



Philosophical Foundations of Children's and Family Law

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CHAPTER

Introduction: The Importance of Theory to Children's and Family Law

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I. Introduction

What defines family law? Is it an area of law with clean boundaries and unified distinguishing characteristics, or an untidy grouping of disparate rules and doctrines? What values or principles should guide it—and how could it be improved? Indeed, even the scope of family law is contested. Whilst some law schools and textbooks separate family law from children's law, this is invariably effected without asking what might be gained or lost from treating them together or separately. Should family law and children's law be distinguished or treated together?

One would expect disagreement on these questions in any context. In bringing together theorists from multiple jurisdictions and at least two primary disciplines, we should not be surprised to find deep differences in approach reflecting different methodologies and foundational questions. The tension between them, we hope, can illuminate and enrich discussion on all sides. Further, through combining insights from law and philosophy, we also intend to add another layer to the current trend to focus on the empirical in family law research, and highlight how critical debates in children's and family law are at once theoretical and empirical in nature. Understanding the nature and content of a child's 'best interests' as contained in multiple jurisdictions' legal frameworks regulating private and public law concerning children, for example, requires us to approach the matter both conceptually—in order to adjudicate between frameworks—and in terms of fit with evidence from research. This immediately makes any satisfactory resolution more uncertain, contested, and subject to criticism. It is in this context that we hope that the conversations between law and philosophy, their points of agreement and divergence, can advance stalled debates.

International differences correspond, of course, to differences in law, policy, and procedure. Contrast, for example, England and Wales' 'single-pot' approach to the distribution of property and maintenance upon marriage breakdown¹ to the more common, 'pillarised'² treatment of matrimonial property, pensions, and maintenance. The difference in system design necessarily affects the available potential justifications. As a more nuanced aspect of the impact of system design, one might consider the normative  difficulties created by the variation in default regimes adopted in relation to matrimonial (or marital) property between US states.³ Facing jurisdictional differences—like considering historical changes within one's own

jurisdiction—can yield an awareness of the context-specificity of one's own starting points. And awareness of how things are done differently can lead us to call into question our own ways of doing things. Such awareness might alert us to unintended consequences of legislation or to innovative solutions. And, more fundamentally, it might cause us to interrogate what we take as the core, the normal, or even the natural. This is where philosophical investigation becomes indispensable.

In section II, we outline a number of respects in which the approaches taken by (academic) lawyers and philosophers writing in this field tend to differ, as well as how the structure of this collection seeks to cut across and highlight both these divergences and shared accounts. In section III, we introduce the key themes that underpin the collection, which demonstrate the potential for cross-fertilization between legal contexts as well as between legal and philosophical perspectives. When we refer to 'lawyers' and 'philosophers', we have in mind those working in family law and children's law in particular.

II. Disciplinary Peculiarities

Perhaps even more telling than international differences are disciplinary divides. Whilst many of us would describe our work as inter-disciplinary, differences in training tell in authors' focus and argumentative starting-points and aims, their chosen methodology, and the nature of the conclusions reached.

A. Focus and aim

The questions asked of Family Division judges very often involve value judgments. As Lord Hoffman reasoned in *Piglowska v Piglowski*, a case concerned with discretionary decision making on financial provision upon divorce:

These guidelines, not expressly stated by Parliament, are derived by the courts from values about family life which it considers would be widely accepted in the community. But there are many cases which involve value judgments on which there are no such generally held views. ... *These are value judgments on which reasonable people may differ. Since judges are also people, this means that some degree of diversity in their application of values is inevitable* and, within limits, an acceptable price to pay for the flexibility of the discretion conferred by the Act of 1973. The appellate court must be willing to permit a degree of pluralism in these matters.⁴

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Judicial decisions that embody fact-specific and pluralistic value judgments pose an interesting dilemma for philosophical writing about family and children's law, which highlights the importance of recognizing that arguments in law and philosophy may have critically different drivers. This is because, within philosophy, much ethical theory rejects evaluative pluralism; its mission is to ascertain the correct (whether true, or most reasonable) answer to such moral and evaluative questions. Whilst much contemporary political philosophy addresses the problem of political decision making within a society characterized by a diversity of religious and ethical views, it also often argues for non-pluralistic principles of justice—which may differ significantly from existing bodies of law. (It is worth noting that ethical and political theorists do not always claim these moral and political principles are ahistorical and transcendental; they may be justified as reflecting the deep shared norms of an existing society, for example.)

By contrast to philosophy's focus on discerning true—or at least reasonable—norms, the nature of legal practice encourages (academic) lawyers to be purposive in their focus on normative issues. This can suggest inconsistency to the external observer since normative argumentation is diversely employed—as a means to win cases in court, to underpin criticism of the justifiability of current legal regulation, or as a basis to argue for law reform. Hence, this is why the Grand Chamber of the European Court of Human Rights asserted the

‘special’ nature of the marriage status as an argument in itself to justify excluding interdependent sisters from tax benefits.⁵ Whereas the correctness of seeing marriage as a ‘special’ status is assumed by the Grand Chamber, Brake’s chapter highlights how philosophical discussion of the extension of state support from different-sex marriage to other relationship forms first considers the normative basis for state support of any relationship and then asks which relationship forms share that characteristic. Especially within a society characterized by diverse religious and ethical views, the ‘special status’ of marriage must be justified, not merely assumed. Whilst Brake presents an argument for reform, the larger aim is to ensure that the law consistently recognizes the value of care.

B. Social constructs and social life

Lawyers also work within and without the social construct of law in a way less often practised by philosophers. Whilst philosophical theory may criticize existing social practices (for example, as unjust) or argue for a particular legal norm in light of its social effects (for example, promoting certain virtues), lawyers tend to accept that law should reflect and respond to existing social practices to a greater degree. This is particularly evident in the context of family and children’s law, where the relationship between familial life and law is porous and the socially constructed nature of law is at the forefront and ever-present. The social constructs of ‘family law’ speak directly to those constructs that have made meaning of social life. But law’s own internal normativity means that lack of fit with social life is not necessarily unjustifiable.

To take a very simple example, when seeking to understand the nature of ‘modern’ marriage, how much weight should we place on individual pieces of evidence about how couples structure their intimate lives? Should the fact that both parties to a marriage keep individual bank accounts have any significance? Might they see their joint lives differently from those who simply have a joint account? Family law scholars currently do not attach any weight to this evidence, but might there be a threshold percentage of married couples so conducting their affairs that would lead us to think it says something about the nature of ‘modern’ marriage? If that behaviour were to form part of the broader social meaning-making of modern life, legal scholars would need normative argumentation to the contrary to explain the divergence of the social construction of marriage in law.

Yet, legal argumentation can assume the need for fit between ‘family law’ and family life. In their contribution to this collection, Bendall and Harding are particularly concerned to highlight the lack of fit between the heteronormativity of constructed marriage and how same-sex couples in civil partnerships understand their relationship.⁶ But, rather than immediate law reform, they call for further research to explore how legal recognition may shape same-sex couples’ lived experience of law. What form would further empirical evidence need to take to justify reform? Whilst evidence from social life is always relevant to law’s social constructs, decisions as to whether to reform and the nature of any reforms require the insertion of a coherent cluster of norms to mediate the interaction between law and lived experience. This is one area where philosophical insights may be particularly valuable.

C. Language and concepts

Language plays significant, but differing roles for both disciplines. Legal analysis can be framed and constrained by particular legal terms of art, such as ‘proportionality’ in relation to rights arguments, which can risk frustrating deeper philosophical engagement.⁷ For philosophers, language is often indicative of whether the underlying concept is ‘thin’ or ‘thick’;⁸ the former suggests a purely evaluative position, whereas the latter is also substantially descriptive. For example, a thin ethical evaluation might be that an act is ‘wrong’, but a thick evaluation such as ‘selfish’ or ‘malicious’ or ‘sadistic’ would give more detailed description. This could be particularly illuminating for lawyers working with difficult concepts in the family context, such as ‘fairness’ in financial provision upon relationship breakdown. Might at least some of the difficulty with ‘fairness’ be explained by the fact that, even in ethics, it is arguably ‘impossible confidently to classify’ ‘fairness’ as either ‘thick’ or ‘thin’?⁹

p. 5 Recognizing the difficulties posed by ‘thin’ concepts, which lack substantive non-evaluative description, also highlights why reference to norms without specifying the content may be an inadequate lens through which to relate social life to family and children’s law. The Commission on European Family Law, for example, reasons that

As regards the substance of the Principles regarding Property Relations between Spouses, *equality* between the spouses is the primary but by no means the only consideration. ... Principles of *sharing* and *fairness*, *solidarity*, *flexibility*, *legal certainty*, *protection of the weaker spouse*, and the promotion of *party autonomy* are likewise of fundamental importance in this area of law.¹⁰

Whilst they note the critical difficulty of balancing these norms,¹¹ they do not suggest how this balance should be struck in particular instances. Can philosophical insight avoid the risk of arbitrariness that may result from balancing normative labels without content?

For lawyers and non-lawyers alike, the lack of correspondence between some legal terms of art and their plain meaning can problematically affect argumentation. ‘Private ordering’ in the family law context, for example, and as Bix notes,¹² is not truly private at all. The ‘paramountcy’ of a child’s ‘best interests’ in law, as Ferguson discusses in her chapter, does not mean that children’s interests are prioritized over those of other parties. Inconsistent concern that the term’s content, when used as a term of art, corresponds to the term’s plain meaning undermines the ability to both critique the nature of the legal term as well as engage with the justifiability of any lack of correspondence between the legal and broader social constructs at stake. Legalistic interpretations of statutory tests, such as the threshold for compulsory child protective intervention,¹³ can also serve to further distance the law from its normative underpinnings.

p. 6 Legal commentators are often more attuned to the expressive aspects of law’s effects,¹⁴ since arguments both for and against legal reform can lie in the signals sent by the language employed in the law. When same-sex couples are granted access to the different-sex institution of marriage, for example, does the message sent change if we talk in terms of ‘same-sex marriage’ or the ‘extension of marriage to same-sex couples’? Ferguson takes the view that it does and, preferring the latter view, adopts the language of ‘extended marriage’¹⁵ despite the persistent unequal treatment of same-sex couples within marriage.¹⁶ Yet, in their chapter on same-sex relationship breakdown, Bendall and Harding use both framings interchangeably, suggesting the contrary view. Whilst the legislators’ intention is important, public reception can also change the symbolic significance of language.

By contrast, consider parental time with children, the legal framing of which has changed from dual order terms such as ‘custody’ and ‘access’ or ‘residence’ and ‘contact’ to single order terms such as ‘parenting’¹⁷ or ‘child arrangements’.¹⁸ These legal devices have been subject to common reformulation as public reception has undermined legislative intention; the language of winners and losers has been understood as

recast despite the legislative attempts to neutralize terminology. With a different direction of justification than typical philosophical argumentation, legal scholars also inconsistently treat public misunderstanding as a justifiable basis to argue for reform, such as in relation to the myth of the 'common law marriage'.¹⁹

Law reform for expressive, not substantive reasons, is more frequently pressed in the family context in philosophy as in law. This is clearly seen in philosophical debate over the nomenclature of 'marriage' vs 'civil unions' for instance; the expressive power of the name, and not simply the bundle of accompanying rights and obligations, matters. In relation to the English law on divorce, for example, parties very often adduce 'behaviour' within the terms of s1(2)(b) of the Matrimonial Causes Act 1973 to prove that their marriage has 'broken down irretrievably' as required by s1(1). In the recent case of *Owens v Owens*,²⁰ the trial judge refused to grant the wife a decree nisi on the grounds that her petition had not met the threshold for s1(2)(b). The Court of Appeal dismissed her appeal. In his lead judgment, Munby P recognized '[t]he hypocrisy and lack of intellectual honesty which is so characteristic a feature of the current law and procedure',²¹ since it was widely known that so many divorcing couples engaged in the 'consensual, collusive, manipulation'²² of s1(2)(b).

Whilst taking the threshold seriously could rectify this abuse of the statute, where does the public interest lie in refusing petitions? Any public policy argument here must be expressive, not substantive.²³ If it were substantive, we could not explain our modern history of overlooking collusive divorce by consent. In expressive terms, there is no obvious reason why we should assume that the difficulty of access to divorce is in a linear relationship with the significance of marriage as an institution.²⁴ These doubts are supported by Trinder finding no evidence that the current law protects marriage.²⁵ Such fluctuating tolerance and intolerance for undermining legislative provisions is at odds with philosophical reasoning, which seeks consistency in argumentation.

