Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution

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Abstract

The idea that parties bargain in the shadow of the law has been highly influential in research on dispute resolution and family law. Critics have questioned the utility and coherence of the concept, but it continues to be widely accepted. This article draws on an empirical study of access to legal information in a post-separation context to argue for a broader and more realistic understanding of how the shadow of the law influences parties' expectations and strategies in family law matters. Family dispute resolution, we suggest, does not take place in the shadow of the positive law (the law contained in statutes, case law and other formal legal sources), so much as the shadow of the folk law (the law as depicted in informal sources such as online materials and popular media). It follows that there is not just one shadow of the law; rather, there are multiple shadows. These findings hold important implications for government agencies, family dispute resolution providers and others involved in providing information and advice on post-separation issues.

I Introduction

We are said to live in the age of information.[1] At no time in the past have people been able so readily to access information about the law. Initiatives like the

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[1] See, eg, Manuel Castells, *The Information Age: Economy, Society, and Culture* (3 vols, Blackwell, 1996–98).

Australasian Legal Information Institute ('AustLII') website[2] and similar open-access online repositories have made it possible for anyone with an internet connection to access statutes, case law and secondary legal materials. Government agencies and non-governmental organisations have also made available a huge range of fact sheets, guidebooks and other information to help non-experts understand how the law might apply to their situation. This is especially the case in family law, an area of acute legal need for millions of Australians.

While it is widely acknowledged that informed participation in the legal system is integral to a democratic society, relatively little is actually known about the information use of people during times of legal need.[3] Consequently, government agencies, law firms and community groups supporting the legal information needs of individuals and families have a limited evidence-base to inform the design and delivery of support and services. Further, legal service providers — including, for example, lawyers and mediators — also have limited understanding of the sources of information informing their client base.

This article reports on an empirical study of access to legal information in a post-separation context. The study built upon the small, but growing, body of work that explores people's experiences of accessing legal information. Legal information experiences can be considered a subset of legal needs research. Studies in this area have tended to focus on the ways law students[4] and lawyers[5] access legal information. The present research extends this body of work to explore legal information experiences from the consumer perspective. The research builds upon the few existing Australian studies in this area, such as Scott's work on how people use the internet to access legal information[6] and Edwards and Fontana's literature review into the legal information needs of older people.[7] The study explored the information experiences of callers to the Family Relationship Advice Line, a national telephone service operated by Relationships Australia. The study's focus was not on the outcomes or content of advice that callers received, but rather their experience of identifying and interpreting sources of legal information prior to accessing the service.

The literature on informal dispute resolution and family law has long recognised the influence of what has come to be known as 'the shadow of the law'

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2 Australasian Legal Information Institute, AustLII <http://www.austlii.edu.au/>.

3 Cf Stephanie Davidson, 'Way Beyond Legal Research: Understanding the Research Habits of Legal Scholars' (2010) 102(4) *Law Library Journal* 561; Susan Edwards and Antonia Fontana, *Legal Information Needs of Older People* (Law and Justice Foundation of New South Wales, 2004); Yolanda P Jones, *'Just the Facts, Ma'am?': A Contextual Approach to the Legal Information Use Environment* (PhD Thesis, Information Science and Technology, Drexel University, 2008); Gillian Kerins, Ronan Madden and Crystal Fulton, 'Information Seeking and Students Studying for Professional Careers: The Cases of Engineering and Law Students in Ireland' (2004) 10(1) *Information Research* 208; S Makri, *A Study of Lawyers' Information Behaviour Leading to the Development of Two Methods for Evaluating Electronic Resources* (PhD Thesis, School of Informatics, University College London, 2008); Sue Scott, 'Law Online: How Do People Access and Use Legal Information on the Internet?' (2000) 25(1) *Alternative Law Journal* 24.

4 See, eg, Kerins et al, above n 3; Jones, above n 3.

5 See, eg, Davidson, above n 3; Makri, above n 3.

6 Scott, above n 3.

7 Edwards and Fontana, above n 3.

on legal option generation and negotiations outside the courtroom. The term was first coined by Mnookin and Kornhauser in an influential 1979 article in the *Yale Law Journal*.[8] They used it to refer to the impact of substantive law on informal negotiations and dispute resolution processes, with particular emphasis on family law matters. As Mnookin and Kornhauser observed, one of the primary roles of family law is to provide 'a framework within which divorcing couples can themselves determine their … rights and responsibilities'.[9] This means that, even in informal dispute resolution contexts, the law still provides the implicit backdrop and framework for negotiations. For example, parties are likely to evaluate proposals based at least partly on whether they feel the law entitles them to a more favourable outcome, or whether they would receive a better outcome in court.

Later authors have added sophistication and depth to Mnookin and Kornhauser's analysis.[10] For example, Jacob points to the importance of the 'articulation of rights using a legal vocabulary' and highlights the importance of intervening parties such as lawyers and personal networks in framing family matters as disputes about the law.[11] More recently, Batagol and Brown have examined the influence of law on family dispute resolution in Australia, noting the range of factors that frame dispute resolution processes and cautioning against the temptation to overstate the influence of legal principles.[12] Two of the present authors have also recently argued that the influence of law on Australian family dispute resolution needs to be understood through reference to its role in shaping the implicit norms and conventions that constrain and guide the mediation process.[13]

None of this research, however, directly answers the question of how participants in family dispute resolution in the current age of ubiquitous digital information source their information prior to entering the process and use that information to evaluate their options. The world of information available to disputants has changed substantially since Jacob's work in 1992 and even since Batagol and Brown's research in 2011. A number of other studies have investigated the sources of legal information used by consumers in family law contexts, but

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8 Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law Journal* 950.

