ways in which

21 Maroney (n 1) 122.

22 See below, nn 36–44.

23 Dan Kahan and Martha Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Columbia Law Review* 269; John Stannard, 'Sticks, Stones and Words: Emotional Harm in the English Criminal Law' (2010) 74 *Journal of Criminal Law* 533; Eimear Spain, *The Role of Emotions in Criminal Law Defences* (CUP 2011); Susanne Karstedt et al, *Emotions, Crime and Justice* (Hart Publishing 2011).

24 Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Liability* (Hart Publishing 2009); Laura E Little, 'Just a Joke: Defamatory Humor and Incongruity's Promise' (2012) 21 *Southern California Interdisciplinary Law Journal* 99.

25 Peter H Huang, 'Reasons within Passions: Emotions and Intentions in Property Rights Bargaining' (2000) 79 *Oregon Law Review* 435; Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing 2007).

26 Janet Weinstein and Ricardo Weinstein, "'I Know Better than That': The Role of Emotions and the Brain in Family Law Disputes' (2005) 7 *Journal of Law and Family Studies* 351; Jennifer Schweppe, 'Best to Agree to Disagree: Parental Discord, Children's Rights and the Question of Immunisation' (2008) 37 *California Common Law World Review* 147; Phillip Shaver et al, 'What's Love Got to Do with It? Insecurity and Anger in Attachment Relationships' (2009) 16 *Virginia Journal of Social Policy and Law* 491.

27 Laura E Little, 'Loyalty, Gratitude and the Federal Judiciary' (1995) 44 *American University Law Review* 699; Laura E Little, 'Envy and Jealousy: A Study of Separation of Powers and Judicial Review' (2000) 52 *Hastings Law Journal* 47; Terry Maroney, 'Emotional Common Sense as Constitutional Law' (2009) 62 *Vanderbilt Law Review* 851.

28 Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing 2009).

29 Jane Herlihy, 'The Psychology of Seeking Protection' (2009) 21 *International Journal of Refugee Law* 171.

30 Terry Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (Vanderbilt Law and Economics Research Paper no 10-28 2011); Terry Maroney, 'Emotional Regulation and Judicial Behavior' (2011) 99 *California Law Review* 1481; Terry Maroney, 'Angry Judges' (2012) 65 *Vanderbilt Law Review* 1207.

31 Heather Conway and John Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34 *University of New South Wales Law Journal* 860.

32 Maroney (n 1) 136.

33 Ibid 123–25.

34 Ibid 136 (a 'wobbly compendium of thought').

35 Ibid 124.

36 Ibid 126.

emotions are or should be reflected in different areas of legal doctrine;³⁷ this is perhaps the one that is most immediately accessible to lawyers. The second is emotion-centred and focuses on the way in which the law responds to or reflects particular discrete emotions such as love, hate, fear, anger and so on;³⁸ this is an obvious approach, but is hampered to some extent by the absence of any generally accepted taxonomy of emotions.³⁹ The third looks at particular legal actors such as judges, solicitors, barristers and so on, the aim being to consider how their work is or should be influenced by emotion;⁴⁰ much of the work in this field so far has concentrated on judges⁴¹ and jurors,⁴² but is of equal relevance to practitioners generally.⁴³ Other approaches identified by Maroney include the 'emotional phenomenon' approach (describing particular emotional phenomena and analysing how these should be reflected in law), the 'emotion-theory' approach (examining legal doctrines and practices in the light of particular theories of emotion) and the 'theory-of-law' approach (analysing the emotional theories and presuppositions reflected in particular legal theories).⁴⁴ This list is by no means exhaustive; thus, for instance, another possible approach is to adopt an analysis whereby emotion may interact with the law in three different ways, these being: (1) the response of law to emotion; (2) the role of the law in creating and fostering emotion; and (3) the influence of emotion in the practice of the law. And, of course, it is quite possible to mix these approaches, for instance, by adopting one particular area of legal doctrine and then considering the impact of particular emotions in that area.

