Families can be the scenes of some of the greatest joys, as well as some of the greatest sadnesses, that life can bring. Surveys suggest that for a substantial majority of people families are more important to them than jobs or status.\(^1\) The interaction of law and the family therefore gives rise to questions of enormous importance to the individuals who appear before the courts and to society at large.\(^2\) In *Huang v Secretary of State for the Home Department*\(^3\) the House of Lords emphasised the importance of families to individuals:

> Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives.

In 2008 the Labour Government agreed:

> Families are the bedrock of our society. They nurture children, help to build strength, resilience and moral values in young people, and provide the love and encouragement that helps them lead fulfilling lives.\(^4\)

This first chapter will consider some key questions about families: What are families? What is family law? Is family life in crisis? It will also highlight some of the most controversial issues which face family lawyers today and which will appear throughout the book. First, it is necessary to attempt a definition of a family.

### 1 Seeking a definition of the family

The notion of a ‘family’ is notoriously difficult to define.\(^5\) Many people have a stereotypical image of what the ‘ideal family’ is like – a mother, a father and two children. Yet this family composition is not the family form that most people will have experienced. Only 24 per cent of households in 2009 consisted of a couple with dependent children.\(^6\) So the image of two

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1. Future Foundation (1999). Yet Babb et al. (2006) report that one in five full-time employees usually works at least 48 hours a week.
2. For a remarkable history of family law during the twentieth century see Cretney (2003a).
parents and two children as the ideal family is just that, an ideal; a powerful ideal, but not the most common family form.\(^7\)

It is possible to distinguish families (a group of people related by blood, marriage or adoption); a nuclear family (parents and their dependent children); extended families (the nuclear family plus the wider kin, e.g. grandparents); kinships (the larger family groups related by blood or marriage); and households (a group of people sharing accommodation).\(^8\) One of the difficulties in defining ‘family’ is the power of the definition and especially the stigma that follows from denying that a certain group of people is a family.\(^9\) In part this explains the strong objections from the gay and lesbian community to the now repealed s 28 of the Local Government Act 1988, which referred to gay and lesbian relationships as a ‘pretended family relationship’.\(^10\)

‘Family’ is presently a term that is of limited legal significance. As we shall see, much effort has been made in attempting a legal definition of ‘marriage’, ‘parent’ and ‘parenthood’, but relatively few cases have defined ‘a family’. However, following the Human Rights Act 1998 and the importance of the right to respect for family life, the concept of family will grow in legal significance.\(^11\)

How might the law define a family?\(^12\)

\[A\] The person in the street’s definition

In an attempt to define a ‘family’, the law could rely on common usage: how would the person in the street define a family? The difficulty with this is that although there may be some cases where everyone would agree that a particular group of people is a family, there are many other cases where, when asked, people would answer ‘I don’t know’, or there would be conflicting answers, reflecting different values, religious beliefs or cultural perspectives. So, asking a person in the street does not help to clarify the definition of family in ambiguous cases. When children have been asked to define families they have revealed a broad understanding of the term and even included pets.\(^13\) Studies of children also suggest that they define families in terms of those people they feel very close to, rather than the standard structure of blood relations.\(^14\)

\[B\] A formalistic definition

The law could rely upon a formalistic approach.\(^15\) Such definitions would focus on whether the group of individuals in question has certain observable traits that can be objectively proved. These definitions often focus on criteria such as marriage or the existence of children. The benefit of formalistic definitions is their clarity and ease of proof. The approach therefore has a strong appeal to lawyers. The definitions avoid involving the court in time-consuming or unnecessarily controversial questions.

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\(^7\) Krause and Meyers (2002) provide an excellent discussion.

\(^8\) Day Sclater (2000). See also Archard (2003: ch. 2) for further discussion, although he takes the view that a family must involve children.

\(^9\) Douglas (2005: 3).

\(^10\) The section was repealed by the Local Government Act 2003, Sch 8(1), para 1.

\(^11\) Munby J (2004c) provides a useful summary of the significance of the Act for family lawyers.

\(^12\) See Diduck (2005) for an excellent discussion of the changing legal understanding of families.

\(^13\) Morrow (1998); Smart, Neale and Wade (2001: 52).

\(^14\) Smart, Neale and Wade (2001: 52).

\(^15\) See Glennon (2008) and Leckey (2008) for an informative analysis.
Seeking a definition of the family

The main disadvantage is that the approach can be rather technical. If the group of people failed to meet the formal requirements of the definition even though they functioned as a family, should they be denied the status of family? For example, some people argue that it would be bizarre if the law treated an unmarried couple who had lived together for 20 years and raised children together any differently from a married couple who had been married 20 years. Should the fact that the married couple undertook a short ceremony 20 years previously make a difference? Those who take such a view may prefer a definition that considers the function the relationship performs, rather than its technical nature.

C  A function-based definition

A function-based definition examines the functions of families in our society. If a group of people perform certain functions then the law can term them a family. The law would be less concerned with the formal nature of relationship between the group of people (e.g. whether they were married or not) and more concerned with their relationship in day-to-day practicalities and their contribution to society. In other words, the approach focuses on what they do, rather than what they are. This has led David Morgan to argue that although we may not be able to define what a family is, we can identify what ‘family practices’ are. If such an approach were to be adopted, the law might describe the functions of a family as: providing security and care for its members; producing children; socialising and raising of children; and providing economically for its members. However, whether a family needs to fulfil all or only some of these functions is controversial. Some have argued that a family’s existence should be focused around children. Others suggest that a sexual relationship, or a potential sexual relationship is essential if families are to be distinguished from friendship. Still others have argued that caring and sharing is what is central to a family.

Opponents of a function-based approach claim that it presupposes that the traditional family is the ideal, and only permits other family forms to be included within the definition if they are sufficiently close to the functions of that ideal. Hence it is argued that it is only because of the dominant position marriage has held in our society that a sexual element is seen as important to the definition of marriage. There is also the problem of proof. Determining what the group of people does is normally far harder than determining whether or not they have undergone a formal ceremony of some kind.

D  An idealised definition

Another approach suggests that a workable definition of what a family is does not exist, but that a definition of an idealised family can be provided. In our society many would see this as a married couple with children. The difficulty is that this idealised picture has become tarnished through evidence of domestic violence; abuse of children within the home; and the

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16 The term ‘functionalist definition’ would be neater, but within sociological writing the term ‘functionalism’ has become associated with one particular view of the function of a family: a highly traditional one.

17 Glennon (2000).

18 Morgan (2003).

19 See Veitch (1976); Rusk (1998).


21 See Lord Clyde in Fitzpatrick v Sterling Housing Association [2000] 1 FCR 21 at p. 35.

22 See Bottomley and Wong (2009).


oppression of women within marriage. But some still promote a highly traditional family form as the ideal, with the father as the head of the household, to be respected and honoured by his wife and children.\textsuperscript{26} In one major survey of opinion only one in ten people agreed that it was the man’s job to earn money and the woman’s job was to stay at home and look after the family.\textsuperscript{27}

To others this picture would be far from ideal. We could try to ‘update’ the traditional image and create an ideal of a mutually supportive family where the children are cared for in a non-patriarchal, caring environment. But such an image of an ideal family is very much a western European one. Where are the grandparents, the uncles and aunts, nephews and nieces? And is it really impossible to be a family without children? So, in a culturally diverse nation such as ours it would be impossible to agree on an idealised family form that would be acceptable to everyone.\textsuperscript{28}

\textbf{E} \textit{A self-definition approach}

This approach would state ‘you are a family if you say you are’. Eekelaar and Nhlapo\textsuperscript{29} have suggested that societies are gradually accepting an increasing variety of family forms and are reaching the position that a family is any group of people who regard themselves as a family. The benefit of such an approach is that it does not stigmatise people as ‘not family’ unless they do not wish to be regarded as a family. In 2008 the then Labour Government accepted there was no ideal family:

> There is no single family form that guarantees happiness or success. All types of family can, in the right circumstances, look after their family members, help them get on in life and, for their children, have high hopes and the wherewithal to put them on the path to success.\textsuperscript{30}

By contrast, the Conservative Party has been dismissive of such an approach, believing that the Government should be bold in declaring that marriage is the best option for families:

> Politicians and policy makers have typically shied away from distinguishing between family structures. They have become scared they might upset someone if they talk about two-parent families. Too many hide behind the mantra that it is just about personal choice and that Government has no opinion . . . The difference in stability between marriage and cohabitation is of fundamental importance, yet Government policy has failed to recognise that [there is] a ‘marriage effect’.\textsuperscript{31}

It will be interesting to see the extent to which the prevailing (2010) Coalition Government adopts a pro-marriage stance.

\textbf{F} \textit{Do we give up?}

So there are severe difficulties in defining families. There is little agreement within society over exactly what constitutes family or what the purposes of a family are. Does this lead us to throw up our hands and say there is no such thing as a family, as so many sociologists do?

\begin{itemize}
  \item \textsuperscript{26} Priolo (2007).
  \item \textsuperscript{27} National Centre for Social Research (2010).
  \item \textsuperscript{28} See Bainham (1995b).
  \item \textsuperscript{29} Eekelaar and Nhlapo (1998: ix).
  \item \textsuperscript{30} Cabinet Office (2008: 5). See also DCSF (2010).
  \item \textsuperscript{31} Centre for Social Justice (2009: 8–9).
\end{itemize}
The argument for not doing so is that most people regard their family (whatever they mean by that) as of enormous importance, and indeed families are seen as having great social significance. Promoting the family is one of the few political ideals with which most people agree.

What this demonstrates is that there are dangers in seeking to promote family life or talk about family law unless we are clear what it is we mean by families. We need to be precise about what aspect of the family a law is seeking to promote, or which group of people is intended to be covered by a particular law. Indeed, it may be that some parts of family law will apply to some families and not to others. It is not that some groups are family and some are not, but that some family groups may need the benefits of a particular law and others not.\textsuperscript{32} What is clear is that the definition of a family may change over time. Gittens writes:

\begin{quote}
Just as it would be ludicrous to argue that a society or an era is characterised by one type of individual, so it is ludicrous to argue that there can only be one type of family. Families are not only complex, but are also infinitely variable and in a constant state of flux as the individuals who compose them age, die, marry, reproduce and move.\textsuperscript{33}
\end{quote}

\section*{G Discussion of how the law defines families}

The legal definition of families has changed over time. In 1950 in \textit{Gammans v Ekins},\textsuperscript{34} talking of an unmarried couple, it was stated: ‘to say of two people masquerading as these two were as husband and wife, that they were members of the same family, seems to be an abuse of the English Language’. This approach would no longer represent the law.

The leading case on the meaning of family in the law is \textit{Fitzpatrick v Sterling Housing Association Ltd},\textsuperscript{35} a decision of the House of Lords. Although their Lordships were careful to explain that they were just considering the meaning of family in the Rent Act 1977, the decision will be highly influential in defining family in other contexts.

\textbf{CASE: Fitzpatrick v Sterling Housing Association Ltd [2000] 1 FCR 21}

The case concerned a Mr Thompson and a Mr Fitzpatrick, who had lived together in a flat for 18 years until Mr Thompson died. Under the Rent Act 1977 Mr Fitzpatrick could succeed to the tenancy of the flat, which had been in Mr Thompson’s name alone, if he was a member of Mr Thompson’s family. So, the core issue was whether a gay or lesbian couple could be a family. By a three to two majority the House of Lords held that Mr Thompson and Mr Fitzpatrick were a family. The majority accepted that the meaning of family is not restricted to people linked by marriage or blood. Lord Slynn suggested that the hallmarks of family life were ‘that there should be a degree of mutual interdependence, of the sharing of lives, of caring and love, or commitment and support’.\textsuperscript{36} He later added that the relationship must not be ‘a transient superficial relationship’.\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{32} Ghandhi and MacNamee (1991).
\item \textsuperscript{33} Gittens (1993: 5).
\item \textsuperscript{34} [1950] 2 KB 328 at p. 331.
\item \textsuperscript{35} [2000] 1 FCR 21.
\item \textsuperscript{36} [2000] 1 FCR 21 at p. 32.
\item \textsuperscript{37} [2000] 1 FCR 21 at p. 35.
\end{itemize}
Chapter 1 What is family law?