9 Ibid 950.

10 The literature on the shadow of the law in family dispute resolution is extensive, but examples include: Becky Batagol and Thea Brown, *Bargaining in the Shadow of the Law: The Case of Family Mediation* (Federation Press, 2011); John Dewar and Stephen Parker, 'The Impact of the New Part VII *Family Law Act 1975*' (1999) 13(2) *Australian Journal of Family Law* 1; Jeremy Feigenbaum, 'Bargaining in the Shadow of the "Law?" — The Case of Same-Sex Divorce' (2015) 20 *Harvard Negotiation Law Review* 245; Herbert Jacob, 'The Elusive Shadow of the Law' (1992) 26(3) *Law and Society Review* 565; Ray D Madoff, 'Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution' (2002) 76(1) *Southern California Law Review* 161; Marygold S Melli, Howard S Erlanger and Elizabeth Chambliss, 'The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce' (1988) 40(4) *Rutgers Law Review* 1133; Michael J Trebilcock and Rosemin Keshvani, 'The Role of Private Ordering in Family Law: A Law and Economics Perspective' (1991) 41(4) *University of Toronto Law Journal* 533; John Wade, 'Forever Bargaining in the Shadow of the Law — Who Sells Solid Shadows? (Who Advises What, How and When?)' (1998) 12(3) *Australian Journal of Family Law* 256.

11 Jacob, above n 10, 568.

12 Batagol and Brown, above n 10, 56–62.

13 Rachael Field and Jonathan Crowe, 'Playing the Language Game of Family Mediation: Implications for Mediator Ethics' (2017) 35(1) *Law in Context* 84.

without looking in detail at the surrounding information experiences.[14] There is therefore a lack of understanding in the existing literature about exactly how legal information influences negotiations about family matters in the contemporary context. The study reported here aimed to fill this gap by generating primary empirical research about the legal information experiences of participants in family dispute resolution. The information gathered through this research then helps us better to understand the sense in which family dispute resolution may be said to take place in the shadow of the law.

Our analysis of the study data exposes the current conception of the shadow of the law in the family dispute resolution literature as incomplete and insufficient. In particular, our results show that individuals acquire legal information of varying levels of reliability and credibility by relying on a range of formal and informal sources. Online sources are particularly influential in shaping parties' understanding of the legal framework, while discussions with family and friends also play an important role. Professional legal advice, by contrast, plays a relatively minor role for many participants. A significant proportion of parties do not or cannot access professional legal advice, while those who do access such advice do not necessarily regard it as the more important factor in guiding their perceptions of the law. The upshot is that while parties' perceptions of the law play an important role in framing their expectations, these perceptions are primarily based on informal sources.

This article therefore argues for a broader understanding of the concept of the shadow of the law and a more realistic conception of how that shadow influences the decision-making of parties in family law disputes. Family dispute resolution, we suggest, does not take place in the shadow of the positive law (the law contained in statutes, case law and other formal legal sources), so much as the shadow of the folk law (the law as depicted in informal sources such as online materials and popular media). Furthermore, there is not just one shadow of the law, reflecting the current state of the positive legal materials; rather, there are multiple shadows, depending on from where the parties are gaining their information. Positive law, as generally understood, is a monistic concept; the folk law, however, is pluralistic, raising the prospect that significantly different understandings of the law may exist for parties from distinct socio-economic or cultural backgrounds.

The article begins by discussing the concept of the shadow of the law, how it has been developed to date and some of the shortcomings of the current literature. We then explain the methodology and design of the empirical research project that forms the foundation for this article, before analysing and discussing the project data as it relates to the participants' experiences of identifying and accessing legal information about their dispute. We conclude that a broader conception of the shadow of the law is needed to reflect how parties to family dispute resolution access and use information. These findings hold important implications for government

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[14] See, eg, Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) app C1, 10. Similarly, Bagshaw et al in their 2011 study identify the sources of information used by those experiencing family violence, in order to evaluate user satisfaction with those services: Dale Bagshaw et al, 'The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006' (2011) 86 *Family Matters* 49.

agencies and family dispute resolution providers, as well as others who provide information about post-separation arrangements.

II The Shadow of the Law

The notion of the shadow of the law is important to understanding how parties to family matters access and use legal information in the course of their dispute.[15] As noted above, the concept was introduced by Mnookin and Kornhauser as part of an investigation into how substantive legal doctrine impacts the bargaining behaviour of divorcing couples; in other words, how legal information and advice influences decision-making about family arrangements. Mnookin and Kornhauser posit, first, that '[d]ivorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law';[16] and, second, that the parties' understanding of the law itself, along with their access to predictive advice about their prospects in court, provide each party with implicit expectations and potential bargaining chips in out-of-court negotiations.[17]

Mnookin and Kornhauser develop a bargaining model to illustrate the influence of the shadow of the law on the parties' decision-making in family dispute resolution.[18] The model consists of five elements: (1) the parties' preferences; (2) the bargaining chips created by the law and predictive advice about the parties' prospects if the matter went to court; (3) the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties' attitudes towards risk; (4) transaction costs and the parties' respective abilities to bear them; and (5) strategic behaviour.

The conception of the shadow of the law advanced by Mnookin and Kornhauser relies primarily upon the predicted outcome that would be imposed by a court if a judge were asked to decide the matter according to the law. However, legal rules are often complicated, ambiguous or discretionary and this provides 'a bargaining backdrop clouded by uncertainty'.[19] The uncertainty of the law means that the bargaining influence of the shadow of the law is fluid. For example, uncertain discretionary standards affect the relative bargaining position of each party because their respective attitudes to risk and their capacity to bear transaction costs may be different. In this way, the shadow of the law can work to highlight the parties' different bargaining strengths and weaknesses in terms of how they weigh up the risks and opportunities presented by the potential of their matter going to court. Mnookin and Kornhauser suggested that for this reason the model must be taken as a whole if it is to illuminate how the legal shadow influences the parties and their approach to assessing various options for resolution of their dispute.[20]

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15 For discussion, see Laurence Boulle and Rachael Field, *Australian Dispute Resolution Law and Practice* (LexisNexis, 2017) ch 11; Olivia Rundle, 'Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8 *Queensland University of Technology Law and Justice Journal* 77, 87.

16 Mnookin and Kornhauser, above n 8, 968.

17 Ibid.

18 Ibid 966.

19 Ibid 969.

20 Ibid 970.

Importantly, the bargaining model suggested by Mnookin and Kornhauser was not intended to be a complete or definitive theory. The concept of the shadow of the law has entered the dispute resolution vernacular in a range of settings beyond family law, but the authors' intentions were more modest. Mnookin and Kornhauser's primary aim was to offer a predictive theory of family dispute resolution, enabling 'a broader analysis of the probable consequences' of legal rules and procedures in informal bargaining contexts.[21] References to the shadow of the law in the dispute resolution and family law literature have tended to extend its significance beyond this original predictive and probabilistic context, viewing it as a general theory of the role of law in informal bargaining.[22]

More recently, however, this generalised conception of the shadow of the law has been subject to critique based on its accuracy and usefulness as a model of family dispute resolution. First, it has been argued that this understanding of the theory overstates the salience of the law in informal dispute resolution contexts. Second, it has been argued that the theory incorrectly assumes that the parties can reach a determinate or accurate understanding of what a court would do. The remainder of this section considers each of these criticisms in turn. Our aim in what follows is to problematise the notion that prevailing conceptions of the shadow of the law provide an accurate understanding of the expectations and strategies of the parties in dispute resolution. The remainder of the article then sets the foundations for a more realistic and useful account of the concept.