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D. The relevance of practice

The realities of, and potential implications for, legal practice vary in their relevance to academic lawyers' and philosophers' work in this area. Much philosophical ink has been spilled lately on the contested²⁶ notions of ideal and non-ideal theory. At its best, ideal theory in normative political philosophy approaches questions of law, policy, and procedure by asking what structures there should be, in light of certain theoretical commitments such as liberty and equality.²⁷ For example, one might start from the position of equal respect²⁸ for individuals in different types of adult intimate relationships, and use that to argue for who should be able to legally adopt a child. Non-ideal theory, by contrast, would take into account specific injustices that systematically differentiate groups of people, and consider how equality is best implemented between groups in—unjustly—unequal starting positions. Through such a lens, for example, historical discrimination against and unjust treatment of women, racial minorities, or same-sex couples could not be ignored in the question of justice in the adoption process, with perhaps heightened scrutiny of norms that would further disadvantage these groups. Rawls defines ideal theory as assuming compliance,²⁹ hence it mostly ignores remedies (or rectification of injustice). It has been charged that this focus makes it useless in addressing systematic injustice;³⁰ its defenders argue that we can only measure wrongs by focusing on what should be the case, and ideal theory describes that.³¹ In this form, ideal theory does not assume humans are ideal or that they will comply with principles of justice; in fact, such idealizing assumptions tend to characterize ideal theory in its worst form.

One way to encapsulate the differing approaches of lawyers and philosophers could be in terms of non-ideal vs ideal theorizing (although this contrast should not be overdrawn, as many philosophers, particularly those who work on issues such as gender and race, aim to practice non-ideal theory). Concretely, the lawyers in this book focus more on non-intact families, unintended effects of legislation, and gaps in policy—areas where things have gone wrong and need to be put right. The philosophers tend to focus more on

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values such as love and equality and propose new legal structures that would reflect those values. In short, the philosophers focus on normative justification, the lawyers on making the law fit for purpose, whatever that purpose might be understood to be. This is all a matter of emphasis, of course—the lawyers’ essays do reflect values, the philosophers are sensitive to past injustice. For example, Altman’s chapter focuses on the justification for ‘parental control rights’, rather than the need for law reform to accommodate them, and Dwyer’s case is centred on articulating a more justifiable basis for current state decision-making on clashes between minority and majority cultures rather than necessarily arguing for different outcomes. Likewise, Brake’s chapter ↵ adduces the systematic disadvantages of domestic workers—often immigrants and women of colour—in considering how an ideally just family law should protect them, and political theorist Shanley considers the vulnerability of disadvantaged women in surrogacy arrangements when applying concepts such as ‘autonomy’ and ‘consent’.

Both disciplines seek to appeal to foundational principles or values in their arguments; but here too their methods reflect their differences in training. Whilst philosophers tend to seek *the* correct principle or justificatory framework and trace its implications, lawyers may be more comfortable with a plurality of justification—as might be found in law. For example, one might contrast the approach taken to justifying the financial consequences of relationship breakdown. Whereas Jeske in her chapter searches for one normative basis for spousal support, academic lawyers are more often content with the suggestion of a plurality of interpersonal and social bases.³² We might wonder if lawyers, more exposed to practice, are more likely to respond to the ‘normal chaos of family law’³³ as well as the institutional constraints in the practice of law (as Leckey emphasizes in his chapter). A measure of pragmatism underpins such an approach. In the context of extending end-of-marriage obligations to same-sex couples, as Bendall and Harding discuss in their chapter, how normatively ‘thick’ could a single basis for spousal support be? Might such a ‘thinner’ theoretical basis lose value for lawyers before it would for philosophers because lawyers may be more interested in seeking to predict future legal outcomes based on the current conceptual account?

E. Cases and generalizability

Philosophers’ and lawyers’ use of cases is typically different. Whilst philosophers will sometimes use a case as a clinching counter-example, they are also prone to give them as examples, not—in themselves—reasons for legislation or judicial development. Cases typically exemplify the general principles which serve as reasons, rather than themselves providing reasons for those principles. In legal argumentation, cases are necessarily often binding precedent with their own reason-giving authority, which can include being a reason for reform. But lawyers are also inclined to parse reasoning and outcomes, to criticize one for not being reflected in the other, and to search for policy-based underpinnings ahead of any available, even articulated, normative basis. The likely outcome of a hypothetical future case, whether determined by legislation or the application of judicial precedent, may also be seen as reason-giving, whereas philosophers are trained to follow the argument where it leads (a practice attributed to Socrates)—even if that is someplace surprising.

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Recent judicial interpretation of the requirements for a parental order in the surrogacy context provides a ready example. Section 54(3) of the Human Fertilisation and Embryology Act 2008³⁴ imposes a six-month time limit for applications. Without a parental order, the commissioning couple can only become the child’s legal parents via the more ↵ onerous process of adoption. In *Re X (A Child) (Surrogacy: Time limit)*,³⁵ Sir James Munby P rejected the literal interpretation of the time limit to allow an application made two years and two months after the child’s birth. He reasoned that the court needed to assume that Parliament intended a ‘sensible’ result;³⁶ that statutory interpretation was informed by the purpose of s 54, which was to have a ‘transformative effect’ on the child’s reality in the context of the paramountcy of the child’s life-long ‘best interests’;³⁷ and that it could not sensibly be thought that Parliament intended the difference

between six months and six months and one day to be determinative, with one day's delay as fatal;³⁸ and that this result was not 'precluded by the linguistic structure' of s 54.³⁹

Whilst the granting of the order is certainly in both the child's 'best interests' and the commissioning couple's interests, it is not clear how, despite Sir James Munby P's assertion to the contrary, this outcome can be seen as other than doing violence to the language of the governing statute. Might it exemplify Dworkin's theory of 'constructive interpretation'?⁴⁰ Beyond legal philosophy, how should philosophical analysis interact with the norms of statutory interpretation?

Philosophers may be more inclined to state their arguments in more general terms, using examples that are not intended to be treated as cases, but mere exemplars. Yet lawyers are often concerned with resolving particularly problematic cases, and can sometimes need to be jurisdictionally specific, but can (unintentionally) also assume the ability to generalize from particular jurisdictions. Leckey directly considers this difficulty in his chapter on the Anglo-Canadian judicial adaptation of the common law to the consequences of cohabitation. His argument seeks to inhabit an 'intermediate zone' between the philosophical unpacking of overarching values and the legalistic focus on the detail of jurisdiction-specific case law developments.⁴¹ For some matters, however, the jurisdictional context fundamentally constrains the possibilities for theoretical argumentation in a way that forestalls any such mediating role. In his chapter on family-based immigration, for example, Lister pragmatically appeals to 'common conceptions' of the 'family' in the particular states in question.

But legal specificity can also be contextualized within broader theoretical arguments. The notion of 'parental control rights' with which Altman's chapter is concerned, for example, arguably owes much to the constitutional status of the parental rights doctrine in the United States. The very different perspective on the extent of parents' entitlement to control children's lives presented in Dwyer's chapter is grounded in an American understanding of the state's *parens patriae* powers, which is not constrained to judicial exercise as in England and Wales. While sensitive to that context, however, both chapters offer critical insight into the nature and viability of broader arguments over the justification of parents' rights. Similarly, there is a necessary specificity to 'private ordering' in its various forms, which Bix discusses in his chapter. It is critically important, for example, whether parties are simply *opting between* the state's default and alternative regimes as in some jurisdictions' approaches to matrimonial property, or entitled to *opt out of* the state's default. But, as Bix contends, 'the argument for private ordering is a general one', often grounded in the notion that competent parties are best placed to protect their own interests.⁴²

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F. The limits to arguments

Variations in purpose, use of cases, and generalizability also tell in the fact that philosophers and lawyers writing in this field tend to draw limits to their arguments differently. At least some legal scholars limit the reach of their arguments by pragmatic or policy concerns. Often, this is implicit: the logic of the theoretical arguments used to ground the case for reform is not explored, but the arguments are used to underpin the case for incremental reform. One example might be found in how the autonomy-based case for extending different-sex marriage to same-sex couples⁴³ or, indeed, extending same-sex civil partnership to different-sex couples,⁴⁴ is often put. Sometimes legal scholars' pragmatic or policy limits on their arguments are explicit, such as Lister's focus on 'typical cases, not unusual ones'⁴⁵ in his examination of family-based immigration in this book (though Lister is also a philosopher).

By contrast, in Brake's chapter on extending state support and protection to all adult caring relationships, she explicitly accepts that the inclusion of paid caring relationships may be seen to entail a *reductio ad absurdum* of her argument for 'minimal marriage',⁴⁶ a radical reform of marriage law entailed (she argues) by principles of neutrality and equal treatment; Brake embraces this logical conclusion to her argument.

Similarly, in Jeske's chapter on moral and legal obligations to support 'family', she focuses on the functional features of interpersonal relationships to determine both whether a relationship qualifies as 'intimate' and what those intimates owe to one another, and not on a set of desired outcomes. Chambers has recently argued that, rather than an argument from liberty or equality underpinning the extension of marriage to same-sex couples, these liberal values undermine any notion of state-recognized marriage and necessitate the shift to a 'marriage-free state'.⁴⁷

p. 11 These philosophical arguments echo the Law Commission of Canada's 2001 proposals to move 'beyond conjugality'⁴⁸ and adopt a 'more principled and comprehensive approach to encompass the full range of ... close personal adult relationships',⁴⁹ which would not simply extend relationship statuses but adopt a new methodology for legally responding to personal relationships. Whilst the Commission's proposals remain exceptionally innovative and continue to be embraced by scholars,⁵⁰ they did not find favour with the legislature. Transformation to family life can be rapid, especially when ↵ hastened by technological developments, but reform to the governing legal framework is commonly alluvial, casuistic, and piecemeal.

This is, of course, all a matter of emphasis. In her chapter on the justifications for the legal relationships created by surrogacy arrangements, Shanley sees theories of care and relational rights as at the core of the legal and social relationships created between the commissioning couple, surrogates, and the resultant child. Her conclusion on legal-parental status following birth, however, implicitly recognizes the practical limits of surrogacy's socially enlarged understanding of what it means to be a parent. Whilst surrogacy contracts 'create intrinsic and on-going relationships',⁵¹ the 'very small' number of disputes over surrogacy outcomes tells against denying the gestational mother legal parental status immediately following birth.⁵²

What can we learn from this interdisciplinary analysis about the justifiable role of policy concerns in limiting the scope of legal rules and principles? Is it simply a matter of perspective? Or is the best understanding of the relationship between theory and policy limits necessarily contextualized to the issue at stake within children's or family law? Might this suggest the need for more careful consideration of the nature of the policy arguments in play?

III. Themes

The chapters in this book are organized by four themes: definitions; relationships; rights and obligations; and regulation and intervention. These themes reflect the core debate with which each chapter engages, rather than the substantive legal context in which the discussion takes place. Through this arrangement, we hope to draw together the contrasting and converging arguments and solutions typically seen as concerned exclusively with either adult relationships or regulating children. But we do not arbitrarily limit discussion of each contributor's arguments to one theme where their points clearly have resonance elsewhere.

A. Definitions

We focus here on the two critical, interwoven issues of the nature of the 'family' and 'family law'. Exploring the 'family law' concept also invites consideration of the place of 'private ordering', which lies at the heart of both determining the limits of 'family law' and the question whether there should be legal intervention in family life at all. Thus 'private ordering' will be discussed in relation to our final theme, which focuses on regulation and intervention, but remains critically relevant here.

1. The concept of ‘family’

p. 12 How necessary is it for philosophers or lawyers to define ‘family’? Can we sensibly talk of ‘family law’ without a clear understanding of the ‘family’ concept? How should we understand the nature of the ‘family’? Should talk of ‘family’ be replaced by discussion of ‘families’? Whilst the notion of ‘families’ may be initially attractive as it explicitly signals the diversity of family forms, it is arguably unnecessary. The ‘family’ concept does not of itself require that only one arrangement be accepted as familial. It does not require us to ask *who* is correctly seen as belonging to *the* family. We can justifiably ask *what* are the characteristics of *a* family, which can be shared by multiple family forms. Indeed, rather than such characteristics comprising the minimum content of a ‘family’, it may be that multiple, equally valid familial forms possess different combinations of those characteristics.

Philosophers see some concepts, such as ‘justice’ and ‘fairness’, as ‘essentially contested’: their general meaning is agreed, but there is disagreement over what they require in any particular instance.⁵³ But in relation to law, it is the particular applications that are critical. Consider, for example, the concept of ‘fairness’ in the family law context. The debate is not about the *application* of a general notion of ‘fairness’, but what ‘fairness’ actually *means*: whilst that debate aims to determine the content of ‘fairness’ as the basis for justifiable distribution of assets and income upon divorce and dissolution, there is no agreed broader concept to be instantiated.

Writing from a philosophical perspective, Archard reasons that ‘family’ is not such a contested concept.⁵⁴ Whilst its meaning is not generally agreed, it is settled that it is ‘a distinctively different institution’.⁵⁵ This may explain why Okin, in her landmark work in feminist political philosophy, does not focus directly on the definition of ‘family’ but on its role as the ‘linchpin of the gender structure’.⁵⁶ In her analysis of the gender injustices within the family, Okin highlights the centrality of the family to children’s and women’s vulnerability in society.⁵⁷ The lack of examination of the ‘family’ may also simply be due to the liberal tradition—which, Okin contends, for the most part ignored the family while treating it as the protected private sphere, relegating injustices within it outside the scope of political justice. As Eichner notes in respect of Rawls,

In paying little attention to the issue of families, Rawls’s work is hardly atypical; except when families were used as a foil to develop contrasting principles that should apply to the political realm (which was deemed not to include the family), there has been little attention to families in this tradition.⁵⁸

Diduck proposes that

‘family’ is one way to describe forms or expressions of intimate or private living based upon care and interdependence. ... What makes a relationship familial ... is not necessarily a biological, legal, or conjugal connection, rather it is what people do in it ⁵⁹

p. 13 But Diduck’s positioning of legal connections as equivalent to, rather than a potential means of recognition of those non-legal connections, may be problematic. The very persistence of the ‘family law’ field requires that ‘family’ be defined, coherently or otherwise, at least at its core. Lawyers must proceed on the basis that ‘family’ is an essentially contested concept, the meaning of which is generally agreed, even when discussion suggests that it is not. The need to resolve individual disputes, and regulate society more generally, requires a working legal definition or context-specific definitions. This contrast both opens the opportunity for and immediately complicates cross-fertilization between philosophical and legal writings on the nature of ‘family’.