Applying these criteria to the couple in question, they were certainly family members. Mr Fitzpatrick had cared for Mr Thompson during the last six years of his illness. Lord Clyde, unlike the others in the majority, thought that it would be difficult for a couple to show that they were a family unless there was an active sexual relationship or the potential for one. He felt that the sexual element was important if a distinction was to be drawn between families and acquaintances. The dissenting judges argued that the paradigm of the family was a legal relationship (e.g. marriage or adoption) or by blood (e.g. parent–child). As the couple did not fall into these definitions, nor did they mirror them, they could not be regarded as a family, although the minority added that they believed Parliament should consider reforming the law so that a survivor of a gay or lesbian relationship could take on a tenancy.

In *Mendoza v Ghaidan* it was held that a same-sex couple were living ‘as [the tenant’s] husband or wife’ for the purposes of para 2(2) of Sch 1 to the Rent Act 1977, which lists those entitled to succeed to a statutory tenancy. Relying on the Human Rights Act 1998 the House of Lords interpreted the paragraph to read ‘as if he or she were his wife or husband’ and held that this would cover long-term same-sex partners. In *Joram Developments Ltd v Sharratt* a 24-year-old man and a 75-year-old woman shared a flat, enjoying each other’s company and living communally, although there were no sexual relations. The House of Lords was willing to say they shared a household, but not that they were members of a family.

So, to summarise the law’s approach to defining a family, the law does not restrict the definition of family life to those who are married or those who are related by blood. It is willing to accept that other less formal relations can be family if they can demonstrate a sharing of lives and degree of intimacy and stability. However, it would be wrong to say that the law takes a pure function-based approach because if a couple are married they will be regarded as a family, even though their relationship is not a loving, committed, or stable one.

The law, therefore, in defining families, uses a combination of a formalist and function-based approach. Despite these developments recognising a variety of family forms it can be argued that there is a hierarchy of families in family law: the top position being taken by married couples, with unmarried heterosexual couples and same-sex couples below them. Certainly the closer a relationship is to the ‘ideal’ of marriage the more likely it is to be recognised as a family.

### New families?

Some commentators believe that at the beginning of the twenty-first century we are witnessing some fundamental changes in the nature of families. Others argue that family life has been in constant flux across the centuries. Certainly some current statistics make dramatic reading. The more detailed figures are given at relevant parts throughout the book, but some of the main changes in family life in recent years include the following:

40 [1979] 1 WLR 928.
41 Bailey-Harris (2001c).
42 Silva and Smart (1999).
43 Fox Harding (1996).
People are now marrying at an older age; the rate of marriage is dropping; and there are projections that fewer and fewer people will marry. In 2007 of those aged over 30 only 55% were married.

Increasingly people are cohabiting outside of marriage. In 2008, 45% of children were born to a mother who was unmarried. In 2007, of those aged 16–29 10% were married, while 16% were cohabiting. In 2007 around 10% of the adult population were cohabiting.

Same-sex relationships are increasingly acceptable. It has been estimated that there are between 2.3 and 3.2 million gay, lesbian or bisexual people in the UK.

In the 1970s and 1980s there were sharp increases in the rate of divorce. In recent years the divorce rate appears to have levelled off, and even slightly declined. However, it has been projected that 41% of marriages entered into in the 1990s will end in divorce.

An increasing proportion of children lives in lone-parent households. In 2007, 20% of households with dependent children were headed by a single parent. In 2009 only 63% of children lived with a married couple.

The average size of households is in decline (in 2009 it was 2.4 people) and there is a significant increase in the number of people living alone. In 2009, 29% of households contained a single person. It has been estimated that this will rise to 35% by 2021.

The proportion of the population over the age of 65 is ever increasing.

There has been a sharp decline in birth rates. In a survey of women aged 21–23 only 40% said they expected to have a baby in the next five years. Women are leaving having children until later. In 2007 20% of births were to women over the age of 35. Two thirds of mothers are in paid employment.

More and more children are living with their parents even after their eighteenth birthday: in 2006, 58% of men and 39% of women aged 20–24 in England still lived at home with their parents.

There were more than seven million people (12% of the population) living alone in the UK in 2009.
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As these statistics indicate, the nature of family life is certainly undergoing a change. Geoff Dench and Jim Ogg have suggested that we are experiencing a dramatic shift from the traditional model of ‘mother–father–child’ family to one based on ‘mother–grandmother–child’, with fathers (and fathers’ sides of the family) becoming irrelevant for many children. They argue:

We can see a clear tendency at the moment for matrilineal ties (through the mother) to become the more active, while patrilineal, through the father, may often be very tenuous or even non-existent... [There is now] a growing frailty in ties between parents... an increasing marginalisation of men, and of ties traced through men, and a stronger focusing of families around women. 61

Certainly there has been a dramatic increase in the extent to which child care is undertaken by grandparents, so that now four in five pre-school children are to some extent cared for by grandparents. By contrast, there has been a decreasing significance in the roles played by aunts, uncles and wider relatives. 62

However, contrary to the views of Dench and Ogg, others have argued we are witnessing a significant change in family life because fathers are seeking to play an increasing role in the lives of their children. 63

TOPICAL ISSUE

New men, old fathers?

Fathers 4 Justice and other such groups 64 have gained notoriety with campaigns that have included throwing purple flour at the Prime Minister, parading across Buckingham Palace and wearing costumes of male superhero figures: 65 all of this in the name of promoting the role of fathers, particularly after divorce, and campaigning against what they regard as discrimination against fathers. Whether we are witnessing a change in the role men play in family life is hotly debated. 66 Traditionally the family could be seen as a central way in which sex roles were created and reinforced. 67 Women were to be bearers and carers of children and other dependants. Men were to be providers. The woman’s role and place was in the home. The man’s domain was in the ‘real world’ of commerce and business. 68

This is now changing; although quite how is unclear. 69 There certainly appears to be an increased acceptance that the traditional model of the family is not how things should be. In a recent survey only 17 per cent of men thought the traditional model still desirable. 70 Surprisingly, perhaps, of teenagers questioned, 21 per cent of boys believed women should adopt a traditional role. 71 Many couples seek to ensure that there is an equal sharing of household tasks and child care. However, most fail, and in heterosexual couples women still end up performing the clear majority of household labour and child care. 72

63 Collier (2010); Fatherhood Institute (2008).
64 Fathers 4 Justice is now said to be disbanded: Collier (2009b).
68 Collier (2010).
69 Featherstone (2009 and 2010).
Most people accept that there has been a change in public perception about what is expected of a ‘good father’ although it is unclear how much this has affected the practice of fathering.\(^{73}\) Looking at the new paternity leave of two weeks given to fathers following the birth of a child, a recent study found that only 50 per cent of fathers took the full two weeks available.\(^{74}\) Less than 20 per cent took up the right to claim more than that.\(^{75}\) That said, other studies showed that over 70 per cent of fathers wished they had been able to take more leave than they did in fact take.\(^{76}\) Whether this is rhetoric not matching reality or a demonstration of the financial pressures many couples are under is a matter for debate. Even if fathers are spending more time with children they are not doing so in a way which impacts on their career progression. While for mothers childbirth often signals a move into no paid work or part-time work, for fathers it rarely does.\(^{77}\) Even in cases where both partners work more than 48 hours a week, only 20 per cent of women said their partner had the main responsibility for the washing and the cooking.\(^{78}\)

A significant study in the role of the modern father found that, although the majority of fathers were spending more time with their children, their care was often mediated through the mother. In other words, the mother enabled the care, for example, by supervising it, or suggesting what the father might do with the child.\(^{79}\) Further, there is good evidence of many fathers ‘cherry picking’ the fun parts of child care (e.g. playing with the child), leaving the more mundane roles to mothers.\(^{80}\) Perhaps this is indicated by a survey of children who were asked ‘who understands you best?’: 53 per cent said ‘mum’; 19 per cent said a best friend and only 13 per cent said ‘dad’.\(^{81}\) Furthermore, in a different survey 65 per cent of fathers felt that mothers were ‘naturally’ better at looking after children than fathers.\(^{82}\) In any event, an optimist may hope that we are seeing the start of an acceptance that the raising of children should be undertaken equally by men and women. The image of fathers in the law has certainly changed, with Sheldon and Collier noting that

the image of unmarried fathers as unworthy, irresponsible and disengaged has been increasingly supplemented, if not entirely supplanted, by a very different depiction of unmarried fathers: as a discriminated group who are often deeply committed to their children yet find themselves denied access to them, being left unfairly dependent on the whims of sometimes hostile mothers.\(^{83}\)

The extent to which this is a truthful representation will be considered further in Chapter 9.

Evidence concerning the importance or otherwise of a father figure is in dispute.\(^{84}\) Studies showing the success of lesbian couples in raising children together may suggest that, although there may be a benefit from having two or more people sharing the load of parenting and providing the child with a variety of input, whether they happen to be male or female does not matter.\(^{85}\) Others, however, believe there is something unique that a male parent has to offer.\(^{86}\)

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\(^{73}\) Featherstone (2009).

\(^{74}\) Smeaton (2006).

\(^{75}\) According to Thompson et al. (2005: viii) only one in five fathers altered their work patterns following the birth of a child.

\(^{76}\) Yaxley, Vinter and Young (2005). But see BBC Newsonline (2009d) for evidence of a reluctance by fathers to take paternity leave.

\(^{77}\) Featherstone (2009).

\(^{78}\) Family and Parenting Institute (2009).

\(^{79}\) Lewis and Welsh (2006); Welsh et al. (2004).

\(^{80}\) Featherstone (2009: 34).

\(^{81}\) ICM (2004).

\(^{82}\) Thompson et al. (2005).

\(^{83}\) Collier and Sheldon (2008: ch. 6).

\(^{84}\) Maccullum and Golombok (2004).

\(^{85}\) Dunne (2000).

\(^{86}\) Hauari and Hollingworth, K. (2010).
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Not only has the image of what makes a ‘good father’ changed, so too has the notion of what makes a ‘good mother’.\(^{87}\) There has been an increased responsibility placed on parents if their children behave badly,\(^{68}\) and it has been mothers in particular who have been penalised for the misbehaviour of their children.\(^{89}\) Certainly the acceptability, and even necessity, of ‘working mothers’\(^{90}\) has increased.\(^{91}\) Of teenagers questioned, 78 per cent thought that working mothers could have just as strong a relationship with their children as those at home.\(^{92}\)

During the last few years we have seen significant steps being taken by the Government to facilitate ‘working motherhood’: improvements in the provision of child care\(^{93}\) (although it is still inadequate in many areas); an increase in provision for maternity leave;\(^{94}\) much effort to encourage lone parents to take up employment;\(^{95}\) and the development by companies of ‘family friendly policies’ for their staff.\(^ {96}\) Despite this, there are enormous pressures on mothers seeking to combine their paid and caring work.\(^ {97}\) Especially so, now that we live in the era of the Domestic Goddess.