In this collection, we have adopted Maroney's taxonomy and begin with four articles which are 'actor-centred': Maroney looks at the emotions of judges, with a particular focus on judicial anger and its place in the legal system; Doak and Taylor reimagine the sentencing system to make it more emotionally intelligent – an approach that they argue would benefit both offenders and victims; Chakraborti and Zempi examine the impact of the veil ban on Muslim women, their communities and society in general; and finally, Herlihy and Turner examine the role of both asylum seekers and decision makers in the asylum process. We then proceed to a 'doctrine-centred' approach, with Conway and Stannard's examination of the emotional context in which the doctrine of adverse possession operates; and, finally, we look to two articles which are 'emotion-centred': Spain's examination of love and compassion in the context of end-of-life decisions; and Abrams and Keren's examination of the ability of legal actors to cultivate resilience in their clients. That said, some papers straddle two or more areas, but this basic breakdown is a useful starting point for our analysis.

37 Maroney (n 1).

38 Ibid.

39 For a flavour of the debate see Silvano Arieti, 'Cognition and Feeling' in Magda Arnold (ed), *Feelings and Emotions* (Academic Press 1970) 135; Nancy Stein and Keith Oatley (eds), *Basic Emotions* (L Erlbaum 1992); Paul Ekman, 'Basic Emotions' in Dalgleish and Power (n 3) 45; Alexandra Newen, 'Classifying Emotion: A Developmental Account' (2001) 161 *Synthese* 1.

40 Maroney (n 1) 126.

41 Abrams (n 15) 1618–19. Much of Maroney's own work is in this area; see the works cited at n 30.

42 Neil R Feigenson, 'Sympathy and Legal Judgment: A Psychological Analysis' (1997) 65 *Tennessee Law Review* 1; Neil R Feigenson, *Legal Blame: How Jurors Think and Talk about Accidents* (American Psychological Association 2000); Reid Hastie, 'Emotions in Jurors' Decisions' (2001) 66 *Brooklyn Law Review* 991; Neil R Feigenson et al, 'The Role of Emotions in Comparative Negligence Judgments' (2001) 31 *Journal of Applied Social Psychology* 576; David A Bright and Jane Goodman-Delahunty, 'Gruesome Evidence and Emotion' (2006) 30 *Law and Human Behavior* 183.

43 See the works cited by Maroney (n 1) 133. Mention should also be made of the concept of 'therapeutic jurisprudence' coined by Bruce Winick and others: see B J Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy and Law* 184; see further below, n 48.

44 Ibid 126.

In the first article, Terry Maroney begins by observing that, traditionally, the task of the legal system is to 'systematically reduce the opportunities for judicial emotion to insert itself'. However, she cogently argues that this view of human emotion is contrary to 'virtually everything we know about emotion and its value' for four key reasons: first, emotion reveals reasons; second, emotion motivates action in the service of reasons; third, emotion enables reason; and, finally, emotion is educable. She argues that, rather than seeking to suppress judicial emotion, the legal system should rather aim to regulate it, a process which will both allow judges to deal with the emotional challenges of their job, but also 'selectively integrate those emotions into their decisional processes'. Using judicial anger as a lens through which this new model is tested, she observes that anger is 'quintessentially judicial' as, once triggered, it generates a desire to affix blame and assign punishment. However, it can also be 'deeply threatening to competent judicial performance'. Thus, she concludes, judicial anger should be regulated, rather than stifled, particularly given the health risks of emotion suppression. This approach will 'maximise beneficial iterations of judicial anger while minimizing destructive ones'.

Building on Maroney's observations on the role of emotions in the legal system generally, Doak and Taylor note that the perception is that if the door to emotions is left ajar, the 'core normative features of the legal system of consistency, certainty and fairness would be lost in a maelstrom of emotional outpourings'. However, they go on to observe that, in the context of sentencing in particular, 'emotions matter' and a more emotionally intelligent sentencing system would be beneficial for four key reasons: first, it would strengthen therapeutic justice; second, it would strengthen procedural justice; third, it would improve the quality of decision-making; and finally, it would transform the relationships between victims and offenders. They then examine the ways in which the emotional narratives of victims and offenders can be taken into account when determining sentence through both pre-sentence report and victim personal statements or family impact statements. The authors admit that, while these innovations have been a step in the right direction, they do not go far enough and argue that emotions can play an even more central role within the current parameters of the criminal justice system. While seeing these steps as an interim measure, the ultimate aim being a 'fully-fledged emotionally-intelligent model of sentencing' which would require a significant reconfiguration of penal ideology, they argue that these interim steps may well trigger a broader realisation that criminal sentencing 'ought to perform a wider function than the mere retribution of wrongs'.