In his chapter, Archard explores three types of definition of ‘family’: functional; formal, drawing on shared social meanings; and definition based on overlapping similarities or ‘family resemblances’.⁶⁰ Preferring a functional account, Archard suggests that it has one distinct advantage—it ‘allows for a separation of the conceptual and the normative’.⁶¹ But is that sufficient to merit its adoption? There may be further difficulty created by the fact that, once we recognize any non-normative concept of ‘family’ as a legal concept, it thereby becomes normative. Whilst it may be possible to define ‘family’ in non-normative terms, how useful is that for the law’s purposes?

Further, even if we accept a functional perspective, we still need to draw limits to the functional ‘family’. That exercise arguably requires a conceptual account to ground limits to the functional. In his case for family-based immigration, Lister reasons that there seems to be a ‘common core’⁶² shared across multiple jurisdictions’ conceptions of ‘family’ ‘... without which the notion of a family hardly makes sense’.⁶³ This suggests a pre-legal social or natural understanding of ‘family’, which corresponds to the second type of definition suggested by Archard. But justification is required for this to be replicated as a legal norm, and a conceptual account is required to draw limits beyond any ‘common core’. Indeed, the posited inclusion of same-sex relationships as within the ‘family’⁶⁴ suggests such an account may already implicitly underpin this approach.

The nature of the ‘family’ has always been more complex than the form-function binary, yet how the two should interrelate remains an open question. This issue was recently before the European Court of Human Rights in *Paradiso and Campanelli v Italy*.⁶⁵ An Italian couple had registered themselves as the legal parents of a child born via surrogacy in Russia, despite the fact that surrogacy was illegal in Italy. Further, neither of the commissioning couple were genetically related to the child. By a majority of eleven to six, the Grand Chamber held that no ‘family life’ within the terms of Article 8 of the European Convention on Human Rights⁶⁶ had been established between the commissioning couple and the child. The majority summarized their view as follows:

Having regard to ... the absence of any biological tie between the child and the intentional parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bounds, the Court considers that the conditions enabling it to conclude that there existed a *de facto* family life have not been met.⁶⁷

p. 14 Intention, emotional bonds, and short-term physical care were insufficient to form a functional ‘family’ for the purpose of establishing ‘family life’. Whilst the outer limits of ‘family’ are assessed in practical terms, they are implicitly informed by an unarticulated concept of ‘family’. The theoretical debate over the nature of the ‘family’ becomes unavoidable and critically in need of resolution.

In any event, in the legal context, the disputed term is often not ‘family’ but one commonly understood to be familial, such as ‘parent’, ‘mother’, or ‘father’. This creates a further layer of difficulty for the theorist since the multifarious ways in which an individual might acquire any one of those legal statuses risk undermining any potential for coherence within the larger ‘family’ concept. We should not be too quick to assume that the gestational route to the legal ‘mother’ status is valued for the same reasons as the genetic route to legal ‘father’ status. Rather than devaluing the enquiry into the nature of ‘family’, however, might this multiplicity suggest an alternative path to explore?

2. Defining 'Family Law'

Family Law is a comparatively new field, hence in his foreword to Graveson and Crane's edited collection, *A Century of Family Law: 1857–1957*, Lord Evershed MR reasons that '“Family Law” is not a term of art ...' but '... rather a convenient means of reference to so much of our law ... as directly affects ... the family'.⁶⁸ What is at stake when we question the nature of 'family law'? How necessary is it that the aim or aims of 'family law' correspond to that or those of familial forms, whether external or intrinsic?

Why might it matter whether 'family law' is distinctive from other areas of law and, if so, how we should understand its uniqueness? One answer lies in the roles played by 'family law': it can serve as crucial state endorsement to individuals' relationships through permitting individuals to enter into a formal legal 'status' such as marriage or parenthood; it can serve as a mechanism for the enforcement of rights and obligations between and against 'family' members, as well as signalling the justifiability of such enforcement; and it can serve as a mechanism for privileging 'familial' above 'non-familial' relationships (whether in terms of enforcing rights and obligations within the family, protecting 'familial' relationships against state interference, or justifying access to limited state resources), as well as suggesting the justifiability of such privileging. On this view, 'family law' and the 'family' are inter-defined. Diduck, for example, reasons that 'if family is the environment that we live in and what we do as a parent, child, or former or current partner, family law ... is any form or means of regulating, supporting, or governing that environment, those actions, and their consequences'.⁶⁹ But does this mean that any uniqueness to 'family law' is contingent upon our understanding of the 'family'?

p. 15 Archard explores an alternative possible relationship between 'family law' and 'family' in his complication of the truism that 'Family law is the law of the family'.⁷⁰ on the basis that the former is normative and the latter conceptual.⁷¹ As a result, the conceptual ↪ 'family' can be used to evaluate the success of normative 'family law'.⁷² Drawing a parallel conclusion that the 'nitty gritty' empirical details of actual families can be used to evaluate normative 'family law', Leckey's comparative study of the regulation of the financial consequences of the breakdown of cohabiting relationships suggests that the boundaries of 'family law' need to be drawn to reflect how the majority arrange their lives.⁷³

But, as discussed above, the legal concept of 'family' may itself be considered normative. This means that whether a relationship qualifies as 'familial' in law, hence within the scope of 'family law', can have significant consequences for both affected individuals and the broader social interest. This also gives rise to philosophical argument suggesting that the legal definition of 'family' should be guided by broader normative considerations such as justice and equal treatment, as Brake explores in her discussion of paid caregivers.⁷⁴ By contrast, den Otter's consideration of polyamorous relationships demonstrates the political significance of the formal legal status itself as he argues for 'marriage' to be extended to relationships that lack one of the traditional hallmarks—the requirement that there are only two parties to the relationship.⁷⁵ Might the range of differing perspectives suggest that 'family law' is ambivalent and, possibly, empty of content?

Eekelaar's account seeks to counter such concerns by setting out the contextualized interactions between legal and social norms within 'family law'.⁷⁶ He argues that, in performing its various roles, 'family law' interacts with social norms; it both reflects others as well as seeks to create its own.⁷⁷ But, beyond focusing on the detail of the content of 'family law', Eekelaar suggests that 'the most important issue' is to ask 'what is the point of having family law at all?'.⁷⁸ Diduck suggests that

[F]amily law is about determining responsibility for responsibility. Family law determines the responsibilities of individuals to each other and by extension, the responsibilities of families and the state and the community to each other. Whether it is about money, care of children,

employment, income support, or housing, the purpose of family law is to allocate and enforce responsibility for those responsibilities'.⁷⁹

Eekelaar concludes that the purpose of 'family law' lies in regulation of the exercise of power so as 'to uphold the view of the "common good" taken by those in power',⁸⁰ as limited by Finnis' qualification of 'respect for the equal right of all to respectful consideration'.⁸¹ His account of the content of 'family law' is borne out of a need to respond to the expanding range of family forms, which 'scientific advances ... still further stretched'.⁸²

p. 16 An alternative response to the difficulty in defining the contours of the 'family law' field might be to conclude that the reference to 'family' should be rejected and the domain otherwise conceived. Elsewhere, Eekelaar proposes adopting the model of 'personal law' to 'refer to laws, whether applicable on the basis of an individual's communal allegiance or not, which purport directly to regulate their private life'.⁸³ Whilst this response captures the increasingly illusive nature of the field, it may risk creating similar difficulties for defining the scope of the domain in practice. What if we abandon the search for the substantive domain of family life? Might the breadth of accounts instead be seen to reveal the flexibility of 'family law' as a discursive, interpretive, and persuasive tool? In other words, might 'family law' be distinctive for the attitude it requires to be taken to regulating individuals' lives, both in terms of the norms at stake and the way in which those norms interrelate?

But, alongside academic suggestions of the distinctiveness of 'family law', the judicial attitude is more inconsistent. In *Prest v Petrodel*,⁸⁴ the UK's Supreme Court had to decide the court's jurisdiction in proceedings concerning financial remedies upon divorce to be able to order properties owned by companies to be transferred to an applicant spouse to satisfy their claim. The companies in question were owned by a group, which was wholly owned and controlled by the husband. Whilst the panel of seven adopted a resulting trusts analysis to justify making the property available to meet the wife's claim, they roundly rejected any suggestion that the 'family law' context provided any special justification for 'piercing the corporate veil'. Lord Sumption reasoned:

If there is no justification as a matter of general legal principle for piercing the corporate veil, I find it impossible to say that a special and wider principle applies in matrimonial proceedings by virtue of section 24(1)(a) of the Matrimonial Causes Act 1973. ... This section is invoking concepts with an established legal meaning and recognised legal incidents under the general law. Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different.⁸⁵

By contrast, the approach to statutory interpretation evidenced in cases such as the surrogacy decision of *Re X*, discussed above,⁸⁶ may be said to suggest a distinctive 'family law' approach. But how should we decide whether 'family law'—the substantive domain, the norms, or the interrelation of those norms—is a unique legal field; whether it is in some sense 'special'? This requires agreement about the governing evaluative criteria.

p. 17 Without consensus on the question of distinctiveness, including its nature, we do not know the full terms of what is at stake when considering whether to extend the benefits of marriage to cohabitants on functional grounds;⁸⁷ or whether an intimacy-based argument for financial provision that cuts across formal legal categories of relationship⁸⁸ can be sustained within 'family law' or must be understood to cut across the boundaries of 'family law'; or whether we can simply transpose concepts from other areas of law, such as the fiduciary relationship,⁸⁹ into 'family law'. Moreover, settling the issue of distinctiveness has significant consequences for both the nature of the relationship between 'family law' and 'children's law', as well as the possible scope and theoretical basis of 'private ordering' within 'family law'. As a result, it is perhaps surprising that this debate remains unsettled. Has the unavoidable need to interpret and apply

‘family law’ to resolve individuals’ problems led to lawyers being too ready to proceed on the basis that disputed concepts such as the ‘family’ are valid and with settled content, despite the evidence to the contrary?

B. Relationships

Within this theme, we focus on the legal and moral significance of adult intimate relationships, both those to which a formal legal status has been assigned, such as ‘marriage’, and those to which it has not, such as cohabitation. We also consider the nature of the adult-child relationship, particularly in terms of the award of parental legal status and legal recognition of more functional parenting through concepts such as ‘parental responsibility’.⁹⁰ These horizontal and vertical interpersonal ties are united by the importance of status and functional perspectives on relationships more generally. As rights and obligations can flow from relationships or their content, this theme necessarily overlaps with the third.

1. Status

What moral or legal significance, if any, should we attach to the form of individuals’ relationships? Should there be legal status relationships, where legal consequences attach to their form as opposed to their function? If so, should identical legal consequences attach to all adult intimate status relationships? Answering these questions, of course, depends on the normative considerations taken to guide ‘family law’, as well as the pragmatics of legal procedure and desired outcomes.

Currently, ‘family’ is recognized as a legal status relationship in only some contexts (such as immigration); in other contexts (such as certain instances of tort liability),⁹¹ status is attributed to more particular relationships (such as ‘marriage’ or ‘parent’) which are familial in character.⁹² Within the conventional confines of ‘family law’, the use of statuses more particular than ‘family’ generally prevails though one could argue, of course, that all instances of recognizing the ‘family’ as a legal status should be seen to thereby constitute ‘family law’.⁹³

p. 18 Varying perspectives on three related issues reveal how arguments engage with status. First, in terms of already-established statuses, arguments involving status either assume their validity or question the justifiability of their persistence as legal statuses from which consequences automatically flow. This dialectical shift dramatically changes the nature of arguments made available. Chapters within our collection illustrate this divergence in approach. Lister’s case for family-based immigration assumes the justifiability of the ‘family’ status based on the ‘common understanding’⁹⁴ between jurisdictions of its existence and contents. Lister starts from a position that assumes the justifiability of what the law currently is—how ‘family’ is defined for immigration purposes—but then posits the extension from different-sex to same-sex relationships within that definition.⁹⁵ By contrast, Jeske starts by ‘dislodge[ing] “family” as a term of fundamental moral significance’ for the purpose of determining the moral obligations that intimates owe to each other,⁹⁶ particularly as expressed through spousal support or maintenance—her arguments then generating a basis for moral critique of existing law.

