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The Emotional Dynamics of Property Law

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Chapter 15
The Emotional Dynamics of Property Law
Heather Conway and John Stannard*

Introduction

Property is a foundational module in law schools, and one of the most conceptually challenging for students to grasp. At the outset, we try to persuade them that property is not simply the object or the asset itself; that, as a legal construct, property denotes rights over ‘things’ (both tangible and intangible), which the law will protect. We explain ownership as the ultimate legal claim, encompassing what has been traditionally described as a bundle of rights and incidents¹ and hinging on notions of excludability.² Then, just as these ideas gain traction, we introduce different theoretical perspectives. Contemporary scholarship has posited a range of views,³ with some questioning the bundle of rights approach and speaking instead to concepts such as ‘exclusivity’ and ‘agenda setting’,⁴ to ‘inalienability rules’⁵ and to property as a ‘law of things’.⁶ In the midst of this intellectual haze, however, two things stand out. First, labelling something as ‘property’ and someone as its ‘owner’ carries a potency that is not associated with other legal terms and jural relations. Second, property speaks to relational ties and social interactions: it is not simply about the relationship between the owner(s) and the property itself.⁷

Studies show that most people have a “mental toolbox of basic property rules.”⁸ As a result, some of the themes we explore in class undoubtedly reflect what non-owners - and law

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¹ Antony M. Honoré, “Ownership,” in *Oxford Essays in Jurisprudence*, ed. Anthony G. Guest (Oxford: Oxford University Press, 1961) 107. See also Bruce Ackerman, *Private Property and the Constitution* (New Haven, CT: Yale University Press, 1977).

² See Kevin Gray, “Property in Thin Air,” *Cambridge Law Journal* 50, no. 2 (1991): 252 and Thomas W. Merrill, “Property and the Right to Exclude,” *Nebraska Law Review* 77 (1998): 730.

³ See e.g. Joseph Singer, “The Ownership Society and Takings of Property: Castles, Investments and Just Obligations,” *Harvard Environmental Law Review* 30 (2006): 309 and “Democratic Estates: Property Law in a Free and Democratic Society,” *Cornell Law Review* 94, no. 4 (2009): 1009. See also Eduardo M. Peñalver, “Land Virtues,” *Cornell Law Review* 94 (2009): 821.

⁴ Larissa Katz, “Exclusion and Exclusivity,” *University of Toronto Law Journal* 58, no. 3 (2008): 275.

⁵ Lee Anne Fennell, “Adjusting Alienability,” *Harvard Law Review* 122, no. 5 (2008): 1403.

⁶ Henry E. Smith, “Property as the Law of Things,” *Harvard Law Review* 125, no. 7 (2012): 1691.

⁷ Gregory S. Alexander, “The Socio-Obligation Norm in American Property Law,” *Cornell Law Review* 95, no. 4 (2008): 745.

⁸ Peter DeScoli and Rachel Karpoff, “People’s Judgments About Classic Property Law Cases,” *Human Nature* 26, no. 2 (2015): 184, 186.

students whose views have yet to be shaped by the travails of a property law module - instinctively *feel* about property. Property has a symbolic resonance; ownership confers significant rights, and owners can exclude others from using or accessing their property. However, other basic assumptions can be misplaced: for example, that ownership rights are absolute and unqualified, and that the law always protects the rights of owners above everything else. Drawing on these ideas, this chapter will argue that people's perceptions of property and what it means to them are not necessarily replicated in property law theory and doctrine - and that this conceptual disconnect is most apparent when we look at emotional attachments to property.

All legal systems have well-developed and highly specialised property law rules. Yet these do not always reflect the affective connections that exist between owners and their property. In some instances, the law is preoccupied with treating specific types of property as mere commodities. This reflects a rather crude application of basic law and economics theory, in which the main function of property law is seen as being to facilitate the process whereby assets are transferred into the hands of those who are prepared to pay the highest price for them.⁹ At other times, the law takes a more nuanced view, acknowledging the meaning of the property to the owner and the character of the relationship between the owner and the property - something which a number of scholars have argued is necessary to capture the true meaning of property.¹⁰

This chapter explores these ideas by looking at specific types of property, and the extent to which there is a disconnect between the underlying legal and emotional dynamics. In the pages which follow we shall consider some of the theoretical perspectives before going on to see how and to what extent they are reflected in the law.

⁹ See e.g. Herbert A. Bernhard, "The Minority Doctrine Concerning Direct Restraints on Alienation," *Michigan Law Review* 57, no. 8 (1959): 1173; A. Mitchell Polinsky, *An Introduction to Law and Economics* (New York: Wolters Kluwer, 4th edn, 2011); Scott Grattan, "Revisiting Restraints on Alienation," *Monash Law Review* 41 (2015): 67; and Thomas J. Miceli, *The Economic Approach to Law* (Stanford: Stanford University Press, 3rd edn, 2017).

¹⁰ Margaret J. Radin, "Property and Personhood," *Stanford Law Review* 34, no. 5 (1982): 957 and *Reinterpreting Property* (Chicago: University of Chicago Press, 1993); Jeremy A. Blumenthal, "'To Be Human': A Psychological Perspective on Property Law," *Tulane Law Review* 83 (2009): 609.

I. Theoretical Perspectives

Relatively little has been written on the connection between property and emotions from a legal perspective, despite the centrality of property in everyday human life and the significance which legal systems and individuals attach to property rights. However, many scholars have looked at the link between property and emotions from a psychological perspective, analysing what property means to us as individuals and a society, and basic emotional traits associated with the broad constructs of 'ownership' and 'possession'.¹¹ This is slowly being mapped onto the field of law.¹² We would argue, however,¹³ that there is one particular emotion cluster that is of particular importance in the property context: that of 'attachment',¹⁴ and its two distinct (yet related) subcategories of 'material possession attachment' and 'place attachment'.¹⁵

The first of these is a multifaceted and emotionally complex attachment to a specific material object, the nature of which can change over time. An extension of the self, material possession attachment is based on some sort of ongoing personal history between the person and the possession.¹⁶ Typical examples might include a wedding ring, an old family photo album or favourite holiday souvenir, all of which are imbued with an emotional significance beyond their status as simple items of property and have a sentimental value way beyond their economic worth. Both the uniqueness of the possession and the person's emotional connections to it create a reluctance to sell, whether for the market value¹⁷ or a price in

¹¹ Leonard Bloom, "People and Property: A Psychoanalytical View," *Journal of Social Behavior and Personality* 6, no. 6 (1991): 427; Floyd W. Rudmin, "'To Own is to be Perceived to Own': A Social Cognitive Look at the Ownership of Property," *Journal of Social Behavior and Personality* 6 (1991) 85; James K. and Ellen M. Brown, "Association as a Psychological Justification for Ownership," *Journal of Psychology* 128, no. 4 (1994): 365.

