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JOHN
EEKELAAR

FAMILY LAW AND PERSONAL LIFE

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This book is dedicated to The New Zealand Law Foundation.

Family Law and Personal Life

JOHN EEKELAAR

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Preface

When I was invited by the Faculty of Law of the University of Otago to visit New Zealand in 2005 as the New Zealand Law Foundation Distinguished Visiting Fellow, I had already written a paper on the theme of friendship which forms chapter 2 of this volume. That paper arose as a result of an interview I conducted in a research project with my colleague Mavis Maclean at the Oxford Centre for Family Law and Policy (OXFLAP), in which it emerged that the household contained an additional person as a result of quite remarkable circumstances. These are explained in the chapter. An early version of that paper appears in a memorial volume to my friend and colleague, Professor Dr Petar Sarcevic, and is published with permission of Selliers European Law Publishers. I then decided to explore family law as refracted through other 'themes', and, as the invitation required lectures and seminars to be given at the main New Zealand law schools, I thought I would try these ideas out on my New Zealand hosts. In the end I was able to discuss the papers on 'Friendship' and 'Truth', and another which later became 'Power' in New Zealand, while I presented a short version of 'Respect' as a keynote address at the 12th World Conference of the International Society of Family Law, at Salt Lake City on the way there. The responses encouraged me to think of combining these papers into a small book, which I have now done with two additional papers, one on 'Responsibility' and the other on 'Rights'. The former was presented to a Conference on Responsibility in Family Law held at the University of Sussex in September 2005.

I must record my intense gratitude to The New Zealand Law Foundation, to whom this volume is dedicated, not only for its generosity, but also for providing the occasion to prompt me to

undertake this project. In particular, I must thank Mark Henaghan and his colleagues at the Law Faculty of the University of Otago for all they did to make the visit so useful and enjoyable.

While engaged on this process, it seemed to me that I was pursuing a wider purpose, which was to suggest how the legal regulation of people's personal lives might be defended. This involved making political, or ideological, assumptions against which justifications for such regulation could be set. The assumptions I have made will look like those of liberalism, but I have been careful not to make any claims about the nature of liberalism. Instead, I have preferred to use an expression which carries less theoretical baggage: the 'open' society. I argue that the historical manifestation of formal and informal regulation of family practices has been through the exercise of power. This inevitably owes much to feminist scholarship, whose analysis of family law in terms of power relations between the genders is now taken for granted. However, my exposition puts as much, if not more, emphasis on the exercise of power between the present generation of adults and the next as on gender relations. Indeed, the attempt by previous generations to control their successors is a major pre-occupation of the text. Furthermore, the exercise of power is shown to have adopted two main forms: instrumentalism and welfarism. In counterpoise to this account, the book concludes with the argument that modern notions of rights have created the possibility of redistributing the exercise of power achieved under welfarism. That argument requires the exposition of a theoretical understanding of rights, including children's rights, cultural or group rights, and human rights, and an evaluation of their role in an open society. Within this framework, the text explores the interrelationship between the legal regulation of people's personal lives and the values of friendship, truth, respect, and responsibility. In doing this, a variety of controversial issues are examined in the light of those values: these include the legal regulation of gay and unmarried heterosexual relationships; freedom of procreation; state supervision over the exercise of parenthood; the role of fault in divorce law; the way parenthood is allocated; the rights and responsibilities of parents to control their children; the place of religion in the family; the rights of separated partners regarding property and of separated parents

regarding their children; and the freedom of children to determine their own destinies.

The result provides, I think, a new way of looking at much of family law (or, as I now prefer to call it, personal law). The area of legal activity covered is wide. In order not to weigh down the text with too much detail, I have made extensive reference to the literature, including the occasions when I have discussed the detail at greater length. This has, I hope, allowed a sharper focus on the issues raised by the themes and values. If it is, as I think, instructive to view one area of law in the context of these themes and values, it is also instructive to reflect on the concepts they represent in the light of the part they play in this area of life. But again, I did not want the book to become a detailed theoretical analysis of all aspects of these concepts. I have provided such analysis as seemed necessary in order to engage with them, and to consider how their practical application in this context could influence the ways we think about them. To that limited extent this is not just a book about personal law, but is also a comment on legal theory.