Secondly, in terms of the consequences of legal status relationships, approaches vary from a strict binary view that distinguishes status from non-status relationships on the basis of formalities and sees only the former as justifying relationship-specific legal consequences; to a range of moderate views, which blend the formal and the functional, and see non-status relationships as potentially grounding legal consequences, albeit not as significant as those that attach to status relationships; to a fully functional view, which does not distinguish between the legal consequences that can be attached to status and non-status relationships. This final perspective renders the consequences of formalities nothing more than the creation of a ‘bare’ status.

In his analysis of judicial developments to respond to the financial consequences of the breakdown of cohabitants' relationships, Leckey questions the underlying basis of the financial obligations that flow from the breakdown of the 'marriage' status relationship. He reasons that at least some of the 'robust public interests' that underpin the response to 'marriage' also apply to cohabitants,⁹⁷ and suggests that 'family law's' default regime should extend to cohabitation so as to respond to the reality of individuals' lives.⁹⁸ This perspective undermines the validity of the existing status, assuming that it is a proxy for relationships with particular functional features such that regulation should focus on the functional content alone. But might positing marriage and cohabitation as meriting a 'family law' response nevertheless be seen as embracing a status perspective? Insofar as the notion of the 'family law' default regime might be seen to embody a cluster of rights and obligations such as conventionally attach to a status, the 'family law' default appears to evoke status.

Thirdly, in terms of responding to relationships not recognized within formal legal status categories, approaches vary from calling for the *expansion* of a particular status; to creating an *additional* status with identical legal consequences; to *substituting* the current status with another, which may also be expanded to accommodate specific non-status relationships; to seeing the logic of the need to respond to the non-status relationship as requiring the abandonment of any distinction between, and the *convergence* of the treatment of (particular) status and non-status relationships.

Expansion arguments can entail either assuming the justifiability of the current status's normativity and arguing that the new relationship form shares that recognized normative basis, or arguing for extension on the grounds of a different normative basis. The most obvious example of the latter is arguably that of an equality-based discrimination argument for extension regardless of the normative basis for the core status relationship, such as might be made in the context of same-sex couples access to marriage.⁹⁹ In his case for better legal treatment of polyamory, Den Otter challenges the unquestioned privileging of different and same-sex marriage on the grounds of 'mononormativity'.¹⁰⁰ He seems to suggest the justifiability of both the substitution of a more inclusive status of 'plural marriage',¹⁰¹ and the creation of an additional status 'legal[ly] equivalent' to a two-person marriage.¹⁰²

In relation to convergence-led arguments, functional convergence can sometimes collapse into assumed normative convergence. Herring, for example, draws on the socially constructed nature of the man–woman sex dyad to make the case for sexless family law;¹⁰³ in doing so, however, the argument shifts between focus on sex and gender, the latter of which is much more conventionally seen as a social construct. Even if sex is understood as socially constructed, it is not clear that the way that it interacts with aspects of biology should be assumed to have the same normative significance as gender.¹⁰⁴

The option of creating an additional status relationship highlights how the issue of status is more complicated than categorization as 'status' or 'non-status'. In English law, for example, there is more than one status relationship within both the adult intimate ('marriage', 'civil partnership') and the parenthood categories ('mother',¹⁰⁵ 'father',¹⁰⁶ 'other parent',¹⁰⁷). Whilst 'marriage' and 'civil partnership' were posited as separate-but-equal, the distinctive labels and persistent substantive differences undermined that impression.¹⁰⁸ The relative status of the 'other parent' compared to the 'mother' and the 'father' remains unclear. Labels have meaning; different labels are assumed to have distinctive meanings. Hierarchies of status relationships—in terms of their legal or moral significance—may be intended or unintended. The need to justify any hierarchy requires specific normative argumentation, which is often overlooked or minimized. These difficulties militate against adopting additional status categories in favour of expanding existing categories, yet the former remains a desirable political solution.

Only with attention to the choices entailed by engaging with status can we understand how any one account views the role of status. Each lawyer or philosopher's normative response to existing statuses; preferred accommodation of non-status relationships; and conclusion regarding the consequences of status and non-

status relationships rests on a particular view as to the significance of status. In the context of both adult intimate and adult-child relationships, status tends to be valued for the role it plays in structuring social life, which focuses state resources on certain types of relationships. In respect of marriage, for example, the former Secretary of State for Children, Schools and Families, Ed Balls, reasoned that:

Marriage is an important and well-established institution that plays a fundamental role in family life in our society. However, marriage is a personal and private decision for responsible adults, with which politicians should not interfere. The Government supports couples who choose to get married: for many families marriage offers the best environment in which to raise children, and remains the choice of the majority of people in Britain.¹⁰⁹

The concept of status relationships does not of itself offer certainty since status could be acquired, for example, through decisions grounded in assessment of the functional content of relationships. The particular conceptions of status employed in practice, however, are either triggered by the satisfaction of formalities or in recognition of a single fact (such as proof of genetic parental connection to a child), hence do achieve valued certainty. But these public policy concerns only explain, and do not justify the existence and persistence of status relationships.

Yet, how individuals value status may be reason-giving. In relation to marriage, for example, Den Otter argues that reforming legal marriage to recognize plural marriage would 'be a step toward removing its social stigma'.¹¹⁰ The expressive aspect of status may be important to how valued and accepted individuals feel in their life choices. Whether this could be accomplished via bare legal status is open to debate, given that the aspiration to marry currently remains strong¹¹¹ despite declining marriage rates.¹¹² Could status suggest a 'different moral significance' to the relationship if the status concept were empty? The significance of status to individuals' meaning-making supports ascribing substantive legal consequences to status relationships.

p. 21 But what of the role that status plays as a proxy for function? Can we justifiably ignore any state interest in prioritizing relationships with particular functional content, via sufficiently accurate status proxies, and rest the normative case for status exclusively on individual flourishing? Even if we sought to move to a fully functional approach, could we do so? Taking the adult intimate and adult-child contexts together may offer some insight. In particular, the English legal concept of 'parental responsibility'¹¹³ repays attention.

Within parenthood, 'parental responsibility' contrasts with legal parental status, and is defined through its content. Section 3(1) of the Children Act 1989 states that it means '[a]ll the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.¹¹⁴ The breadth and parasitic nature of this definition immediately hints that this might not be the useful starting-point most definitions form.¹¹⁵ The reference to rights, as well as the bundling and collective label for functional content, is immediately suggestive of status. Moreover, at least in part because there is much functional overlap with legal parental status and the vast majority of those with 'parental responsibility' will also have legal parental status, it is not clear that the mainstay of those with and aspiring to be awarded parental responsibility view it in functional terms. Indeed, much of the difficulty in retaining the functional intention of the concept may be due to the difficulty in sustaining that normative value based on the limited numbers of individuals who hold 'parental responsibility' alone.

As a result of this comparison with the adult-child context, one might wonder if we can make the case for the functional basis of adult intimate relationships such as 'marriage' only because of the broader status-bounded context. If attempts at a purely functional approach inevitably create status, the separability of function is contingent on the persistence of status. This complex relationship within particular legal relationships carries through into the umbrella definition of 'family'. How does the issue of status relate to the issue of the distinctiveness of 'family law'? Does the existence of status relationships of itself suggest

p. 22 'family law' is distinctive? Or does any distinctiveness more readily or more significantly lie in the consequences of status via discretionary decision-making underpinned by the interrelation of particular norms? If it is the response to relationships that may be a hallmark of 'family law's' distinctiveness, this could equally incorporate the normative recognition of the functional content of relationships. Whilst no debates are resolved through taking these issues together, it does ↪ highlight the deeply theoretical nature of the significance of the empirical content of relationships.

2. Intimacy and the functional family

The preceding discussion highlights that the functional content of family life is relevant, albeit in uncertain terms, to defining the notions of 'family' and 'family law' and their normative moral and legal significance. Beyond definitions and the award of legal status relationships, how sensitive should the legal regulation of individuals' lives be to either specific functional aspects or any core functional character of their intimate relationships? Does the moral view of the significance of function, as opposed to form, assist the legal debate? How should 'family law' respond to changing functional families?

How can we best encapsulate what is normatively significant about functional families? Here, insight from philosophy may be particularly valuable. When thinking about the place of individuals within families, discussion has focused on redefining the individual's relationships with others through notions such as 'relational',¹¹⁶ or contextualized¹¹⁷ autonomy and (welfare) interests. When conceiving of the relationships themselves as normative, discussion has centred on the broader notions of 'care',¹¹⁸ 'vulnerability',¹¹⁹ and 'intimacy'.¹²⁰

p. 23 How can we decide on which of these (or other) concepts, to focus? Which represents the most relevant functional aspects of relationships for legal focus? Dwyer highlights the 'moral hazard' of typical contextualized and relational approaches if parents know that, all else being equal, it is in the child's 'best interests' that their parents are both happy in themselves and in their parenting role.¹²¹ Care can comprise the response to vulnerability, but also create new vulnerabilities.¹²² Is there one right end to the conceptual and normative telescope for 'family law'? In her argument for the legal protection of the relationship between paid caregivers and care recipients, Brake focuses on caring. She argues that 'the state should support caring relationships, in which partners are non-fungible and the relationship is itself the primary purpose of the association',¹²³ limited only by the requirement that the parties should want the state to support their ↪ relationship of caring.¹²⁴ Jeske reasons that the moral and legal obligations that underpin spousal support are grounded in intimacy, which she defines as characterizing a relationship in which both parties:

- (a) have mutual positive attitudes toward one another that can be described as liking, loving, etc.,
- (b) have a concern for each other that exceeds that which they have for any person merely in virtue of being a person, and their history with each other exhibits that concern, (c) have desires to spend time with each other and have already causally interacted with each other in some relevant manner, and (d) have or are in the process of acquiring knowledge about each other that goes beyond what a stranger or mere acquaintance would have.¹²⁵

Whereas Jeske focuses on the intimate nature of the relationship, Brake's caring argument arguably centres on an aspect of intimate relationships. How many more relationships would be caught by Jeske's argument? Could the criteria for intimacy be satisfied without caring being a feature of the relationship? Could parties who wish their relationship to be seen as a caring one not also be intimate? Whichever frame we use to revalue our connections, it creates difficulties for the ongoing normative significance of the 'family' label. For the organizing notion of 'family' to continue to accurately capture the types of relationship with which the law should be concerned, must it be reformulated to embrace the wider class? Or can it find a new role as

part of a larger structure of valued relationships? Writing in sociology, Smart concludes in favour of the latter approach:

[I]t is now time to ... develop a broader conceptualization, one that can keep the term 'family' in the lexicon, but which puts it alongside other forms of intimacy and relationships without already prioritizing biological or married forms of relationship and/or intimacy.¹²⁶

Does the approach we adopt affect our ability to accommodate new relationship forms as deserving of legal recognition? Should all 'intimate' or 'caring' relationships necessitate the same legal response? In particular, should only some benefit from the recognition and protection of 'family law'? For example, should this protection be restricted to only those caring relationships in which caregiving creates vulnerability (particularly, economic dependence) for the caregiver?¹²⁷ If 'intimacy' or 'caring' are taken as the focus of family law, is this because care and intimacy are values which the law should protect and promote—or because care and intimacy create vulnerabilities against which the law should protect?

p. 24 In his discussion of the nature and scope of 'family law', Archard contends that 'if the value of "intimate relations" lies in something other than serving the proper end of "the family" then any justification of their legal recognition lies beyond that which fixes the proper scope of family law'.¹²⁸ Of course, if we move away from bringing together qualifying relationships under the head of 'family', it becomes more difficult to treat all such relationships as justifiably within the scope of 'family law'. Hence, rather than presenting a way forward, reframing in terms of 'intimacy' or 'care' arguably simply shifts the critical definitional question for 'family law' as outwith the 'family' and within the framing concept of choice, whether 'intimacy', 'care', or something else.

The case for polyamorous or plural marriage, which both Den Otter and Brake discuss in their chapters, highlights what is at stake in determining the limits of recognition. Eekelaar notes that '[t]he fact that areas of people's personal lives are legally unregulated does not mean that they are "norm-free"'. In many respects, it will make little difference whether the norms are legal or social'.¹²⁹ But there are certain aspects of the recognition and enforcement of norms that need to be legal to be effective, both in terms of their expressive and coercive aspects. In the absence of shared, comprehensive definitions, the persuasiveness of the need to look to functional aspects of relationships such as 'intimacy' and 'caring' creates a further difficulty. How should the law respond, if at all, when our understanding of the functional core changes? In respect of surrogacy, for example, Shanley argues that

surrogacy stretches our understanding of what constitutes a 'family'. Debates and discussions about surrogacy, therefore, are important not only for refining medical practice, legal regulations, and cultural understandings of contract pregnancy and the families created by surrogacy contracts, but also for prompting us to consider the grounding of parent-child relationships in general.¹³⁰

As we develop a more nuanced understanding of the nature of surrogacy, particularly in terms of how we conceptualize the relationships it creates, this can have significant consequences for legal regulation, including beyond the surrogacy context.

