

Introduction

Law takes a very dim view of love.¹

They say that the world was built for two

Only worth living if somebody is loving you²

The aim of this book is to test the (in)visibility of romantic love in the legal discourse of modern Australian marriage. Romantic love has become a core part of modernity and, unsurprisingly, a dominant part of the western marriage discourse,³ but to what extent is this view replicated in the legal meaning of marriage? This question is important for two reasons. If love has become the reason people marry, then it is important that this is reflected in the law's content and application. This is self-evidently important for the legitimacy of law. Just as important is the question of how we understand law. Is law engaged with emotions, or separate from them? This forms part of a long-standing theoretical debate in the history of ideas.

To understand law's relationship with love is no easy task. While law names emotions, it deals with them only obliquely.⁴ Emotions are not considered 'fit' for the study of law, and love even less so, with its 'stigma of association with women's magazines or frivolous trivia'.⁵ Law is not alone in its scorn of emotions. The history of ideas has been dominated by a seemingly impenetrable distinction between reason and emotion, which not only distinguishes between the two, but values the former over the latter.⁶ In this discourse, emotion is

1 ABC Television 'R v Dana' episode three *Rake* 18/11/2010.

2 Lana del Rey, *Video Games*, Polydor 2012.

3 Increasingly this is true also in non-western cultures. See, for example, the portrayal of 'love marriages' in Indian Bollywood films.

4 R F Moran, 'Law and Emotion, Love and Hate' (2000–2001) 11 *Journal of Contemporary Legal Issues* 783.

5 C Smart, *Personal Life* (Polity Press, Cambridge 2007) 58.

6 The opposition of reason and emotion has a long tradition dating back to the ancient Greek philosophers. Plato saw emotions as obstructions to the attainment of our true rational selves while Aristotle believed that a true understanding of the world around us could not be achieved without reference to our emotions. This debate has remained prominent in the history of ideas ever since. Underlying Aristotle's and Plato's difference is the view that they have of emotions themselves. A diverse number of conclusions have been reached about emotions. Emotions have been seen as bodily physical sensations, but also as expressions of our knowledge, ethics and value systems. Darwin saw them as vestiges of our evolutionary past, while others have argued that they are learned cultural phenomena. Anthropologists have reached different conclusions as to whether they are culturally specific or universal to all humans. Emotions are seen as phenomena that distract our purposes and lead us astray, but also as instruments that fine tune our thinking and help us to make 'rational' choices. If we see our emotions as devoid of meaning, as physical urges that can lead us into over-reactions, as blind passions, then one is more readily attracted to a view that emotions should be exorcised from any role in public life. On the other hand, if we accept a more 'cognitive' view of emotions, as purposeful aids to making ethical and rational choices, then we are not threatened by an idea that emotions are, and should be an integral part of public decision making. The important and positive role that emotions can play in public

relegated away from the important sphere of public discourse on the grounds that it is chaotic, unpredictable and therefore can too easily lead us into error.⁷ A discourse of law that is inclusive of emotions in general, and love in particular, needs to overcome this hurdle.

This book will show that a careful study of love is neither frivolous nor trivial. In societies such as Australia, love is exalted, and is often presented as one of humanity's most powerful emotions. It is hailed as radical, liberating and equalising; as a progressive force capable of breaking down entrenched social barriers, delivering happiness and satisfaction; and of being at the forefront of a new humanism. The message that love is the most important thing in life is found all around us. It is not surprising, therefore, that love has permeated the institution of marriage.

The social discourse of marriage has changed radically during the last century or so, and yet it is still steeped in many traditional ideas. When considering the laws of marriage, the institution embodies a number of tensions. These tensions can be expressed as a variety of contests: Christianity versus secularism; patriarchal versus feminist; hierarchy versus equality; heterosexual versus queer; procreation versus love; traditional versus liberal; church versus state; status versus contract; duty versus agency. The tensions will be evident in the discussion and analysis of the book.

The substantive discussion of the law in this book is clustered around three main legal events that have explicitly challenged traditional legal understandings of marriage. The case of *Re Kevin (Validity of Marriage of Transsexual)*,⁸ the case of *Garcia v National Australia Bank*⁹, and the passing and subsequent overriding of the Australian Capital Territory's Civil Union Act (2006) by the

life has to some extent been accepted in some of the disciplines, however it remains persistent in law. For some studies in thinking about emotions see the following: J M Barbalet, *Emotion, Social Theory, and Social Structure: A Macrosociological Approach* (Cambridge University Press, UK 1998); C Calhoun and R Solomon, *What is an Emotion?: Classical Readings in Philosophical Psychology* (Oxford University Press, New York 1984); K Oatley and J M Jenkins, *Understanding Emotions* (Blackwell Publishers, Oxford 1996); K Oatley, *Best Laid Schemes: The Psychology of Emotions* (Cambridge University Press, Cambridge 1992); R Solomon (ed), *Thinking About Emotions: Contemporary Philosophers on Emotions* (Oxford University Press, Oxford 2004); P A French & H K Wettstein, *The Philosophy of Emotion*, Midwest Studies in Philosophy XXII (University of Notre Dame, Indiana 1998).

⁷ See D Evans, *Emotions: The Science of Sentiment* (Oxford University Press, Oxford 2001); Oatley & Jenkins, *Understanding Emotions*; Calhoun & Solomon, *What is an Emotion?*

⁸ There are two cases here: *Re Kevin (Validity of Marriage of Transsexual)* (2001) 28 Fam LR 158 (*Re Kevin* No1) and *Attorney-General for the Commonwealth v Kevin and Others* (2003) 30 Fam LR 1 (*Re Kevin* No2).

⁹ There are three *Garcia* cases in total: *Garcia v National Australia Bank Ltd* BC 9301944 Supreme Court of NSW Equity Division 1993; *National Australia Bank v Garcia* [1996] NSWSC 253; *Garcia v National Australia Bank Ltd* [1998] CLR 395.

federal government on the ground that the civil unions it legislated into being too closely resembled marriage.¹⁰ Each of these episodes will be analysed with a view to answering these questions:

What meaning of marriage emerges from these episodes?