I hope that the book will demonstrate that personal law, possibly more than any other area of law, affects the most profound aspects of people's lives and of what it means to live in human communities. In writing it I have had to confront and try to take a position on these issues, which I hope amounts to a coherent whole. There are many things over which others are bound to disagree with me. But if I have set out a framework for thinking about them, and even as a means of evaluating laws and policies, I will have achieved my objective.

John Eekelaar

Oxford
May 2006

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Power

Family Practices and the Diffusion of Power

The following passage is from an introductory text on kinship and marriage published in 1967. The author is discussing matrilineal descent systems:

The nearest example outside the Nayar of this form of grouping is found amongst the Menangkabau of Malaya who are similarly matrilineal. The well-known Ashanti of Ghana approached this method, but their case is complicated and seems to be an amalgam of several solutions. The Ashanti have been made famous in anthropology for what has been called the 'visiting husband' solution. This is virtually the same as the Nayar method. Any evening in an Ashanti town, we are told, one will see children running between the houses carrying dishes and bowls of food. They are taking it from the mother's house to the father's house. The father will be at home with his mother, and his sisters and their children. Already we can see some differences from the Nayar situation. The children here have an accepted father and their mother has at least to cook for him. The Ashanti live in towns, and so the houses will be quite near and this arrangement is feasible. Already then the husband–wife bond appears to be stronger than in Malabar. There has been more 'intrusion' by the husband: he can make more demands. What is more, in many cases amongst the Ashanti he is able to bring his wife home to live with him. But here is the rub: his children are not his—they belong to his wife's lineage—so that at some point they must return to the lineage house where the mother's brothers live. This problem makes the nuclear family of the Ashanti a tenuous thing: and it is often short-lived, with the wife going home to mother.[1]

[1] R Fox, *Kinship and Marriage* (Penguin Books, 1967) 101–2.

This passage is typical of many which appear in the anthropological literature. It identifies certain social, or ethnic, groups by their kinship practices. The phrase 'amongst the […].' (used twice in this extract) recurs constantly in this literature. It implies that, to be one of […], a person must follow the stated practice ('the mother *has at least to* cook for him'; 'the husband … can make more *demands*'; 'at some point [the children] *must* return to the lineage house where the mother's brothers live'). The practices are felt as obligations by the members of the group. They are therefore also examples of the manifestation of the exercise of power within the society: in this case, of fathers over mothers, husbands over wives, and adults over children.

But the nature of power is complex. It has been explained variously as a feature of social structures, or of the way social relations are interpreted or of the way ideology, economic resources and military and political power are organized.[2] Whatever view is taken of power as a conceptual matter, it is apparent that it need not be located solely in formal institutions, but may be subtly diffused throughout society. In homogenous societies the pattern may be relatively straightforward. The identification of a society with its customs creates the impression of a stable, timeless community, with clear obligations. Such communities are largely assumed in these anthropological accounts. They talk of behaviours 'amongst the […],' not, usually, of a *range* of behaviours amongst them, or of behaviours pertaining only to some of them. Max Gluckman[3] entered a note of caution. He explained that societies can undergo disturbance from internal and external events. Nevertheless, despite such events, they experience a state of equilibrium over time. Understanding such equilibrium requires fixed points in an analysis of 'what is in reality a constant process of disturbance and readjustment'. These 'fixed points' are 'groups and social relationships, with their attendant customs and beliefs'.[4] On this view, then, the 'customs and beliefs' of these societies remain a constant feature, allowing the society to maintain a cohesiveness over time despite periods of disruption.

[2] For example, A Giddens, *The Constitution of Society* (Polity Press, 1984); M Mann, *The Sources of Social Power, vol 1* (Cambridge University Press, 1986); M Foucault, *Discipline and Punish: the Birth of the Prison* (Penguin Books, 1991).

[3] M Gluckman, *Politics, Law and Ritual in Tribal Society* (Blackwell, 1965) 300.

[4] Ibid 282.