Sylvia Hewlett\(^ {98}\) argues there is a battle for motherhood. Mothers are finding the tension between a desire to maintain a career and to have children complex. She notes that 59 per cent of Britain’s top female executives do not have children. Among professional women in the United States 42 per cent do not have children. One recent study argued that in the UK a third of graduate women will not have children.\(^ {99}\) The pressure on women seeking to combine work and raising a child is increased given the growing perception that by undertaking paid work a woman will harm family life. In 1998 51 per cent of women believed that family life would not suffer if a woman worked, but this had fallen to 46 per cent in 2002.\(^ {100}\) A different study found that 61 per cent of those questioned believed that parents did not get to spend enough time with their children. Some 48 per cent admitted that they chose to pursue their career even if that affected their family life.\(^ {101}\)

Some sociologists believe we are witnessing an increase in individualisation, with personal development being a key aspect of people’s lives.\(^ {102}\) Elisabeth Beck-Gernsheim explains the individualisation thesis in this way:

On the one hand, the traditional social relationships, bonds and belief systems that used to determine people’s lives in the narrowest detail have been losing more and more of their meaning. . . . New space and new options have thereby opened up for individuals. Now men and women can and should, may and must, decide for themselves how to shape their lives – within certain limits, at least.

\(^{87}\) For a discussion of the idealisation of mothers see Herring (2008a).
\(^{88}\) Kaganas (2010).
\(^ {89}\) Featherstone (2010a).
\(^ {90}\) The idea that mothers who are not in paid employment are not working is, of course, false.
\(^ {91}\) See the discussion in Churchill (2008).
\(^ {92}\) Park, Phillips and Johnson (2004).
\(^ {93}\) HM Treasury (2004b). In one study of parents with young children, nine out of ten parents had used some form of child care or early years provision in the previous year: Bryson, Kazimirski and Soutwood (2006).
\(^ {94}\) See Work and Families Act 2006. However, there is still ample evidence of discrimination against workers who become pregnant: Adams, McAndrew and Winterbrotham (2005).
\(^ {95}\) Especially through the Sure Start Programme. Government consultation has indicated a widespread concern that lone parents are in fact feeling pressured to take up employment: DWP (2006a).
\(^ {96}\) Lewis (2009); James (2009).
\(^ {97}\) Gatrell (2005).
\(^ {98}\) Hewlett (2003).
\(^ {100}\) BBC News Online (2008i).
\(^ {101}\) BBC News Online (2007i).
\(^ {102}\) Beck (2002); Daly and Scheiwe (2010) but see Smart (2007a) and Eekelaar (2009) for a questioning of this.
On the other hand, individualization means that people are linked into [social] institutions...these institutions produce various regulations...that are typically addressed to individuals rather than the family as a whole. And the crucial feature of these new regulations is that they enjoin the individual to lead a life of his or her own beyond any ties to the family or other groups – or sometimes even to shake off such ties and to act without referring to them.103

This vision of an individualised society is rejected by some as failing to pay sufficient account to the sense of obligation that family ties do generate.104 Others argue it is simply impossible for an individual to pursue their vision for their life without forming relationships with others.105

There is, however, little doubt that many people experience tensions between their family responsibilities and their personal aspirations. Many parents value their role as care-giver, but, to the outside world, status and power are achieved through career development, rather than child-care responsibilities.106 Indeed, as already mentioned, it may even be that the pursuit of personal fulfilment is putting people off becoming parents. In a recent survey,107 64 per cent of men and 51 per cent of women agreed that it was more important for women to enjoy themselves than to have children (the fact that the question sees these as alternatives is revealing!). A majority of those questioned believed doing well at work and earning money can ‘count for more’ than bringing up children. Two thirds of men and women said that career pressures made it harder to bring up children and explained decreases in the birth rate.108 It is difficult to know what to make of surveys of this kind, but they do reflect a widespread belief that children are expensive, take up too much time and represent an end of fun and youth.109

So, with the changing understanding of what it means to be a mother or father, and indeed whether being a mother or father is a good thing, the meaning of family is under challenge. Moreover, gay and lesbian relationships are offering a challenge to traditional heterosexual models of relationship.110 The future for families is hard to predict. Shelley Roseneil and Sasha Budgeon111 have suggested that rather than talking of families we should refer to ‘cultures of intimacy and care’. They even suggest that for many people the role played by close friends is more important than that played by those with whom people have sex, who flit in and out of life more quickly than best friends. Indeed it has been suggested that we are seeing a rapid increase in friends sharing homes together and this will be an increasingly common social phenomenon.112

2 Should family life be encouraged?

Most people regard families as beneficial. Indeed the Universal Declaration of Human Rights proclaims that the family is ‘the natural and fundamental group unit of society’. However,
there are those who oppose families. The benefits and disadvantages of family life will now be briefly summarised.

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**Is family life good?**

**Arguments in favour of family life**

1. Emotional security. Family members can provide crucial emotional support and care for each other. Parents can furnish the love and security that children need as they are growing up. As Schaffer has argued:

   Families are ideally suited for the bringing up of children: they are small, intimate groups, making it easy for children to acquire consistent rules of behaviour; they are linked to various outside settings (other families, work, leisure, and so forth) to which children can gradually be introduced; and they are usually composed of individuals deeply committed to the child whose security and care can therefore be guaranteed. The family is thus the basic unit within which the child is introduced to social living.

2. Families can be regarded as essential to the development of people’s identity and to the pursuit of their goals in life. Similarly, families enable children to develop their own characters and personalities.

3. The advantages of family life are not limited to the benefits received by the members themselves. Families benefit the state. Ronald Reagan captured a popular perception that: ‘Strong families are the foundation of society. Through them we pass our traditions, rituals and values. From them we receive the love, encouragement and education needed to meet human challenges. Family life provides opportunity and time for the spiritual growth that fosters generosity of spirit and responsible citizenship.’

4. The family can also be supported as an institution which protects people from powerful organisations within the state. It is harder for the state to misuse its powers against groups of people living together, than to oppress individuals living alone.

**Arguments against families**

1. A major concern over families is the level of abuse that takes place against the weakest members. It has been claimed that around a quarter of all young females are abused within the home. Levels of domestic violence are strikingly high. Certainly, behind the screen of ‘respectable family life’ appalling abuse of children and women has occurred. Whether the amount of interpersonal violence would decrease if there were no families may be open to doubt.

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113 Barrett and MacIntosh (1991).
114 Schaffer (1990: 204).
115 Parsons and Bales (1955).
117 Mount (1982: 1).
118 Cawson, Wattam, Brooker and Kelly (2000) cite 21% of girls having suffered sexual abuse; 82% of abuse of girls is by parents or relatives.
119 See Chapter 6.
Should family life be encouraged?

2. There is a major concern that families are a means of oppression of women. Delphy and Leonard argue:

    We see men and women as economic classes with one category/class subordinating the other and exploiting its work. Within the family system specifically, we see men exploiting women’s practical, emotional, sexual and reproductive labour. For us ‘men’ and ‘women’ are not two naturally given groups, which at some point in history fell into a hierarchical relationship. Rather the reason the two groups are distinguished socially is because one dominates the other in order to use its labour.\footnote{Delphy and Leonard (1992: 258).}

The argument is not necessarily that every family involves oppression, but that the structure of family life too readily enables oppression to occur.

3. Barrett and MacIntosh\footnote{Barrett and MacIntosh (1991).} argue that families encourage the values of selfishness, exclusiveness and the pursuit of private interest, which undermine those of altruism, community and the pursuit of the public good.\footnote{See also Brecher (1994).} They insist: ‘The world around the family is not a pre-existing harsh climate against which the family offers protection and warmth. It is as if the family has drawn comfort and security into itself and left the outside world bereft. As a bastion against a bleak society it has made that society bleak.’\footnote{Barrett and MacIntosh (1991: 80).} If, rather than spending time on DIY and gardening, family members spent time on community projects, would society be a better place?

Questions

1. What, if anything, is good about family life? Are those goods found in all families?
2. Imagine we had a completely different society. What forms and structures of intimate relationships could be possible? Would they be better or worse than we currently have?

Further reading

Read \textit{Herring} (2010c) and \textit{Fineman} (2004) for a discussion of whether family law should be arranged around caring relationships, rather than sexual ones.

A Proposing new visions for families

If the law and society were to attempt to promote a radically different form of family life, what might that be?

1. Martha Fineman has suggested that we should view the carer–dependant\footnote{Although see Herring (2007a) for an argument that the distinction between carer and cared for is not straightforward.} relationship as the core element of a family.\footnote{Fineman (2004). In Fineman (1995) she had suggested the mother–child dyad as the key relationship. See the excellent discussion of Fineman’s work in Reece (2008).} She is therefore seeking to move away from seeing the sexual relationship between a man and a woman as the core element of family life and instead is focusing on dependent relationships.\footnote{See also Deech (2010a).} It is these caring relationships which are of real value to society, certainly more so than a couple having just a sexual relationship. Adopting such an approach I have argued in favour of a ‘sexless family law’:
We must ask what kinds of relationship require the ministrations of family law: its protective; adjutive; and supportive functions. The answer is not marriage, civil partnership and cohabitation. In other words a sexual relationship is not what marks a relationship as one requiring the functions of the law. Rather it is relationships marked by care and interdependency. These are the relationships which are of greater importance to society and need promotion. These are the relationships which are likely to cause the greatest disadvantage, especially in economic terms, and therefore need the protective and adjutive work of family law.127

Anne Bottomley and Simone Wong have suggested that the law should centre around ‘shared households’.128 Property law for intimate relations should depend on the sharing of a home and care, rather than any sexual or formal relationship between the parties.129 The kinds of approaches mentioned here would all include relationships such as a daughter caring for her elderly father within the purview of family law.

2. Barrett and MacIntosh argue that society should move away from small units towards collectivism. They would like to see a range of favoured patterns of family life, involving larger groups of people living together in a variety of relationship forms.130 As noted above, increasing numbers of people live alone and this might suggest a model where people throughout their lives engage in a variety of relationships, but without cohabiting with anyone. Sociologists have recognised ‘living apart together relationships’, where a couple have a monogamous sexual relationship, but live in separate places.131 Levin suggests three conditions to be regarded as a couple who are ‘living apart together’: that the couple agree they are a couple; others see them as such; and they live in separate houses.132 E-mail, texting and other IT makes such relationships easier to maintain. A device that allows couples who are separated by distance to have long-distance sex by drawing in light on each other’s bodies may be of assistance too!133 It has been estimated that there are 2 million men and 2 million women in England and Wales who are ‘living apart together’.134

3. Weeks et al., looking at the meaning of ‘family’ within the gay and lesbian community, talk of ‘families of choice’. Families are seen as ‘an affinity circle which may or may not involve children which has cultural and symbolic meaning for the subjects that participate or feel a sense of belonging in and through it’.135 Family in this definition are those people to whom a person feels particularly close, rather than those with whom there is a blood tie.

4. Beck-Gernsheim136 argues that for many people there is a pressure between people pursuing their own goals for their lives and the obligations they feel they owe to their families. She argues this will not lead to the end of the family: ‘The answer to the question “What next after the family” is thus quite simple: the family! Only different, more, better: the negotiated family, the alternating family, the multiple family, new arrangements after divorce, remarriage, divorce again, new assortments from your, my, our children, our past and present families.’137

129 Bottomley and Wong (2009).
130 Barrett and MacIntosh (1991: 134).
131 Haskey and Lewis (2006); Carling (2002).
133 BBC Newsonline (2009c).
Approaches to family law

A What is family law?