But matters may be more complex. In his discussion of judicial attempts to adequately respond to the financial consequences of cohabitation, Leckey highlights that desirable default rules may differ from what would be indicated by the fact-based content of parties' relationships.¹³¹ More broadly, Jeske explains how normative argumentation is vulnerable to functional transformations in social life:

The normative occupies an unusual space, sharing as it does features with the mathematical realm, and yet so much more at the mercy of the empirical insofar as it relates to human beings with all of

their empirical and contingent flaws, hopes, loves, commitments, and needs.¹³²

If any broader conceptualization of relationships we value operates outwith the notion of 'family', a transformation in our understanding of the functional value of relationships may require complete reformulation of the system of regulation. If we were able to accommodate values such as 'intimacy' or 'caring' within the 'family' definition, however, this would seem to enable such developments to be more straightforwardly reflected in the legal framework. Of course, this second alternative is available only if we conclude that 'family' can accommodate the wider range of valued relationships – such as friendship and plural marriage from the outset. Serious engagement with the nature of relationships seems to raise many more questions for 'family' and 'family law' than it can answer.

C. Rights and obligations

Within this theme, we bring together discussion of the rights held by and obligations owed to individuals within intimate relationships, both as between adults and as centred around any children. At a conceptual level, rights and obligations are often understood correlatively; X's right against Y to financial orders (particularly spousal support, maintenance, or alimony) corresponds to Y's obligation to pay.¹³³ But any such correlativity does not extend across contexts: separating couples with children often mistakenly conflate the financial obligations that arise between each other with any right to spend time with and make decisions about their shared children's upbringing. Relationship recognition is one factor that underpins discussion in both areas, so examination of this theme highlights some of the consequences of the debates explored in the second theme, over familial status. As public justifications are important to both the financial obligations owed between adults in intimate relationships and the restrictions that may be imposed on decision-making by and about children, there is also some overlap with the final theme: regulation and intervention.

1. Justifying obligations

What is the nature of any financial obligation owed to one's former spouse once the relationship has broken down? Should there be identical obligations for same-sex couples who have entered into a civil partnership or marriage, where available? What if the parties did not marry but were only cohabitants? Should the same rationale underpin property division and maintenance or spousal support?

With the advent of no-fault divorce to terminate the legal consequences of marriage, any preceding justification for enduring financial consequences fell away. Writing in the US context, Ellman reasoned that 'alimony [is] a remedy to a problem that ha[s] not been clearly identified. We cannot explain how alimony claims should be measured or why former spouses should even be liable to pay them, until we specify why we allow them at all'.¹³⁴ The inconsistent description of financial provision regimes as 'redistributive'¹³⁵ and 'distributive'¹³⁶ highlights the lack of attention to the finances problem. Only a 'distributive' regime denotes entitlement on the part of the applicant; a 'redistributive' regime positions the applicant as supplicant.

The absence of consensus over theoretical basis has contributed to the failure to introduce greater certainty by law reform. The American Law Institute's *Principles of the Law of Family Dissolution*,¹³⁷ which sought to develop reform out of existing practice, have only had an 'anemic impact'¹³⁸ in practice. English law reform has avoided the larger issue of the normative basis for imposing any financial obligation and has instead focused on whether nuptial agreements should be made legally binding and, since the majority of separating couples have limited means only, how best to understand 'needs'.¹³⁹ The latter has been implemented via non-statutory guidelines,¹⁴⁰ which follow the Canadian advisory guidelines on spousal support in seeking to encapsulate best practice, rather than explicitly reform the law.¹⁴¹ In comparison to

the ALI Principles, the Canadian guidelines have been ‘very successful’ and ‘widely used’.¹⁴² It is notable that the Canadian approach is explicitly ‘not directed at a theoretical reordering’ of the law.¹⁴³ Thus, in neither the US, England and Wales, nor Canada have reform proposals brought theoretical clarity to financial orders. This is further complicated by the fact that it remains unsettled whether the same normative basis needs to underpin all forms of financial orders, such as division of property and maintenance, or whether the normative basis can be ‘pillarised’.¹⁴⁴

Jeske’s chapter brings philosophical insight to this legal quandary, noting the distinction between ‘special obligations of intimacy’ and obligations in relation to which the intimate relationship has played only an instrumental role in both providing a ‘fertile arena’ for the generation of obligations and providing to the parties a ‘privileged position for promoting value’.¹⁴⁵ Jeske distinguishes between the justifying nature of moral obligation and the non-justificatory existence of legal obligation. Yet the availability of financial orders assumes justification.

Whilst Jeske explores the possibility of a single normative basis for spousal support, academic lawyers tend to ground the obligation in a plurality of bases. It is noteworthy that those multiple bases include both interpersonal¹⁴⁶ and social or public justifications.¹⁴⁷ Jeske critiques three of the leading models of spousal support that form the basis of judicial reasoning—reimbursement/compensation; rehabilitation; and income security.¹⁴⁸ She concludes that, because of the way in which broader social policy is implemented via spousal support, analysis of the prevalent models evidences that ↪ the state ‘is approaching [marriage] as an economic institution, not as an intimate relationship’.¹⁴⁹

Jeske’s conclusion poses a significant challenge for academic lawyers: it suggests that any role for public justification undermines the intimacy-oriented case for recognizing and privileging marriage and that, if marriage is privileged, it can only be as an economic institution. If marriage needs to be understood in those terms at breakdown, however, that implies a disconnect between the reasons for relationship recognition and the response to breakdown. The debate over the normative basis of financial orders upon marriage breakdown thus risks undermining the justifiability of both the extension of the legal regime on financial orders to civil partnership¹⁵⁰ and the extension of marriage to same-sex couples.

What if the parties did not enter into a status relationship but were cohabitants? Leckey’s discussion of judicial responses to the breakdown of cohabitation highlights ‘the significant state interests in the economic regulation of adult intimacy’.¹⁵¹ This expression of the public interest reflects Jeske’s analysis of marriage, hence both supports the adoption of the same default rules on the financial consequences of relationship breakdown and the rejection of the recognition of any of these relationships as deserving prioritization over other relationship forms. But what if we can reconcile the apparently opposed public justification and interpersonal or intimacy-based grounds? Might the public justification for financial orders also underpin the normative basis for recognition, where individuals’ relationship recognition is motivated by intimacy? Given the significant impact of financial distribution on individuals’ lives, including weighty consequences for couples outside of recognized relationship categories, it is difficult to justify the current Anglo-American focus on developing consistent best practice without also seeking to progress the theoretical debate.

2. Framing the legal regulation of children

Does it matter how we frame children’s legal relationships with others? This task is currently fulfilled by various notions: ‘children’s rights’, ‘rights for children’, ‘best interests’, obligations, and duties. What, if anything, might make one approach preferable to others? How relevant is the place of these concepts in moral theory to the roles they play in legal regulation?

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In contrast to the justification for financial orders, there has been significantly more discussion of the normative basis of the legal devices through which we regulate children. In both cases, however, lawyers—academics and practitioners—have tended to overlook theoretical uncertainties and focus on legal practicalities,¹⁵² whilst assuming ↯ normative justification. For example, in discussing whether there is a case for children not having rights, Herring notes the theoretical debate over the applicability of the ‘will theory’ and ‘interest theory’ of rights to children; however, reasoning that the issue is ‘discussed in detail in books on jurisprudence’,¹⁵³ he does not express a preference for one theoretical account. This common perspective means that the surrounding legal discussion of the rights that children (are said to) have assumes theoretical justification where there may be none.

In the legal arena, the lack of shared normative understanding, or even significant ongoing discussion thereof, may contribute to the damage done by inaccurate ‘children’s rights’ argumentation, which Alderson describes:

NGOs are among the foremost child rights advocates. Yet when NGO members present rights as simplistic uniform rules, instead of complex universal principles that are open to local interpretations, such as when NGOs claim that the UNCRC bans child labour (it does not), then they can unfortunately increase opposition to children’s rights and so offer the critics strong, albeit misinformed, anti-rights arguments.¹⁵⁴

Treating ‘children’s rights’ as simple legal rules without understanding their conceptual nature risks undermining the value of ‘children’s rights’. But, as Macleod argues in his contribution to this collection, avoiding that situation may not need to ‘... turn on defending a determinate position about the deep philosophical foundations of moral rights’,¹⁵⁵ so that ‘children’s rights can be vindicated as important even if they are incompletely theorized’.¹⁵⁶ For the purposes of legal practice, however, can this strategy be successful? Or can legal coherence and consistency only be grounded in a comprehensive theoretical account? Macleod’s case for incomplete theorization offers an interesting way forward for lawyers.

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Macleod examines various types of scepticism about ‘children’s rights’ in moral theory and concludes that reluctance to recognize ‘children’s rights’ in that context is unjustified.¹⁵⁷ Two broader aspects of Macleod’s discussion are particularly valuable in contrast to the legal literature. Firstly, in relation to the categories of rights children might have, Macleod outlines Feinberg’s three categories of rights; ‘A-rights’, ‘A-C rights’, and ‘C-rights’. Only the final type is held by children exclusively; Macleod suggests the right to be loved¹⁵⁸ and the right to play¹⁵⁹ as examples of such moral rights. For the lawyer, however, these are not typically the types of rights discussed as ‘children’s rights’. Moreover, the language of ‘children’s rights’ tends to be used quite imprecisely in the legal context: it can refer to ‘A-C rights’, such as the right to life;¹⁶⁰ ‘A-rights’, such as liberty rights to exercise autonomy and make determinative decisions (eg, freedom of religion);¹⁶¹ and ‘C-rights’, though these are less frequently recognized in law, and rights are posited as ‘C-rights’ that are better understood as ‘A-C rights’ such as the ↯ right to education.¹⁶² Both ‘A-C rights’ and ‘A-rights’ can be expressed as fundamental human rights in law. Macleod understands ‘children’s rights’ as the set of rights comprised by both “A-C rights” and “C-rights”’.¹⁶³ Were this to be transplanted directly into the legal context, might it make the use of the language of ‘children’s rights’ more confusing since it suggests that ‘children’s rights’ are both distinct from and blended with fundamental human rights?

In the legal arena, Ferguson distinguishes between ‘children’s rights’ and ‘rights for children’,¹⁶⁴ where the former encapsulates one means of prioritizing children’s interests over those of other parties and comprises both additional rights given to children (‘C-rights’) as well as fundamental human rights, where the application of the content of the right is critically affected by the fact that the rightsholder is a child. The latter rights are not straightforwardly expressed as ‘A-C rights’ but might be usefully considered as a C-specific gloss on ‘A-C rights’. Whilst Ferguson seeks to highlight the way in which children’s unique status, capacities, and interests mean that regulation with fundamental human rights can become more than the

mere application of ‘A–C rights’ to the facts, how workable is this as a normative account for lawyers? Overlaying the categorization of adult and children’s rights in moral theory serves to highlight the need for increased precision in legal reasoning and analysis.

Secondly, Macleod posits three features of moral rights that might justify ‘children’s rights’: signalling, normative weight, and enforcement.¹⁶⁵ This can be neatly contrasted with the features of legal rights that might justify ‘children’s rights’: aspirational or expressive value, procedural protections and recognition, and substantive aspects.¹⁶⁶ The first legal aspect straightforwardly corresponds to the equivalent in moral theory. Normative weight in the context of moral theory means that rights are typically given priority over competing interests,¹⁶⁷ which can also often justify enforcement. There is a sense in which normative weight underpins all three features of legal rights since law is itself a normative exercise. Understood in terms of the consequences for competing interests, however, it is better related to the substantive aspects of legal rights in practice. Whilst enforceability is not a requirement for recognition as a moral or legal right, the long-term value of unenforceable rights is open to question, particularly in the case of children, who are less likely to be in a position to independently protect their own interests by other means.

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Beyond the non-instrumental desire for normative coherence, it is critical to resolve the theoretical debate for instrumental reasons: there are many ways in which we fall short in our treatment of children, yet it is possible that a better understanding of one or more of these concepts could improve that situation. Ferguson argues that ‘it is the potential for ensuring a better outcome from the child’s perspective that should determine which approach or approaches we prefer’.¹⁶⁸ Even if correct, of course, that might simply prompt the question: what are better outcomes from the (affected) child’s perspective? How straightforwardly can such a question be answered?

This shifts the discussion from focus on the correct frame to directly targeting the relationship between children’s interests and the interests of other parties and the community. It is in this context that Ferguson’s contribution to this collection presents a case for the prioritization of children’s interests. Rather than positively arguing for prioritization, she outlines and tests the case that would need to be made if the current legal language governing the regulation of children, such as ‘best interests’ and ‘children’s rights’, were to speak for itself. Approaching the issue as whether children are a ‘special case’ to be prioritized enables us to avoid the debate over the precise theoretical basis of ‘children’s rights’ or ‘best interests’. Macleod’s incomplete theorization thus shares a strategic aim with Ferguson, though the two authors adopt very different means to achieve that end.