Do these episodes displace traditional meanings of marriage?

Is romantic love a part of the discourse and, if so, what is the meaning of the love that emerges from them?

Before turning to that substantive analysis, there are two important background discussions which frame the central questions of the book. The first is how this book is informed by the development of the law and emotion scholarship, and the second is how the discussion is informed by the understanding of romantic love that dominates contemporary society.

Framing the Questions of the Book

The Importance of Law and Emotion Scholarship

This book constitutes an example of how an emotional discourse (love) of a legal institution (marriage) enriches our understanding of that institution, helps us to understand how legal disputes are influenced by that understanding, and helps us to frame its regulation and reform (law). The importance of the question, however, goes beyond these important practical questions. At its heart, its aim is to challenge the exclusion of emotion from law and to challenge the dominant rhetoric of law that emerges from positivism.

Early positivists, such as Jeremy Bentham and John Austin, aimed to develop an intellectual framework in which law could be seen as rational, modern, and scientific. To achieve this, they disputed that law should be linked to morality and rights (natural law), and challenged the claim that law could consist in

¹⁰ These cases are not in family law. It could be argued that a book that examines the meaning of modern marriage should begin with an analysis of the Family Law Act (FLA). However, the legal episodes that this book relies upon exist for the most part outside of this revolutionary piece of legislation. This needs some explanation. My brief analysis of family law cases around those issues shows an unwillingness on the part of the newly established Family Law Court to engage in discussion, either explicit or implicit, about the question of marriage and its meaning since the repeal of the Matrimonial Causes Act. Presumably a return to such questions raised the spectre of the old law, which was to be avoided at all costs. To engage with Family Law Cases on the meaning of marriage, let alone its relationship to love, is therefore a difficult exercise. Courts circumscribe their reasoning to narrow points of law and go to great lengths to avoid any statements that can be read as being in any way normative. Because of this, despite the FLA appearing as a logical place to begin and end a discussion on marriage and love, the FLA is part of the back-story rather than the central story in this book. For more information on the impact of the FLA on marriage see chapter one.

unwritten and immemorial custom found in communities by the judge (common law theory). Instead, they wanted law to be associated with objectivity, certainty and neutrality.¹¹ Modern positivism continues to operate inside this paradigm, unified under two central assertions: that law is law as long as it is created in the approved political way, and that law and morality are and ought to be separate from one another. One of the many consequences of this framework is the exclusion of emotion from law.

Critical jurisprudence¹² has challenged this view of law and has contributed to an emotional discourse both generally and specifically. To begin with the general, critical jurisprudence, as part of the post-modern tradition, challenges meta-narratives. In so doing, it aims to liberate 'suppressed narratives' and 'subvert dominant paradigm[s]',¹³ and in the process make room for alternative ways to understand law. Such an approach necessarily includes emotion. Furthermore, a central argument common to all strands of critical jurisprudence is its challenge to the idea of objectivity. For positivists, the claim that law can be objective (no matter how that is understood)¹⁴ is central to the legitimacy of law. Critical jurisprudence challenges this claim from four distinct perspectives: critical legal studies (CLS) asserts that law is political, feminism that it is gendered, critical race theory (CRT) that it is racial, and queer theory that it is heteronormative.¹⁵ In mounting these challenges, critical jurisprudence also undermines positivist claims that the law is value-neutral and rational.

As well as these general arguments, critical jurisprudence has developed a body of scholarship that has explicitly demanded an emotional engagement. This scholarship centralises the subject of law and the importance of identity based on sex, gender, race and sexuality.¹⁶ Related to this, is the use of the methodology of storytelling,¹⁷ a method that demands that law engages with

11 See K Lee, *The Positivist Science of Law* (Avebury, Aldershot 1989) and M Davis, *Asking the Law Question: The Dissolution of Legal Theory*, second edition (LawBook Co, NSW 2002).

12 Critical jurisprudence refers primarily to the schools of critical legal studies (CLS), feminisms, critical race theory (CRT) and queer theory, all of which can to some extent be characterised as post-modern. Critical jurisprudence can also include more general approaches to the study of law, such as law and society, law and literature and, of course, law and emotion.

13 A E Cook, 'Reflections on Post-Modernism' (1991–92) 26 *New England University Law Review* 751, 754.

14 J L Coleman, 'Truth and Objectivity in Law' (1995) 1 *Legal Theory* 33–68.

15 I feature queer theory in this book in order to show how it has advanced critical scholarship, challenged the objectivity of law, and exposed and critiqued the heteronormativity of marriage and of romantic love.

16 J M Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105–176. See also discussion of identity and emotion in Barbalet, *Emotion Social Theory and Social Structure* 11–12.

17 Storytelling is a method adopted in order to 'make arguments vivid' and 'to bring the raw experience of life as forcefully as possible into conceptual debates around law', Cotterrell, R *Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, second edition (Lexis Nexis, UK 2003). Tony Massaro describes storytelling in law as both a 'call to context' and a demand for more individualised justice, a method that implies that all voices are equal, and that diversity of voices is of 'paramount' political importance. The method, he says, embodies a number of demands that resonate throughout the legal system. He argues that this is evident in the lawyer-client relationship, where lawyers are now encouraged to let their clients tell

the way its processes impact upon real individuals rather than abstract entities or categories. It demands that law take into account ‘existing social and legal arrangements and actual human behaviour’.¹⁸ Furthermore, feminism’s general project of making women’s experiences central, rather than marginal to the way law thinks and acts has been central to the development of an emotional point of view in law, if nothing else by the long association of women with emotion.¹⁹ This has been further assisted by the feminist project of exposing the private sphere, laden with emotional content, into public focus.²⁰