¹² See e.g. Andreas Rahmatian, "Psychological Aspects of Property and Ownership," *Liverpool Law Review* 29, no. 3 (2008): 287; Barbara A. Spellman and Frederick Schauer, "Artists' Moral Rights and the Psychology of Ownership," *Tulane Law Review* 83 (2008): 661; Jonathan R. Nash and Stephanie M. Stern, "Property Frames," *Washington University Law Review* 87, no. 3 (2009): 449; and DeScioli and Karpoff, "People's Judgments."

¹³ And see also Heather Conway and John Stannard, "Property and Emotions," *Emotion Review* 8, no. 1 (2016): 38.

¹⁴ See generally John Bowlby, *Attachment and Loss, Volume 1*. (New York, NY: Basic Books, 1969) and Jude Cassidy and Phillip R. Shaver eds., *Handbook of Attachment: Theory, Research and Clinical Applications* (New York: The Guilford Press, 1999).

¹⁵ A third category- 'brand attachment'- is overlooked, because it is less important in the social and psychological contexts of the present analysis.

¹⁶ Susan Shultz Kleine and Stacey Menzel Baker, "An Integrative Review of Material Possession Attachment," *Academy of Marketing Science Review* 1 (2004): 1.

¹⁷ Russell W. Belk, "Possessions and the Sense of Past," in *Highways and Buyways: Naturalistic Research from the Consumer Behavior Odyssey*, ed. Russell W. Belk (Prov, UT: Association for Consumer Research, 1991), 114.

excess of that; they also render the item irreplaceable if lost or damaged. Although material possession attachment has numerous characteristics, two are particularly relevant in the context of the current discussion. First, there is a lot more to the concept than simply liking or valuing an object; material possession attachment involves a completely different (and much stronger) set of emotions.¹⁸ Secondly, it involves not so much possession in the physical or legal sense- though obviously this will often be the case- but rather psychological appropriation in the sense that the object is perceived as ‘mine.’¹⁹

Place attachment, in contrast, denotes the affective connection that a person develops and maintains with a particular location. Defined in the literature as “an emotional bond formed by an individual to a physical site due to the meaning given to the site through interactional processes”,²⁰ the types of place and the relevant experiences can vary widely though the dominant theme is a strong sense of “person-place bonding that develops over time via repeated interactions with a place.”²¹ Specific examples might include a favourite holiday destination or recreational site; an individual’s current home or living space, the family residence in which he or she was raised, and the surrounding neighborhood; an area of land (regardless of size), which someone either purchased or inherited. For present purposes, our focus will be on the latter two categories as illustrative of the core themes that we are exploring here. However, two passing observations can be made. First, the formative processes and resultant connections to these specific types of property can be personal, group and cultural;²² a sense of ‘rootedness’ and community ties can be important as well.²³ Secondly, and more generally, place attachment bears numerous similarities with material possession attachment; in particular, it involves a similar psychological process of

¹⁸ Kleine and Baker, “An Integrative Review”: 6. See also Susan Shultz Kleine, Robert E. Kleine and Chris T. Allen, “How is a Possession “Me” or “Not-Me”? Characterizing Types and an Antecedent of Material Possession Attachment,” (1995) *Journal of Consumer Research* 22, no. 3 (1995): 327.

¹⁹ Kleine and Baker, “An Integrative Review,” 2.

²⁰ Melinda J. Milligan, “Interactional Past and Potential: The Social Construction of Place Attachment,” *Symbolic Interaction* 21, no. 1 (1998): 1. See also Irwin Altman and Setha M. Low, *Place Attachment* (New York, NY: Plenum Press, 1992) and M. Carmen Hidalgo and Bernardo Hernández, “Place Attachment: Conceptual and Empirical Questions,” *Journal of Environmental Psychology* 21, no. 3 (2001): 273.

²¹ Kleine and Baker, “An Integrative Review,” 16 citing Low and Altman, *Place Attachment*. See also Milligan, “Interactional Past and Potential.”

²² Jennifer E. Cross, “Processes of Place Attachment: An Interactional Framework,” *Symbolic Interaction* 38, no. 4 (2015): 493.

²³ Charis E. Anton and Carmen Lawrence, “Home is Where the Heart Is: The Effect of Place of Residence on Place Attachment and Community Participation,” *Journal of Environmental Psychology* 40 (2014): 451, 452.

appropriation by which the place in question ceases to be a mere geographical location and becomes closely linked with the person's identity.²⁴

Both material possession attachment and place attachment are emotionally complex and dynamic concepts, which are based on singularised and formative personal histories between the individual and the object or place in question.²⁵ The specific attachments are both multifaceted and multi-layered (they are a tangle of 'messy' emotions rather than a single feeling), and speak to much more than the economic worth of the subject-matter. And while it would be misleading to present the emotions triggered by both types of attachment as exclusively positive experiences (both material possession attachment and place attachment can trigger ambivalent, sometimes negative feelings towards a particular object or place)²⁶ our focus throughout is on the affirmative aspects. This is not just because the applicable literature tends to focus more on these, but because- and with the acknowledged risk of sounding overly generalist- it is the positive emotional experiences embodied in both material possession and place attachment that imbue the object or place with its highly abstract and deeply personal value, and trigger the specific responses in the scenarios below when the particular item or physical space is removed, violated or no longer accessible.

Broadly speaking, both material possession and place attachment theories see certain types of property- both real and personal- as inextricably linked to an individual's personality and his or her lived experiences. In some ways, this resonates with Radin's seminal 'property as personhood' theory,²⁷ one aspect of which views property as both constitutive and reflective of a person's identity. Adopting these themes, the following section uses selected examples to examine the extent to which different types of attachment and what we might describe as 'proprietary emotions' are reflected in ownership rules and legal contests involving property.