There is no accepted definition of family law. Family law is usually seen as the law governing the relationships between children and parents, and between adults in close emotional relationships. Many areas of law can have an impact on family life: from taxation to immigration law; from insurance to social security. Therefore, any book that attempts to state all the laws which might affect family life would be enormous, and inevitably textbooks have to be selective in what material is presented. Conventions have built up over the kinds of topics usually covered, but these are in many ways arbitrary decisions. For example, the laws on social security benefits and taxation can have a powerful effect on family life, but they are usually avoided in family law courses. This book has a chapter on family issues surrounding older people, but this topic is not included in many family law courses. Rebecca Probert recently edited a book on the law on intact families (i.e. families which have not experienced relationship breakdown), highlighting how family lawyers tend to focus on issues which arise when families break up, and ignore the many families who stay together.

B How to examine family law

There has been much debate over how to assess family law. What makes good family law? How do we know if the law is working well? This chapter will now consider some of the approaches that are taken to answer these questions, although no one approach is necessarily the correct one and perhaps it is best to be willing to look at the law from a number of these perspectives.

(i) A functionalist approach

This approach regards family law as having a series of goals to be fulfilled. We can then assess family law by judging how well it succeeds in reaching those goals. For example, if we decide that the aim of a particular law has the purpose of increasing the number of couples who marry, then we can look at the rate of marriages to see if the law has succeeded in its aim. So what might be the objectives of family law?

Eekelaar has suggested that, broadly speaking, family law seeks to pursue three goals:

1. Protective – to guard members of a family from physical, emotional or economic harm.
2. Adjustive – to help families which have broken down to adjust to new lives apart.
3. Supportive – to encourage and support family life.

It might be thought that functionalism is such a straightforward approach that it would be uncontroversial. However, there are difficulties with the functionalist approach:


Hale (2009a).

See Wikeley (2007a).

Probert (2007c).


Millbank (2008b).

Chapter 1 What is family law?

1. One difficulty is that a law rarely has a single clearly identified goal. More often it is attempting a compromise between competing claims. A recent Act on divorce claims that it is seeking both to uphold marriage and to make it possible to divorce with as little bitterness or expense as possible.\(^{145}\) These are contradictory aims. The Act may or may not strike an appropriate balance between them, but we cannot judge the success of the Act by deciding whether or not it reaches a particular goal, because it has several.

2. Another problem with the functionalist approach is that the law is only one of the influences on the way that people act in their family life. So an Act designed to reduce the divorce rate may have little effect if other social influences cause an increase in the divorce rate. The fact that the divorce rate has not fallen may not be the fault of the Act. The rise might be the result of a complex interaction between the law and all sorts of other influences on family life.\(^{146}\)

3. With the functionalist approach there is a danger of not questioning whether the aims of the law are the correct ones to pursue. So, just asking whether an Act designed to reduce the divorce rate has actually helped reduce divorce sidesteps asking whether we want to reduce the divorce rate. It is even a little more complex than this because sometimes the law appears to create the very problem it is seeking to fix. For example, it is only because we have legal marriage that we have ‘a problem’ with divorce.

4. A further difficulty with functionalism is that it overlooks what the law does not try to do. The fact that the law does not regulate a particular area can be as significant as a decision of the law to regulate.

These are powerful criticisms of the functionalist perspective, but do not render it invalid. The approach is so tied to common sense that it cannot be denied as a useful method. However, as the criticisms demonstrate it does have serious limitations.

(ii) Feminist perspectives

Feminist contributions to family law have been invaluable.\(^{147}\) At the heart of feminist approaches is the consideration of how the law impacts on both men and women; in particular, how the law is and has been used to enable men to exercise power over women. Alison Diduck and Katherine O’Donovan explain:

The importance of feminist perspectives on family law . . . is to bring to light the ways in which the legal regulation of private, family relations are also about the regulation of social and political relations; they are about the nature and value of dependence and independence, about the balance of social and economic power and about the part that law plays in this regulation. A feminist perspective emphasizes the personal as political, and, born as it was of feminist activism, feminist theory is also about the possibility of the transformation or reconstruction of both.\(^{148}\)

It is important to appreciate the richness of the feminist perspectives:

1. At a basic level, feminist writers point to ways in which the law directly discriminates against women. For example, at one point in history a husband could divorce his wife on

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\(^{146}\) Hill (1995) discusses the wide variety of influences on family life.

\(^{147}\) For excellent recent discussions of family law from feminist perspectives see Diduck and O’Donovan (2007); Diduck (2003); Fineman (2004: ch. 6) and Munro (2007).

\(^{148}\) Diduck and O’Donovan (2007: 3).
the ground of adultery, but a wife could only divorce her husband on the adultery ground if there was also some aggravating feature, for example that the adultery was incestuous. Nowadays there are relatively few provisions that discriminate in such an overt way.  

2. Feminist writers also highlight aspects of family law which are indirectly discriminatory: that is, laws which on face value do not appear to discriminate against women, but in effect work against women’s interests. An example is the rule that financial contributions to a household are far more likely to give rise to a share of ownership in the house than non-financial ones through housework. This indirectly discriminates against women because it is far more likely that women provide only non-financial contributions to a household than men.  

3. Feminists have also sought to challenge the norms that form the foundation of the law. Terms which the law might regard as having a given meaning, such as ‘family’, ‘marriage’, ‘work’ and ‘mother’, have been shown in fact to be ‘constructs’, images which the law has wished to present as uncontroversial, but which are in fact value-laden. Feminists argue that the law has a construct of what is a ‘good mother’ and penalises those who are not regarded as ‘proper mothers’, such as lone parents. Smart suggests that society believes a good mother ‘can prevent delinquency by staying at home to look after the children, she can reduce unemployment by staying at home and freeing jobs for men, she can recreate a stable family unit by becoming totally economically dependent on her husband so that she cannot leave him. She is the answer.’ Mothers who depart from this ideal, for example lone mothers, are penalised by the law and blamed for all kinds of social harms. Rather less work has been done on the way the law constructs men and what makes a good father.  

4. Some feminist perspectives have also challenged what are sometimes called ‘male’ forms of reasoning. These feminists have categorised reasoning which focuses on individual rights as ‘male’ and as undermining the values that women prize, such as relationship and interdependency. Gilligan has written of a distinction between the ethic of care (which rests on responsibilities, relationships and flexible solutions rather than on fixed long-term solutions) and the ethic of justice (which focuses on abstract principles from an impartial stance and stresses the consistency and predictability of results). This has led to much dispute over whether rights or ethic of care are a more appropriate way to develop feminist thought. Elizabeth Kiss has summarised many of these concerns:

Feminists who embrace an ethic of care contrast their approach with an ethic of rights which they seek to supplement or even supplant. Cultural feminists and feminist communitarians criticize rights for being overly abstract and impersonal and for reflecting and endorsing a selfish and atomistic vision of human nature and an excessively conflictual view of social life. Feminist legal scholars argue that rights analysis obscures male dominance, while feminist poststructuralists charge that rights language is bound up with socio-linguistic hierarchies of gender and with the outdated patriarchal fiction of a unitary self. Finally, many

149 See Runkee v UK [2007] 2 FCR 178 where a challenge to the payment to widows but not widowers failed. Now the benefits for widows and widowers are the same.
150 See Chapter 4.
152 See e.g. Herring (2008a).
154 Gilligan (1982).
155 For further elaboration on ethic of care see Held (2006) and Herring (2007a).
156 Wallbank, Choudhry and Herring (2009).
Chapter 1 What is family law?

Theorists argue that feminist political strategies should not be centred around rights, claiming that such an approach reinforces a patriarchal status quo and, in effect, abandons women to their rights.  

5. Feminists have also been concerned with how the law operates in practice and not just with what the law says. For example, although the law might try to pretend that both parents have equal parental rights and responsibilities, in real life it is mothers who carry out the vast majority of the tasks of parenthood. So, it is argued, the legal picture of shared parental roles does not match the reality.

There are, of course, divisions among feminist commentators and there are dangers in referring to ‘the feminist response’ to a question. Most notably for family law there is a disagreement between those who espouse feminism of difference and those who endorse feminism of equality. Feminism of equality (sometimes called liberal feminism) argues that women and men should be treated identically. Okin, for example, would like to see a world where gender matters as little as eye colour. Feminism of difference argues that the law should accept that men and women are different, but should ensure that no disadvantages follow from the differences. The issue of child care is revealing. Feminists of equality might argue that we should seek to encourage men and women to have an equal role in child rearing so that they also have an equal role in the workforce. Feminists of difference would contend that we need to ensure that child rearing is valued within society and recompensed financially. Society needs to esteem the nurturing work traditionally carried out by women, rather than forcing women to have to adopt traditionally male roles if they are to receive financial reward. The root problem with these approaches is that they can both work against some women. Feminism of equality might work to the disadvantage of the woman who does not want to enter the world of employment but wants to work at home child caring and home-making. Indeed, arguably, middle-class women have only felt able to go out to work because they have been able to employ other women to provide housework and child-care services. The difficulty with feminism of difference is that, by stressing differences, it can be seen as exacerbating and reinforcing the traditional roles that men and women play and so can limit the options for women. Much work is therefore being done to produce a third model which values the caring and nurturing work traditionally carried out by women, but at the same time protects the position of women in the workforce. Dunn argues there is a need for:

recognising and celebrating the value of women’s traditional areas of work and influence rather than accepting a masculine and capitalist hierarchy of value which can lead to women passing on their responsibilities to less powerful women. In conjunction with this would be the view that this valuable work is something that male peers can and should do, the aim being to facilitate and insist upon change in men’s lives – enabling them to become more like women to the same degree that women have become more like men.

158 Wallbank (2009).
159 This is only true if both have parental responsibility. See Chapter 8.
160 Wallbank (2009); Day Scater and Yates (1999).
162 For an argument for gender neutrality in family law from a perspective which is not explicitly feminist see Bainham (2000c).
163 See Boyd (2008) for an excellent discussion of the uses of equality made by fathers’ groups and feminists.
166 For an excellent discussion of equality and discrimination generally see Fredman (2002).
But until men are more willing to undertake this change and value the caring work women do, women are left to carry on their caring work unvalued. As should be clear, the law can only supply part of the impetus for equality for women. Political, cultural and psychological changes are necessary if there is ever to be an end to disadvantages for women.  

(iii) The public/private divide

Traditionally it has been thought appropriate to divide life into public and private arenas. Family law has been seen as the protector of private life. Notably, the European Convention on Human Rights upholds ‘a right to respect for private and family life’. The significance of this distinction between public and private life is twofold. First, the traditional liberal position is that there are some areas of our lives that are so intimate that it is inappropriate for the state to intervene. It is argued that it is quite proper for the law to regulate aspects of public life, such as contracts, commercial dealings, and governments, but that other areas of life are so private that they are not the state’s business. Goldstein et al. argue that protection of family privacy is essential to promote the welfare of the child:

When family integrity is broken or weakened by state intrusion, her [the child’s] needs are thwarted, and her belief that her parents are omniscient and all-powerful is shaken prematurely. The effect on the child’s developmental progress is likely to be detrimental. The child’s needs for security within the confines of the family must be met by law through its recognition of family privacy as the barrier to state intervention upon parental autonomy.

Not only, it is contended, should the state not intervene in private areas, it cannot. Imagine a law that makes adultery illegal. This might be opposed on the basis that it infringes people’s privacy. It might also be argued that it would be unfeasible. The police cannot keep an eye on the nation’s bedrooms and hotels to monitor whether adultery is taking place!

Secondly, it is maintained that where it does intervene in the public arena, the law seeks to promote different kinds of values than it does on the rare occasions when it deals with private law issues. In the public law sector people are presumed to be self-sufficient and able to look after themselves, whereas in the private arena the law stresses mutual co-operation and dependency.