A *The Salience of the Law*

A number of authors have suggested that the concept of the shadow of the law places too great an emphasis on the role of the law by assuming that the law is relevant in all negotiations.[23] In other words, the central role given to the law in private negotiations has been challenged. Certainly, the law plays a significant part in many negotiations and particularly in contractual or commercial matters where the dispute is framed in an explicitly legal way. However, the importance of the law and the relative emphasis that it may be given in the minds of the negotiating parties is plausibly influenced by a range of other factors, such as the parties' respective needs and interests; any differences in negotiating power;[24] any unwillingness a party may have to resort to court; ambiguities in the law; moral principles and values; issues of blame and fault; and the role of gender.[25]

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21 Ibid 996.

22 Cf Margaret Thornton, 'Sex Discrimination, Courts and Corporate Power' (2008) 36(1) *Federal Law Review* 31; Ruth Charlton, 'Shared Parenting Laws See Subtle Changes in Mediation Dynamics' (2007) 45(3) *Law Society Journal* 30.

23 See, eg, Batagol and Brown, above n 10, 56–8; Melli, Erlanger and Chambliss, above n 10, 1147; Jacob, above n 10, 566; Wade, above n 10, 290.

24 Cf Rachael M Field, 'Mediation and the Art of Power (Im)Balancing' (1996) 12 *Queensland University of Technology Law Journal* 264; Rachael Field and Jonathan Crowe, 'The Construction of Rationality in Australian Family Dispute Resolution: A Feminist Analysis' (2007) 27 *Australian Feminist Law Journal* 97.

25 Cf Rachael Field, 'Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part' (1998) 14 *Queensland University of Technology Law Journal* 23; Patricia A Gwartney-Gibbs and Denise H Lach, 'Gender and Workplace Dispute Resolution: A Conceptual and

For example, Batagol and Brown found that the content of the positive law had a limited impact on mediated agreements in family matters, and that the shadow of the law was most relevant where legal proceedings were imminent or where legal advice had been received.[26] In family disputes where lawyers are not involved and the parties do not contemplate going to court, the shadow of the law may therefore be outweighed by other social, cultural and economic factors. Wade has likewise suggested that the shadow of the law is not relevant to parties who are not working within a directly applicable statutory framework and who do not seek to add judicial effect to their agreements.[27]

Mnookin and Kornhauser, as we saw above, developed their original model of the shadow of the law in the context of family dispute resolution. However, small commercial or contractual disputes may not have any realistic prospect of getting to court and lawyers may not be consulted. Parties may therefore not pay any significant attention to the content of the law, preferring to reach a pragmatic business-oriented or interest-based outcome. A similar point could apply to family or other disputes where the parties are motivated to a significant degree by personal, religious or cultural values. For example, parents who are both from a devout religious background may view the law as relatively unimportant in resolving their dispute. Consequently, parties who rely upon moral, commercial or interest-based agreements may choose not to bargain in the shadow of the law.

B *The Uncertainty of the Law*

The concept of the shadow of the law proposed by Mnookin and Kornhauser has also been criticised for being too rigid and for failing to recognise the uncertainty and plurality of the law.[28] This criticism is focused on the way in which the shadow of the law theory takes for granted that there is one interpretation of the law that can be provided with certainty. As almost every practising lawyer will attest, the reality is that the law is far more contingent. This is because, for example, the law is often discretionary; legal sources often require interpretation and different interpretations are possible; legal outcomes (particularly in family matters) are often situational and depend upon the decision-maker's view of the facts; and legal advice is often a synthesis of a range of different sources, making it a somewhat probabilistic and uncertain exercise.

The parties' understanding of the law can also be influenced by a lack of access to legal representation and information, as well as by popular perceptions or the media. Indeed, this situation seems to be the norm for participants in family dispute resolution, rather than the exception, as we suggest later in this article. A further contributor to the uncertainty of the law therefore lies in the parties' level of understanding or misunderstanding of the legal framework. People can only bargain

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Theoretical Model' (1994) 28(2) *Law and Society Review* 265; Leigh Goodmark, 'Alternative Dispute Resolution and the Potential for Gender Bias' (2000) 39(2) *The Judges' Journal* 21.

[26] Batagol and Brown, above n 10, 192–4.

[27] Wade, above n 10, 290.

[28] See, eg, Batagol and Brown, above n 10, 58–62; Melli, Erlanger and Chambliss, above n 10, 1143–7; Trebilcock and Keshvani, above n 10, 551.

effectively in the shadow of the law if the law creates a reliable and predictable shadow for them. The influence of the law's shadow (as both a bargaining chip and a baseline for negotiations) is therefore of most benefit to parties who have access to sound legal advice, while others may find that the shadow cast by the law means they are bargaining in the dark.[29] Consequently, power imbalances, lack of access to legal information, an inability to afford lawyers, and inexperience in negotiation all affect the ability of a party to bargain effectively and strategically in the shadow of the law.

Additionally, Melli, Erlanger and Chambliss question whether court orders actually constitute the shadow of the law for informal dispute resolution.[30] For example, in the context of mandatory mediation in various legal settings,[31] and increases in private settlement, an additional and alternative shadow is cast by the private agreements of the parties. Of course, the obvious issue with this shadow is that private settlements are often confidential and so its influence is limited to legal and dispute resolution practitioners (and the parties, if they are repeat participants) referring to their knowledge of past cases. Nevertheless, it is worth considering that the shadow of the law concept may need further development to recognise that multiple shadows may arise from multiple perspectives. This suggestion is explored in further depth in the final section of this article.