Some versions of family history of Western societies are presented in similar terms. Peter Laslett, whose work significantly altered previous perceptions about the nature of family life in Britain in earlier times, tended to present a relatively uniform view of society as it changed over time, based on broad demographic data.[5] Even Michael Anderson (who observed that, at least as far as Western Europe is concerned, 'there is, except at the most trivial level, no Western family type'[6]) wrote of English family behaviour after the mid-twentieth century as if it was a comparatively homogenous phenomenon:

> … the data seem robust enough to suggest that in a very real sense in the 1970s there was a right age to marry, in a way which was not found in any period before the Second World War;

and

> what all this seems to suggest is that another important new characteristic of family life—indeed of all life—in the years after the Second World War was its greater age-gradedness and predictability. A young person aged say, 14, looking forward in the 1960s, could, with a reasonable probability of being right, have predicted within a very few years the timing of his or her future life course—leaving school, entering employment, leaving home, marrying and setting up home, early patterns of child-bearing and rearing. None of this would have been possible in the nineteenth century.[7]

Tamara Hareven questioned the assumption of homogeneity, commenting that 'the main dissatisfaction with the studies of change over time that have emerged in the 1970s has been their linearity and their generalizations for an entire society based on the experience of one class, usually the middle class'.[8] Janet Finch, writing in the

[5] P Laslett, *The World We Have Lost—Further Explored* (Methuen, 1983) especially ch 4. Among the 'misbeliefs' Laslett exposed were that children married young, and that most of our ancestors lived in households consisting of extended families. Many households were indeed large, but this was mainly because of the presence of servants.

[6] M Anderson, *Approaches to the History of the Western Family* (Macmillan, 1980) 14.

[7] M Anderson, 'What is new about the modern family?', OPCS Occasional Paper, *The Family*, 31 (1983) reprinted in M Drake (ed), *Time, Family and Community: Perspectives on Family and Community History* (Blackwell, 1994) 80, 81–2.

[8] TK Hareven, 'Recent Research on the History of the Family' in M Drake (ed.), *Time, Family and Community: Perspectives on Family and Community History* (Blackwell, 1994) 38.

late 1980s about change in the nature of familial obligations over time, was aware of this problem, for although she often generalized about the British population as a whole, she was alert to possible class differences,[9] and, when comparing the past with the present, cautioned that 'we are not comparing like with like' because of (among other things) changes in the composition of the population as a whole:

> In addition to all the differences which I have itemized in terms of age structure, family formation and lengths of generations, we should note also that the British population in the past was less racially and ethnically diverse, being almost exclusively white.[10]

In the 1989 Lewis Henry Morgan Lectures, Marilyn Strathern explained variations in family patterns in terms of the characteristic of individuality. Since individuals are not fixed by their roles or relationships, any individual can take on a variety of family roles.

> Thus is an infinitely plural world reproduced—full of persons only some of whom can be claimed as kin and with a range of kin only some of whom one gets to know as persons.[11]

Strathern was still willing to generalize: for the English, 'we might usefully take the individual as a modern fact of kinship'.[12] But who are the English? On this account they are identified as those for whom that generalization holds true. Strathern recognized this circularity.

> The English were thus self-defined in an overlapping way as at once a people and a set of cultural characteristics. I exploit the ambiguity in my own account, and refer to the English as though they were identifiably both.[13]

But helpful as these definitions of cultural groups are, they do not necessarily hold for entire populations inhabiting certain geographical areas; not even if they are subject to the same political and legal systems. Even if generalization about the kinship practices of

[9] J Finch, *Family Obligations and Social Change* (Polity Press, 1989) 82.
[10] Ibid 84–5.
[11] M Strathern, *After Nature: English Kinship in the Late Twentieth Century* (Cambridge University Press, 1992) 83–4.
[12] Ibid 83. [13] Ibid 30.

'the English' is possible (and this may now be difficult), this could not apply to the whole population living in England. The ethnic diversity of the United Kingdom is well known. In 2004, 7.9 per cent of the UK population was 'foreign born' (4.0 per cent having arrived within the previous 15 years). Many more would have been born to people who were themselves foreign born. The countries of origin are extremely diverse.[14] This diversity extends into family practices. For example, Kathleen Kiernan has shown from data in the Millennium Cohort Study that Asian groups were more likely to be married when they had a baby than either white or black groups.[15] But it is important not to build stereotypes, because there are significant differences within groups, depending on facts such as religion and social class, as well as significant commonalities between them.[16] This was well illustrated in an Oxford study on how people viewed their family obligations.[17] This found that ethnic minority respondents tended to marry out of deference to their culture or their parents, whereas the white British were more likely to marry for pragmatic reasons or because they felt it was a symbolic way to show their commitment. The minority groups tended to see their duties to their partners as originating in the institution of marriage, in contrast to the white British group who were more likely to see their obligations as resting on an independent ethical principle (such as doing good to someone who does good to you). Despite these differences, it was concluded that the end result could look very similar. For example, while many ethnic minority respondents thought it was important that their relationship should develop within the framework of marriage, they saw it as reaching complete fullness on the birth of a child. In a similar way many of the white British saw their relationship being confirmed or transformed by the birth of a child. And, while the white British were less willing than the minorities to