II. Legal Applications

²⁴ Milligan, "Interactional Past and Potential," 16-17.

²⁵ Kleine and Baker, "An Integrative Review."

²⁶ See e.g. Louise Chawla, "The Ecology of Environmental Memory," *Children's Environments Quarterly* 3, no. 4 (1986): 34.

²⁷ Radin, "Property and Personhood."

Before we begin our analysis, two points require attention. First, property concepts and rules obviously vary across different societies and cultures; for the most part we are focusing on Western constructs of property, and its treatment within these legal systems. Second, the examples below were deliberately chosen, not only because we felt that these would resonate strongly with a broad spectrum of readers, but to incorporate aspects of both real and personal property (to date, law and emotion scholarship in the area has tended to focus on the former).

1. Criminal Law Offences Involving Property

Most modern systems of criminal law draw a clear distinction between offences against the person (such as homicide, assault, and rape) and offences against property (such as theft, fraud, and criminal damage or mischief). As George Fletcher pointed out back in 1978, we are now accustomed to thinking about these in terms of the interests they protect; the focus of offences against the person is the physical integrity of the victim, while his or her property rights are taken care of by offences against property.²⁸ The causing of emotional harm does not fit easily within this frame of reference; even in the context of offences against the person, the tendency of the courts is to be wary of penalising what is often termed ‘mere’ emotional distress, at least where it is not accompanied by a recognisable psychiatric diagnosis.²⁹ However, it has been argued that, from a historical perspective, there is a lot more to property offences than the traditional dichotomy might suggest, and that even such a basic property offence as theft has as much to do with protecting the victim’s possession as his or her economic interests in the property stolen.³⁰

This of course resonates very strongly with the emotional factors discussed above, and traces can be seen in a number of areas, most notably in relation to the home. One clear example of this is the Scots offence of ‘hamesucken’, in which a person is pursued into his or

²⁸ George Fletcher, *Rethinking Criminal Law* (Oxford New York: Oxford University Press, 1978), 30.

²⁹ See Leslie Y. Garfield, “The Case for a Criminal Law Theory of Intentional Infliction of Emotional Distress,” *Criminal Law Brief* 5, no. 1 (2009): 33 and John Stannard, “Sticks, Stones and Words: Emotional Harm and the English Criminal Law,” *Journal of Criminal Law* 74, no. 6 (2010): 533.

³⁰ Fletcher, *Rethinking Criminal Law*, 30-57.

her home and assaulted there.³¹ This was formerly a capital offence, and still provides aggravated penalties; in the words of Professor John Cairns, the word “still resonates as a term, because individuals like to feel secure in their own home, and invasion of one’s home seems particularly heinous.”³² Likewise, the courts in England and Wales have always treated domestic burglary as especially serious,³³ and this principle continues to be reflected in the current Sentencing Council Guidelines.³⁴ The potential risk to those who might be in the home at the time is undoubtedly a factor here; more than that, however, domestic burglary involves “violation of the extended self”³⁵ through the taking of personal possessions and the encroachment by strangers into one’s home. As Kearon and Leach have pointed out, victims’ reactions to burglary (and other ‘property crimes’) can “only be understood in the context of victims’ relationships to their homes, personal possessions and related significant personal objects.”³⁶ In the same way, Sharfstein argues that courts “routinely anticipate that people will resort to deadly force over even the most picayune trespasses” to land,³⁷ and the so-called ‘castle’ doctrine seen in some jurisdictions gives a wide latitude to citizens who use lethal force in defence of the home,³⁸ or even in defence of occupied vehicles and vessels.³⁹ While this could also be explained as reflecting the home as a pre-eminent place of safety, the emotional attachments involved are also relevant since the very concept of ‘safety’ denotes reassurance and feelings of comfort, personal wellbeing etc. As we have seen, the law takes less account of emotional attachments to personal property in this context, and this is something that could be addressed, either in the context of sentencing or by a greater willingness to bring emotional trauma within the scope of offences against the person.⁴⁰

³¹ *Gul v. HM Advocate* [2013] HCJAC 177; *Gemmell v HM Advocate* [2011] HCJAC 129; and *Jaklovev v. HM Advocate* [2011] HCJAC 90.

³² “Scottish Legal News” (8 July 2015), accessed at <https://www.scottishlegal.com>.

³³ *R v Brewster* [1997] 6 WLUK 531; *R v Jenkins* [2001] EWCA Crim 1181; and *R v Saw* [2009] EWCA Crim 1.

³⁴ Sentencing Council, *Burglary Offences: Definitive Guideline* (2011), accessed at <https://www.sentencingcouncil.org.uk>.

³⁵ Kleine and Baker, “An Integrative Review,” 19.

³⁶ Tony Kearon and Rebecca Leach, “Invasion of the ‘Body Snatchers’: Burglary Reconsidered,” *Theoretical Criminology* 4, no. 4 (2000) 451, 452.

³⁷ Daniel J. Sharfstein, “Atrocity, Entitlement and Personhood in Property,” *Virginia Law Review* 98, no. 3 (2012): 635, 639.

³⁸ See Catherine L. Carpenter, “Of the Enemy Within, the Castle Doctrine and Self-Defense,” *Marquette Law Review* 86, no. 4 (2003): 653 and Denise M. Drake, “The Castle Doctrine: An Expanding Right to Stand Your Ground,” *St Mary’s Law Journal* 39 (2007): 573.

³⁹ Stuart P. Green, “Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles,” *University of Illinois Law Review* 1 (1999): 1.

⁴⁰ See Richard S. Miller, “The Scope of Liability for the Negligent Infliction of Emotional Distress: Making the Punishment Fit the Crime,” *University of Hawaii Law Review* 1 (1979): 1 and Stannard, “Sticks and Stones.”