III Study Design and Methodology

We saw in the previous section that the notion of the shadow of the law has moved a significant way beyond what was originally envisaged by Mnookin and Kornhauser. There are credible challenges to the concept of the shadow of the law, and the term itself is contested and capable of different interpretations. However, much of the literature on dispute resolution and family law continues to assume the relevance and coherence of the concept. New understandings of the shadow of the law are therefore important to dispute resolution theory and practice, and these new understandings must be explicitly articulated so the term can be used with meaning and clarity. Our aim in the remainder of this article is to draw upon empirical data from a study of parties in family dispute resolution to inform a more nuanced and layered understanding of the concept.

The empirical research that forms the basis for our analysis was gained through an exploration of the information experiences of family dispute resolution participants. Funding for the project was provided by a grant from the Australian Institute of Judicial Administration. An interdisciplinary project team was formed, with researchers from both law and information science disciplines. As explained below, the information experience approach, pioneered by some of the team

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29 Cf Rachael Field, 'Participation in Pre-Trial Legal Negotiations of Family Law Disputes: Some Issues for Women' (1998) 12(3) *Australian Journal of Family Law* 240, 244.

30 Melli, Erlanger and Chambliss, above n 10, 1143–7.

31 See, eg, *Family Law Act 1975* (Cth) s 60I; *Family Law Rules 2004* (Cth) sch 1 pt 2. For further discussion, see Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) *University of New South Wales Law Journal* 929; Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45(2–3) *Common Law World Review* 214.

members themselves in previous work,[32] was chosen for the unique analytical perspective it brings to the concept of legal information. Information experience has emerged as a distinctive domain of research from the discipline of the information sciences. As Bruce and Partridge observe, it adopts a 'holistic approach to understanding peoples' engagement with information', taking 'into account the interrelations between people and their broader environments in a manner which considers people and their world as inseparable'.[33]

The purpose of this study was to explore and understand the ways people experience a particular phenomenon. Consequently, a qualitative and interpretive research approach was employed. In-depth interviews seek to understand the world from the participants' perspective and to reveal the meaning of these experiences from the participants' point of view.[34] Kvale described interviews as 'a conversation that has a structure and a purpose determined by the one party — the interviewer'.[35] Through this conversation, the interviewer has a 'unique opportunity to uncover rich and complex information',[36] and the participants can express their story using their own words. In-depth interviews were identified as the most appropriate approach for the study because of their suitability in obtaining data about people's views, opinions, ideas and experiences.[37]

Participants were drawn from people who had called the Family Relationship Advice Line, a national telephone service funded by the Federal Government and operated by Relationships Australia.[38] The Advice Line is a source of telephone advice for families on relationship issues, particularly at the time of separation. It is not designed to provide legal advice, but rather it can offer: general information about the family law system; advice on the process of separation; support and advice about how to approach post-separation parenting; and referrals to other providers such as telephone dispute resolution, Family Relationship Centres and other social support services.[39] The participants were screened to ensure that all were adults and currently involved in the negotiation of post-separation parenting arrangements.

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32 See, eg, Christine Bruce and Helen Partridge, 'Identifying and Delineating Information Experience as a Research Domain: A Discussion Paper' (Social Media and Information Practices Workshop, University of Boras, Sweden, 10–11 November 2011) <http://eprints.qut.edu.au/47204/>; Sharon Bunce, Helen Partridge and Kate Davis, 'Exploring Information Experience Using Social Media during the 2011 Queensland Floods: A Pilot Study' (2012) 61(1) *Australian Library Journal* 34; Christine Yates, Helen Partridge and Christine Bruce, 'Exploring Information Experiences through Phenomenography' (2012) 36(112) *Library and Information Research* 96; Christine Yates et al, 'Exploring Health Information Use by Older Australians within Everyday Life' (2012) 60(3) *Library Trends* 460.

33 Bruce and Partridge, above n 32, 1.

34 Steinar Kvale and Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (SAGE, 2nd ed, 2009) 327.

35 Steinar Kvale, *Doing Interviews* (SAGE, 2007) 7.

36 Robert Y Cavana, Brian L Delahaye and Uma Sekaran, *Applied Business Research: Qualitative and Quantitative Methods* (Wiley, 2001) 138.

37 Hilary Arksey and Peter Knight, *Interviewing for Social Scientists* (SAGE, 1999) 32–3.

38 Relationships Australia is a community-based, not-for-profit Australian organisation that provides relationship support services for individuals, families and communities through service providers in each Australian state and territory: Relationships Australia, *Welcome to Relationships Australia* (2017) <https://www.relationships.org.au/>.

39 Australian Government, *Family Relationship Advice Line* <https://www.familyrelationships.gov.au/talk-someone/advice-line>.

There was no requirement that legal proceedings be anticipated or on foot, which was important to uncover a range of different information experiences.

After receiving advice from the Family Relationship Advice Line, callers were asked about their willingness to participate in a research project and, if they agreed, were transferred by phone to a member of the research team for the interview or to arrange a later call-back time. Interviews were anonymous and participants were offered a small gift voucher as an acknowledgement of their time spent taking part in the interview. Ethical clearance was obtained through the Queensland University of Technology and the project was reviewed internally through the processes of the project partner.[40]

Participants were selected based on their interest in proceeding, rather than any demographic criteria. The resulting sample comprised twenty participants, including thirteen men and seven women. Six of the interviewees had accessed a mediation service. A sample size of twenty participants is a standard-to-large sample size for a thematic analysis. However, in keeping with the literature on qualitative research, the focus was on obtaining data saturation rather than achieving a defined number.[41] Data was collected through semi-structured interviews. Kvale and Brinkmann define the semi-structured interview as a 'planned and flexible interview with the purpose of obtaining descriptions of the life world of the interviewee with respect to interpreting the meaning of the described phenomena'.[42] Interviews were conducted by telephone and were audio-recorded. One research team member undertook all interviews to minimise variations in the interview process. Most of the interviews were conducted immediately following the warm transfer from the advice-line personnel, with only three being rescheduled to suit the interviewees. The duration of interviews ranged from 20 to 50 minutes.