According to Terry Maroney, the legitimation of emotion also owes something to the American Legal Realists of the 1920s and 1930s, who focussed the meaning of law on the practice of law and in particular on the role of the judge.²¹ Maroney argues that the Realists should be understood as being among the first to argue that emotion is and ought to be understood as a part of the legal process. Accepting and demanding a judge’s use of discretion entails an understanding of who the judge is that includes her sociological, political ideological and psychological aspects, none of which, Maroney claims, can be thought of independently of emotion.²²

But the legitimacy of emotion in law has received its greatest boost from the recent development of a specific law and emotion scholarship. During the last few decades, a small group of legal scholars have begun to probe the scope of emotions in law. This scholarship has made substantial contributions to the way we think about the law. First and foremost, the scholarship has challenged the exclusion of emotions from law, arguing that law must recognise and include the rich normative depth of emotions.²³ The scholarship has developed to include

their story; in law teaching, where stories are being used to illustrate legal arguments, and in the work of judges and courts, where decision-makers are being asked to consider the uniqueness of the life experiences that litigants represent. All this promotes a variety of ends. Stories provide connections between people and experiences, they explore ways of thinking, and they heal and destroy experiences. For Massaro, storytelling is inextricably entwined with empathy, however it is difficult to extricate storytelling from emotion generally. T M Massaro, ‘Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds’ (1988–89) 87 *Michigan Law Review* 2106.

18 T M Massaro, ‘Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds’ (1988–89) 87 *Michigan Law Review* 2125.

19 S Mendus, *Feminism and Emotion: Readings in Moral and Political Philosophy* (Macmillan Press, GB 2000).

20 I have drawn upon feminist literatures to show the ways in which feminist legal theories have challenged the objectivity of law by arguing that law is gendered; the association between the feminine and emotion; the arguments that feminists have made against marriage, against love and against sex; and the impact that feminist ideas have had upon the same-sex marriage debate. Throughout the book I repeatedly use the term feminisms in order to indicate the broad movement and philosophy generally associated with the term. This is not to downplay the rich diversity of the views that the term embodies.

21 In particular, see Oliver Wendell Homes Jr, John Chipman Gray, Karl Llewellyn and Jerome Frank.

22 T Maroney, ‘The Persistent Cultural Script of Judicial Dispassion’ (2011) *California Law Review* 629–294.

23 H Peterson, ‘Informal Law and/of Love in the European Community’ in H Peterson (ed), *Home Knitted Law Norms and Values in Gendered Rule Making* (Ashgate, Dartmouth 1996) 114–155 and H Peterson (ed), *Love and Law in Europe: Complex Interrelations* (Ashgate, Dartmouth 1998) and P Goodrich, ‘Law in the Courts of Love: Andreas Capellanus and the Judgements of Love’ (1996) 48 *Stanford Law Review* 633–675.

more detailed work which has illuminated the role of emotions on different legal actors — judges,²⁴ juries,²⁵ lawyers,²⁶ witnesses and victims²⁷ — and in different legal contexts — criminal law,²⁸ family law,²⁹ domestic violence,³⁰ sexual harassment law,³¹ and contract law.³² The scholarship has also isolated the existence of specific emotions in law, for example, fear,³³ disgust,³⁴ shaming,³⁵ empathy,³⁶ mercy,³⁷ love,³⁸ and hope.³⁹

Alongside and in partnership with this scholarship, practical approaches have developed in different jurisdictions which have accepted the important role that emotions play in the thinking and practices of law (comprehensive law movement). Practices such as problem solving courts and circle sentencing

24 N R Feigenson, 'Sympathy and Legal Judgement: A Psychological Analysis' (1997) 65 *Tennessee Law Review* 1–78; L Little, 2002 'Adjudication and Emotion' (2002) 3 *Florida Coastal Law Journal* 205–218; M C Nussbaum, 'Emotion in the Language of Judging' (1996) 70 *St John's Law Review* 23–30.

25 K S Douglas, D R Lyon & J R Ogloff, 'The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?' (1997) 21 *Law and Human Behaviour* 489–509; B Myers, S Jay Lynn & J Arbuthnot, 'Victim Impact Testimony and Juror Judgements: The Effects of Harm Information and Witness Demeanour' (2002) 32 *Journal of Applied Social Psychology* 2393–2412.

26 S Bandes, 'Repression and Denial in Criminal Lawyering' (2006) 9 *Buffalo Criminal Law Review* 339–390.

27 S Bandes, 'Empathy, Narrative and Victim Impact Statements' (1996) 63 *University of Chicago Law Review* 361–412.

28 M C Nussbaum and D Kahan, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Columbia Law Review* 269–374.

29 C Huntington, 'Repairing Family Law' (2008) 57 *Duke Law Journal* 1244–131.

30 N Seuffert, 'Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law' (1999) 23 *Melbourne University Law Review* 211–240.

31 P Goodrich, 'The Laws of Love: Literature, History and the Governance of Kissing' (1998) 24 *New York University Review of Law & Social Change* 183–234.

32 H Keren, 'Considering Affective Consideration' (2009–10) 40 *Golden Gate University Law Review* 165–234; M A Eisenberg, 'The World of Contract and the World of Gift' (1997) 85 *California Law Review* 821–866.

33 S Bandes, 'Fear Factor: The Role of Media in Covering and Shaping the Death Penalty' (2003–04) 1 *Ohio State Journal of Criminal Law* 585–598.

34 D M Kahan, (1999) 'The Progressive Appropriation of Disgust' in S Bandes (ed), *The Passions of Law* (New York University Press, New York 1999). M Nussbaum, "'Secret Sewers of Vice": Disgust, Bodies and the Law' in S Bandes (ed), *The Passions of Law* (New York University Press, New York 1999).