2. Recovery of Compensation for Damage to Property

Similar considerations apply where compensation is claimed in the civil courts by a person whose property has been wrongfully destroyed or damaged. The law's standard approach here is to make an award based on the market value of the property, which will often be simply the cost of replacing it with an equivalent item, but there are cases where courts have realised that the kind of emotional attachments we have been discussing make the property essentially irreplaceable. A good example is the English case of *O'Grady v Westminster Scaffolding*,⁴¹ where the claimant's classic car was badly damaged due to the negligence of the defendants. The defendants argued that the damages should be restricted to the cost of replacement, but the judge decided that, in the special circumstances of the case, the owner should get the full cost of the repairs; given that this was no ordinary car but a classic car, and the claimant had spent a lot of time and money on it over the years, it would not be fair to restrict him to the cost of replacement. In the same way, some United States jurisdictions have allowed recovery of damages for the loss of heirlooms and other property which is of no intrinsic market value but to which the owner has a sentimental attachment.⁴² These examples are not simply about the item in question being 'one of a kind' and irreplaceable, though that is undoubtedly part of the narrative; it is the emotional value of the item to the injured party- what we might describe as its sentimentality- that make market value such a difficult restitutionary marker to apply.⁴³

What goes for inanimate property applies even more strongly in the case of pets; for instance the New York Civil Court in *Corso v Crawford v Cat and Dog Hospital Inc*,⁴⁴ a case involving the wrongful disposition of the remains of a dead dog, declared that a pet was not just a thing, but occupied a special place somewhere in between a person and a piece of property, the essential factor being that (unlike other property) it was capable of returning affection as well as receiving it. For this reason it has been argued that claimants whose

⁴¹ *O'Grady v Westminster Scaffolding* (1962) 2 Lloyd's Law Reports 238.

⁴² See Phil Goldberg, "Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes the Rule of Law, Modern Values and Animal Welfare," *Stanford Journal of Animal Law and Policy* 6 (2013): 30. See also Victor E. Schwartz and Cary Silverman, "The Rise of Empty Suit Litigation: Where Should Tort Law Draw the Line?" *Brooklyn Law Review* 80, no. 3 (2014): 599.

⁴³ Patrick Luff, "The Market Value Rule of Damages and the Death of Irreparable Injury," *Cleveland State Law Review* 59, no. 3 (2011): 361.

⁴⁴ (1979) NYS2d 415:182.

companion animals are wrongfully killed should at least be entitled to the same kind, though not necessarily the same magnitude, of damages as parents of young children who are wrongfully killed.⁴⁵ However, as Goldberg has shown, courts in the United States have steadfastly resisted calls to extend the law in this way.⁴⁶ The one exception to this is in cases involving the intentional infliction of emotional injury, as in the example cited by Goldberg where in the film *Fatal Attraction* one character deliberately kills another's pet rabbit to whom she knows the other is especially devoted. There seem to be two rationales behind the reluctance of the courts to develop the law in this way, one being the anomaly of allowing for emotional loss in these cases where it is not allowed for the loss of human beings other than spouses and children, and the other being the impact it would have on the cost of pet products and services generally, most notably in the field of insurance.

3. Legal Contests Involving the Home

The concept of 'home' has spawned a vast amount of literature in recent years, much of which emphasises the complex and multifaceted nature of the concept.⁴⁷ Thus for Thompson, the home is the "most intimate space we inhabit...the place where our most significant relationships are nurtured [and] where we can impart a sense of self in both physical and psychological ways."⁴⁸ For Gurney the home is, for good or ill, nothing less than an "emotional warehouse";⁴⁹ for Low these emotions can be not only "proactive" ones such as love, warmth, trust and security, but also "reactive" ones associated with defensive feelings and a desire to be protected from real or imagined dangers.⁵⁰ The law recognises the inherently unique character of the home in, for example, protecting it from external threats

⁴⁵ Steven M. Wise, "Recovery of Common Law Damages for Emotional Distress, Loss of Society and Loss of Companionship for the Wrongful Death of a Companion Animal," *Animal Law* 4 (1998): 33.

⁴⁶ Goldberg, "Courts and Legislatures."

⁴⁷ See e.g. D. Geoffrey Hayward, "Home as an Environmental and Psychological Concept," *Landscape* 20 (1975): 2; Kimberley Dovey, "Home and Homelessness," in *Home Environments*, eds. Irwin Altman and Carol M. Werner (London: Plenum Press, 1985), 33; Hazel Easthope, "A Place Called Home," *Housing, Theory and Society* 21, no. 3 (2004): 128; D. Benjamin Barros, "Home as a Legal Concept," *Santa Clara Law Review* 46, no. 2 (2006): 255. However, Stern is more critical- Stephanie M. Stern, "Residential Protectionism and the Legal Mythology of Home," *Michigan Law Review* 107 (2009): 1093.

⁴⁸ Susan Thompson, "Home and Loss: Renegotiating Meanings of Home in the Wake of Relationship Breakdown," *M/C Journal* 10, no. 4 (2007): [1] (retrieved from <http://journal.media-culture.org.au/0708/07-thompson.php>).

⁴⁹ Craig Gurney, "Towards a More Affective Understanding of Home," in *Proceedings of Culture and Space in Built Environments: Critical Directions/New Paradigms* (2000): 33, 33.

⁵⁰ Setha M. Low, "The New Emotions of Home: Fear, Insecurity and Paranoia" in *Indefensible Space: The Architecture of the National Insecurity State*, ed. Michael Sorkin (New York: Routledge, 2008), 233, 233.

(the ‘castle doctrine’ mentioned above is one illustration). Yet where the home is at the centre of private legal disputes- those between individuals and/or non-state organisations- the emotional significance ascribed to it varies significantly.