A pre-defined set of questions was developed to stimulate discussion, but the questions were altered dynamically to facilitate the conversation in keeping with semi-structured interview guidelines.[43] Questions were asked to better understand what sources of information participants had used to assist in post-separation parenting arrangements; what they found useful or not useful; what they knew about post-separation parenting arrangements before they started looking for information; and what types of information they think might have better assisted them. A second tranche of questions was created for participants who had used a mediation service, asking specifically for their experiences in relation to that process. Questions were asked to mediation participants to better understand what sources of information they accessed in the lead up to the mediation process; what they found useful or not useful when engaging in the process; and what other information they would have liked to have. In addition, follow-up and probing questions were used to explore the participant's responses and experiences. These included: 'Could you explain that further?', 'Could you tell me more about that?' and 'Could you please give me an example?'

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40 Queensland University of Technology, University Human Research Ethics Committee, Approval Number 1300000834.

41 For discussion of sample size, see John W Cresswell, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (SAGE, 3rd ed, 2013) 157.

42 Kvale and Brinkmann, above n 34, 327.

43 Ibid ch 7.

The recorded data was de-identified (with a pseudonym being assigned to each participant) and transcribed verbatim for thematic analysis. Thematic analysis is a method for identifying and analysing patterns or themes within the data that are considered to be important to the description of the phenomenon being studied.[44] Cavana, Delahaye and Sekaran note that thematic analysis is undertaken to 'identify the underlying themes, insights and relationship within the phenomenon being researched'.[45] The data analysis process was an iterative one, constantly grounded in the interview data. The researchers spent time listening to the audio-recordings, coding and reviewing the transcripts, with the aim of identifying the emerging themes. Additionally, coding was used to determine the similarities, differences and potential connections among keywords, phrases and concepts within and among each interview. This included concepts and themes directly and indirectly revealed by the interviews. For example, Rubin and Rubin note that researchers 'may discover themes by looking at the tension between what people say and the emotion they express'.[46]

Data was analysed using first and second cycle coding methods. In the first cycle, structural coding was used to allocate basic labels to the data that would provide a topic inventory.[47] In the second cycle, focused coding was used to categorise the data according to thematic or conceptual similarity, and eventually to develop the most prominent or significant categories from the data.[48] A codebook was developed and maintained during data analysis, which contained a list of all the codes that had been created, together with their descriptive meaning. As new codes emerged during the analysis, these were added as necessary following discussion among the research team members.

The findings presented in the following section focus specifically on aspects of the interviews that are salient to the participants' experiences of finding and accessing information about the law in the course of negotiating post-separation parenting arrangements. The interview transcripts revealed a range of distinctive information experiences described by the participants, but a number of recurring themes were identified. These themes, considered together, cast doubt on traditional understandings of the shadow of the law, instead suggesting a more pluralistic and socially grounded picture of how post-separation parties experience the search for legal information.

IV The Nature and Sources of Legal Information

The interview transcripts revealed three distinct themes concerning the participants' experiences of finding and accessing legal information in a post-separation parenting context. The first theme concerns the complexity and ambiguity of the informational sources available. Far from seeing the law as a monistic structure yielding a single

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44 Virginia Braun and Victoria Clark, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research in Psychology* 77.

45 Cavana, Delahaye and Sekaran, above n 36, 69.

46 Herbert J Rubin and Irene S Rubin, *Qualitative Interviewing: The Art of Hearing Data* (SAGE, 2nd ed, 2005) 210.

47 Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (SAGE, 2nd ed, 2013) ch 3.

48 Ibid ch 5.

right answer, parties spoke about the quest for legal information as a process of engagement with a plurality of ambiguous and often conflicting sources. A second theme concerned the importance of informal sources in the quest for legal information. Participants reported relying heavily on friends, family, online sources and popular media as ways to access legal understanding. These sources were preferred to more formal and traditional methods of gaining legal advice due to their accessibility, immediacy and familiarity.

A third and related theme concerned the relatively low importance that participants placed on formal sources of legal advice in relation to their situation. A consistent theme in the interviews was that parties either did not obtain legal advice or did not heavily rely on it in identifying and evaluating their options. Participants gave a range of explanations for not accessing or relying on legal advice, including cost, waiting times or dissatisfaction with their experiences. Even where parties obtained legal advice, they often viewed it as merely one source of information along other informal sources. A number of participants reported discounting legal advice in favour of more accessible, digestible or trusted sources of legal information. A common experience of legal information, as revealed by this research, is not determinate and reliable advice from a lawyer, but rather dynamic and ambiguous data drawn from a diverse range of social sources.

A *Complexity and Source Selection*

Several participants in the study depicted the search for information as a journey or quest where a range of conflicting or confusing sources presented a challenge to obtaining a clear picture. Almost all participants reported beginning their quest for information with an internet search, either alone or in conjunction with other informal sources. Some participants were satisfied with the levels of online information and reported relying on it almost exclusively, such as Noel, who commented:

> I found more than enough on the internet … I virtually had everything I really needed. In between the Family Care Centre, my solicitor, and the internet, I found all my answers really … There's more than enough information out there, there's more than enough sorts of people to help you out there, there's more than enough.

More commonly, however, participants reported feeling confused or overwhelmed by the quantity of online materials. For example, Fran recounted that:

> I went on the Family Law Court website … it came up with a phone number so that's why I called them … I really couldn't find what I was searching for. To be perfectly honest, I find those websites extremely difficult to navigate … I find them really hard to work out.

Ingrid described a similarly confusing search for information:

> I had spoken to Legal Aid but then I was recommended on a website, and also by someone who's been through something similar, that speaking to Family Relationships actually helped them move forward better than anything else did … they're going to have someone call me with regards to what I need to

> do legally, which has been good. … I think I did Google early on to what was necessary … I found a lot of it wasn't really clear.

Conflicting sources of information led several participants to feel stressed, tired or overwhelmed. Ingrid reported that 'also, they gave me the number of the Family Mediation Council which I was going to ring today, but then because I've only just done the other thing today, I felt like I needed a bit of a breather'. Bobby similarly observed that 'I've been asking people and it's just been confusing and people are saying different things'. Darius reported a similar experience, reflecting that:

> I couldn't decide which one is not useful and which one is useful — because so many information, I'm currently kind of overwhelmed, you know? I have so many issues that I have to deal with, and I still couldn't figure out which information is helpful and which information is not.

The confusing and overwhelming nature of the sources often led participants to fall back on more personalised sources of advice in an attempt to obtain clarity or reassurance. Bobby expressed this desire directly:

> I haven't really understood a great deal of everything. And I guess that I sort of have to sit down with someone, face-to-face and sort of understand my rights with child support, child custody and my financial … you know, what I'm entitled to with money. So if someone just sat with me face-to-face, I think I could understand a lot more. But as I said before, I'm not really understanding a lot from the internet.