The distinction between private areas of life (into which the law should not intervene) and public areas of life (where the law may intervene) is deeply embedded in many people’s thinking and much liberal political philosophy. The differentiation is particularly important in family life, although it is far from straightforward. The following are some of the difficulties with the distinction:

1. Is there really a difference between intervention and non-intervention? Imagine a family where the husband regularly assaults his wife. The law might take the view that this is a private matter and that it should not intervene. But, with this approach, what is the law doing? It could be argued that by choosing not to intrude, the law has permitted the existing power structure to be reinforced. In other words, the husband’s power can be exercised by him only because of the state’s decision not to step in. So a decision not to intervene

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168 Lewis and Campbell (2007); Day Sclater and Yates (1999).
169 See the discussion in Gavison (1994); Oliver (1999).
170 See Herring (2009b) for a discussion of the role played by autonomy.
172 To make a rather conservative selection of venues.
173 A distinction is sometimes drawn between Gemeinschaft: the values of love, duty, and common purpose (private values) and Geschellschaft: the values of individualism, competition and formality (public values).
should not be seen in a neutral light, but as a decision to accept the status quo. This makes the distinction between intervention and non-intervention more complex than at first appears.

2. Can we distinguish the public and the private? Take the example of child abuse. Although this takes place within the home, the consequences of it can affect all of society. The state will have the cost of providing alternative care for the child and of dealing with the social harms that flow from child abuse. This indicates that although the conduct takes place in private it has public consequences. Nicola Lacey argues that all areas of life – both public and private – involve interlocking arrangements, institutions and relationships between different kinds of people and bodies. To classify a particular area of life as public or private is to oversimplify the complex interplay between governments, corporations and citizens. As one commentator has put it: ‘government does indeed have an interest in who does the dishes, given that patterns of inequality and inequity in the home may shape both adults’ and children’s capacities for and opportunities for self-government’.

3. Why exactly might we want to protect the private? The argument for respecting private life is that it enables people to make decisions about how to live their lives free from state intervention. The traditional liberal approach is that each person should be able to develop his or her own beliefs and personality, free from state intervention unless there is a very good reason for the state to intrude. However, this argument does not necessarily support a neutral stance from the state. Take a wife being regularly assaulted by her husband: it is arguable that to enable her to develop her own beliefs and personality the law must intervene. In other words, the promotion of her autonomy (the freedom to choose how she wishes to live her life) which underpins the notion of privacy doctrine does not necessarily require the law to be non-interventionist. In fact to promote an individual’s privacy might require intervention in her private life. I have controversially suggested that there are some forms of family life (e.g. those characterised by abuse) that do not deserve respect and so are not protected by article 8. But it may be argued that undesirable forms of family life still deserve prima facie protection, even though there will be very good reasons which justify intervention.

4. Is respecting privacy in fact about promoting societal interests? Eekelaar argues that, rather than dividing the world into public and private, it is more effective to recognise that the state has an interest in all areas of life, and the question is how the state best promotes its interests. In relation to families, non-intervention often best promotes the state’s interests. Andrew Bainham suggests that: ‘Child-rearing may be seen with equal justification as either a private matter, subject to state involvement only when public norms are transgressed, or as a public matter in the sense that the task of giving effect to the community’s standards and expectations for child-rearing is delegated to parents.’ So this approach

174 This may be because the law is happy with the status quo or because the law is concerned that legal intervention would cause even more harm. See further Eekelaar (2000a).
175 See also Freeman (1985).
176 Lacey (1993).
177 Schneider (2000a: ch. 6).
179 Herring (2009b).
180 Gavison (1994).
181 Herring (2008c).
would require us to ask whether society’s goals are best furthered by intervention or non-intervention in this particular area, rather than asking whether this is a private or public area of life.

5. A further argument is that the image of the home and family as a private place is an ideal that may be true for some middle-class couples, but for those reliant on social housing and benefits the home can be seen as replete with social intrusion. In fact the state may police families in a less obvious way than direct legal intervention: health visitors, teachers, neighbourhood watch schemes and social workers could all be thought a form of policing of families outside formal legal regulation. The argument here is that to regard legal intervention in family life as the only form of state intervention is unduly narrow.

6. Some commentators challenge not the existence of the public/private distinction, but the way in which it has been used to women’s disadvantage. Such people suggest that, for example, the way that the law has classified domestic violence as a private matter, and the ‘problem of lone parents’ as a public one, works against women’s interests. Indeed a critic would argue that those areas of life which are traditionally the preserve of women are labelled as private and so not worthy of legal intervention, whereas the men’s world is labelled public and so deserving of regulation. Further, that by describing the care of children and vulnerable adults as private, the state has avoided much of the cost of care which has fallen particularly on women.186

(iv) Family law and chaos

Any image that family law controls family life in Britain is clearly false. It has been said that ‘the law of the family is the law of the absurd’.187 The point here is that people do not live their family lives only after considering the legal niceties involved. People do not (normally) consult their lawyers before making love, moving in together, or even getting married. The notion that people treat each other in intimate relationships by following the requirement of the law is clearly unrealistic. Indeed family law has been criticised for failing to pay sufficient attention to the emotions that govern how people act in their intimate lives.188 The vast majority of people simply do not know what the law relating to families is, and, even if they did, it would be very unlikely that the law would influence the way they would act in their family lives.189 This is not to say that family law is utterly powerless. First, in the cases that actually reach the court, a court order usually has a strong influence on the lives of the parties thereafter. Secondly, the law and legal judgments act as one part of the maelstrom of general attitudes within society towards the family, and the general attitudes of society can affect the way people think they ought to behave and hence the way they do behave.

Family law has to deal with people who act in the heat of love, hate, fury or passion, and so it is not surprising that it cannot itself be entirely rational. Like human beings, the law seeks to pursue contradictory objectives with inconsistent means. There is nothing necessarily wrong with this. To seek coherence and consistency in family law may therefore be a false

184 Health visitors regularly visit a mother in her house following the birth of a child.
185 Donzelot (1980); Parton (1991); Rodger (1996).
189 Rose (1987).
190 Especially when reported in the media.
goal. The law is dealing with the chaotic relationships of inconsistent and unreliable people, and so it is not surprising that the law reveals these characteristics too.\textsuperscript{191} There is a further issue and that is that social attitudes and practices are changing fast. Carol Smart has written that family law is ‘hurrying along in the wake of changes brought about by people themselves’.\textsuperscript{192}

\textbf{(v) Autopoietic theory}

Autopoietic theory has been developed from the ideas of Teubner. Its main proponent in the family law arena is Michael King.\textsuperscript{193} He argues that society is made up of systems of discourse, and that law is but one system of communication within society.\textsuperscript{194} One significance of the theory is that it recognises that there are difficulties in one system of communication working with another. In other words, the law has a certain way of looking at the world and interacting with it. The law classifies people and disputes in particular ways (‘a mother’; ‘a father’; ‘a contact dispute’; ‘a child abuse case’), applies the legal rules to it, and produces the appropriate legal response. This process may transform the problem, as the parties understood it, into a quite different form of dispute and then produce an answer inappropriate to the parties’ actual needs. Further, when other systems of communication attempt to interact with the legal system, unless they are able to put their arguments into the form of legal communication, the legal system cannot deal with them. For example, when social workers or psychologists are called upon by the courts to advise on what is in the best interests of the child, their evidence will be transformed into a legal communication. This may not be easy for lawyers. The law tends to concentrate on sharp conclusions: guilty or not guilty; abuse or no abuse. Social workers, by contrast, concentrate on on-going relationships and working in flexible methods over time, rather than setting down in a written order what should happen to children for the future.

\section{Current issues in family law}

Some of the general issues that affect family law will now be considered.

\subsection{How the state interacts with families}

Fox Harding has suggested seven ways in which the state could interact with families.\textsuperscript{195} Although only sketched here at a superficial level, they demonstrate the variety of attitudes the state could have towards families.

1. \textit{An authoritarian model}. Under this approach the state would set out to enforce preferred family behaviour and prohibit other conduct. The law could rely on both criminal sanctions and informal means of social exclusion and stigmatisation. This approach would severely limit personal freedom.

\textsuperscript{191} Dewar (1998).
\textsuperscript{192} Smart (2009: 7).
\textsuperscript{194} E.g. King (2000).
\textsuperscript{195} Fox Harding (1996).
2. *The enforcement of responsibilities in specific areas.* This model would choose the most important family obligations which the state would then seek to enforce. It is similar to the authoritarian model, but recognises that some family obligations are unenforceable.

3. *The manipulation of incentives.* Here the aim is to encourage certain forms of family behaviour through use of rewards (for example, tax advantages), rather than discourage undesirable behaviour through punishment. 196

4. *Working within constraining assumptions.* Here the state does not overtly advocate particular family forms, but bases social resources on presumptions of certain styles of family life. For example, especially in the past, benefit and tax laws were based on the presumption that the wife was financially dependent on her husband.

5. *Substituting for and supporting families.* In this model the state’s role is limited to supporting or substituting for families if they fail. In other words, the state does not seek to influence the running of the family until the family breaks down, but if it does then the state will intervene.

6. *Responding to needs and demands.* Here the law intervenes only when requested to do so by family members. Apart from responding to such requests, the state does not intrude in family life.

7. *Laissez-faire model.* Under this approach the state would seek to exercise minimal control of family life, which would be regarded as a private matter, unsuitable for legal intervention.

**B Privatisation of family law**

There is much debate over whether there is a lessening of the legal regulation of family life. Some believe that we are witnessing the privatisation of family life, with the law regulating it less and less. 197 For example, the Government has attempted to encourage couples who are divorcing to use mediation to resolve financial disputes and disagreements about what should happen to the children after divorce, rather than using lawyers and court procedures. On the other hand, there are other areas of family law where the law appears more interventionist. There has been an increased use of the criminal law against parents whose children misbehave. 198 So, the picture is not a straightforward one of intervention or deregulation. Dewar has argued that, rather than experiencing deregulation, the law is focusing its resources on cases where there is a need for legal intervention. 199 An example to illustrate his argument concerns parental arrangements for children on divorce. Previously, in divorce cases involving children there would be a hearing where a judge would meet the parties and consider the arrangements for the children. However, now there is no such hearing and, unless either party applies for a court order, the judge will not consider the arrangements for the children in depth. This could be seen as privatisation of family law, but it could also be seen as focusing judicial time on those cases which need it – those where the parents cannot agree what should happen to the child. Such an attitude can be seen in *Re G (Children) (Residence Order: No Order Principle)* 200 where it was held that if the parties have reached a carefully

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196 See further Roberts (2001).
198 See Keating (2008).
200 [2006] 1 FLR 771.
negotiated agreement over the children the court should normally make an order in the terms agreed and not seek to produce an alternative solution.

The law does seem more ready to intervene in family life once the family has broken up. For example, while the family is together there is no direct attempt to ensure that a child is receiving a reasonable level of financial support from his or her parents. However, once the couple separate, the Child Support legislation comes into operation to ensure that a wage-earning parent financially supports the child at a suitable level. The law appears to assume that where a family lives together any difficulties can be resolved by the parties themselves within the ongoing relationship; the law is only needed when the parents separate.\(^{201}\)

Some research has been conducted into why people seek court orders in relation to children.\(^ {202}\) One might suspect that the reason found was that court orders were sought where the parties were in disagreement. However, the researchers found that this was only one reason why an order might be sought. The other two were:

1. **Authority.** The parents wanted to be able to rely on the authority that a court order gave them, in particular where they felt they lacked control in a specific situation and wanted the confidence that a court order would provide.