Ferguson’s prioritization argument stands in direct contrast to Altman’s case for ‘parental control rights’, which he sets out in his contribution to this collection. Rather than the term ‘parental rights’, Altman uses the language of ‘parental control rights’

to distinguish parental entitlements to control their children’s lives from other moral claims asserted by parents, such as the right to become a parent, and the right to associate with one’s children, including claims for child custody, for visitations, and for limits on relocation by the child and custodial parent.¹⁶⁹

He reasons that ‘[p]arental control ... benefits children and society by enticing people to become parents or to carry out their parenting duties well’.¹⁷⁰ This may be correct from the parent’s perspective, but how desirable are parents who require such incentives? The recasting of the parent–child relationship as primarily grounded in ‘parental responsibility’ in English law¹⁷¹ suggests indirect justification for the parental role. Altman posits that to adopt the indirect approach, to ground ‘parental control rights’ in the interests of their children and broader society is to treat them as a means only. The value of a directly justified right, Altman argues, lies in the ability for parents to resist the state overriding decisions ‘deemed

unwise'.¹⁷² Dwyer counters in his chapter, reasoning that the independent interest account 'conflates caring greatly about something and having a fundamental interest at stake'.¹⁷³

The definitional limits of Altman's argument are particularly interesting for lawyers. He suggests that each type of parental rights is grounded in distinct parental interests; but one could also accept the relatedness of the contexts whilst seeing parents as having independent rights in some contexts but not others. This highlights the need to further examine the relationship between concepts such as 'parental responsibility' and contexts such as parental disputes over spending time with their children and relocation.

p. 31 Altman examines and rejects two potential bases for 'parental control rights'—intimacy and the fiduciary nature of the parent-child relationship. Whilst Altman does not seek to alter outcomes in practice, but only to propose a better understanding of the basis of parental control rights, it is an interesting question whether the expressive ↵ aspect of drawing on parent-centred interests could have the unintended consequence of extending protection of parents' non-ideal decisions in practice. Might this be a reason to reconsider a parent-oriented expression of the parent-child relationship?

In respect of intimacy, Altman argues that realistic state intervention in families would not undermine the parental interest in intimacy,¹⁷⁴ and the minimum degree of privacy and autonomy it requires.¹⁷⁵ Without the parental interest in intimacy being in conflict with state intervention, this interest is unable to protect parents' unwise decisions from being overridden. This can be compared with Jeske's argument that the moral and legal obligations that underpin spousal support are grounded in intimacy.¹⁷⁶ For Jeske, intimacy enables a more expansive understanding of morally and legally valuable relationships. Similarly, Altman's rejection of the parental interest in intimacy rests on intimacy being insufficiently narrow to conflict with most exercises of state intervention. Whereas Jeske grounds her case in intimacy directly, however, Altman focuses on the parental interest in intimacy. Do we need to distinguish between these references to intimacy, especially given that the parental interest lacks the mutuality contemplated by intimacy itself?

Altman also rejects the case for treating 'parental control rights' as grounded in the parental interest in 'fiduciarity'. He argues that the Brighthouse-Swift account incorrectly requires the interest in acting to further children's welfare to include determining the child's moral instruction.¹⁷⁷ He further contends that the narrower Hannan-Vernon account, which distinguishes the parental interest in becoming a fiduciary from the exclusively child-oriented exercise of the fiduciary role, is unworkable.¹⁷⁸ Altman's rejection of the fiduciary account is particularly thought-provoking for lawyers since, within the legal literature, this understanding of the parent-child relationship has been presented in various forms since the 1970s and has recently begun to gain more traction.¹⁷⁹ A careful assessment requires us to determine whether 'fiduciary' must bear the same meaning as in other contexts, or whether—to return to the unsettled debate—the 'family law' conceptualization can and should be distinctive.

The political impact of legal arguments cannot be underestimated, and how we assess Altman's proposal for an independent basis for 'parental control rights' is at least in part political. When might we prefer Appell's account, which sees 'parental rights [as] a woman-centred and empowering doctrine that serves important social and political interests and acts as one of the only barriers to dismissing mothers who do not meet dominant norms'?¹⁸⁰ The political signal of repealing legal language that 'prioritises' children's interests, by contrast, might explain why, as Ferguson considers, that language persists despite academic convergence on equal treatment with adults.

p. 32 Moreover, might the political appeal of concepts such as 'parental control rights' in the US context be grounded in excessive concern over children's rights? This should be ↵ considered against the backdrop of the constitutional protection of parents' rights in the United States. In *Troxel v Granville*,¹⁸¹ Justice Scalia reasoned that 'the interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court'.¹⁸² Further informing an understanding

of the US context is its failure to ratify the United Nations' Convention on the Rights of the Child¹⁸³ despite the fact that, as Tobin explains, '[f]ar from seeking to drive a wedge between children and their parents, the CRC makes it clear that children's interests are best served when they enjoy a strong and supportive relationship with their parents'.¹⁸⁴

The possibility and nature of independent parental rights critically affects any conclusions we can reach on whether parents have rights that can conflict with children's rights or interests, or whether, properly understood, they can never conflict. This is particularly important given Eekelaar and George's argument that jurisdictions are moving away from a 'possessory rights' understanding of the parent-child relationship to one grounded in 'parental responsibility' and similar concepts.¹⁸⁵ Due to the nature of the public interest in resolving any conflict of rights, this issue is discussed within the final theme.

D. Regulation and intervention

We focus our final theme on the interface between the 'family', 'family life', and the state. Of course, as Dwyer argues in his contribution to this collection, there exists no practical alternative to 'state intervention into the family' of 'leaving families alone'.¹⁸⁶ The socially constructed nature of law means that the state is necessarily involved in every area under discussion, such as the definition of 'family' and the recognition of particular relationships through the award of a legal status. Here we discuss situations in which the question of whether and how the state should intervene or regulate is the central issue: firstly, the justifiable threshold for, and nature of intervention in 'family' formation and 'family life', including conflicts between 'family' members; secondly, the place for 'private ordering' more generally.

1. Public policy and intervention in the 'family'

Is the state justified in restricting or burdening recognition of 'families' in which children are created with external support, such as via fertility treatment, surrogacy, and adoption? What model of the 'family', if any, should be reflected in such contexts? When is the state justified in removing children from parental care? Is the state justified in criminalizing the physical punishment of children by their parents or in overriding decisions parents make about their children's medical treatment? Are disputes between 'family' members ever truly private? Should such disagreements involving children be resolved differently from those concerned only with adults?

'Family' formation and intervention in 'family life' are taken together here because both contexts evidence an underlying priority for parent-child relationships created through genetic and gestational connection. The surrogacy process raises moral and legal quandaries and, when children are born as a result of surrogacy, the question of who should be granted legal parental status is a complex one. Surrogacy is often discussed as an exception to the general approach to procreation and parenthood but, as Shanley argues in her contribution to this collection, an examination of surrogacy prompts reconsideration of the basis of the parent-child relationship more generally.¹⁸⁷

Shanley contends that a shift from focusing on individual rights to the complexity of the affected relationships is overdue, with increased recognition and role for gamete donors and surrogates post-birth. In this regard, she highlights the potential for increased, regulated non-anonymity; pre-birth meetings between the surrogate and the commissioning parent or parents; and post-birth contact between the surrogate and commissioning parent or parents, and between the surrogate and the child. Shanley recognizes the risk that entitlement to information about donors or surrogates might further entrench a biologized concept of 'family', though suggests that is forestalled by practical safeguards.¹⁸⁸ Given the binary nature of the award of status, it is an interesting question whether the legal framework would be able to embody the moral complexity, particularly in the expressive aspects of the award of legal parental status.

The normative view we take of preferable ‘family’ forms is reflected in the threshold we set for justifiable intervention in ‘family life’ and the decision to adopt a ‘best interests’ or a ‘threshold’ model of child protection. As the latter requires family dysfunction beyond merely not acting in the child’s ‘best interests’, it suggests a privileging of (birth) parents over children—that parents and not the state bear the primary responsibility, hence a concomitant right to raise their children as they see fit.¹⁸⁹ But should this be seen as a moral or legal right? Setting the appropriate threshold for intervention in ‘family life’ requires balancing the interests of the state against those of the ‘family’ unit. Whether individuals’ interests, especially children’s interests, fall on the same side as those of the state or the ‘family’ unit, or both, is vital to determining this threshold.

In the seminal case of *Re H & Ors (Minors) (Sexual Abuse: Standard of Proof)*,¹⁹⁰ for example, Lord Nicholls addressed the various parties’ interests that determine the threshold for intervention:

On one side are the interests of parents in caring for their own child, a course which prima facie is also in the interests of the child. On the other side there will be circumstances in which the interests of the child may dictate a need for his care to be entrusted to others.¹⁹¹

p. 34 This suggests that it is the connection between parents and their children which sustains the parental interest and justifies the threshold for intervention requiring greater dysfunction than merely not acting in the child’s ‘best interests’. Is this a justifiable characterization of the child’s interests at stake?

Previous discussion of Altman’s chapter sets out his view of ‘parental control rights’, which favours an independent parent-oriented perspective that supports the current deferral to parental behaviour. By contrast, Shanley’s analysis of the relationships created by surrogacy prefers a relational rights perspective. Understanding parental relationships in this way forestalls the possibility of a parent-oriented perspective on freedom from state intervention, but this does not mean that there could not be a ‘family’ unit for such protection. By contrast, on Dwyer’s view, any notion of parental rights, howsoever grounded, ‘is an affront to the equal moral personhood of children’.¹⁹² Moreover, the state acts in a fiduciary role when it recognizes a child’s legal parents, hence is ‘bound to choose the best parents from among adults willing to serve’.¹⁹³ This justifies greater intervention in ‘family life’, though the state should continue to respect parental decisions that do not significantly impact on the child’s welfare.¹⁹⁴

There are two contexts in which the connection between the nature of the parent–child relationship, hence parental rights, and intervention in ‘family life’ is especially critical: the resolution of conflicts of rights and interests between parents and children, and cultural and religiously-grounded arguments for freedom from state intervention.

When individuals’ rights and interests appear to be at odds with those of other family members, the community, or the state, there are two basic approaches to framing the issue for resolution. On the one hand, properly understood, there may be no conflict, hence the outcome that favours one party’s rights or interests can straightforwardly be preferred. Alternatively, whilst such a conflict exists, one party’s rights or interests, or a particular right or interest may be seen to outweigh those of others or other rights or interests.

Where it is understood that there is a genuine conflict, it is critical whether the conflict is resolved as a matter of law or as a matter of fact. The latter suggests that the particular circumstances of the dispute justify more weight being placed on one party’s rights or interests, or a particular right or interest, in the final balancing exercise. The former suggests that the nature of one party’s rights or interests, or a particular right or interest, requires privileging from the outset before application to the facts. Whether we conclude that there is a conflict and, if so, how it should be resolved is shaped by how we construct and understand the nature of children’s and parents’ interests.

A proper understanding of the nature of a particular statutory, judicial, or academic approach to the relationship between the interests of children and others thus requires precise reasoning. But language and analysis can seem insufficiently clear on this point. In his contribution to this collection, Macleod argues that 'it seems extremely difficult to deny that children have distinct (though complex) claims or interests that merit ↪ recognition as especially important'¹⁹⁵ and that 'protection of some of these claims or interests has a kind of normative priority or urgency over other considerations'.¹⁹⁶ When might this occur? Would such priority be as a matter of law or fact? How might this be affected by the nature of any conflict of interests or rights?

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Ferguson is unusually explicit as to the nature of her claim: that children's interests should be prioritized as a matter of law over those of others, including their parents'. The controversial nature of her position perhaps suggests why reasoning is typically less precise. But can we improve the treatment of children without such unequivocal analysis? Consider the European context: the ECHR does not itself describe the relative position of the child and the European Court of Human Rights has variously articulated it. Children's 'best interests' have been said to be 'of particular importance',¹⁹⁷ 'the primary consideration',¹⁹⁸ 'the paramount consideration',¹⁹⁹ and to 'prevail';²⁰⁰ 'consideration' of children's interests has also been described as 'of crucial importance'.²⁰¹ Academic debate assumes these different terms represent different ways of preferring children's interests; discussion centres on which view to prefer. The two most commonly contrasted formulations are those in *Johansen v Norway* and *Yousef v The Netherlands*. The Court in *Johansen* contends that:

[A] fair balance has to be struck between the interests of the child ... and those of the parent. ... In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent.²⁰²

Whereas, in *Yousef*, the Court reasons that:

in judicial decisions where the rights under Art.8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail.²⁰³

Academic preference has been expressed for the *Johansen* formulation over the *Yousef* formulation.²⁰⁴ Such expression of preference assumes that the language is significant. ↪ Even if language *should* matter, as Ferguson argues, *does* it in fact matter here? This remains to be settled.

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How, if at all, are these arguments affected by the addition of cultural or religious considerations? This turns on whether the basis of any parental interests should be relevant when weighed against the child's, as well as how we should evaluate the child's place within a community or culture. In his contribution to this collection, Dwyer argues that the child's interests alone are relevant to decision-making about fundamental aspects of their welfare and others' interests are relevant only indirectly.²⁰⁵ Whilst religiously or culturally-grounded decisions can have 'intense significance' for parents and other caregivers, Dwyer reasons that it is mistaken to see those as the only justifications for attaching such importance to decisions.²⁰⁶ On his account, therefore, there are no rights or interests to be balanced against the child's, nor is any special weight to be given to religious and cultural concerns.

Dwyer contends that ascribing legal rights to parents, which recognize parents' independent interests, would be 'in derogation of the state's *parens patriae* role'.²⁰⁷ We might understand this as a theoretical case for the 'no conflict' option discussed above being the only permissible interpretation of any apparent conflict of rights or interests. This can be directly contrasted to Altman's argument for an independent basis for parental rights. The centrality of the state interest to Dwyer's account is particularly significant. How

can we decide whether the state interest lies in recognizing only children's rights and interests directly or also recognizing that there are other rights and interests with which they may conflict?