35 T M Massaro, 'Shame Culture and American Criminal Law' (1991) 89 *Michigan Law Review* 1880–1944.

36 L Henderson, 'Legality and Empathy' (1986–87) 85 *Michigan Law Review* 1574–1654.

37 J G Murphy & J Hampton, *Forgiveness and Mercy* (Cambridge University Press, Cambridge 1998); M C Nussbaum, 'Equity and Mercy' (1993) 22 *Philosophy and Public Affairs* 83–125.

38 P Goodrich, 'Law in the Courts of Love: Andreas Capellanus and the Judgements of Love' (1996) 48 *Stanford Law Review* 633–675; 'The Laws of Love: Literature, History and the Governance of Kissing' (1998) 24 *New York University Review of Law & Social Change* 183–234; 'Erotic Melancholia: Law Literature, and Love' (2002) 14 *Law & Literature* 103–129; *The Laws of Love: A Brief Historical and Practical Manual* (Palgrave Macmillan, London, 2006); Seuffert, 'Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law'; H Peterson, 'Informal Law and/of Love in the European Community' in Peterson (ed), *Home Knitted Law Norms and Values in Gendered Rule Making* (Ashgate, Dartmouth 1996) 114–155, and *Love and Law in Europe* (Ashgate, Dartmouth 1998).

39 K Abrams and H Keren, (2007) 'Law in the Cultivation of Hope' 95 *California Law Review* 319–382.

encompass therapeutic and restorative justice theories and practices,⁴⁰ and these consider ‘extra-legal’ factors such as emotions as essential to their operation and effectiveness.⁴¹

Law and emotion scholarship has developed to an extent where we can discern a variety of approaches within it. Maroney⁴² identifies six commonly combined approaches: the emotion-centred approach (how an emotion is and should be reflected in law); the emotional phenomenon approach (how an emotion has been and should be experienced in law); the emotion theory approach (how emotion and theories of emotion are reflected in law); the legal doctrine approach (how emotions are reflected or should be reflected in legal doctrines); the theory of law approach (how emotions and their theories are reflected in theories of law); and the legal actor approach (how legal actors are influenced by emotions).

Kathryn Abrams has characterised the scholarship as embodying three different but not necessarily exclusive phases which she has labelled recognition, reconnaissance and regulation.⁴³ The recognition work is the general critical scholarship’s challenge to the objectivity of law as discussed above, but also includes the scholarship which acknowledges the role that emotions have on the work of legal actors. Reconnaissance scholarship involved the importation of emotion scholarship from other disciplines into legal processes in an attempt to illuminate aspects of law which were not previously visible. The third phase, regulation, involves using the ‘emotional’ intelligence gained in law and emotion scholarship to influence the direction of law. As Abrams puts it, law and emotion scholarship has developed so that the question is not so much ‘should or shouldn’t a particular emotion be recognized through law but how, when, and — perhaps, most importantly — through what kinds of legal interventions’, can the law affect emotions (express, reflect, channel, script, cultivate or destroy them).⁴⁴

Above I have surveyed the discourse that has occurred between law and emotions in general. Much of this scholarship has involved the study of negative emotions and much of it has occurred in the field of criminal law. This book, however, is concerned with the emotion of love, and with laws outside of the criminal law

40 H Strang & J Braithwaite (eds), *Restorative Justice and Civil Society* (Cambridge University Press, New York 2001).

41 S Daicoff, *Law as Healing Profession: The ‘Comprehensive Law Movement’* (New York Law School Clinical Research Institute Research paper series 05/06#12 <http://cdn.law.ucla.edu/SiteCollectionDocuments/workshops%20and%20colloquia/clinical%20programs/susan%20daicoff.pdf> accessed 17/07/10).

42 T Maroney, ‘Law and Human Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 30 *Law and Human Behaviour*, special issue on ‘Emotion in Legal Judgement’ 119–142.

43 K Abrams, ‘Barriers and Boundaries: Exploring Emotion in the Law of the Family’ *Virginia Journal of Social Policy and the Law* (2009) 16, 301–321.

44 Abrams, ‘Barriers and Boundaries’ 304.

context. The pioneer of the field of law and love is Peter Goodrich.⁴⁵ Goodrich's work crosses over a number of legal approaches. It can be classified as falling within the Critical Legal Studies school, the Post-modern school and the Law and Literature school. However we conceptualise his work, it contributes to the meaning of law and the meaning of love, and provides an example of a methodology that can be used in law and love scholarship.

In keeping with early law and emotion scholarship, a key element of Goodrich's work is a call to reject the exclusion of emotion in legal thought. The exclusion of emotion from law, he argues, reinforces the private and public distinction, and the male foundations of the legal system.⁴⁶ Moreover, the prohibition of *eros* from law leads to either a repressed or a deviant sexuality.⁴⁷ Goodrich's work goes one step further: he attempts to extract from predominately literary sources, the actual rules that govern, or should govern, love.⁴⁸

My approach is different to Goodrich's in that I am engaged with an analysis of traditional legal sources, however, the importance of his work for this book lies in his pioneering and legitimation of the study of the relationship between love and law, and in his pioneering and legitimation of a critical approach to the study of law.

Returning to the broader law and emotion scholarship, in general we can say that it is seen as either marginal and irrelevant to the 'real' task of law or, alternatively, that it is received with suspicion and caution. For example, in relation to storytelling, both Paul Gewitz⁴⁹ and Tony Massaro⁵⁰ have warned against 'excessive emotion' and 'unguided emotion'. In relation to judging, Martha Nussbaum has stated that, to be useful, emotion must be tethered to evidence.⁵¹ Restorative justice has been criticised for demanding 'compulsory compassion' in cases where it is not only inappropriate, but downright harmful.⁵² In relation to the scholarship as a whole, Carol Sanger has described 'legislating

45 N Seuffert and H Peterson have explicitly named Goodrich as sparking their interest in the area of law and love. P Goodrich, 'Law in the Courts of Love: Andreas Capellanus and the Judgements of Love' (1996) 48 *Stanford Law Review* 633–675; *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge, London 1996); 'Epistolary Justice: The Love Letter as Law' (1997) 9 *Yale Journal of Law & Humanities* 245–295; 'The Laws of Love: Literature, History and the Governance of Kissing' (1998) 24 *New York University Review of Law & Social Change* 183–234; 'Erotic Melancholia: Law Literature, and Love' (2002) 14 *Law & Literature* 103–129; 'Amatory Jurisprudence and the Querelles des Lois' (2000) 76 *Chicago-Kent Law Review* 751–778; *The Laws of Love: A Brief Historical and Practical Manual* (Palgrave Macmillan, London 2006).