In the past decade, a number of European countries have imposed restrictions on the public practice of Islam and Chakraborti and Zempi examine the emotional impact that veil ban laws have on Muslim women in Western cultures. They argue that, contrary to public opinion, where the wearing of the veil is seen as the mark of a subjugated woman, the veil ban is actually a form of oppression. They introduce us to the key concept of *ummah*, which 'reflects the development of a robust collective identity among the world's Muslims'. The veil ban, which results in both multiple and intersectional discrimination against Muslim women, alienates women from society and its cumulative effect, they argue, can be to 'reinforce the sense of alienation experienced by members of the *ummah*-based community'. Of perhaps even more concern, they argue, is the stigmatisation of such women as criminals, thereby potentially 'legitimising' acts of violence against them when they are in public. Finally, they observe, the ban goes beyond Muslim women, but affects the entire Muslim community and indeed society as a whole, 'on the basis that [the] law attacks the fundamental value of liberal democratic states: the issue of choice'. Ultimately, they argue that the veil ban 'compounds the emotional suffering of those affected by it on the basis that it communicates a message

of institutionalised Islamophobia through formal power structures of law-making, police procedure, prosecutorial power and governmental policy'.

Herlihy and Turner then examine the role of emotions in refugee law, particularly the emotions of both the applicant and the decision maker in asylum claims. Drawing on psychological science, they show how an understanding of these principles can assist us in comprehending the experiences of both sets of actors in the asylum process. First, they look at the emotions of the claimant and how lay theories of emotions can sometimes lead to conclusions which are contrary to a psychological understanding of the experience. They observe the different way in which individuals process different types of memory and the impact that post-traumatic stress disorder can have on the recalling of such memories. Relying on psychological theories of memory and recall, rather than lay theories, they argue, will improve the asylum process. They then turn to the experiences of the decision maker, noting that the subject matter of asylum claims, involving 'some of the most atrocious acts that humans perpetrate on each other', can impact on the decision maker in a number of ways. Particularly interesting is their discussion on the manner in which decision makers must sometimes 'tolerate uncertainty' which adds to the emotional burden of the work: a decision maker cannot know if their decision was correct, or if they have returned the claimant to face further torture and persecution. Ultimately, they argue that these crucial decisions regarding asylum claims must be made in a manner which is both informed and underpinned by the best available scientific knowledge.

Conway and Stannard take a doctrine-centred approach and begin their analysis of the emotional paradoxes of adverse possession by wryly observing that property lawyers are generally 'a serious lot, not prone to feverish bursts of excitement'. However, one area of property law which energises even the most staid of lawyers, along with the population as a whole, is the doctrine of adverse possession. The authors begin their examination of the doctrine by looking at the manner in which Western cultures value property and observe that, while society sometimes sees the actions of a squatter on land as 'immoral', the misuse or neglect of land by the original owner can also be contrary to the value which we as a society place on land. They go on to examine a number of instances of 'squatting' and note that the actions of both the squatter and the landowner will impact on the perception of the squatter in society as a whole. These perceptions are then reflected in the legal system through the courts and the legislature, which seek to confine the operation of the doctrine in a manner which protects the owner. They argue that there is an 'overwhelming sense' in society that adverse possession is both morally and socially wrong and that by shifting the protection from squatter to landowner, the law is responding to 'the negative emotions generated by adverse possession'.

Our final two articles take an emotion-centred approach to this complex area. Spain examines the topical and legally complex area of assisted dying, observing that central to any debate on the issue are 'the emotions which motivate those involved'. Arguing that the law should understand emotions before punishing individuals who commit acts while under their influence, she states that, in the context of end-of-life decisions, two emotions are often central to the decision-making process: love and compassion. She then goes on to discuss the current legal position and particularly examines the role of the traditional defences in cases of assisted dying, observing that no established defence is useful in these contexts for either policy or theoretical reasons. She then goes on to argue that a new excusatory defence should be established which recognises the key role that the emotions of the defendant play in these cases. This defence would operate where the defendant acted out of love or compassion for the victim and reflects the modern evaluative view of emotions. It would be subject to limitations, however, where the emotion and response were

'reasonable and socially justifiable' and where the medical condition of the victim was 'objectively verifiable' as a terminal or chronic illness. This new defence, she argues, would exculpate those individuals who act 'in an understandable way in response to reasonable and socially acceptable emotions'.