The types of attachment highlighted earlier have fluid boundaries, and material attachment shades into place attachment when analysing the home, though the latter theory is likely to be the dominant one here. Affective connections to the home are simultaneously complex and deeply-rooted. In the matrimonial context, Anthony has described it as an “important third party in the marriage”⁵¹- an observation that applies to most intimate personal and familial relationships. Emotions run high in family law matters,⁵² and the home is often the focal point when couples are divorcing or separating. Within the legal arena, its value as a financial asset is a harsh yet inescapable reality, and courts will also be guided by who owns the home (if not in joint names), whether one person has the means to purchase the other’s share or whether a sale and division of the asset is the best way forward. Legal- and practical- realities will override sentimental ties, and residential displacement is inevitable as shared living arrangements come to an end. Yet, in relationship break-ups involving minor children, the kaleidoscope turns and emotional attachments are recognised by governing legislation- albeit implicitly. Here, the custodial parent is often granted the family residence in the absence of a mediated agreement imposing something else. In doing so, the law is prioritising the children’s needs, recognising the nurturing and stability aspects of the home from a child welfare perspective. Embedded within this policy objective, is a tacit acknowledgment of the children’s place attachments to home as the locus of family life, formative childhood interactions and the place where they want to continue living into adulthood.⁵³ In this scenario, the custodial parent’s place attachments are recognised vicariously, though these may have changed significantly during the demise of the relationship itself. Thompson has pointed out that meanings of home are “disrupted, changed and lost when families...fall apart”;⁵⁴ instead of being a source of comfort, familiarity and shared memories, the home can become a source of pain that symbolises the loss of the intact family⁵⁵ as well as lost hopes and dreams.⁵⁶ Meanwhile the non-custodial parent must

⁵¹ Kathryn H. Anthony, “Bitter Homes and Gardens: The Meanings of Home to Families of Divorce,” *Journal of Architectural and Planning Research* 14, no. 1 (1997): 1, 1.

⁵² See e.g. Clare Huntington, “Repairing Family Law,” *Duke Law Journal* 57, no. 5 (2007): 1245.

⁵³ Gordon Jack, (2010). “Place Matters: The Significance of Place Attachments for Children’s Well-Being,” *British Journal of Social Work* 40, no. 3 (2008):755, 758.

⁵⁴ Thompson, “Home and Loss,” [1].

⁵⁵ Anthony, “Bitter Homes,” 4.

establish a new home environment and begin the process of creating new and meaningful ties in unfamiliar surroundings, while negotiating the loss of the shared home, the routine of family life and the neighbourhood ties that went with it.⁵⁷ Family changes disrupt place attachments, adding to the overwhelming sense of loss and grief that comes with the end of an intimate relationship.⁵⁸

In contrast, when third parties such as lenders and creditors become part of the legal scenario the picture changes dramatically because the home is now the focal point of an entirely different type of dispute. The sentiments and attachments of those living there are overlooked; instead, the law views the home as a capital asset to be sold to discharge outstanding debts. In mortgage foreclosures- a frequent occurrence in the wake of subprime lending and high rates of residential mortgage default- sale seems inevitable, in the absence of debtor-protective measures such as the right to reclaim the property if the debtor can find the money (so-called ‘redemption rights’).⁵⁹ Similar trends can be seen in consumer bankruptcy actions; the emotional and psychological well-being of those who live in the home (both adults and children) is disregarded, unless individual state exemption laws protect it from liquidation.⁶⁰ Conscious of the public policy interest in allowing those who loan money against the security of the home to recoup their debt if things go wrong, the law’s mantra is to sell and reimburse if necessary. For the displaced homeowner or occupier, however, this involves so much more than the loss of a physical structure and financial investment; there is the loss of security, of personal and familial identity and pride, and a sense of disempowerment often mixed with a strong sense of failure. As Fox O’Mahoney has pointed out, it “is important to recognize that while the whole idea of ‘home’ as an emotional attachment may not easily fit within the value structures of the traditional law-and-economics approach to property law, the significance of the home as identity is undoubtedly real for

⁵⁶ Thompson, “Home and Loss,” [18].

⁵⁷ Thompson, “Home and Loss,” [18]. Beyond the physical space of the home, there is the process of dividing the objects within it- many of which (such as family photos or treasured gifts) generate their own strong material possession attachments.

⁵⁸ Darcy L. Harris, “Navigating Intimate Relationship Loss: When the Relationship Dies But the Person is Still Living,” in *Counting Our Losses: Reflecting on Change, Loss and Transition in Everyday Life*, ed. Darcy L. Harris (Routledge: New York, 2011), 65.

⁵⁹ Melissa B. Jacoby, “The Value(s) of Foreclosure Law Reform,” *Pepperdine Law Review* 37, no. 2 (2010): 101.

⁶⁰ Richard M. Hynes, Anup Malani and Eric Posner, “The Political Economy of Property Exemption Laws,” *Journal of Law and Economics* 47, no. 1 (2004): 19.

occupiers.”⁶¹ Yet, while individual and familial place attachments to the home tend to be overlooked, some commentators have argued for a more reflective legal approach which preserves the primary residence where possible. For example, Baker has proposed a ‘right to rent’ scheme whereby homeowners would be able to rent the property back after foreclosure to protect the shelter aspect of the home and prevent forced exit by residents with special needs such as minor children.⁶²

4. State Sanctioned Losses of Property: Adverse Possession and Eminent Domain

Despite the fundamental right to property enshrined within the American legal system, there are two situations actively facilitated by the state in which owners can lose their property. The first is adverse possession, whereby the law allows a squatter to claim another person’s land based on uninterrupted possession for a period of time prescribed in limitation statutes, and which varies from state to state.⁶³ At the end of that time, the squatter becomes the ‘rightful’ owner through was initially a ‘wrongful’ act (trespass to land), and the original owner has their title extinguished without compensation from the squatter (or from the state).

Adverse possession is both controversial and emotive: public reactions are overwhelmingly negative, and it tends to be viewed as nothing more than “theft or robbery, a primitive method of acquiring land without paying for it.”⁶⁴ The current authors have analysed the emotional dynamics elsewhere,⁶⁵ arguing that societal views of adverse possession are shaped by an expectation that the law provides strong (if not impervious) protections for private property rights and that such rights are subject to minimal state inference. From the perspective of the landowner, however, this is only part of the emotional narrative. He or she will feel a strong sense of loss- of something that was legally theirs, of the use and future plans for the property. Financial loss will be a factor as well, and while the payment of compensation would not ‘make things right’ here, the absence of compensation

⁶¹ Lorna Fox O’Mahoney, “Home Ownership, Debt and Default: The Affective Value of Home and the Challenge of Affordability,” in *Affordable Housing and Public Private Partnerships*, ed. Nestor M. Davidson (Routledge: London, 2009), 169, 180.

⁶² Dean Baker, “Subprime Borrowers Deserve an Own to Rent Transition,” *The Economists’ Voice* 5, no. 1 (2008): pp. -. Retrieved 21 Nov. 2019, from doi:10.2202/1553-3832.1312.