[14] S Kyambi, *Beyond Black and White: Mapping New Immigrant Communities* (Institute for Public Policy Research, 2005).

[15] K Kiernan, and K Smith, 'Unmarried Parenthood: New Insights from the Millennium Cohort Study' (2003) 114 *Population Trends* 23.

[16] See A Phoenix and F Hussein, *Parenting and Ethnicity*, Review Paper for the Joseph Rowntree Foundation (2006).

[17] M Maclean and J Eekelaar, 'The Significance of Marriage: Contrasts between White British and Ethnic Minority Groups in England' (2005) 27 *Law & Policy* 379.

admit that marriage imposed duties on them towards their 'in-laws', they derived an obligation towards them from an alternative route. They saw it as part of their duties to their partner.[18] This diversity makes understanding the pattern of the exercise of power within our society more difficult.

The Open Society

The extent to which social practices can be seen as manifestations of power could depend on whether they are considered to be rules or simply 'habits'. This has been much debated by legal theorists. Of course, legal theorists are concerned about *legitimate* power (Joseph Raz uses the term 'authority'[19]), but it is power nonetheless. After criticism of his earlier view by Ronald Dworkin, HLA Hart appeared to accept that social rules existed where the fact that there was general conformity to a practice 'is part of the reasons which its individual members have for acceptance'.[20] This seems to mean that a practice is a rule only if those who follow it do so because they feel they ought to conform ('there is a rule that they should [. . . .])' rather than that, for example, it is merely convenient or prudent to conform.[21] It may be difficult to make this distinction in real life. What is important is that large numbers of people believe that they, and others, should act in certain ways. These beliefs will be underscored by social pressure from various sources, such as community groups and family members. Institutional lawmakers know this well, and can harness the power of social rules in applying laws.[22] In this way institutional power combines with the diffused

[18] J Eekelaar and M Maclean, 'Marriage and the Moral Basis of Personal Relationships' (2004) 31 *Journal of Law and Society* 510.

[19] J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1994) ch 10. Raz's well-known view that law can exercise its function of providing authoritative direction only if identified by reference to social sources was expressed by reference to state or institutional power. It becomes strained in the case of diffused power expressed in social norms, but probably still holds because people who purvey social norms are usually socially identifiable.

[20] HLA Hart, *The Concept of Law* (Clarendon Press, 1994) 255–7.

[21] See J Raz, *Practical Reason and Norms* (Oxford University Press, 1999) 58.

[22] For a full discussion, see J Eekelaar, 'Uncovering Social Obligations: Family Law and the Responsible Citizen' in M Maclean (ed), *Making Law for Families* (Hart

power of informal social norms. There is no legal requirement that the adult members of the family must distribute their earned resources fairly within the family because it can be assumed they will follow the social rule that they should do this. Parliament does not legislate on detailed ways to bring up children because parents will select from a range of social rules, or practices, which guide them in this role. But the fact that the law leaves activities to be controlled by social rules does not mean that these will not be legally enforced in certain circumstances. In tort law, compliance with social norms may be relevant in deciding whether someone has acted 'reasonably'. In family law, a judge might have to decide what would be a reasonable provision for a deceased spouse to have made for a surviving partner.[23] Describing the way the courts should apply their discretion in making financial and property orders on divorce, Lord Hoffmann has said:

> It is one of the functions of the Court of Appeal to lay down general guidelines on the relative weights to be given to various factors in different circumstances … These guidelines, not expressly stated by Parliament, are derived by the courts from values about family life which it considers [sic] would be widely accepted by the community.[24]

But family law cannot just be about the way these systems of power are exercised. It is the purpose of this book to reflect on values which should inform the system of governance in matters concerning what at this stage one can broadly call family living. It is an important feature of institutional lawmaking and law appliance that the lawmakers and law appliers are susceptible to argument about the values which underpin their activities. Argument is another form of power. This is particularly so where the lawmakers themselves subscribe to sets of values which can act as constraints on the exercise of power. My discussion is premised on the assumption that we wish our society to be 'open'. The 'open' society was the expression used

Publishing, 2000) ch 2. See further Elizabeth S Scott, 'The Legal Construction of Norms: Social Norms and the Legal Regulation of Marriage' (2000) 86 *Virginia Law Review* 1901.