46 Goodrich, 'The Laws of Love' 201.

47 Goodrich, 'The Laws of Love' 199.

48 See Goodrich, *Law in the Courts of Love*; 'Erotic Melancholia' 114.

49 P Gerwitz, 'On "I Know it When I See it"' (1996) 105 *Yale Law Journal* 1023–104.

50 T M Massaro, 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds' (1988–89) 87 *Michigan Law Review* 2099–2127.

51 M C Nussbaum, 'Emotion in the Language of Judging' (1996) 70 *St John's Law Review* 30.

52 A Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press, Vancouver 2004).

with affect' as a cheap crowd pleaser with the potential to be misused. She has warned that it constitutes a general tendency in society of an 'increasing socialization into having or at least displaying appropriate emotional responses in situations once unconnected to emotional involvement'.⁵³ Sanger has called for more caution and deliberation when we consider the legitimacy of law's role as a means of 'cultivating specific emotions'.⁵⁴

These comments are to be considered carefully when evaluating the substantive issues that law and emotion scholarship gives rise to, however, we must be careful that they don't stifle the importance the scholarship has in legitimating emotion (and with it women and the private sphere), and the challenge it makes to positivism (and the view of law that is rooted in objectivity and a rational and scientific point of view).

The Meaning of Love

A book that asks whether law reflects love must engage with how we understand the concept of love itself, how it has developed and what it means in contemporary society.

The earliest discussion of love in western culture can be found in Plato's *Symposium*.⁵⁵ Here Simon May claims we find two lasting ideas of love.⁵⁶ In the speech of Aristophanes, we hear that love is a longing to find a part of ourselves and that, when we find it, it constitutes a unification, a merging of both our bodies and our souls which 'heal the human sore'.⁵⁷ From the speech of Socrates delivered as the ideas of Diotima (priestess and expert on love), we learn that love is the quest for the attainment of beauty, wisdom and the good. Love is represented as a ladder with the erotic at the lowest rung and ending with an abstract love at the highest. Love is aroused by beauty of a person's looks as well as their soul, character and deeds; it begins with sexual attraction but it is more than that; it raises us to higher things. Love has stages. In the first stage, a young lover will apply himself to the contemplation of physical beauty. A young lover will move from one lover to another, realising that beauty is not limited to one type. In the second stage, a lover will become a lover of beauty in a more general sense and will relax his passion for one person, as this will be considered beneath him. In the third stage, a lover will come to realise that the soul is more valuable than the body, and he will therefore come to appreciate

53 C Sanger, 'The Role and Reality of Emotions in Law' (2001–2002) 8 *William & Mary Journal Women & Law* 109.

54 C Sanger, 'Legislating with Affect: Emotion and Legislative Law Making', in J M Fleming (ed), *Passions and Emotions* (New York University Press, New York 2013) 63–64.

55 Plato, *Symposium* trans W R M Lamb, Loeb Classical Library (Harvard University Press, Cambridge 1975).

56 S May, *Love: A History* (Yale University Press, New Haven 2011) 40.

57 The Speech of Aristophanes in Plato, *Symposium* 141.

that beauty on the inside is more valuable than outward signs of beauty. The fourth stage consists of the realisation that the concept of beauty can encompass social and moral beauty. This will lead to a desire to acquire knowledge. The fifth stage is the realisation of absolute and pure beauty.⁵⁸

Aristotle's *Philia* adds another, more ethical dimension to love. For Aristotle, friendship, love and justice are all linked. Friendship is the model for love, and justice is the model for friendship. A moral community needs both justice and friendship. The type of friendship that provides this model for love and justice is that which is based upon a sense of being good and doing good.

Christianity began the exaltation of love to the ultimate ideal it has become by asserting that there is nothing better than to love and be loved.⁵⁹ This message is found most strongly in the works of St Paul and St John the Evangelist. In the book of the Corinthians, St Paul says that love is greater than all knowledge, wealth, power and even faith:

Love is patient; love is kind; love is not envious or boastful or arrogant or rude ... It bears all things, believes all things, hopes all things, endures all things ... And now faith, hope, and love abide, these three; and the greatest of these is love.⁶⁰

St John the Evangelist preached that love brings us as close as possible to God: 'God is love, and those who abide in love abide in God, and God abides in them.'⁶¹ This idealisation of love enabled the progression of western thinking about love to the courtly and romantic tradition. However, these largely positive developments came at a great cost. As will be attested to later, Christianity was brutal to sexual love.

The term courtly love was not used till the nineteenth century, but it refers to the idea of love that emerged in the twelfth century among a small section of the aristocracy, predominantly French. Its ideas were proselytised by troubadours who performed highly stylised poems whose themes were commonly embedded in a story of a poet or knight's love for an inaccessible aristocratic lady. The stories often depicted a struggle between love, desire and duty.⁶²

58 Socrates' speech in Plato, *Symposium* 173–211.

59 For more discussion on love and Christianity see D'Arcy, *The Mind and Heart of Love: Lion and Unicorn a Study in Eros and Agape*; E Leites, 'The Duty to Desire: Love, Friendship, and Sexuality in Some Puritan Theories of Marriage' (1982) 15 *Journal of Social History* 383–408. See also A Nygren, *Agape and Eros: A Study of the Christian Idea of Love* trans A G Hebert (SPCK, London 1932–1939) and May, *Love: A History*.