⁶³ Jeffrey E. Stake, “The Uneasy Case for Adverse Possession,” *Georgetown Law Journal* 89 (2001): 2419.

⁶⁴ Henry W. Ballantine, “Title by Adverse Possession,” *Harvard Law Review* 32, no. 2 (1919): 135, 135.

⁶⁵ Heather Conway and John Stannard, “The Emotional Paradoxes of Adverse Possession,” *Northern Ireland Legal Quarterly* 64, no. 1 (2013): 75.

adds proverbial insult to injury. Place attachments are disrupted as the state sanctions something that seems inherently wrong, fuelling the sense of anger and injustice- and a sense of helplessness as the landowner's displacement is not a voluntary act.

Despite its very different theoretical basis, similar themes are apparent when looking at eminent domain. An "inherent attribute of sovereignty",⁶⁶ eminent domain allows the government to take private land for public use in certain circumstances. Under the Fifth Amendment of the US Constitution, the power can only be exercised where the land is required for "public use" and where the owner is given "just compensation" in return; similar limitations are placed on federal and state governments through the Fourteenth Amendment. The erosion of private property rights on the basis of public interest has been questioned,⁶⁷ and it is hardly surprising that eminent domain is an emotive topic which triggers extreme public reactions.⁶⁸ There is no better illustration than the backlash to the Supreme Court decision in *Kelo v City of New London*,⁶⁹ when it ruled by a 5:4 majority that residents living in Fort Trumbull, New London, some of whom had been residents for their entire lives, had to vacate their homes for the pharmaceutical giant Pfizer to build a new plant there with all its supposed economic benefits for the community.⁷⁰ Again, we can see the disruption of place attachments and the sense of anger triggered by the loss of a stable home and surrounding neighbourhood- all with minimum investment on the part of Pfizer. Yet the forced displacement and sense of helplessness at having to leave one's home and community is only part of the narrative; the fact that any compensation payable is typically benchmarked at the fair market value of the property⁷¹ exacerbates the problem and increases the sense of loss.

This blunt financial model treats the home as mere 'bricks and mortar'; it does not acknowledge the outrage caused by a forced taking, let alone the psychological loss of the home as a repository of memories and as a symbol of personal and familial identity, the physical and emotional investments in the property over time, as well as the loss of

⁶⁶ Janice Nadler, "The Social Psychology of Property: Looking Beyond Market Exchange," *Annual Review of Law and Social Science* 14 (2018): 367.

⁶⁷ See e.g. Ellen Frankel Paul, *Property Rights and Eminent Domain* (Routledge: New York, 2017).

⁶⁸ Janice Nadler and Shari S. Diamond, "Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity," *Journal of Empirical Legal Studies* 5, no. 4 (2008): 713.

⁶⁹ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁷⁰ See Charles E. Cohen, "Eminent Domain After *Kelo v. City Of New London*: An Argument For Banning Economic Development Takings," *Harvard Journal of Law and Public Policy* 29, no. 2 (2005): 491 and Ilya Somin, "The Grasping Hand: 'Kelo v. City Of New London' And The Limits Of Eminent Domain" (Chicago: University of Chicago Press, 2016).

⁷¹ Steven J. Eagle, *Regulatory Takings* (New Providence, NJ: LexisNexis, 5th edn, 2013).

neighbourhood and community when private citizens are forced to relocate from one area to another under the guise of ‘public good’.⁷² Fried has described the loss of a home in these circumstances as similar to the death of a loved one⁷³- an analysis which resonates with theories of material possession attachment and place attachment, though studies have reported higher place attachments to homes than to neighbourhoods.⁷⁴ Of course, it is a harsh reality that emotional attachments cannot be used to frustrate policy goals where property is needed in the public interest; but the idea of that same property being reducible simply to its market value does not reflect the emotional attachments that displaced owners have to it. While economists might “assume that the sentiments, memories, relationships, meaning, and identity that connect an owner with her property can be translated into a dollar value,”⁷⁵ this is not true in eminent domain cases- though some have questioned whether it is actually possible to incorporate sentimental values into determining a property’s value, given the “inherent subjectivity” this would entail.⁷⁶ Undeterred, Nadler and Diamond have posited different models for reflecting this, such as set proportion percentage increases on the market price.⁷⁷ Meanwhile Powell suggests retaining the market value baseline, but introducing stronger legal protections for property owners and less expansive state powers to reduce the overall level of regulatory takings.⁷⁸

5. Inheritance Disputes in Families

Set against the loss of a loved one, inheritance disputes within families occur at an emotionally charged time.⁷⁹ Those involving adult children following the death of a parent are uniquely complex and divisive, as unequal estate distributions, parental disinheritance or simple disagreements over ‘who gets what’ reignite “old issues of sibling rivalry and

⁷² Raymond R. Coletta, “The Measuring Stick of Regulatory Takings: A Biological And Cultural Analysis,” *University of Pennsylvania Journal of Constitutional Law* 1, no. 1 (1998): 20; Jeffrey T. Powell, “The Psychological Cost of Eminent Domain Takings and Just Compensation,” *Law & Psychological Review* 30 (2006): 215.

⁷³ Marc Fried, “Grieving for a Lost Home,” in *The Urban Condition: People and Policy in the Metropolis*, ed. Leonard J. Duhl (New York, NY: Basic Books, 1963), 151.

⁷⁴ See Maria Lewicka, “Place Attachment: How Far Have We Come in the Last 40 Years?” *Journal of Environmental Psychology* 31, no. 3 (2011): 207.

⁷⁵ Nadler, “The Social Psychology.”

⁷⁶ David Markell, Tom Tyler and Sarah Brosnan, “What Has Love Got To Do With It?: Sentimental Attachments and Legal Decision-Making,” *Villanova Law Review* 57, no. 2 (2012): 209, 223.

⁷⁷ Nadler and Diamond, “Eminent Domain,” 14-15.

⁷⁸ Powell, “The Psychological Cost.”