Finally, Abrams and Keren provide a fitting end to our collection, in their analysis of the potential of law to enhance resilience by cultivating positive emotions. They note that legal actors are slow to use the law to achieve emotional goals, but ultimately argue that positive affective responses can be achieved by programmatic interventions prescribed by law, through a sustained process of habituation. They begin by discussing the literature on resilience, noting that individuals respond to adversity in very different ways – this ability or inability to cope and the role of positive emotions in building resilience to adverse situations forms the psychological foundation of their analysis. Drawing on their earlier study on the ability of legal actors to cultivate hope,⁴⁵ they argue that many of their earlier understandings reflect 'insights embodied in the psychological literature'. Observing that the ability of an individual to cope effectively is a function of their connection with resources in their environment, they argue that the turn to law 'which is capable of structuring or regulating relations between individuals and their environments, [is] a plausible and necessary move'. Once legal actors have established programmes which foster positive emotions, there may be, they argue, 'new opportunities for psychologists to examine the processes by which lawyers and legally structured institutions help to foster positive emotions among groups who are their clients and beneficiaries'.

Writing in 2004, Stephen Morse predicted that in the long run scholarship on law and the emotions was likely to have considerably less impact than that on law and economics.⁴⁶ We have already looked at some of the reasons for his pessimism, including the enormous potential breadth of the topic, the lack of any 'standard' theory of emotion and the fact that not everyone engaged in the study of law and emotions even knows that they are doing so.⁴⁷ However, assuming for the purposes of argument that law and emotions is a topic worth studying – and for the reasons given above there are good grounds to believe that it is – there are a number of challenges which need to be borne in mind if that study is to have the impact it deserves.

The first is the need to encourage scholars working in the field both to realise that fact, and to pool their insights with others. As at least one of the present editors can testify from experience, it is all too easy to study law and emotions in a vacuum without being aware of the work that is going on elsewhere⁴⁸ – all the more so, given that the field straddles so many discrete academic disciplines. As we have seen, Terry Maroney and others have done much in recent years to draw the different threads together, but there is more work to be done. One useful approach would be for someone to try to draw up a comprehensive bibliography of law and emotions, which would then be regularly updated. Another would be to foster regular contacts between those engaged in the area, in which scholars from different disciplines could share their insights and inform future work on the subject. This

45 Kathy Abrams and Hila Keren, 'Law in the Cultivation of Hope' (2007) 95 California Law Review 319.

46 Stephen J Morse, 'New Neuroscience, Old Problems' in B Garland (ed), *Neuroscience and the Law: Brain, Mind and the Scales of Justice* (Dana Press 2004) 157, 186 (cited by Maroney (n 1) 133).

47 See above, nn 33–35.

48 Thus, for instance, eight years before *The Passions of Law* came on the scene, David D Wexler and Bruce Winick brought out their seminal *Essays in Therapeutic Jurisprudence* (Carolina Academic Press 1991), in which they argued that law itself could be seen to function as a therapist or therapeutic agent. However, there has until recently been little cross-fertilisation between 'law and emotions' and 'therapeutic jurisprudence', despite the key relevance of the latter to Maroney's 'legal actors' approach (nn 40–43).

has already been done to some extent on the other side of the Atlantic,⁴⁹ and there have recently been similar initiatives in Ireland,⁵⁰ but there is a lot more room for this sort of thing if law and emotions is to find its feet as a discipline in its own right.

Another challenge is the need for lawyers working in the area to be aware of the psychological and philosophical debates surrounding the emotions. One major difficulty that has to be met is that there is no consensus even as to what an emotion is,⁵¹ or to how it relates to kindred concepts such as feeling and affect,⁵² still less as to the content and taxonomy of discrete emotions.⁵³ Again, scholars from a legal background who venture into the area have to be aware of the pitfalls of terminology, with seemingly familiar concepts such as 'cognition' and 'intention' having very different meanings in the context of psychology and philosophy to those to which they have become accustomed.⁵⁴ Given that law and emotions scholarship straddles so many different academic disciplines, each with its own established jargon, to call for a common vocabulary is perhaps, as Lord Wilberforce said in another context,⁵⁵ to cry for the moon, but one who reads in areas with which he or she is unfamiliar has at least to be aware of these problems.