60 1 Corinthians 13:1,2,4,7,13.

61 1 John 4:7–11 and 16.

62 See F R P Akehurst and J M Davis (eds), *A Handbook of the Troubadours* (University of California Press, Berkeley 1995). Tristan and Iseult tells a typical story of courtly love. Sir Tristan is a knight who is sent by his King to negotiate for the hand of a neighbouring princess and bring her home to him to be his queen. On the return journey they fall in love. The rest of the story is about their affair and how they try to keep their love and fulfil their respective duties to the King. *Tristan & Iseult a Twelfth Century Poem* trans J H Caulkins

Irving Singer characterises courtly love around five central features: that love between men and women is something splendid and is an ideal worth striving for; that it is ennobling for both the lover and the beloved; that sexual love is more than libido or a physical impulse but is something ethical and aesthetic; that love has rituals within it but it is not necessarily related to marriage; and that love is an intense and passionate relationship that establishes a oneness between the lovers. These developments paved the way for romantic love.⁶³

Like courtly love, romantic love cherishes and idealises the love between men and women. It too ennobles lovers and sees love as ritualistic and spiritual, and as a means by which a oneness between lovers is created. It also sees sex as both pleasurable and good. It would be a mistake, however, to see romantic love purely as a restatement of the courtly tradition. Romantic love expresses many changes that occurred following the middle ages, and can be seen as reflecting a new kind of humanism which embodies ideas of liberty and equality, and, importantly, extends those ideas to the whole of society:

By the nineteenth century every scullery maid could dream of dancing her way into some Prince Charming's heart, and every young aristocrat could yearn for the vampish woman of the streets who would elicit his true virility.⁶⁴

Solomon echoes this, arguing that one of the features of romantic love is that it is appropriate only between equals. Like Singer, he relies upon the Cinderella story to argue that romantic love is a 'great levelling device' in society, a force that not only requires equals but is capable of creating them. It is for this reason that he claims that romantic love 'now finds its greatest popularity in self-consciously egalitarian societies'.⁶⁵ Hendrick and Hendrick claim that love must primarily accord individuals a certain freedom and autonomy, and love must itself be liberated from considerations of economy and politics.⁶⁶ These presuppositions

& G R Mermier (H Champion, Paris 1967). (For a quirky modern version of this story see the movie *Shrek* by Dreamworks 2001.) Another is the story of Lancelot and Guinevere, E Vinaver, *Lancelot and Guinevere: New Edition of the Romance of Lancelot and Guinevere* (The Folio Society, London 1953). Andreas Capellanus is often described as the prince of courtly love. See A Capellanus, *The Art of Courtly Love* trans J J Parry (Frederick Ungar Publishing, New York 1941). Capellanus states that everyone of sound mind can fall in love, but there is an age barrier. Men cannot be in love under the age of 14 (although true love for men really needs to wait till 18 as, before that, boys are too easily embarrassed) and over the age of 60. Women can only fall in love between the ages of 12 and 50. There are three avenues to true love: beauty, wit and excellent character. Great wealth and generosity of wealth can lead to love, but Capellanus is scathing of such love and says it should not be acknowledged by the courts of love. While beauty is important, men and women who adorn themselves excessively are not worthy subjects of love. To retain love, Capellanus advises secrecy, generosity and keeping good company. To increase love, he advises lovers to see each other rarely, to dream of one's lover and to feel jealousy. A Capellanus, *The Art of Courtly Love* book one 32–36 and book two 151–153.

63 I Singer, *The Nature of Love* vol 2: Courtly and Romantic (Chicago University Press, Chicago 1984) chapter one.

64 I Singer, *The Nature of Love* vol 3: The Modern World (Chicago University Press, Chicago 1987) 18.

65 R C Solomon, *About Love: Reinventing Romance for Our Times* (Little Field Quality Paperbacks, Lanham MD 1994) 45.

66 S Hendrick & C Hendrick, *Romantic Love* (Sage Publications, Newbury Park 1992) 39.

depend upon a modern western industrial society. In this way, romantic love becomes connected not only with individual freedom, but also modernity and progress. As Solomon argues:

In essence, romantic love came of age only when newly industrialized and increasingly anonymous societies fostered the economically independent and socially shrunken ('nuclear') family, when women as well as men were permitted considerable personal choice in their marriage partners, when romantic love novels spread the gospel to the multitude of women in the middle class (whereas courtly love had been the privilege of a few aristocratic heroines) and, philosophically most important, when centuries-old contrast between sacred and profane love had broken down and been synthesized in a secular mode (like so many ideas of the Enlightenment).⁶⁷

The idea that romantic love is radical, liberating and modern has spread beyond western societies. It finds expression for example in challenges to common (mis)perceptions of arranged marriages in India.⁶⁸ In the 'Red Love' context, it is equated with the shattering of capitalism.⁶⁹

Contemporary love has developed many of the features of love that were begun during the romantic period. If love was extended to the masses during that time, the message has now reached saturation point in our culture. Beck and Beck-Gernsheim claim that love is now considered the major existential goal of our times, capable of providing all of us with a sense of worth and a way of being in the world.⁷⁰ Illouz claims that love has become the 'cultural core of modernity',⁷¹ a supreme value capable of delivering happiness — a 'collective utopia'.⁷² Bruckner has described it as the general ideology of the West,⁷³ and May, as the 'undeclared religion of the west', 'the ultimate source of meaning

67 Solomon, *About Love* 60.

68 Reuters, *Just Woman@asiaOne* 21/12/2007. <http://www.asiaone.com/Just%2BWoman/News/Women%2BIn%2BThe%2BNews/Story/A1Story20071221-42037.html> accessed 19/05/10. It is a common theme in Bollywood films to show the tussle between a couple's romantic love and the interests of their joint families. See R Majumbar, *Marriage and Modernity: Family Values in Colonial Bengal* (Duke University Press, Durham London 2009).