Subsequently, Bobby described the reassurance she felt when receiving telephone advice from a Family Relationships Centre:

> I'm sort of really not understanding a lot of what I'm reading … But the lady that I spoke to yesterday from the Family Centre, she was quite thorough with what she was telling me, so I could sort of understand a little bit more as to what I was reading on the internet … I was quite terribly relieved that I had someone that was going to call me back in a week or two and sort of guide me and advise me as to what my rights are.

Ethan also reported that he felt a strong desire for personal interaction, both to obtain more concrete information and for human contact:

> I just found a phone number and called … I just knew I needed to call someone and I just wanted to find a phone number to be honest. I didn't really care about the information … I'm in the military so we have easy access to legal advisors. So all I have to do is just ring them up … I've just got to ring them up and they'll give me the appropriate information.

B *The Importance of Informal Sources*

The search for relatable and concrete information led participants to rely on the advice of friends, family and community leaders, particularly those who had undergone similar experiences. Darius recounted that:

> I used Google search …I talked to my friends … he advised me to make some calls … and advised me to seek information online and from government

> website … It's always nice to have somebody who you actually feel close to, to talk about all these issues.

According to Ethan, friends and acquaintances were an important source of information, enabling him to bypass the complexity of other sources:

> [P]retty much word-of-mouth from other people, asking people and all that sort of stuff, those that have been through this stuff before … mainly people who've gone through this before, just what I'm entitled to and, I don't know, just all the other stuff I suppose. I just asked them — there's people at work, people I know from friends, and I'd ask people. I'd find someone that's going through this, so then I'd go and approach them. … They've done the research and I've just listened to them because they've obviously researched it and they've just passed it on to me.

Kerry similarly recounted relying on friends and family for relatable information:

> Friends are vital, you know, because they've been through it and there's no doubt, you take a great deal of information through them. … [M]y brother has been through it as well many, many years ago and you know, you take notice of what they have to say.

Some participants reported relying on information from friends or family which included substantive (and potentially unsound) advice about legal options or strategies. For example, Vinnie reported initially consulting websites 'like the Centrelink website and the Child Support', but found they contained similar information, leading him to rely on informal advice from someone with prior experience:

> I mean they're all linked pretty closely together so they had some pretty good articles on there. … [B]ut I had advice from a friend of mine who is a mortgage broker to just go through and document that we want to share 50/50 custody of our son … I'm in the middle of organising to see, probably, I think to see a mediator to draw up a parenting plan. I'm pretty sure that's through Relationships Australia.

Friends and family were influential sources of information for many participants, but other community sources also played a role. Noel reported that:

> I believe first and foremost, I went to my solicitor when this happened and we just had a good old chat … And then I think from there, I researched on the internet, 'Mediation Centres' near me. And from memory, the Catholic Care Centre popped up and some others as well, but I picked up one that was close to me. And being a Christian, I thought I'd go to a Catholic one, it's a good idea, so why not. And it went from there. … [T]here was a receptionist was quite handy at the Catholic Care Centre, and that's what I've asked … I asked her a couple of questions, I said 'Look, how does this work? What's it all about?' and she gave me some pointers on how it works.

Similarly, Darius related that '[a]ctually initially, I talked to my pastor. … My pastor actually referred me to the Church Counselling Service … after three [free?] counselling service ... he actually offered me some information and suggestions.'

A further source of information reported by multiple participants was news reports or other popular media. According to Tina:

> I think it was on the television or … I know it's a media … I think it's on television that there are a couple that separate and then she doesn't know what to do. So, it was introduced to her by a best friend about the Family Relationships. So yeah, that's what I saw … that's how I saw Family Relationships. That's how I started searching through the website. And the Family Relationships was … I think they arranged me to call … someone to call me about the legal side.

Ethan also reported forming beliefs about his legal options and position based on a combination of observing other people's experiences with the process and drawing on television or media depictions:

> I knew that I was entitled to my son. And as for involvement, I knew I had to pay child support for the times that he wasn't with me, which is fair enough. That's pretty much about it … seeing other people's relationships … through what other people's relationships went through and learn from them, and just stuff you see on the TV or, I don't know, you read about it online or in the paper … I kind of had a clear-cut picture of what I had to do … I know there is information out there, there's plenty of websites, you know, dads' rights websites — I know they exist.

C *The Role of Legal Advice*

Participants reported not obtaining formal legal advice for a variety of reasons, including lack of financial resources and timeframes. For example, Bobby said 'I haven't spoken to any solicitors as yet … they require money which I don't have. So mainly it's been information from friends and also the internet'. Steve reported: 'I did get some advice through a solicitor, but in the end Legal Aid was rejected. Um, however I'd spoken to enough people and called enough helplines and things to know where I stood. So I represented myself.' Elle expressed frustration with the waiting times, saying: 'I need some legal advice but I have to wait for the lawyer to call me, so it's just the timeframe.'

Other participants reported seeking formal legal advice at some point in the process. Darren, for example, reported that:

> I've spoken to a lawyer, um I've made some enquiries through Relationships Australia um and ended up at the Family Health Centre, or whatever it is, um, which is where I got put onto you. That's sort of the only information I've gathered so far.

This reliance on legal advice as merely one source among others was reported by several participants. This may reflect the limited time and attention that lawyers can devote to each matter, particularly in a Legal Aid context. David, for example, reported on relying on advice from Legal Aid alongside other sources:

> I've called Legal Aid and I have called a few like help … men's helplines and stuff like that and they have given me a bit of information … It has given me an understanding of what I need to do because this is the first time … so everything so far has been really useful. … I had to look for it and like call

> up, like certain phone numbers like men's helplines and stuff to put me in the right direction.

Tom also recounted a similar experience:

> Just the internet, and I just started Googling stuff. And then I did speak to a friend who actually works for Legal Aid, he's a lawyer for Legal Aid and I gave him a call and asked him for advice … I couldn't get onto him first actually, but yeah, I tried to get onto him and then I called the … what was the original place, Family Relationships, yeah, yeah, that — I called that line and then they've put me onto the place at Tweed, they gave me their number to make an appointment for a mediation time.