The third challenge is the need to write with precision and to ensure that what is said is rooted in evidence. Law and emotions may sound rather 'touchy-feely', but that is no excuse for academic sloppiness when writing in the area. A scholar who writes about the relevance of particular emotions in the legal context should be careful to ensure that he or she can define what these emotions mean;⁵⁶ one who writes about the behaviour of legal actors must do so by reference to the psychological literature;⁵⁷ one who writes about the law's reaction to emotion in the context of public opinion must be careful to check what the

49 Thus, *The Passions of Law* itself had its genesis in a conference held in Chicago in 1998 (see n 12 above), and in 2007 a further conference was held at Berkeley, California, on the topic 'Law and the Emotions: New Directions in Scholarship' <www.law.berkeley.edu/1111.htm> accessed 18 December 2012.

50 For instance the interdisciplinary conference on 'Regulating Emotions' organised by one of the present editors and held in May 2012 under the aegis of the Emotions and Society Research cluster at the University of Limerick, and the Law and Emotions Colloquium held at Queen's University Belfast in March 2013.

51 This question was famously raised by William James in his seminal article 'What is an Emotion?' (1884) 9 *Mind* 188, but, as Solomon points out, the debate has gone on since the days of Plato and Aristotle and has still not been resolved: Robert C Solomon, 'The Philosophy of Emotions' in Michael Lewis, Jeannette M Haviland-Jones and Lisa Feldman Barrett (eds), *Handbook of Emotions* (3rd edn, Guilford Press 2008) 3; see also Paul E Griffiths, *What Emotions Really Are: The Problem of Psychological Categories* (University of Chicago Press 1997); Paul Ekman and Richard J Davidson (eds), *The Nature of Emotion: Fundamental Questions* (OUP 1994); Robert C Solomon, *What is an Emotion?* (OUP 2003).

52 Ekman and Davidson (n 51) 48–96; Joseph V Brady, 'Emotion: Some Conceptual Problems and Psychophysiological Experiments' in Arnold (n 39) 69, 70; Nancy L Stein, Marc W Hernandez and Tom Trabasso, 'Advances in Modeling Emotion and Thought' in Lewis et al (n 51) 575, 578–80.

53 Ekman and Davidson (n 51) 5–47; Arieti (n 39) 135; Paul Ekman, 'Basic Emotions' in Dalgleish and Power (n 3) 45.

54 Thus 'cognition' does not imply conscious appraisal: Andrew Ortony, Gerald L Clore and Alan Collins, *The Cognitive Structure of Emotions* (CUP 1988) 4; Richard S Lazarus, 'The Cognition–Emotion Debate: A Bit of History' in Dalgleish and Power (n 3) 10. Nor does 'intention' imply desire or purpose: Peter Goldie, *The Emotions* (Clarendon Press 2000) 16; John R Searle, *Intentionality: An Essay in the Philosophy of Mind* (CUP 1983), ch 1.

55 In *Photo Productions Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 844. Lord Wilberforce was talking here about the problems of terminology in relation to contractual discharge, but the literature on emotions displays similar problems.

56 This is not as impossible a task as might at first appear; a lot of work has been done in defining and classifying discrete emotions for the purposes of computer recognition programs: see Roddy Cowie, Ellen Douglas-Cowie and Cate Cox, 'Beyond Emotion Archetypes: Databases for Emotion Modelling Using Neural Networks' (2005) 18 *Neural Networks* 371.

57 The first three articles in the present collection are good examples of this.

public actually feels, if possible on the basis of empirical evidence.⁵⁸ One of the problems here is that such evidence is not always easy to obtain; one wonders, for instance, whether some of the empirical studies done elsewhere, such as the judicial survey referred to in the essay by Terry Maroney, could be replicated in the context of the British Isles. But a lot more work of this sort needs to be done if future writings on law and emotions are to be built on the rock and not on the sand.

One of the problems with law and emotions, as with any evolving field of study, is that it takes time to design new tools for the job and to acquire the necessary skill in using them. Another problem is the need for those who write on law and emotions to know their way round a number of disciplines, including law, philosophy, psychology and sociology; most of those who embark on the study of the topic are grounded in only one of these, and there is the ever-present danger that the Jack – or Jill – of all trades will end up as the master – or mistress – of none. Be that as it may, this collection of essays is offered to the reader in the hope that it will stimulate an interest and will lead to a more mature appreciation of a new and fascinating field of study.

58 See, for instance, the work of Hough and others, suggesting that public attitudes to crime are not as 'punitive' as is often assumed: Julian Roberts and J M Hough, *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (Willan 2002).