2. **Vindication.** Here what was sought was the approval of the court for the parties’ agreement and a formal record of it. Also researchers felt that sometimes an application to the court was used to send a message to the child. For example, a father might make an application for a residence order which was doomed to failure so that he could say to the child that it was the court’s choice rather than the father’s that the child should live with the mother.

Of course, often parties avoid seeking court orders. This may be because of the expense,\(^{203}\) or the fact that the wrong they wish to be righted is not one recognised by the law. The law cannot usually prevent one spouse spreading gossip about the other, for example.

It is perhaps ironic that at the same time as many call for family law to become increasingly privatised, there has been increasing pressure on the Government to open up the family courts.\(^ {204}\) Traditionally, family cases, especially those involving children, have been held in private, and publication not permitted without express permission of the judge. This has enabled some to say that the family law courts are secretive and are able to pass judgments free of public scrutiny and accountability. Behind closed doors judges and social workers conspired to remove children from their parents and make judgments which were anti-fathers, it was alleged. Cynics might argue that the press were frustrated in not being able to report sordid tales of child abuse and family breakdown which would sell newspapers. The fact that the media were not allowed access to the courts and were restricted in their reporting was seen as meaning the courts were neither transparent nor accountable. Indeed, claims were made that the bar on press attendance and reporting infringed the rights to freedom of the press in article 10 of the European Convention on Human Rights (ECHR). Increasing pressure led to a change in the law.\(^ {205}\) The Family Proceedings (Amendment) (No 2) Rules\(^ {206}\) permit accredited members of the press to attend most proceedings in family courts. This includes ancillary relief proceedings as well as disputes over children.\(^ {207}\) The press can be

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\(^ {201}\) Eekelaar and Maclean (1997: 2).

\(^ {202}\) Pearce, Davis and Barron (1999).

\(^ {203}\) And/or being refused legal aid funds to bring the application.

\(^ {204}\) E.g. Munby J (2005). For the latest proposals see Ministry of Justice (2007).

\(^ {205}\) Crawford and Pierce (2010) and George and Roberts (2009) provide useful discussion of the issues.

\(^ {206}\) SI 2009/857.

excluded to protect the privacy of the parties, especially children, or where their presence will impact on the evidence given to the court. Those seeking to exclude the press must offer justification for this.

No reporting is allowed concerning cases involving children without the leave of the court. The Children, Schools and Families Act 2010, once in force, will expand what issues journalists can report and will give them access to documents produced for court proceedings. It confirms that the publication of court proceedings is an offence unless it is permitted under the Act, or authorised by the judge. Section 12 permits publication if the information was obtained by an accredited news representative, the information does not identify the parties to the proceedings and is not ‘sensitive personal information relating to the proceedings.’ The Act allows in the future judges to give permission to allow sensitive information to be published where:

(a) it is in the public interest to give the permission;
(b) it is appropriate to give the permission so as to avoid injustice to a person involved in, referred to in or otherwise connected with the proceedings;
(c) it is necessary to give the permission in the interests of the welfare of a child or vulnerable adult involved in, referred to in or otherwise connected with the proceedings;
(d) an application for permission has been made by a party to the proceedings, or on behalf of a child who is the subject of the proceedings, and granting the permission is appropriate in all the circumstances.

When this is in force much weight is likely to depend on whether the interest in the case is simply prurient or whether there are genuine issues of public concern.

In Re Child X (Residence and Contact: Rights of Media Attendance: FPR Rule 10.2 8 (4) a celebrity father was seeking contact and residence for his children. The media wished to attend. Sir Mark Potter held that the press should be excluded. In this case evidence of the child’s views had been given on the basis of confidentiality. To make the child’s views public would breach that confidence. The ECHR article 10 rights of press were therefore outweighted by the article 8 rights of the child. This decision provides a welcome emphasis on the interests of the child. Indeed the reasons provided for excluding the press would apply in many cases.

Critics have complained that although the interests of the press have been taken into account the privacy rights of children have not. Julia Brophy’s survey of young people found that 96 per cent of them said that they would be much less willing to talk to experts or give evidence if they knew reporters would have access to what they said. There are also severe dangers that cases will be sensationalised and misreported by the press.
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For those with concern about the increasing potential for press reporting of family cases, some reassurance can be found in the words of the President of the Family Division:

In my judgment it is grotesquely contrary to the interests of children to allow journalists access to sensitive court documents. Quite apart from the desire to encourage frankness in what may well be very personal and sensitive areas of a case, are lawyers now to draft documents with one eye to them being published in the press? What a charter for the tendentious litigant and the downright publicity seeker! It is simply unacceptable that such documents should be available and, presumably, capable of being selectively reproduced. And if they are to be redacted, who is to do the redacting? And who will pay? Practitioners will be on fixed fees, irrespective of whether you think the process acceptable. Surely the judge cannot be expected to do it. 220

Assuming this is the approach the rest of the judges take there will be little or no reporting of sensitive material. However, that is perhaps still not entirely reassuring. The presence of the media in the court and the potential for access to documentation will have a significant impact on children and couples going through times of considerable personal stress.

C Autonomy

Linked to the public–private debate is the role attached to autonomy. Autonomy has become a major theme in family law in recent years. 221 In basic terms autonomy is the principle that people should be able make their own decisions about how to live their lives, as long as in doing so they do not harm others. Joseph Raz defines it in this way:

The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives. 222

In terms of family law this means that we should respect individual’s decisions about how they wish to live their family lives, and the state should not interfere. People should be free to leave relationships without undue hardship. Similarly, in the case of disputes between the parties, we should respect their decisions about how to resolve them. The state should not be telling people how to run their families, or imposing solutions on their disputes. Autonomy appears to be playing a more prominent role in family law with increasing weight being placed on enabling couples to resolve disputes themselves and with the law taking a less interventionist stance. 223 This emphasis on autonomy could be explained in part by it falling in with Government attempts to reduce legal aid and general legal expenditure. It might also reflect the fact that the issues raised in family cases are often contentious: relying on autonomy avoids the Government having to take sides. However, not everyone supports the emphasis on autonomy. I have argued that the image of individuals making choices to pursue their goals in life is anathema to family life:

Individualism ignores the complex web of relations and connections which make up most people’s lives. The reality for everyone, but in our society particularly women, is that it is the values of inter-dependence and connection, rather than self-sufficiently and independence, which reflect their reality. People do not understand their family lives as involving clashes of

220 Wall (2010).
221 Herring (2010b); Ryder (2009).
222 Raz (1986: 369).
223 Herring (2010b).
individual rights or interests, but rather as a working through of relationships. The muddled
give and take of everyday family life where sacrifices are made, and benefits gained, without
them being totted up on some giant familial star chart, chimes more with everyday family life
than the image of independent interests and rights.  

Some writers have supported the use of relational autonomy, where the focus is on the
making of choices within the context of relationships.  

D The decline in ‘moral judgements’

It is arguable that the law is increasingly reluctant to make what some see as moral judgements.
At one time the courts were happy to state what had caused the breakdown of a marriage;
who was a good mother or a good father; or what was the best way to raise a child. However, increasingly the courts have been unwilling to do this, and have accepted that there
is not necessarily one right answer in difficult cases. In particular, the courts are more and
more reluctant to accept that a party’s bad conduct should affect the outcome of a case. At
one time the question of whether a party had engaged in bad conduct was highly relevant in
divorce cases, custody disputes and financial cases. Nowadays behaviour is rarely relevant.  

Another notable example of the law’s reluctance to impose moral standards is the fact that
the House of Lords or Court of Appeal will only overturn a lower court’s decision if it is
shown that the judgment was clearly outside the range of decisions that the court could
reasonably make. The higher courts will not overturn a ruling simply because it is not the
decision that they would have made. There is some evidence that judges are becoming
increasingly less willing to hear cases and make decisions, and rather seek to persuade or
encourage the parties to reach their own agreement.  

It may be that the law’s increasing reluctance to make moral judgements represents
increasing uncertainty over moral absolutes in society at large. Bainham questions the
assumption that there is a shared body of common values about family life and the role of
family in society. He even questions whether it can be said that society accepts that adultery
is morally wrong. He argues: ‘It seems likely that if we were to concentrate on the practice
rather than the theory of matrimonial obligations, at least as strong a case could be made for
identifying a community norm of marital infidelity.’ If we cannot even agree that adultery is
wrong, there are few areas indeed where the law could set down moral judgements. However,
Regan has argued that the law cannot avoid making moral judgements. Even declining to
express a moral judgement is in a way expressing a moral view. Also, as Bainham argues, the
courts are willing to use bad behaviour as evidence of how an individual may behave in the
future. So, although a father who has been violent may not be denied contact with his child

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224 Herring (2010b: 266).
225 Rhoades (2010a and b); Herring (2010b).
226 For a discussion of the interaction between legal and social norms see Eekelaar (2000a).
228 Piglowska v Piglowski [1999] 2 FLR 763.
229 Bainham (2001a).
233 Munby J (2005: 502); Bainham (2000c). This is often put down to a decline in religious belief. However,
note that in a recent large-scale study 19% of those questioned said they went to a religious service at least
once a month (Babb et al. (2006: 200)).
235 Regan (2000).
on the basis that he has behaved immorally, he might be denied contact on the basis that his past bad conduct indicates that he might pose a risk to the child in the future.\textsuperscript{235} It is also notable that family lawyers have generally been rather reluctant to discuss the notions of responsibilities in family law. In part this may be due to a concern about the moral assessment that may be implied. Nevertheless it is clear that the notion of responsibility is a key one in family law.\textsuperscript{236} Baroness Deech\textsuperscript{237} makes the interesting point that we are happy to attach responsibilities and make moral judgements about some areas of life – the environment, diet or smoking – but not in relation to intimate family life.

Criticism of the law’s reluctance to uphold moral principles has come from a leading feminist writer, Carol Smart.\textsuperscript{238} She argues that there is an overemphasis on ‘psy professions’ who focus on children’s welfare and fathers’ rights, while a mother’s interests are lost. She is not, of course, calling for the courts to uphold ‘traditional morality’, but rather wishes to emphasise ‘the morality of caring’. This is tied in with an argument that the law should focus on what family members ‘do’ rather than what their rights are. She argues that the ‘doing’ of parenthood – providing the day-to-day care of the child – should be given far more weight than in the present law, which instead emphasises rights, such as ‘the father’s right to contact the child’.\textsuperscript{239} Janet Finch has recently argued that as well as family being about ‘doing’ it is also about displaying. She explains:

By ‘displaying’ I mean to emphasize the fundamentally social nature of family practices, where the meaning of one’s actions has to be both conveyed to and understood by relevant others if those actions are to be effective as constituting ‘family’ practices.\textsuperscript{240}

\section{E Sending messages through the law}

The number of cases where the courts actually decide what happens to a family is small. Of far more importance is the general message that the law sends to individuals and to the solicitors who advise them. The ability of the law to send messages has been recognised by the Law Commission, which concluded, in a discussion on the law of divorce, that: ‘for some of our respondents, as for our predecessors, it was important that divorce law should send the right messages, to the married and the marrying, about the seriousness and the permanence of the commitment involved. We agree.’\textsuperscript{241} The law can also send messages through the language it uses.\textsuperscript{242} For example, judges have said that it is no longer appropriate in legal terms to speak of illegitimacy, because whether a child’s parents are married or not does not affect the child’s status.\textsuperscript{243}

The problem with using the law as a means of sending messages is that, as regards the general public, the message that the law wishes to send is transmitted by the news media. The reliability of the media as conveyors of legal messages is certainly open to doubt. The Government can, of course, send messages of its own about family life outside the context of the law. For example, the Government has created the National Family and Parenting Institute.

\begin{thebibliography}{99}
\bibitem{235} Bainham (2001a). See Chapter 9 for a discussion of the law on contact.
\bibitem{236} Bridgeman, Keating and Lind (2008).
\bibitem{237} Deech (2010d).
\bibitem{238} Smart (1991).
\bibitem{239} Smart (2007a: 45).
\bibitem{240} Finch (2007: 66).
\bibitem{242} Bainham (1999b). This question becomes particularly important in discussing the enforcement of court orders: see Bainham (2003a).
\bibitem{243} Though it is not as straightforward as this; see Chapter 7.
\end{thebibliography}
to advise people on parenting and family matters. However, Eekelaar has expressed some concern that using the law to send ‘messages’ concerning how individuals live their intimate lives may infringe the principle that ‘aspects of an individual’s life are matters for determination by that individual alone’.