69 The concept of 'Red Love' originated from the novel of the same name by Alexandra Kollontai. Red love appears to be used to signify the coincidence of romantic love with Marxism and, at least for some, implies free love. See <http://www.solidarity-us.org/node/1724> accessed 18/05/10. For another look at the revolutionary nature of romantic love, especially its connection with free love outside of the 'western context', see E Tipton, 'Sex in the City: Chastity vs Free Love in Interwar Japan' (2005) 11 *Intersections: Gender and Sexuality in Asia and the Pacific* intersections.anu.edu.au/issue11_contents.html accessed 11/05/2010.

70 Beck & Beck-Gernsheim, *The Normal Chaos of Love* trans M Ritter and J Wiebel (Polity Press, Cambridge 1995) 193–194.

71 E Illouz, *Why Love Hurts: A Sociological Explanation* (Polity, Cambridge 2012) 120.

72 Illouz, *Consuming the Romantic Utopia: Love and the Cultural Contradictions of Capitalism* (University of California Press, Berkeley 1997) 2.

73 P Bruckner, *The Paradox of Lovetrans* S Randall (Princeton University Press, Princeton NJ 2012).

and happiness'.⁷⁴ According to these writers, the key messages in contemporary society are that love is a selfless, unconditional 'gift', that affirms the loved one, that transforms us to a higher state of being, is eternal, benevolent, harmonious and redeems us from our suffering.⁷⁵ Love gives us a feeling of 'living in high altitude',⁷⁶ and represents a 'Dionysian affirmation of life'.⁷⁷ We seek love because it makes us feel at home, it roots our life, it validates and solidifies our existence, it 'deepens our sense of being', it enables us to 'experience the reality of our life as indestructible', it offers us a promise of 'ontological rootedness'.⁷⁸ We crave this because we are born with an 'intense feeling of vulnerability'.⁷⁹ It achieves this because it is the 'central link – in the long chain of interaction rituals'.⁸⁰ Its prominence is assisted by the fact that it is a common theme in mass culture, especially film and advertising, and has become associated with mass consumption and the ethics of consumerism.⁸¹

Contemporary love also continues the themes of liberty and freedom. Beck and Beck-Gernsheim assert that love requires individuals who are free, active and accountable agents,⁸² and a context free of any external rules and pressures: love is a blank form whose actual content is a 'subjective and mutual invention'.⁸³ It is these features of contemporary love that, for Anthony Giddens, make it a potential for significant social transformation. Giddens claims that the rise of romantic love today has led to the democratisation of the private sphere. It has given rise to the 'pure relationship' which is a durable emotional tie that can be established according to another person on the basis of the tie itself rather than to anything extrinsic to it.⁸⁴ He says that the pure relationship is 'part of a generic restructuring of intimacy' which can emerge in contexts other than heterosexual marriage.⁸⁵ Essential to the emergence of the 'pure relationship' is the emergence of 'plastic sexuality', a sexuality which 'functions as a malleable feature of self, a prime connecting point between body, self-identity and social norms'.⁸⁶ Romantic love has given way to 'confluent love', an ideal of love that gives everyone a chance to become sexually accomplished that is not necessarily

74 May, *Love: A History* 1.

75 May, *Love: A History* 2.

76 Bruckner, *The Paradox of Love* 75.

77 Bruckner, *The Paradox of Love* 128.

78 May, *Love: A History* 6.

79 May, *Love: A History* 10.

80 Illouz, *Why Love Hurts* 120.

81 Illouz, *Consuming the Romantic Utopia* 28. Hsu-Ming Teo has argued that love in twentieth century Australia has undergone a change that brings it closer to an American, white, middle-class, consumerist model. Hsu-Ming Teo 'The Americanisation of Romantic Love in Australia' in A Curthoys and M Lake (eds), *Connected Worlds: History in Transnational Perspective* (ANU E Press, Canberra 2005).

82 Beck & Beck-Gernsheim, *The Normal Chaos of Love* 193–94.

83 Beck & Beck-Gernsheim, *The Normal Chaos of Love* 193.

84 A Giddens, *The Transformation of Intimacy: Sexuality Love and Eroticism in Modern Societies* (Polity Press, Cambridge 1992) 2.

85 Giddens, *The Transformation of Intimacy* 58.

86 Giddens, *The Transformation of Intimacy* 15.

heterosexual or monogamous. In the model of the pure relationship and confluent love, the relationship holds only while each partner is gaining sufficient benefit from it. Importantly for same-sex love, confluent love differs from romantic love because 'while not necessarily androgynous, and still perhaps structured around difference, [it] presumes a model of the pure relationship in which knowing the traits of the other is central'.⁸⁷ As such, sexuality is only one of the factors to be negotiated as part of the relationship. While Giddens' formulation of love in modern society has been criticised for not reflecting reality,⁸⁸ its importance is in its formulation of a democratic way of understanding love. For Giddens, 'pure relationship', 'plastic sexuality' and 'confluent love' are all 'part of a generic restructuring of intimacy'⁸⁹ representing a formulation of love that is more democratic and inclusive than any in the past.

To round off this discussion on love, something must also be said about sex. Indeed, it is often the case that the two are discussed as if they were the same thing. This slippage is understandable. The relationship between sex and love throughout the ages cannot be easily separated. As Zygmunt Bauman claims, 'sex eroticism and love are linked yet separate. They can hardly exist without each other, and yet their existence is pent in the ongoing war of independence, the boundaries between them are hotly contested — alternatively, but often simultaneously, the sites of defensive battles and of invasions.'⁹⁰

In the classical Greek tradition, sexual intercourse was not necessarily a part of love. Sex could be an expression of love but, as we saw above, love itself was primarily seen as an ideal for the attainment of something else.⁹¹ Christianity's view of sex was largely negative. Christian love was chaste, pious, dutiful and stable, tied to 'an eternal being, a pure love',⁹² barely tolerated even within marriage.⁹³ St Augustine describes sexual impulse and orgasm as 'an almost

87 Giddens, *The Transformation of Intimacy* 63.

88 L Jamieson, 'Intimacy Transformed? A Critical Look at the Pure Relationship' (1993) 33 *Sociology* 477–494.

89 Giddens, *The Transformation of Intimacy* 58.

90 Z Bauman, 'On Post Modern Uses of Sex' (1995) 15 *Theory Culture and Society* 19.

91 Sexual intercourse was also disconnected from heterosexuality. Stephen Garton says that sex in classical times was understood as an act between an active and a passive partner. He argues that the 'central trope of Greco-Roman sexual culture was activity/passivity not homosexuality/heterosexuality. S Garton, *Histories of Sexualities* (Equinox Publishing, London 2004) 32.