It is notable that formal legal advice, where obtained, was often not regarded as the single or most authoritative source of information. In some cases, participants reported discounting or overriding legal advice based on what they viewed as more helpful or concrete advice from other sources. Steve reported becoming frustrated with formal legal advice and turning to informal sources (with questionable results):

> I, again, wasted a lot of time with this Legal Aid solicitor until I spoke to my cousin, who um had been in a similar situation and she, she basically advised me to not waste time, that it's … that it is quite easy and acceptable to represent yourself.

Kel also reported representing herself due to dissatisfaction with her lawyer:

> My lawyer was a total a-hole and he was horrible, and he like … but I had to pay him up 'til … 'cause I applied for Legal Aid, so I actually had to pay him money to represent me and … well me, because the father had our eldest child and he wouldn't return him back into my care. So I was fighting to get my son back. … And, yeah, he was just an a-hole, so yeah, I represented myself after I told him to go jump.

A similar story was told by Vinnie, who sought legal advice, but found himself dissatisfied with his lawyer's adversarial outlook:

> A few weeks ago, I did go and see a lawyer and I guess he was trying to get the best outcome for me. But I found the whole … I don't know, like table banging 'We'll get this for you, we'll get that for you', that probably wasn't really what I was looking for … I was seeing a private lawyer company. I didn't find that helpful, but all the government-type helplines have been very, very helpful. I've only been in contact with Relationships Australia this week so yeah, I haven't had … didn't receive any pamphlets or information packs or anything.

V Bargaining in the Shadow of the Folk Law

The traditional conception of the shadow of the law suggests that parties enter into family mediation with some awareness of the applicable legal rules. These rules then supply the implicit framework for the conduct of the negotiations. However, the interview responses analysed above present a more complex picture. First, parties to family dispute resolution often lack a clear conception of the options open to them due to a multiplicity of conflicting or overlapping sources. This tends to lead to choices to rely on a particular source over others — based not necessarily on its

reliability, but on its accessibility or clarity in the advice provided. Several participants reported a preference for telephone or face-to-face advice over more impersonal sources of information.

Second, and relatedly, participants in family dispute resolution do not bargain in the shadow of the law so much as in the shadow of the folk law: that is, popular or informal understandings of the law that may or may not reflect the positive legal rules. The role of informal sources, such as websites, friends and family, religious or community leaders, and popular media is more prominent for many participants than formal legal advice. Even where legal advice is sought, it is often viewed as another source of information alongside more informal avenues, rather than a single authoritative point of contact. This suggests that the concept of the shadow of the law, insofar as it applies to family dispute resolution, is more complex and polycentric than is sometimes thought.

Participants in the study consistently expressed a desire to gain information about the legal framework for their dispute, but there was a marked inconsistency and complexity in the methods used to gain this information. Websites, friends and family, community sources, and popular media all played a role. Legal advice was sought in a number of cases, but it was rarely the single most authoritative source of advice. Rather, participants seem to have built up a general understanding of the legal framework by piecing together information from a range of formal and informal sources. This information backdrop then provides the context for their participation in family dispute resolution.

It is therefore not the case that participants in family dispute resolution bargain in the shadow of the law, at least if this is understood as meaning that the positive law provides the implicit baseline for negotiations. Nor does the positive law serve as a meaningful bargaining chip for many parties. Rather, parties bargain in the shadow of the folk law — being an understanding of the law that they gain from a multiplicity of formal and informal sources. This has a number of significant consequences. First, different parties may have access to different sources of information, meaning that the folk law is not univocal. There may be multiple shadows being cast on different parties, who may therefore approach the process with contrasting or conflicting expectations.[49]

Second, the socio-economic, cultural or religious backgrounds of the parties may make a difference to their lived information experiences and therefore their expectations for post-separation arrangements. This has the potential to amplify the role of cultural or other differences in the family dispute resolution process.[50] As two of the present authors have argued elsewhere, it also has the potential to create or exacerbate power imbalances in family dispute resolution, where the expectations of one party lie closer than those of the other party to the implicit values and

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[49] Cf Field and Crowe, above n 13, 89–91.

[50] See generally Morgan Brigg, 'Mediation, Power, and Cultural Difference' (2003) 20(3) *Conflict Resolution Quarterly* 287; Samantha Hardy and Olivia Rundle, 'Applying the Inclusive Model of Ethical Decision Making to Mediation' (2012) 19 *James Cook University Law Review* 70; Siew Fang Law, 'Culturally Sensitive Mediation: The Importance of Culture in Mediation Accreditation' (2009) 20(3) *Australasian Dispute Resolution Journal* 162.

expectations of the mediator.[51] For example, where the mediator is a trained lawyer, a party whose expectations reflect the shadow of the positive law may appear better prepared, more realistic or more rational than a party whose expectations reflect a different range of information experiences. This creates the potential for implicit or unconscious bias to infiltrate the process.

Third, where popular understandings of the law differ from the law itself, it is the popular understandings and not the positive law that provide the framework for the dispute.[52] This is particularly significant where popular discourse reflects an outdated or inaccurate view of the legal framework. For example, several participants in the study used outdated language such as 'child custody', 'shared custody' or 'visitation rights' to describe the legal framework applicable to post-separation parenting matters.[53] This provides an example of popular discourse lagging behind the terms of the *Family Law Act 1975* (Cth), which refers to concepts such as 'parenting orders' and 'shared parental responsibility'.[54] Several participants also referred to their 'rights' or 'entitlements' in terms of access to children,[55] using language at odds with the current child-centred legislative framework.[56]

This suggests that legal amendments aimed at shifting the focus of family law matters towards the best interests of the child, as opposed to the rights or entitlements of the parents, may have limited effect on the way that family dispute resolution is framed or understood by the parties. Participants also misnamed key services that they consulted, further showing the lack of uptake of formal terms and language within popular discourse.[57] Interestingly, however, other specialised legal terms arising from legislation, such as 'child support',[58] seem to be reflected in popular understandings to a much greater extent. This may reflect the intuitive appeal and longevity of the terms, but also their uptake and use by advice lines or government services — for example, a number of participants reported being exposed to a dedicated child support advice service or helpline.[59]

VI Conclusion

The concept of the shadow of the law has been hugely influential in research on dispute resolution and family law. Contemporary references go far beyond Mnookin and Kornhauser's original project of offering a predictive tool for post-separation

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51 Field and Crowe, above n 13, 92–6.