2. Private ordering

There is a sense in which the issue of 'private ordering' is the first question to be asked in interrogating family law and children's law. Just because a legal regime exists, which already recognizes and regulates particular relationships as 'familial', does not mean it should be assumed to be the starting-point from which analysis begins. Does 'private ordering' move relationships outside of 'family law', or do they necessarily remain within 'family law'? Why might it matter? Are there compelling reasons of liberty, state neutrality, or choice for adult relationships to be treated as a matter of 'private ordering', and not pre-defined status? Yet could relationships involving children be consigned to 'private ordering' (in any meaningful sense) without unacceptable conflict with children's interests? And would relegating adult relationships to 'private ordering' fail to protect those made vulnerable by caregiving or in gender-structured relationships?

p. 37 In the legal context, 'private ordering' is conventionally associated with protection of autonomy in the form of express agreements reached between the parties, as Bix discusses in his contribution to this collection. But, as his analysis of possible justifications for recognizing and, possibly, enforcing such agreements highlights, matters are more complex. In addition to autonomy, he examines arguments from social utility, ²⁰⁸ Eekelaar's 'privileged sphere' of personal interactions, ²⁰⁸ the protection of dignity and against exploitation, and broader public policy arguments.

Current attempts to better understand the nature of the debate over 'private ordering' face two critical difficulties: firstly, in practice, justifications for restrictions have been inadequately articulated; and, secondly, its expansion has often occurred in procedural terms, such as with the introduction of family law arbitration in England and Wales.

Consider nuptial agreements. Until recently, nuptial agreements were deemed void at common law in England and Wales as contrary to public policy for 'undermin[ing] the concept of marriage as a life-long union'. ²⁰⁹ In 2014, the Law Commission opined that 'the evolution of the law and changed social attitudes have rendered this public policy rule obsolete', ²¹⁰ but did not clearly articulate why binding nuptial agreements do not undermine marriage. Yet, as discussed above, the meaning of marriage in society both informs and is informed by its conceptualization in 'family law'. The default statutory regime provides the law's understanding of the meaning of marriage at its breakdown and, to an extent, more generally. In her dissent in *Radmacher v Granatino*, ²¹¹ Lady Hale recognizes that the debate over the status of nuptial agreements raises 'some profound questions about the nature of marriage in the modern law', ²¹² though reaches no conclusion on the extent to which, if at all, nuptial agreements should be able to alter the 'irreducible minimum' of marriage. ²¹³ The public policy debate has

shift[ed] from moralist concerns to protect the institution of marriage from spouses and others who make agreements liable to destabilise an individual marriage to more benevolent, paternalist concerns to protect individual contracting spouses (or would-be spouses) from agreeing terms which, with the benefit of hindsight, might be judged imprudent. ²¹⁴

Yet, it remains unsettled how 'private ordering' outside of the default regime should relate to the meaning of 'marriage'. Further, any case for maintaining or even reinforcing legal regulation of intimate relationships should be set against Jeske's suggestion that state intervention may be more likely to destroy intimacy than promote it, ²¹⁵ and Eekelaar's discussion of contexts in which the legalization of social norms may risk undermining them. ²¹⁶

This analysis highlights the key dilemma created by the increasing pace of ‘private ordering’ in domestic and international family and children’s law regimes, such as through the recent launch of the International Family Law arbitration scheme: there is no shared understanding of the justifiable public interest in regulating and intervening explicitly in individuals’ intimate lives by the creation of default regimes rather than implicitly by creating or leaving space for private ordering. What is required for individuals to be ‘(part) author of [their] own li[ves]’?²¹⁷ ↵

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Notes

- 1 Matrimonial Causes Act 1973 C 18, Part II (England and Wales).
- 2 Dutta, cited by JM Scherpe, ‘Towards a Matrimonial Property Regime for England and Wales’ in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia 2012) 133, 138.
- 3 Contrast, eg, California’s ‘community of property’ default regime (Fam C s 751 s770) with the judicial ‘equitable distribution’ default in Georgia (*Stokes v Stokes*, 246 Ga 765m 273 SE2d 169 (1981)).
- 4 *Piglowska v Piglowski* [1999] 3 All ER 632, 644D-G (UKHL) (Lord Hoffmann) (emphasis added).
- 5 *Burden and Burden v United Kingdom* (App No 13378/05) (Grand Chamber) [2006] ECHR 1064: [63].
- 6 See C Bendall and R Harding’s chapter.
- 7 It should be noted that ‘proportionality’ is used too within certain philosophical ethical frameworks; philosophy too has its terms of art.
- 8 See, B Williams, *Ethics and the Limits of Philosophy* (Harvard UP 1985). Though it should be noted that Williams cast doubt on the ease of distinguishing between the two different types of concept: B Williams, ‘Truth in Ethics’ (1996) 8 Ratio 227, 234.
- 9 S Scheffler, ‘Morality Through Thick and Thin: A Critical Note of Ethics and the Limits of Philosophy’ (1987) 96 The Philosophical Review 411, 417.
- 10 K Boele-Woelki, F Ferrand, CG Beilfuss, M Jäntera-Järeborg, N Lowe, D Martiny, W Pintens, *Principles of European Family Law Regarding Property Relations between Spouses* (Intersentia 2013) 33 (emphasis in original).
- 11 *ibid* 33–34.
- 12 BH Bix, ‘Private Ordering and Family Law’ (2010) 23 Journal of the American Academy of Matrimonial Lawyers 249, 250.
- 13 In England and Wales, see *Newham London Borough Council v AG* [1993] 1 FLR 281, 289 (Sir Stephen Brown P) and compare reasoning in decisions such as *Re J (Children)* [2013] UKSC 9.
- 14 C Sunstein, ‘On the Expressive Function of Law’ (1995–1996) 144 University of Pennsylvania Law Review 2021. For an interesting discussion of the range of expressive claims made about law, see RH McAdams, *The Expressive Powers of Law* (Harvard UP 2015) ch 1, especially 13–21.
- 15 L Ferguson, ‘The Curious Case of Civil Partnership: The Extension of Marriage to Same-Sex Couples and the Status-Altering Consequences of a Wait-And-See Approach’ (2016) 28 Child and Family Law Quarterly 347, 354–55.
- 16 *ibid* 354.
- 17 See, eg, Alberta’s Family Law Act 2003 C F-4.5, s 32.
- 18 Children Act 1989 c. 41, s 8 (England and Wales).
- 19 A Barlow, C Burgoyne, E Clery, and J Smithson, ‘Cohabitation and the Law: Myths, Money and the Media’ in A Park, J Curtice, K Thomson, M Phillips, M Johnson and E Clery (eds), *British Social Attitudes – the 24th Report* (Sage 2008) (discussed in C Bendall and R Harding’s chapter).
- 20 [2017] EWCA Civ 182.
- 21 *ibid* [94] (Munby P).
- 22 *ibid*.
- 23 L Ferguson, ‘Hard Divorces Make Bad Law’ (2017) 51(3) Journal of Social Welfare and Family Law 364.
- 24 *ibid*.
- 25 L Trinder, ‘Finding Fault?’ Interim Research Findings, University of Exeter, online: <findingfault.org.uk/wp-content/uploads/2017/03/Finding-Fault-interim-research-findings.pdf> accessed 24 March 2017 1.
- 26 See, eg, C Mills, ‘“Ideal Theory” as Ideology’ (2009) 20 Hypatia 165.
- 27 For a valuable overview, see Z Stemplowska and A Swift, ‘Ideal and Nonideal Theory’ in D Estlund (ed), *The Oxford Handbook of Political Philosophy* (OUP 2012).
- 28 See L Ferguson’s chapter for a discussion of equal moral consideration.
- 29 J Rawls, *Justice as Fairness: A Restatement* (Harvard UP 2001) 13.

30 See, eg, A Sen, 'What Do We Want from a Theory of Justice?' (2006) 103 *Journal of Philosophy* 215.

31 See, eg, Z Stemplowska, 'What's Ideal about Ideal Theory?' (2008) 34 *Social Theory and Practice* 319, 326–29.

32 See, eg, J Herring, 'Why Financial Orders on Divorce Should Be Unfair' (2005) 19 *International Journal of Law, Policy and Family* 218. But contrast L Ferguson, 'Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation' (2008) 22 *International Journal of Law, Policy & the Family* 61.

33 J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467.

34 Human Fertilisation and Embryology Act 2008, c 22.

35 [2014] EWHC 3135 (Fam).

36 *ibid* [52] (Sir James Munby P).

37 *ibid* [54] (Sir James Munby P).

38 *ibid* [55] (Sir James Munby P).

39 *ibid*.

40 R Dworkin, *Law's Empire* (Harvard UP 1986).

41 See R Leckey's chapter.

42 See BH Bix's chapter.

43 See, eg, Kennedy J's judgment for the majority in *Obergefell v Hodges*, 576 US __ (2015).

44 See, eg, the arguments by the applicants in *Steinfeld and Keidan v Secretary of State for Education* [2016] EWHC 128 (Admin); [2017] EWCA Civ 81.

45 See M Lister's chapter.

46 See, also E Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (OUP 2012).

47 C Chambers, *Against Marriage: An Egalitarian Defense of the Marriage-Free State* (OUP 2017).

48 Law Commission of Canada, *Beyond Conjuality: Recognising and Supporting Close Personal Adult Relationships* (Law Commission of Canada 2001) xxvi.

49 *ibid*, xi.

50 See, eg, N Barker, *Not the Marrying Kind* (Palgrave Macmillan 2013) 203–04.

51 See ML Shanley's chapter.

52 See ML Shanley's chapter.

53 D Archard, *The Family: A Liberal Defence* (Palgrave Macmillan 2010) 1–2 (citing Gallie).

54 *ibid* 1.

55 *ibid* 5.

56 SM Okin, *Justice, Gender, and the Family* (Basic Books 1989) 14.

57 *ibid* 172.

58 M Eichner, *The Supportive State: Families, Government, and America's Political Ideals* (OUP 2010) 45.

59 A Diduck, 'What is Family Law For?' (2011) *Current Legal Problems* 1, 3.

60 See D Archard's chapter (citing Wittgenstein in respect of 'family resemblances').

61 See D Archard's chapter.

62 See M Lister's chapter.

63 See M Lister's chapter.

64 See M Lister's chapter.

65 (App No 25358/12) (24 Jan 2017) (ECtHR (Grand Chamber)).

66 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (1950).

67 *Paradiso* (n 65) [157] (majority).

68 Lord Evershed MR, 'Foreword' in RH Graveson and FR Crane (eds), *A Century of Family Law: 1857–1957* (Sweet & Maxwell 1957) vii–xvi, vii.