⁷⁹ P. Mark Accettura, *Blood & Money: Why Families Fight Over Inheritance and What To Do About It* (Michigan: Collinwood Press, 2011).

dominance.”⁸⁰ Some disputes are driven purely by economic consequences of a lost inheritance; but in many instances, it is the fact that specific bequests are viewed as posthumous representations of “love, validation, and importance” between parent and child⁸¹ that is the real problem. Different types of property are imbued with meaning, and generate strong emotional attachments, as well as creating their own distinct inheritance expectations—something that is not reflected in wills and estates law.⁸²

The core value of testamentary freedom allows a legally competent adult to bequeath their property to whomever they choose.⁸³ This means that parents are free to disinherit their children, if they choose to do so: while we might view children as the natural recipients of their parent’s bounty, there is no such legal entitlement and the United States stands alone in allowing total disinheritance.⁸⁴ Yet, it would be wrong to assume that the only aggrieved children are those who find themselves frozen out in this manner; estate contests are just as common where a parent has executed a legally valid will, but the resultant estate distribution is perceived by the children as unjust or unfair. The emotional effects are not short-lived or confined to the disappointed beneficiary; as Drake and Lawrence have pointed out, “[w]here inheritance distributions are concerned..., perceptions of injustice may sour family relationships for generations.”⁸⁵

Most wills focus on real estate, businesses and financial assets, as high value items. We return to the third one below, and focus initially on the first two. Testamentary freedom facilitates individual choice; however, when it comes to deciding which child should inherit family land or a family business, a host of factors come into play. The property in question may not be easy to divide or apportion (doing so might ultimately devalue it); there may be

⁸⁰ Jay Folberg, “Mediating Family Property and Estate Conflicts,” *Probate & Property* 23 (2009): 8. See also Jeanne Safer, *Cain's Legacy: Liberating Siblings From a Lifetime of Rage, Shame, Secrecy, and Regret* (New York, NY: Basic Books, 2012) and Heather Conway, “Where There’s a Will...: Law and Emotion in Sibling Inheritance Disputes,” in *The Emotional Dynamics of Law and Legal Discourse*, ed. Heather Conway and John Stannard (Oxford: Hart Publishing, 2016), 35.

⁸¹ Accettura, *Blood and Money*, 2.

⁸² This discussion focuses solely on testamentary gifts as opposed to intestacy distributions, since both the will-maker’s freedom of choice and how this is perceived by his/her survivors makes it more amenable to a law and emotions analysis than a legislatively mandated universal scheme.

⁸³ Jesse Dukeminier and Robert H. Sitkoff, *Wills, Trusts and Estates* (Wolters Kluwer: 9th edn, 2014), ch 1.

⁸⁴ Ronald Chester, “Disinheritance and the Adult Child: An Alternative from British Columbia,” *Utah Law Review* 1 (1998): 1. A notable exception in the US is the state of Louisiana.

⁸⁵ Deirdre G. Drake and Jeanette A. Lawrence, “Equality and Distributions of Inheritance in Families,” *Social Justice Research* 13, no. 3 (2000): 271, 272.

the question of which child has worked on the land or played a pivotal role in the business; and birth order and gender often play a role when it comes to things like family farms where the emphasis still tends to be on the eldest son.⁸⁶ The family home is another good example; since the property is not divisible in a practical sense, and adult children who have long since moved away are unlikely to return, a parent's will might direct that the home be sold and the proceeds divided equally between the children. Although consistent with social norms around the post-mortem allocation of wealth, such directions can be problematic for the child who is not keen on selling because of strong and enduring emotional ties to the property. Place attachments dominate here: the home is a repository of memories, a unique physical space that conjures up nostalgic images of warmth, security, and growing up as a family with the now deceased parent(s). A share of the monetary value cannot compensate for this loss. The same is true of old family cottages and vacation homes where siblings holidayed with their parents. In many cases, parents (acting with the noblest of intentions) leave vacation properties to their children as shared owners, passing them on "like a precious heirloom, to be filled with new memories".⁸⁷ All too often, the result is discord when one sibling insists on keeping the property to recreate their own childhood idylls and another resents having their inheritance tied up in a place which they now only value as a cash asset. Vacation properties are a fertile source of litigation,⁸⁸ though American courts cannot simply overturn an estate distribution since there is no scope to vary the terms of an otherwise valid will. Instead the law's approach is to sell and apportion- the typical default position where two parties are fighting over something which cannot be split into separate parts. The end result is obvious: one sibling's financial gain is the other's psychological loss, and something which just cannot be compensated by giving that brother or sister a share of the money raised by selling the property.

Looking beyond real property, money and cash convertible assets such as stocks and shares can be divided in whatever way a parent sees fit- more so than most of the other types of property being looked at here. Where the division is unequal, siblings may be minded to contest any resultant economic disparity, not because of particularly strong emotional attachments to the money itself, but because of what the unequal distribution symbolises and

⁸⁶ Jacqueline J. Goodnow and Jeanette A. Lawrence, "Inheritance Norms for Distributions of Money, Land and Things in Families," *Family Science* 1, no. 2 (2010): 73 and Daphna Hacker, "The Gendered Dimension of Inheritance: Empirical Food for Legal Thought," *Journal of Empirical Studies* 7, no. 2 (2010): 322.

⁸⁷ Stuart J. Hollander, Rose Hollander and David Fry, *Saving the Family Cottage* (Chicago: Nolo, 2013), 8.

⁸⁸ Hollander, Hollander and Fry, *Saving the Family Cottage*.

a sense that this is in some way unfair. Of course, there is no discrete legal basis for doing so: testamentary freedom is paramount, and seemingly ingrained social assumptions that children are entitled to equal shares of a parent's estate, where there is more than one child, are not reflected in any legal reality. The law allows unequal treatment.⁸⁹ Personal possessions, in contrast, are often omitted from the distributive contents of a dead parent's will; and while real estate and money are more likely to trigger the sort of litigation alluded to here, disputes over who gets items of personal property (for example, a mother's wedding ring or a father's watch; photo albums; lovingly assembled collections of books, music or china; family mementoes such as Christmas ornaments and holiday souvenirs) can become just as embittered, even if they are less likely to end up in court.