F Legal aid and costs

The role that costs and legal aid plays in family law is crucial. The aim of legal aid, as defined by the Lord Chancellor at the time, ‘is to provide a reasonable level of help in legal matters to people in genuine need, who could not afford that help without some subsidy or guarantee from the public’. If legal aid is not available for certain kinds of proceedings then access to that part of the law is effectively denied to a section of the population. Indeed a leading judge has commented that family courts appear to be witnessing an increase in cases where people are representing themselves, which makes cases last longer, and may impede justice.

One notable example is the right to defend a divorce petition. Although this right exists in theory, it would be very unlikely that someone would be granted legal aid to defend a divorce petition. So the right to defend a divorce petition in effect is a right only for the wealthy. Further, there is some evidence that at least in some parts of the country it has become difficult to find a solicitor or barrister to deal with legal aid work. Therefore, in some places the only sources of advice are through volunteers who are not legally qualified (e.g. at a Citizens’ Advice Bureau). Even the judiciary have accepted that the family justice system is ‘stretched to breaking point’.

Most concerning is the dramatic increase in fees for local authorities seeking to bring care proceedings (in May 2008 the fees were increased from £150 to £4,825), which many believe has deterred local authorities bringing proceedings to protect children. As a result in 2010 the Government announced plans to abolish the court fees for care proceedings. In R (Hillingdon London Borough Council) v Lord Chancellor an unsuccessful legal challenge was brought against the increase. The increase in fees has, remarkably, produced strong statements opposing them by both groups representing Circuit Judges and District Judges. Wall LJ has argued that the Government’s lack of legal aid funding is exploiting the family law system. In a remarkably unrestrained speech he stated:

Our dedication, our goodwill, our passionate belief that our function is to address the best interests of vulnerable children and families is not being recognized by a government which, however much it pays lip service to the welfare of children, is frankly indifferent to disadvantaged children and young people who are the subject of proceedings, and simply refuses properly to fund the family justice system, relying instead on the fact that we have always got by in the face of government indifference, and will continue to do so.

246 The detailed law on legal aid is now found in the Access to Justice Act 1999, as amended.
248 See Moses-Taiga v Taiga [2008] 1 FCR 696 where a husband was ordered to make payments to his wife during the litigation of her ancillary relief claim so that she could afford to instruct a firm of experienced solicitors.
249 Wall LJ (2008a).
250 Davis, Finch and Barnham (2003).
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Mr Justice Coleridge in a speech noted the dramatic fall in the number of child-care lawyers and the shortage of social workers in local authorities' children's departments.  

A further significant effect of the costs issue is that now all questions of reform of family law must consider the potential impact on the legal-aid bill and the general cost to government. Arguably, the Child Support legislation and the proposed divorce reform in the Family Law Act 1996 were both driven at least in part by a desire to cut the cost to the Government of legal aid. In 2010 the Government announced huge cuts to the family legal aid budget.

Families in crisis

There are some who believe that families are in crisis. Typical of such a view is the following statement of the Conservative Party's Centre for Social Justice:

A strong, successful and cohesive Britain needs strong families. Family stability in Britain has been in continuous decline for four decades. Since the 1970s there has been a decline in marriage. Over the same period there has been a marked increase in the number of lone parents, with a quarter of all children now growing up in single parent households. A further one in four children are born to cohabiting couples. Around one in ten families with dependent children are stepfamilies. Sadly, 15 per cent of all babies are born and grow up without a resident biological father, and seven per cent are born without a registered father on their birth certificate. Britain has the highest divorce rate and highest teenage pregnancy rate in Europe, with the teenage pregnancy rate actually rising between 2006 and 2007. Tragically, at least one in three children will experience family breakdown, in the form of parental separation, by age 16.

Not only are they dismayed at such facts, they are dismayed at changing social attitudes towards sex, family life and the importance of marriage. There is no doubt that there has been a notable shift in public attitudes in these areas. In the British Social Attitudes Survey 2008 70 per cent of people thought there was nothing wrong with sex outside of marriage; the figure in 1984 was just 48 per cent. Only 28 per cent of those questioned thought that married parents were better than unmarried ones. But other attitudes and practice have proved harder to shift: 77 per cent of people in couples say that the woman usually does the laundry, a percentage little changed since 1994.

Despite the wringing of hands over the 'decline in family life', a recent survey found 93 per cent of those questioned were happy with their family life. Seventy-five per cent of people questioned said they were happiest when with their family, only 17 per cent said they were happier with friends. For family lawyers immersed in the problems that arise on family breakdown it is easy to forget that families are a source of great joy for many people. Further, it is arguable that the increased rates of marriage breakdown show that more is expected of intimate relationships, and people are not willing to put up with low quality relationships. That might not be a bad thing. There is also little evidence that family ties not based on marriage become weakened. Marriage may be in crisis, that does not mean families are. There is often political talk of promoting family values, by which is usually meant: stable marriages; gendered division of roles; the confinement of sexuality to the married heterosexual

258 BBC Newsonline (2007e).
259 Smart (2007a: 15).
260 For a discussion of the difficulty in finding agreed ‘family values’ in today’s society see Carbone (2000).
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unit; and the support of these patterns through government policy. These have been championed in particular by some on the ‘new right’. Alison Diduck has suggested that when people mourn the loss of the traditional family they are in fact grieving for the loss of the values of loyalty, stability, co-operation, love and respect, rather than the traditional image of the married couple with children. Others speak of the ‘new family’, where the traditional notions of family have been cast aside to make room for multifarious forms of family life. So, whether family life is in crisis or simply undergoing change is a matter for debate.

Anthony Giddens suggests that there has been a fundamental shift in the nature of intimate relationships. He suggests that today the typical relationship is one entered into for its own sake, for what can be derived by each person from a sustained association with another; and which is continued only in so far as it is thought by both parties to deliver enough satisfaction for each individual to stay within it.

This is a highly individualised concept of relationships. It has been criticised by some feminist commentators for failing to recognise the role that dependency and caring plays in the lives of women particularly. Lewis has argued that although individualism is a significant influence in many people’s lives, it should not be thought that this means that people do not value commitment. Rather this commitment is negotiated and the result of ‘give and take’ within a relationship. This means that the value of the relationship is found by the couple themselves, rather than in the form it takes. In other words people no longer feel there are social expectations on how relationships should develop (e.g. that they should lead to marriage). Rather, people develop their own relationships in their own way.

**H Solicitors, barristers and family law**

As we have already noted, the vast majority of disputes between family members do not reach the courts. Many are resolved by negotiation using solicitors. Hence the position of the family law solicitor is a crucial one in the working out of family law in everyday life. Ingleby has suggested the term ‘litigotiation’ as appropriate to explain what many family lawyers do. The word suggests a combination of litigation and negotiation, meaning that the parties negotiate through the mechanisms put in place to prepare for litigation. The ‘guess’ or prediction of what a court will order shapes the bargaining of the solicitors. If, for example, the solicitors are negotiating a financial settlement after divorce, they will normally be able to estimate the range within which a court is likely to make an order. The negotiations will then concern where in that range the parties can reach agreement. Further, there is increasing interest in the attitudes and practices of family lawyers. Piper has suggested that ‘solicitors appear to have internalised an agreed set of “rules” which must be followed by those aspiring to be good family lawyers’. Even if the case reaches barristers they too make extensive efforts to reach settlement.

261 Jagger and Wright (1999: 1–2).
263 Howard and Wilmot (2000).
265 For arguments against such increased individualism see Eekelaar and Maclean (2004).
266 Lewis (2001b); Eekelaar and Maclean (2004).
268 Eekelaar, Maclean and Beinart (2000).
270 Eekelaar and Maclean (2009).
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Non-legal responses to family problems

No family lawyer would claim that the law provides the solutions to all problems that families might face.\(^{271}\) The importance of the role played by social workers, psychiatrists, psychologists and mediators in resolving difficulties families face should not be underestimated. Thorpe LJ,\(^{272}\) in an important case concerning disputes over contact with children, stated:

> The disputes are often driven by personality disorders, unresolved adult conflicts or egocentricity. These originating or contributing factors would generally be better treated therapeutically, where at least there would be some prospect of beneficial change, rather than given vent in the family justice system.

It is notable that solicitors are being expected not only to provide legal advice, but also point clients in the direction of other sources of help.\(^{273}\) In part this is in response to recognition that litigation can be distressing for the child.\(^{274}\)

As we shall see in Chapter 9, Thorpe LJ’s suggestions have been adopted by the Government, with legislation now encouraging non-legal means of resolving contact disputes. In Chapter 3 the benefits and disadvantages of using mediation rather than lawyers will be discussed and it will be noted that recent suggestions of reform of the divorce law have been dominated by attempts to encourage parties to rely on mediation, rather than using lawyers.

Rights and consequentialism

The tension in family law between the wish to promote the welfare of the child and the concern to protect the rights of family members has been emphasised by many writers and it gives rise to some fascinating theoretical issues. In an insightful article\(^{275}\) Stephen Parker has analysed how the approach of family law has swung between ‘utility’ and ‘rights’. A utilitarian approach, he argues, ‘evaluates acts and institutions in terms of their consequences for reaching’ a goal; in this context the goal is the promotion of the welfare of the child, whereas a rights-based approach seeks ‘not to evaluate an act or institution solely in terms of its consequences’ (for example, promoting the welfare of the child) but in terms of ‘the right of an actor to do it’. Parker suggests that in Anglo-Australian law there had been a gradual shift from rights to utility, but there is now gradual reversion to rights. In fact the picture is confused, as Parker acknowledges, because there is not a clear attachment to either rights or utility across family law at present. He suggests that this represents ‘normative anarchy’\(^{276}\) and Dewar has stated that this is part of the ‘normal chaos of family law’.\(^{277}\) Dewar argues that rights and utility are ‘simply different and incompatible ways of approaching the tasks of conceptualising children and their needs and of decision making in such cases’.\(^{278}\) As we shall see repeatedly in this book, the Human Rights Act 1998 has highlighted this tension between rights and welfare.

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\(^{271}\) Wall LJ (2009).
\(^{272}\) Re L (A Child) (Contact: Domestic Violence) [2000] 2 FCR 404 at p. 439. See further Smart (2007a).
\(^{273}\) Melville and Laing (2010).
\(^{274}\) Re N (Section 91(14)) [2010] 1 FLR 1110.
\(^{276}\) Parker (1992: 312).
\(^{277}\) Dewar (1998).