69 Diduck (n 59) 3.

70 See D Archard's chapter.

71 See D Archard's chapter.

72 See D Archard's chapter.

73 See R Leckey's chapter.

74 See E Brake's chapter.

75 See RC Den Otter's chapter.

76 See D Eekelaar's chapter.

77 See J Eekelaar's chapter.

78 See J Eekelaar's chapter.

79 Diduck (n 59) 6.

- 80 See J Eekelaar's chapter.
- 81 See J Eekelaar's chapter.
- 82 See J Eekelaar's chapter.
- 83 J Eekelaar, *Family Law and Personal Life* (OUP 2006) 31.
- 84 [2013] UKSC 4.
- 85 *ibid* [37] (L'Sumption).
- 86 *Re X (A Child) (Surrogacy: Time limit)* (n 35) and corresponding main text.
- 87 As Leckey posits in his chapter.
- 88 As Jeske proposes in her chapter.
- 89 S Altman's chapter explores and rejects this possibility in relation to 'parental control rights'. For a recent argument in favour of the fiduciary characterization, see L Smith, 'Parenthood is a Fiduciary Relationship' (working paper, 24 July 2017) online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007812> accessed 20 Aug 2017.
- 90 See, eg, Children Act 1989 (n 18), s 3(1).
- 91 cf liability for negligently inflicted psychiatric injury and presumed categories of close love and affection (*Alcock v Chief Constable of South Yorkshire* [1991] UKHL 5); status-based duty of care in negligence presumed owed by parents to children (*Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)* [1994] 1 WLR 1071, 1077 (Saville LJ)) (dicta on adults *in loco parentis*, resting on an assumed parent-child status-based duty of care).
- 92 The elevation of the family founded on marriage to constitutional status in Ireland is particularly noteworthy in this context: Constitution of Ireland, Art 41 (1 July 1937; as revised October 2015).
- 93 For an interesting attempt to bring together a wide range of such contexts, see R Probert (ed), *Family Life and the Law: Under One Roof* (Ashgate 2006).
- 94 See M Lister's chapter.
- 95 See M Lister's chapter.
- 96 See D Jeske's chapter.
- 97 See R Leckey's chapter.
- 98 See R Leckey's chapter.
- 99 cf Ferguson (n 15).
- 100 See start of RC Den Otter's chapter.
- 101 See end of RC Den Otter's chapter.
- 102 See end of RC Den Otter's chapter.
- 103 J Herring, 'Sexless Family Law' (2010) 11 *Lex Familiae* 3.
- 104 For an overview of the sex/gender distinction within contemporary feminist philosophy, including problems with the distinction itself, see M Mikkola, 'Feminist Perspectives on Sex and Gender' (2016) *The Stanford Encyclopedia of Philosophy* <<https://plato.stanford.edu/entries/feminism-gender/#SexDis>> accessed 24 August 2017⁷¹.
- 105 The common law award of status is grounded in parturition (*Amphill Peerage Case* [1977] AC 547, 577 (Lord Simon)). The statutory rule in the assisted-reproduction context is based on gestation (HFEA 2008 (n 34), s 33).
- 106 The common law presumptive award of status is grounded in marriage to the gestational mother (*Amphill Peerage*, *ibid* 577 (Lord Simon)). The statutory rule in the assisted-reproduction context is grounded in marriage (s 35), consent in the absence of marriage (ss 36–37), with genetic connection as a default in the absence of compliance with the statutory requirements (s 41).
- 107 This term refers to the second female parent in the context of fertility treatment: HFEA 2008 (n 34), ss 42–44.
- 108 Ferguson (n 15) 354.
- 109 Department for Children, Schools and Families, *Support for All* (Green Paper, Cm 7787, 2010) 1 (Ed Balls, 'Ministerial Foreword').
- 110 See RC Den Otter's chapter.
- 111 F Newport and J Wilke, 'Most in U.S. Want Marriage, but Its Importance Has Dropped' *Gallup Polling* (2 August 2013) <<http://www.gallup.com/poll/163802/marriage-importance-dropped.aspx>> accessed 6 November 2017⁷².
- 112 R Fry, 'New Census Data Show More Americans are Tying the Knot, but Mostly It's the College Educated' (*Pew Research Center*, 6 February 2014) online: <<http://www.pewresearch.org/fact-tank/2014/02/06/new-census-data-show-more-americans-are-tying-the-knot-but-mostly-its-the-college-educated/>> accessed 20 August 2017⁷³.
- 113 Children Act 1989 (n 90).
- 114 *ibid*.
- 115 Probert et al remark that '[i]t has often been noted that the broad definition of parental responsibility set out in the Children Act 1989 is in fact no definition at all': R Probert, S Gilmore, and J Herring, 'A More Principled Approach to Parental Responsibility in England and Wales?' in J Mair and E Örüü (eds), *Juxtaposing Legal Systems and the Principles of European Family Law on Parental Responsibilities* (Intersentia 2010) 213. Bridgeman similarly describes parental

- responsibility as ‘a confused, contradictory yet essentially empty concept’: J Bridgeman, ‘Parental Responsibility, Responsible Parenting and Legal Regulation’ in J Bridgeman, H Keating, and C Lind (eds), *Responsibility, Law and the Family* (Ashgate 2008) 242. Freeman likewise describes the concept as ‘clumsy and inchoate’ and Wallbank, citing Herring, notes that it has an ‘uncertain meaning’: M Freeman, ‘The Right to Responsible Parents’ in J Bridgeman, H Keating, and C Lind (eds), *Responsibility, Law and the Family* (Ashgate 2008) 22 and J Wallbank, ‘Parental Responsibility and the Responsible Parent: Managing the “Problem” of Contact’ in R Probert, S Gilmore, and J Herring (eds), *Responsible Parents and Parental Responsibility* (Hart Publishing 2009) 296.
- 116 See, eg, J Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011) (on relational autonomy). In her chapter in this book, Shanley grounds her argument for the consequences of surrogacy in a ‘relational analysis’.
- 117 This is perhaps best explained in the contrast between a ‘contextualized’ and a ‘relational’ approach to welfare. Contrast L Ferguson, ‘The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children’s Rights and Welfare’ in A Diduck, N Peleg, and H Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy—Essays in Honour of Michael Freeman* (Brill 2015) 158–59 to J Herring, ‘Farewell Welfare?’ (2005) 27 *Journal of Social Welfare and Family Law* 159; J Herring and C Foster, ‘Welfare Means Relationality, Virtue and Altruism’ (2012) 32 *Legal Studies* 480.
- 118 See, eg, Brake (n 46) 82–88. On the relationship between ‘care’ and ‘vulnerability’, see S Dodds, ‘Dependence, Care, and Vulnerability’ in C Mackenzie, W Rogers, and S Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2014) 181.
- 119 See, eg, MA Fineman, ‘Equality, Autonomy, and the Vulnerable Subject in Law and Politics’ in MA Fineman and A Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 13.
- 120 See, eg, D Jeske, *Rationality and Moral Theory: How Intimacy Generates Reasons* (Routledge 2008).
- 121 See JG Dwyer’s chapter.
- 122 Dodds (n 118) 201.
- 123 See E Brake’s chapter.
- 124 See E Brake’s chapter.
- 125 D Jeske’s chapter; compare Jeske (n 120) 46–47.
- 126 C Smart, *Personal Life: New Directions in Sociological Thinking* (Polity Press 2007) 187–88.
- 127 T Metz, *Untying the Knot: Marriage, the State, and the Case for their Divorce* (Princeton UP 2010) 126, 138.
- 128 See D Archard’s chapter.
- 129 See J Eekelaar’s chapter.
- 130 See ML Shanley’s chapter.
- 131 See R Leckey’s chapter.
- 132 Jeske (n 120) 151.
- 133 JS Mill, *Utilitarianism* (G Sher ed, Hackett Publishing 1979) 48.
- 134 I Ellman, ‘The Theory of Alimony’ (1989) 77 *California Law Review* 1, 49.
- 135 In the English context, see, eg, J Herring, *Family Law* (8th edn, Pearson 2017) 218; *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 [137] (Baroness Hale, referring to the ‘rationale for redistribution’).
- 136 In the English context, see, eg, S Gilmore and L Glennon, *Hayes and Williams’ Family Law* (4th edn, OUP 2014) 153; *Charman v Charman* [2007] EWCA Civ 503 [29], [69] (Potter P, including reference to the ‘three distributive principles’).
- 137 American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (ALI 2002).
- 138 MR Clisham and RF Wilson, ‘American Law Institute’s *Principles of the Law of Family Dissolution*, Eight Years after Adoption: Guiding Principles or Obligatory Footnote?’ (2008) 42(3) *Family Law Quarterly* 573, 577.
- 139 Law Commission, *Matrimonial Property, Needs and Agreements*, Report No 343 (HMSO 2014).
- 140 Family Justice Council, *Sorting out Finances on Divorce* (Family Justice Council 2016).
- 141 C Rogerson and R Thompson, ‘Spousal Support Advisory Guidelines’, (*Department of Justice Canada*, July 2008) < <http://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/spag/index.html> > accessed 6 November, 2017¹. For a summary, see M Maclean, R Hunter, F Wasoff, L Ferguson, B Bastard, and E Ryrstedt, ‘Family Justice in Hard Times: Can We Learn from Other Jurisdictions?’ (2011) 33(4) *Journal of Social Welfare and Family Law* 319, 326–27.
- 142 Law Commission 343 (n 139) [3.125].
- 143 Rogerson and Thompson (n 141) 1.
- 144 Scherpe, ‘Towards a Matrimonial Property Regime’ (n 2).
- 145 See D Jeske’s chapter.
- 146 For an argument that only interpersonal bases should ground financial orders, see Ferguson, ‘Family, Social Inequalities’ (n 32).
- 147 See, eg, Herring, ‘Why Financial Orders’ (n 32).
- 148 See D Jeske’s chapter.

149 See D Jeske's chapter.

150 Civil Partnership Act 2004 c. 33, s 72; *Lawrence v Gallagher* [2012] EWCA Civ 394.

151 See R Leckey's chapter.

152 In the financial orders case of *McFarlane v McFarlane; Parlour v Parlour* [2004] EWCA Civ 872, eg, Thorpe LJ reasoned that, 'in this jurisdiction we should not flirt with, still less embrace, any of the categorizations of the defining purposes of periodical payments advanced by academic authors. The judges must remain focused on the statutory language, albeit recognizing the need for evolutionary construction to reflect social and economic change. ... [T]o adopt one model or another or a combination of more than one is to don a strait-jacket and to deflect concentration from the statutory language' ([106]).

153 Herring (n 135) 482.

154 P Alderson, 'Common Criticisms of Children's Rights and 25 Years of the IJCR' (2017) 25 *International Journal of Children's Rights* 307, 311.

155 See CM Macleod's chapter.

156 See CM Macleod's chapter (setting out his case).

157 See CM Macleod's chapter.

158 See CM Macleod's chapter.

159 See CM Macleod's chapter.

160 See, eg, *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147.

161 See, eg, *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

162 See, eg, Herring (n 135) 486.

163 See CM Macleod's chapter.

164 L Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21 *International Journal of Children's Rights* 177, 179–82.

165 See CM Macleod's chapter.

166 Ferguson, 'Not Merely' (n 164) 183–90.

167 See CM Macleod's chapter.

168 Ferguson, 'The Jurisprudence' (n 117) 152.

169 See S Altman's chapter.

170 See S Altman's chapter.

171 Children Act 1989 (n 90).

172 See S Altman's chapter.

173 See JG Dwyer's chapter.

174 See JG Dwyer's chapter.

175 See JG Dwyer's chapter.

176 Jeske (n 125) and corresponding main text.

177 See S Altman's chapter.

178 See S Altman's chapter.

179 See, eg, Smith, 'Parenthood' (n 89), especially n 4 for references to earlier arguments that the parent–child relationship is best understood as fiduciary.

180 AR Appell, 'Parental Rights Doctrine: Creating and Maintaining Maternal Value' in MA Fineman and K Worthington (eds), *What is Right for Children?* (Ashgate 2009) 123.

181 530 US 57 (2000) (US Sup Ct).

182 *ibid.*

183 20 November 1989, 1577 UNTS 3.

184 J Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in MD Ruck, M Peterson-Badali, and M Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Routledge 2017) 58.

185 J Eekelaar and R George, 'Children's Rights: The Wider Context' in J Eekelaar and R George (eds), *Routledge Handbook of Family Law and Policy* (Routledge 2014) 288.

186 See JG Dwyer's chapter.

187 See ML Shanley's chapter.

188 See ML Shanley's chapter.

189 K Swift, 'Child Abuse Reporting Systems in Canada' in N Gilbert (ed), *Combatting Child Abuse: An International Perspective on Reporting Systems* (OUP 1997) 38.

190 [1996] AC 563.

191 *ibid* 584–85 (Lord Nicholls).

192 See JG Dwyer's chapter.

193 JG Dwyer, 'The Moral Basis of Children's Relational Rights' in J Eekelaar and R George (eds), *Routledge Handbook of Family Law and Policy* (Routledge 2014) 279; see also JG Dwyer's chapter.

194 Dwyer, 'The Moral Basis', 279.

195 See CM Macleod's chapter.

196 See CM Macleod's chapter.

197 Eg, *Johansen v Norway* (1997) 23 EHRR 33 [78] [*Johansen*]; *Hoppe v Germany* (2004) 38 EHRR 15 [49]; *Görgülü v Germany* [2004] 1 FLR 894 (ECtHR) [43]; *Süss v Germany* [2006] 1 FLR 522 (ECtHR) [88]. Similarly, in *Hokkanen v Finland* (1995) 15 EHRR 139 [58], the ECtHR reasons that, when considering the rights and freedoms of all concerned parties, the child's best interests and rights are 'more particularly' to be taken into account.

198 Eg, *Neulinger v Switzerland* (2012) 54 EHRR 31 [134] (though this is mentioned in the context of the need to strike a 'fair balance' between the parties' competing interests; the ECtHR referred to the Preamble to The Hague Convention on the Civil Aspects of International Child Abduction (25 Oct 1980) in which children's interests are described as being of 'paramount importance').

199 Eg, *Yousef v The Netherlands* (2003) 36 EHRR 20 [73].

200 *ibid* [73].

201 Eg, *Elsholz v Germany* (2002) 34 EHRR 58 [48]; *TP and KM v United Kingdom* (2002) 34 EHRR 2 [70]; *Scott v United Kingdom* [2000] Fam LR 102 (ECtHR) [18–94]. In *Süss*, in addition to the standard recitation of the *Johansen* 'particular importance' formulation, the ECtHR also describes the child's best interests as of 'crucial importance' ([86]).

202 *Johansen* (n 197) [78].

203 *Yousef* (n 199) [73].

204 See, eg, S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 Oxford Journal of Legal Studies 453, 478.

205 See JG Dwyer's chapter.

206 See JG Dwyer's chapter.

207 See JG Dwyer's chapter.

208 Eekelaar (n 83) 82.

209 *N v N* [1999] 2 FLR 745, 752 (Wall J).

210 Law Commission 343 (n 139) [4.28].

211 [2010] UKSC 42.

212 *ibid* [132] (Lady Hale).

213 *ibid* (Lady Hale).

214 J Miles, 'Marital Agreements: "The More Radical Solution"' in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia 2012) 99–100.

215 See D Jeske's chapter.

216 See J Eekelaar's chapter.

217 J Raz, *The Morality of Freedom* (Clarendon 1986) 369.