92 Goodrich, *Law in the Courts of Love* 31. In a discussion on the view of sex in western civilisation mention needs to be made of the Victorian period. One reading of Victorianism is that it represented sexual repression and prudery of all kinds. Foucault, however, has argued that the opposite was actually true, that it produced the discourse of sex because it spoke about it relentlessly in a variety of contexts. M Foucault *The History of Sexuality* trans R Hurley (Pantheon Books, New York 1987).

93 Solomon, *About Love* 57–58. Christianity still has a strict view on what constitutes legitimate sexual acts even within marriage. See G Grisez, *The Way of the Lord Jesus* vol 2: Living a Christian Life (Franciscan Press, Quincy University 1993) 639. However it is important not to overstate this, David West says that over two millennia of Christianity a wide variety of views about sexuality have been accommodated. D West, *Reason and Sexuality in Western Thought* (Polity Press, Cambridge 2005) 26.

total eclipse of acumen and, as it were, sentinel alertness'.⁹⁴ Christianity turns sex and sexuality into something more important than personal desire or even personal moral choices. They become important issues that determine a person's relationship with God and consequently influence their afterlife.

A more positive view of sex emerged with courtly love and was continued by romantic love. Romantic love centralises sex, and is often wrongly equated with free love,⁹⁵ but in fact it does not equate love with sex. While sex can represent the intensity associated with love, it is not the same as love. They are different pursuits.⁹⁶ Zygmunt Bauman claims that to seek sexual delights for their own sake has now become a cultural norm of modernity. Illouz agrees, claiming that in modern western society sex and love form separate and parallel life narratives.⁹⁷ And yet it is still the case that love and sex are difficult to separate. Neil Delaney says that any plausible understanding of contemporary love needs to acknowledge its sexual nature. Love necessarily includes 'mutual longings for sexual intimacy together with a more sweeping delight in each other's physicality'.⁹⁸ Paul Johnson argues that sex is still always in the service of love. Ultimately, he claims, 'love exerts a normative force over sex that cannot be easily escaped.'⁹⁹

Outline of the Book

Chapter one documents the changing legal discourse of marriage by outlining major reforms during the nineteenth and twentieth centuries. This history shows the ways in which marriage has become disconnected from traditional

94 St Augustine, 'The City of God extract' in Solomon & Higgins (eds), *The Philosophy of (Erotic) Love* 45. From this emerges a general view, prominent in Christianity, that to have a body is a trial to be borne. According to D P Verene, personal morality is therefore 'largely body-denying morality based upon a set of restrictions on bodily activities. Classical Christian morality directs me to relate to activities that heavily involve the passions of my body only in certain ways (only through marriage, etc.) and not in others. This is done in order that I can relate properly to my soul and relate my soul properly to God.' D P Verene (ed), *Sexual Love and Western Morality: A Philosophical Anthology* (Jones & Bartlett, Boston c1995) 45.

95 This is especially so in the 'red love' context. Tipton, 'Sex in the City'.

96 Singer, *The Nature of Love* vol 3 10.

97 Illouz argues that this is both a good thing and a bad thing: on the one hand, it can be seen as bringing about equality between the sexes, but, on the other, it has also led to a loss. She says '[b]ecause sexuality need not be sublimated in a spiritual ideal of love, and because "self realization" is perceived to depend on experimentation with a variety of partners, the absoluteness conveyed by the experience of love at first sight has faded away into the cool hedonism of leisure consumption and the rationalized search for the most suitable partner.' Illouz, *Consuming the Romantic Utopia* 289.

98 N Delaney, 'Love and Loving Commitment: Articulating a Modern Ideal' (1996) 33 *American Philosophical Quarterly* 339–347.

99 P Johnson, *Love, Heterosexuality and Society* (Routledge, London 2005) 223. See also Wouters, who argues that sex in contemporary society is being seen once again as an element of an intimate relationship, rather than a goal in its own right. Wouters C, 'Balancing Sex and Love Since the 1960s Sexual Revolution' (1998) 15 *Theory Culture and Society* 201.

meanings and more closely connected to ideas of romantic love. Having established this connection, the book considers the extent to which romantic love forms part of the legal discourse of marriage via an examination of a number of established meanings of marriage derived from its traditional connections with sex (embracing both sexual intercourse and sexual identity), economic considerations and sexuality.

Chapter two analyses the connection between sex (sexual intercourse) and marriage and evaluate its importance. The analysis shows a shifting narrative where sex moves from being inseparable from marriage, and a 'right' for the husband, to being the subject of negotiation between equal partners in the pursuit of mutual pleasure. This shifting narrative makes room for the insinuation of love into the relationship.

Chapter three documents and analyses another shifting narrative - the one between marriage and economic considerations.

Chapter four turns to the connection in marriage between sexual intercourse, sexual identity, and sexuality, and considers the same-sex marriage debate in Australia. In this context, I document how love has come to be considered the most important defining characteristic of the marriage relationship and demonstrate how it has thereby been able to disrupt the traditional requirements of heterosexuality.

This analysis undermines the positivist hold on the understanding of law, as well as the meanings traditionally associated with marriage. In doing so, it opens the discussion on what romantic love means in contemporary society.

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