There are two reasons for this. First, as items accumulated over a parent's lifetime (and sometimes across generations of the same family), they are imbued with personal meaning.⁹⁰ Because they symbolise the dead parent, personal possessions engender exceptionally high levels of emotional attachment, and their symbolic quality is an important factor.⁹¹ While we might argue that all property is 'personal' property in the inheritance context, a dead parent's personal possessions generate particularly strong feelings and inheritance expectations. Such items have a sentimental value unrelated to their economic worth, even outside the inheritance context; they have a heightened personal significance because they are 'bound up' with the person.⁹² Personal possessions generate strong material attachments; and on the death of a parent, which child inherits which items can be a source of contention- and there are no discrete legal rules to fill this particular void. Second, the reality is that certain things (for example, a favourite painting, specific pieces of jewellery) cannot be divided, fuelling the emotional anguish. Stum highlights '[o]ngoing rivalries' and issues of 'power and control' among siblings as influencing the transfer of personal possessions.⁹³ However, birth order and gender also have a significant role to play here- for example, a brother is more likely to claim a father's watch than his sisters, while a mother's wedding

⁸⁹ See Conway, "Where There's a Will."

⁹⁰ Darach Turley and Stephanie O'Donohoe, "The Sadness of Lives and the Comfort of Things," *Journal of Marketing Management* 28, 11 (2012): 1331, 1342.

⁹¹ Judith G. McMullen, "Keeping Peace in the Family While You are Resting in Peace: Making Sense of and Preventing Will Contests," *Marquette Elder's Advisor* 8 (2006): 61, 82.

⁹² Radin, "Property and Personhood."

⁹³ Marlene S. Stum, "Families and Inheritance Decisions: Examining Non-Titled Property Transfers," *Journal of Family and Economic Issues* 21, no. 2 (2000): 177, 179.

ring often ends up with the eldest daughter.⁹⁴ Again, there is no legal basis for such a gendered and hierarchical division; social conventions dominate here.

III. The Way Forward

If there is one theme running through the literature that we have been discussing, it is this: people exhibit identifiable emotional attachments to material objects, which influence how the latter are perceived and valued. Such attachments clearly have a significant impact, but whatever psychological lens is used to view them, it cannot be denied that they are both multifaceted and complex in nature. As we have seen, they also do not fit in well with the standard economic theories underlying property law, which find difficulty in reflecting and quantifying ‘externalities’ of this sort. In the words of Janice Nadler, individuals’ valuation of property is subject to influences not readily predicated by standard economics theory.⁹⁵ For this reason there is often a disconnect between the law’s approach and the psychological dynamics involved. After all, emotional attachments to property speak essentially to its associative dimensions: something that cannot easily be captured in property law discourse. No doubt there is a certain intuitive logic around property and owning property, and what this means, yet at times the law’s treatment of property seems counter-intuitive, coming up with results that do not match social expectations, and which challenge core beliefs around property rights. In sum, it cannot be denied that property law doctrines and rules sometimes ride roughshod over emotional attachments of this sort.

That said, the extent to which property law should reflect such attachments is more doubtful. Indeed it might be argued that to a certain extent a functioning system of property law has to ignore them. There is no clear answer here, but three points can be made in this connection.

First of all, in so far as law is something that people *do*, those who ‘do’ property law (whether as legislators, practitioners or judges) cannot afford to be unaware of the emotional dynamics we have been discussing. The strength of emotional attachments to place and

⁹⁴ Denise M. Drake, “The Castle Doctrine: An Expanding Right to Stand Your Ground,” *St Mary’s Law Journal*, 39 (2007): 573, 598.

⁹⁵ Nadler, “The Social Psychology of Property”.

property and the influence that they exert is something that cannot be denied, and if lawyers, judges and law-makers are to be properly informed in their approach to problems of property law, they cannot afford to be totally ignorant of such matters.

Secondly, saying that those who do property law should be *aware* of the emotional dynamics does not imply that they should be given any particular *weight*. While it may be tempting to suggest that they should be more systematically acknowledged across the board, a universal approach would be neither feasible nor desirable. Not feasible, because emotional attachments are context-specific: they vary according to the type of property, the individual's affective connections to it, and the circumstances in which he or she is confronted with the loss of, damage to or exclusion from a particular piece of property. Not desirable for two reasons: because not all such attachments deserve equal weight, and because they may come into conflict with other more traditional 'commodity' interests and investment-based dynamics. In sum, the answer to the question must be context-specific.

Last but not least, taking emotional dynamics of this sort into account is of no use whatsoever if done from a position of ignorance. Armchair psychology simply will not do in this or any other legal context. In a study published a decade ago, Andreas Rahmatian identified a clear disconnect between the legal and psychological literature in this respect; psychologists, whether individual or social, rarely if ever touched on the topic of property rights, whereas lawyers rarely looked into the possible psychological roots of property rights and the powers they entail.⁹⁶ He goes on to add that while there is clearly some psychological reason for the existence of the legal institution of property, studies to date have been based on a reinterpretation of existing psychological studies – some of which deal with property only incidentally – rather than on any dedicated interdisciplinary programme of research on the topic. Such a programme, as we have argued elsewhere, is long overdue.⁹⁷

IV. Conclusion

In a seminal article written over a decade ago, Terry Maroney stressed the need for law and emotions to embrace a range of established disciplines in order to be recognised as a

⁹⁶ Rahmatian, "Psychological Aspects."

⁹⁷ Conway and Stannard, "Property and Emotion."

specialised field in its own right.⁹⁸ The brief analysis that we have undertaken here has highlighted how this applies to property law, as much as it does to every other legal topic that is studied by those of us researching in this exciting and ever-expanding field of scholarship.

Psychological attitudes towards property, its loss and its acquisition are well-documented in modern western societies- but these are not always reflected in the judicial or legislative processes which govern contested claims, when property law becomes a mechanism for allocating and enforcing rights and duties among persons, regardless of emotion or sentiment, and ownership with all its intrinsic values does not always reign supreme. How a functioning system property law might recognise and reflect emotional attachments when allocating specific types of property or compensating for its loss is a debate for another day. In the meantime, we hope to have persuaded the reader of the extent to which insights from other disciplines can affect both our concept of property itself and the deeper theoretical questions that we have posed here.

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⁹⁸ Terry Maroney, "Law and Emotion: A Proposed Taxonomy of an Emerging Field," *Law and Human Behavior* 30 (2006): 119.

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