[23] Succession Law Reform Act 1995. See further SM Cretney, *Law, Law Reform and the Family* (Oxford University Press, 1998) ch 10.

[24] *Piglowska v Piglowski* [1999] 3 All ER 632, 644.

by the Austrian philosopher Karl Popper when he looked across the world from New Zealand during his temporary sojourn there in the early 1940s at the threatening clouds of Fascist and Communist totalitarianism.[25] He saw the intellectual seeds of this disaster in the philosophies of Plato, Hegel, and Marx, which he denounced as a *trahison des clercs*. They, he claimed, had sought to deprive people of the possibility of making independent moral judgments by proclaiming that the past determines the future, and that we should not, indeed cannot, deviate from the power of the group morality set for us by our predecessors. His was a rallying call to the human spirit. His 'open' society is not a creature of sophisticated political analysis. It is sketched in stark and simple terms, but confronts the deepest political issues. It is one in which people believe they can make their own decisions for themselves, freed from the belief that their futures are determined by the past. 'The future depends on ourselves, and we do not depend on any historical necessity.'[26] 'We must become the makers of our fate.'[27] With this intellectual liberation comes the responsibility of 'true rationalism', which is 'awareness of one's limitations, the intellectual modesty of those who know how often they err …'.[28] If we go wrong, we pick ourselves up and start again. 'We must learn to do things as well as we can, and to look out for our mistakes.'[29] It is a society where minds are open, and individuals will not yield meekly to the demands of the tribe or community.

An 'open' society will require to be governed in a certain way; or, at least, it will be antagonistic to certain modes of government. I have used the expression 'open society' in the way Popper used it rather than 'liberal society', although some might think the latter is a more appropriate description. But liberalism is a complex political theory, with strong protagonists and critics, and I do not wish to enter ideological disputes about its nature, since features sometimes associated with liberalism need not necessarily be associated with the open society as understood here. For example, the liberal ideal

[25] KR Popper, *The Open Society and its Enemies, vols 1 and 2* (Routledge, 1945) (4th edn 1962) 3.
[26] Ibid vol 1, 3. [27] Ibid vol 2, 280. [28] Ibid vol 2, 227.
[29] Ibid vol 2, 280.

described by Ronald Dworkin that the government should not impose any 'sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of equal worth'[30] requires more than is necessary for the society to be 'open'.[31] On the other hand, Dworkin's precept that the state should not impose on individuals simply on the basis of the 'external' preferences of other people about what those individuals should do[32] is more important for an 'open' society, for such a society is likely to hold that a person should not be forced to do or abstain from actions for no other reason than that others want them to act otherwise. This is because people who take charge of their fate will not readily do the bidding of others for no other reason than that the bidding takes place. But things are not often so stark. People in power will not often reinforce their commands with a simple: 'because we say so'. They will point to other factors, as Lord Devlin did when he argued that toleration of homosexuality could threaten social stability.[33] Still, in an 'open' society the claims of the group, or its dominant members, to special knowledge about facts or that they have access to a more highly valued morality will never be allowed to go unchallenged.

The Welfarism Thesis

Since the way the law interacts with family life in an open society is a matter of governance, it is necessary to understand something of the history of this interaction in Britain. I have proposed a theoretical understanding of this history which I will briefly set out.[34] For

[30] R Dworkin, *A Matter of Principle* (Clarendon Press, 1986) 205.

[31] See also the issue of perfectionism (see p 87 below), which is itself a disputed issue for liberalism.

[32] n 30 above, 196, 359–72. See p 178 below.

[33] P Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) ch IV.