52 For further discussion, see Jonathan Crowe, 'Natural Law in Jurisprudence and Politics' (2007) 27(4) *Oxford Journal of Legal Studies* 775, 786–8; Jonathan Crowe, 'Normativity, Coordination and Authority in Finnis's Philosophy of Law' in Mark Sayers and Aladin Rahemtula (eds), *Jurisprudence as Practical Reason: A Celebration of the Collected Essays of John Finnis* (Supreme Court Library Queensland, 2013) 95.

53 Bobby, Carl, David, Malcolm.

54 See, eg, *Family Law Act 1975* (Cth) s 61DA.

55 David, Ethan, Fran, Kerry.

56 See, eg, *Family Law Act 1975* (Cth) s 60CA. For discussion, see Jonathan Crowe and Lisa Toohey, 'From Good Intentions to Ethical Outcomes: The Paramountcy of Children's Interests in the *Family Law Act*' (2009) 33(2) *Melbourne University Law Review* 391.

57 Noel, Bobby, Darren.

58 See, eg, *Child Support (Assessment) Act 1989* (Cth).

59 Darius, Ethan, Kel, Kerry.

negotiations. Critics have questioned the utility of the concept from a number of angles. This article, by contrast, has drawn on empirical research to extend and deepen the concept. We have suggested that family dispute resolution does, in a meaningful sense, occur within the shadow of the law. However, the law in question is not only (or even primarily) the positive law contained in statutes and judicial decisions. Rather, it is the folk law that parties absorb from online materials, friends and family, and the popular media. This folk law significantly shapes people's knowledge and expectations when entering into family dispute resolution. It is also likely to be used as an anchor or bargaining chip by at least some parties.

Shifting the focus of the shadow of the law concept from bargaining in the shadow of the positive law to bargaining in the shadow of the folk law has a number of important implications. Perhaps most significantly, it means that there is not just one shadow of the law; rather, there are many shadows, which may differ from dispute to dispute or party to party. The shadow of the law, in this sense, is pluralistic and potentially ambiguous, rather than monistic or univocal. Different parties draw upon different discourses or sources of information. These different ideas and expectations hold the potential to amplify existing cultural differences or power imbalances between the parties. They may also hinder efforts to reform the legal framework if the changes are not mirrored in social discourse.

The picture of the shadow of the law advanced in this article diverges significantly from the account advanced by Mnookin and Kornhauser. Mnookin and Kornhauser emphasised how legal standards can serve as a bargaining chip based on parties' predictions of how they would fare in court.[60] The interview responses discussed above, however, show that parties to post-separation disputes are far less focused on predicting potential outcomes of litigation than on interpreting and reconciling informal sources of legal information. Critics of Mnookin and Kornhauser's theory have argued that it risks overemphasising the role of the law and understating the complexity and ambiguity of legal sources.[61] However, these criticisms stop short of challenging Mnookin and Kornhauser's focus on positive law as providing the content of the shadow of the law concept. The revised understanding of the shadow of the law suggested in this article retains the explanatory power of the idea, while avoiding some of the important criticisms found in the literature.

A further possible implication of this research is that the traditional concept of the shadow of the law relies upon a legal positivist conception of law that is undermined by empirical evidence. Legal positivism holds that the only necessary factor in determining whether something counts as law is its recognition by authoritative social sources.[62] However, the interview responses discussed in this article indicate that authoritative sources of law play, at best, a subsidiary role in determining how the content of legal obligations are understood by members of the community. The law that people follow in their everyday lives bears more resemblance to what we call the folk law than to the positive law found in statutes and cases. This potentially bolsters critiques of legal positivism, according to which

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60 Mnookin and Kornhauser, above n 8, 968.

61 For discussion, see Batagol and Brown, above n 10, 56–62.

62 Jonathan Crowe, 'Natural Law Theories' (2016) 11(2) *Philosophy Compass* 91, 92–3.

a positivist understanding of law fails to explain the law-following behaviour of ordinary citizens.[63]

Government agencies, mediation providers and others involved in providing post-separation advice and information need to be aware of the influence that the folk law exerts on parties' expectations. For government agencies, there is a need to provide straightforward, accessible and digestible information about post-separation options, recognising that this information is likely to be accessed alongside a multiplicity of other sources. The continuing prevalence of positional and adversarial language about post-separation parenting, in particular, suggests that a concerted effort is needed to promote awareness and understanding of the child-centred legislative framework. Similar considerations apply for others involved in providing advice about post-separation arrangements. Family lawyers, for example, will often be well aware that parties may come to them with a pre-existing understanding of the law gained from informal sources, which is likely to influence, and perhaps displace, the advice that is provided. Seeking to understand this context is therefore important in providing advice that is digestible, salient and helpful to the parties.

Mediators, likewise, need to be mindful that parties to family dispute resolution may come to the process with divergent understandings of the legal framework relevant to their dispute. The pluralistic and ambiguous nature of the folk law poses a potentially significant challenge to mediation ethics, with its traditional focus on the notions of mediator neutrality and impartiality.[64] There is increasing awareness in the literature on mediation ethics of the need to take account of cultural differences and power imbalances between the parties.[65] The research presented here further suggests that mediators should be alive to the prospect of divergent legal shadows influencing the parties' expectations and strategies. In particular, mediators may need to reflect upon their own understandings of the law in order to avoid implicitly favouring parties with similar worldviews.[66] The pluralistic nature of the shadow of the law therefore does not undermine the usefulness of the concept for mediation theory and practice. If anything, it reinforces the concept's importance in understanding the assumptions parties may bring to the dispute resolution process, and the challenges these may pose to the neutrality and impartiality of the mediator.

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63 Ibid 93–4.

64 For further discussion, see Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16(2) *Social and Legal Studies* 221; Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice — Part I' (2000) 11(2) *Australasian Dispute Resolution Journal* 73; Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice — Part II' (2000) 11(3) *Australasian Dispute Resolution Journal* 145; Field and Crowe, above n 13; Field and Crowe, above n 24.

65 See, eg, Brigg, above n 50; Hardy and Rundle, above n 50; Law, above n 50; Field, above n 24; Field, above n 25; Field and Crowe, above n 13; Field and Crowe, above n 24.

66 Cf Field and Crowe, above n 13, 92–6.