**K  Rules or discretion**

There is a debate over the extent to which family law cases should be resolved by relying on rules and the extent to which they should be decided on a discretionary basis.\(^{279}\) Put simply, should a judge decide each case on its merits and be given a wide discretion in reaching a solution appropriate to a particular case or should we have rules to ensure consistency,\(^{280}\) save costs, and protect the rights of individual family members?\(^{281}\) In fact the distinction is not that sharp because there is a continuum between wide discretion and inflexible rules.\(^{282}\) The more family law is seen as a set of fixed rights and responsibilities, the more likely it is for a rule-based system to be used; but if family law is seen as being about achieving justice for the particular individuals involved, it is more likely that a discretionary-based system will be employed. With a discretionary-based system, if the case is going to be decided on its own special facts then the court will require all the relevant evidence to be heard, and this creates more costs in both the preparation of and hearing of a case. So the expense involved is another important factor in deciding the balance between the two regimes.\(^{283}\)

**L  Multiculturalism and religious diversity**

To what extent should family law take into account the variety of cultural practices in British society?\(^{284}\) The question can be framed as how to balance the desire to protect the values of the dominant culture with a need to recognise and respect the values of minority cultures. For example, in relation to marriage, should the law permit polygamous marriages out of respect for minority cultures which may encourage polygamy, or should it rather reflect the disapproval of the majority culture towards polygamy? Corporal punishment of children is another issue over which different cultures may have different practices. Alternatively, the issue can be seen as this: does the law believe that people have rights which should be protected, regardless of their cultural background, or does the law encourage cultural groups to adopt different practices, regardless of whether the majority approves of them?\(^{285}\)

There are various strategies that could be adopted including the following:\(^{286}\)

1. **Absolutism.** This view is that the values of the majority are the only correct values. Absolutism would lead to a strategy of complete non-recognition of the values of minority cultures. Minority cultures would have to adopt the values of the majority. This is not an approach that would be acceptable to most western democracies.

2. **Pluralism.** This approach recognises that there are some issues where minority values should be protected, but others where the majority’s values must be preserved.\(^{287}\) Poulter argues that minority cultural values should be restricted in instances where human rights

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\(^{280}\) As Dewar (2000b) points out, clear rules would ensure that there is consistency between decisions reached not only in the courtroom but also between settlements negotiated by the parties and their lawyers.

\(^{281}\) Dewar (1997).


\(^{283}\) For further discussion see Dewar and Parker (2000).

\(^{284}\) For some useful discussions see Barton (2009); Banda (2005 and 2003); Brophy (2000); Khaliq and Young (2001) and Malik (2007).


\(^{286}\) For a thorough discussion see Freeman (1997a; 2002b).

\(^{287}\) For further discussion see Raz (1994).
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as set out in international agreements must be protected. For example, if the practices of a minority culture infringe children’s rights, the law is permitted to outlaw those practices. Parkinson suggests that ‘the importance of preserving the inherited cultural values of the majority must be balanced against the effects of such laws on the minority’s capacity for cultural expression’. Parkinson insists, in reference to Australia, that there are some aspects of the majority’s culture which are fundamental and should be fixed. He refers to the minimum age of marriage, to laws prohibiting incest, and to the need for consent for marriage as being some of the fundamental values. On these issues, minority family practices which contravened these principles could be outlawed. However, on less fundamental values, the minority practices should be respected, even if the majority found them distasteful.

3. Relativism. This view states that there are no moral absolutes; that different values may be acceptable for particular cultures at particular times. Therefore, if a form of conduct is accepted in a minority culture the majority has no ground upon which to forbid it. If this approach were adopted there might be difficulties over issues where the minority practice is based on a mistaken factual premise. For example, if female circumcision was acceptable in a minority culture because it was thought to provide medical benefits, would the majority be entitled to forbid it because they ‘know’ that it has no medical benefits? In a more positive light, relativism claims that society benefits from there being a wide variety of different cultural practices and beliefs – it creates a richer and more diverse society. However, most relativists accept that there might be some forms of cultural practice that so infringe the rights of others to live their lives as they wish that they should be prohibited. Opponents of relativism argue that once society accepts that people have certain rights, these rights should not be lost simply because a citizen is from a minority culture. If, for example, children’s rights require that the law forbids corporal punishment, children should not lose those rights because they belong to a culture which accepts corporal punishment.

Freeman has argued that a degree of scepticism is justifiable when considering cultural practices:

Many cultural practices when critically examined turn upon the interpretation of a male elite (an oligarchy, clergy or judiciary): if there is now consensus, this was engineered, an ideology construction to cloak the interests of only one section of society.

He stated that the way ahead is to develop, through dialogues across communities, versions of ‘common sense’ values.

One of the few occasions on which the English courts have addressed these issues was *R v Derrieviere*, where a father gave his son, aged under 13, heavy corporal punishment because he had stayed out late at night. The father argued that the level of punishment was normal by the standards of his culture. However, the Court of Appeal held: ‘Once in this

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290 See the discussion in Tilley (2000).
291 Raz (1994).
292 Raz (1994).
293 Freeman (2000d: 13).
294 Freeman (2002b).
296 (1969) 53 Cr App R 637. 6).
country, this country’s laws must apply; and there can be no doubt that, according to the law of this country, the chastisement given to this boy was excessive and the assault complained of was proved.’ However, in sentencing the father, the fact that he was unaware of the acceptable standards of corporal punishment was taken into account. 297 Another example was A v T (Ancillary Relief: Cultural Factors) 298 which involved a divorce between an Iranian couple, who had recently moved to England. On their divorce the husband was refusing to grant his wife a talaq divorce which meant that even though the couple might be divorced in the eyes of the law, they remained married in the eyes of their religion. Baron J ordered that if the husband did not provide the wife with the talaq divorce he was to pay her an extra £25,000. He did this having heard evidence that this was the approach that Sharia courts would have taken, arguing that where the spouses have only a ‘secondary attachment’ to English jurisdiction and culture, then due weight could be given to factors relevant to their ‘primary culture’. It will be interesting to see whether courts in other cases will accept an argument that a different family law might apply to different cultures.

The issue has come to the public attention with speeches by the Archbishop of Canterbury and Lord Chief Justice attracting much attention because they were (inaccurately) reported as saying that English family law should adopt principles from Sharia law. 299 The question being addressed was, in fact, the extent to which secular courts should recognise or be willing to give effect to decisions of Sharia courts, if a couple have chosen to have their disputes settled by those religious courts. Some feel the courts should respect the decision of a couple to have their disputes resolved by an extra-legal alternative. However, Penny Booth voices the concerns of others with such proposals: ‘The danger is in the development of a parallel system of (any) law where the choice as to which system or principle is used is determined not by the individual or the issue but by the group bullies. In family law this danger could arise where the determination of system and approach is not made by the woman but the man: not through the female but through the male-dominated system.’ 300

In recent times it seems that there is particularly a tension between religion and family law. 301 For those with conservative religious values many of the developments in family law are antagonistic to fundamental beliefs, particularly in the area of same-sex relationships. 302 Of course, there are plenty of religious people who take a liberal approach to same-sex relationships. The law must find a way of balancing respect for human rights and respect for religious freedom. This raises broad issues, ranging from whether owners of bed and breakfast establishments can refuse same-sex couple as guests on religious grounds, to whether or when women should be permitted to wear the burkha. These issues are hotly contested. There is a further issue too and that is the extent to which an individual’s religious choice should be respected if it is developed in a culture which does not respect individual choice. For example, if a woman chooses to be utterly subservient to her husband after being raised in a culture that teaches that women must be subservient to men, is that a choice to be respected or should it be regarded as a coerced choice. 303

297 For a useful discussion of how cultural values and human rights interrelate see Freeman (2002a: ch1).
301 Cahn and Carbone (2010).
302 See e.g. Islington LBC v Ladele [2009] EWCA Civ 1357 where a registrar refused on religious grounds to conduct a civil partnership and was sacked.
303 Chambers (2007); Mookherjee (2008).
5 The Human Rights Act 1998 and family law

The Human Rights Act 1998 protects individuals’ rights under the European Convention on Human Rights. That Convention sets out the minimum standards of treatment under the law that people are entitled to expect. The Human Rights Act 1998 has had a significant impact on the way that family cases will be argued. Parents, children and families now regularly bring cases referring to their rights under the Act. There are two important aspects of the Human Rights Act. First, the rights in the Act (which are essentially the rights protected in the European Convention on Human Rights) are directly enforceable against public authorities (e.g. local authorities) and all public authorities must act in a way that is compatible with these rights unless required not to do so by other legislation. The court is a public authority and hence it is generally thought that no court order should infringe an individual’s rights as defined in the Human Rights Act, unless compelled to do so by other legislation. Secondly, under s 3 of the Human Rights Act all legislation is to be interpreted, if at all possible, in line with the Convention rights. If it is not possible to interpret the legislation in accordance with these rights, then the legislation should be enforced as it stands and a declaration of incompatibility issued: this requires Parliament to confirm or amend the offending legislation. In interpreting the extent of the rights protected in the Human Rights Act, the decisions of the European Court of Human Rights and European Commission will be taken into account by the courts. The possible relevance of rights under the Act will be considered at the relevant points throughout this book. However, the impact has been less in family law than in other areas. Sonia Harris-Short suggests two reasons why family law judges have taken a ‘minimalist’ approach to the use of the Act. First, there is a long-standing suspicion of rights among family lawyers, especially because the notion of parental rights might be used to usurp the fundamental principle that the welfare of the child should be the law’s paramount concern. Secondly, many family law cases involve complex issues of moral, social and political significance and the courts wish to avoid being brought into such disputes. Hence we will see in Chapter 11 that courts are very reluctant to use the Human Rights Act to order local authorities to provide children in care with particular services.

6 The UN Convention on the Rights of the Child

Although the UN Convention on the Rights of the Child (UNCRC) is not technically binding in the English courts, it is frequently referred to by the courts and plays a role in influencing the development of the law. The Convention will be referred to at various points in this book where appropriate. The rights include, for example, a right to life, a right to know and be cared for by his or her parents, and a right to freedom of expression.

505 This point is emphasised in Bainham (2000c).
507 Secondary legislation which does not comply with the Human Rights Act can be disapplied: Re P [2008] UKHL 38, discussed Herring (2009a).
509 Harris-Short (2005).
510 Perhaps most especially fathers: Fortin (1999a: 251).
511 Article 6.
512 Article 7.
513 Article 13.
This chapter has considered the nature of families and family law. One point that has emerged is that the terms ‘family’ and ‘law’ do not have a fixed meaning. The understanding of a family has changed over time. For example, although at one point a family would have been defined as a married couple with children, the House of Lords recently accepted that a gay couple can be a family.\textsuperscript{314} The Civil Partnership Act has now given the chance for same-sex couples to have an officially recognised status. John Eekelaar has even suggested that rather than talking about family law it would be more appropriate to talk about the ‘personal law’.\textsuperscript{315} Despite the lack of clarity over what a family is, it is clear that it is a powerful ideal: no major political party would openly advocate ‘family unfriendly policies’. The chapter has also noted the diversity of ways that family law can be approached. There is no one correct way of viewing the law, and each approach has its benefits and limitations. However, the discussion demonstrates that the interaction between families, law and socio-political forces is complex. The tensions between the traditional ideal of what a family should be like and the realities of family life today are revealed in the topical issues discussed throughout the chapter. As these controversies indicate, family law today is quite different from family law 30 years ago; and where family law will be in 30 years’ time is hard to predict.

### Further reading


\textsuperscript{314} *Fitzpatrick v Sterling Housing Association Ltd* [2000] 1 FCR 21.

\textsuperscript{315} Eekelaar (2006b: 31). Although his use of this phrase is potentially misleading because by ‘personal’ he means ‘personal relationships with others’. It is not, therefore, as individualistic a concept as at first appears. See further the discussion in Diduck (2008).
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