[34] The general argument is presented in 'The End of an Era?' in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the US and England* (Oxford University Press, 2000) ch 29; and (2003) 28 *Journal of Family History* 108. The thesis is applied with specific reference to child welfare law in J Eekelaar, 'Child Endangerment and Child Protection in England and Wales' in MK Rosenheim, FE Zimring, DS Tanenhaus and B Dohrn (eds), *A Century of Juvenile Justice* (Chicago University Press, 2002) ch 14.

convenience, I will call it the 'welfarism' thesis, although the idea about the role of welfarism is only a part (but the most important part) of it.

The thesis maintains that, in the period before the eighteenth century Enlightenment, in so far as the law concerned itself with families at all, it was structured so that subordinate family members (women, children) were in a legal relationship designed to promote the interests of the dominant member, the husband (father), and often his family line. So, the wife's property passed to the husband[35] and she was expected to be subservient to his wishes. His legal interest in his children was to their labour, and their marriage was perceived as a way of furthering his interests. Importantly, it did not follow that the husband (father) was not expected to look after the interests of his wife and children. Despite the opinions expressed by some historians,[36] it seems that parents have usually loved their children[37] and were expected to do so (although their ways of showing this have varied substantially). But during the pre-Enlightenment era, the power of kings and fathers was seen to be constrained by morality, not law. Parents did not have a legally enforceable duty to support their children. There was no legal supervision over the way they brought them up. Blackstone justified this by speculating that it might be sufficient punishment of neglectful parents that their 'uninstructed' children were likely to cause them grief in the long run,[38] as if the main purpose of bringing up children properly was to further the parents' interests. This system was mirrored in the political world. The populace were subjects of the king's purposes. A good king was expected to behave benevolently, but there was no legal restraint on

[35] As Dicey put it: 'Marriage was an assignment of the wife's property rights to her husband at any rate during coverture. Much of her property, whether possessed by her at or coming to her after her marriage, either because absolutely her own, or during coverture might, if he chose, be made absolutely his own, so that even if his wife survived him it went to his representatives': AV Dicey, *Law and Public Opinion in England during the Nineteenth Century* (Macmillan, 1963) 371–2.

[36] E Shorter, *The Making of the Modern Family* (Collins, 1976); L Stone, *The Family, Sex and Marriage in England 1500–1800* (Weidenfeld & Nicholson (1977); L de Mause, *The History of Childhood* (Souvenir Press, 1976).

[37] L Pollock, *Forgotten Children: Parent–Child Relations from 1500 to 1900* (Cambridge University Press, 1983); S Shaher, *Childhood in the Middle Ages* (Routledge, 1990).

[38] William Blackstone, *Commentaries on the Laws of England* 1.16.1 (1765).

his authority, nor was it expected that there should be any. I call this the era of Instrumentalism.

The Enlightenment writers, however, following on from John Locke, argued that a king could only *legitimately* exercise power if done in the subjects' interests, and extended this idea to parental power. As legal restraints on absolute political power gradually developed, the same happened with regard to parental power. As the nineteenth century progressed, the courts of equity, reinforced by the Custody of Children Act 1839, began to override a father's right to custody of his children if he harmed their interests. A father's obligation to support his wife and children, which, prior to the Enlightenment only arose in the form of a duty to reimburse the poor law authorities if they were supporting his family, slowly became directly enforceable by family members. Legislation protecting children at work, and later within their own families, began to impose duties on public authorities to protect the welfare of children. All this constitutes welfarism. It will be evident that the term 'welfarism' as used here is far wider than the expression 'welfare state'. This is usually taken to refer to centralized governmental provision for citizen's welfare, originating in nineteenth-century social insurance schemes designed initially to protect individuals against the vicissitudes of industrial capitalism, and moving in the mid-twentieth century to provide education and at least essential cover against ill-health and destitution on the basis of citizenship alone, all of which involves a substantial proportion of national expenditure. Since this patently requires the benevolent use of institutions, the welfare state is a significant manifestation of welfarism, but is only one such manifestation.

Welfarism is a particular way in which power over others is exercised. An important feature of welfarism is that it did not destroy existing social institutions, but acted through them. The reaction to the excesses of the French revolution ensured that the more radical aspects of the Enlightenment's assault on the *ancien régime* failed to take hold.[39] The married father retained his authority over his wife and legitimate children, but was now legally obliged to exercise it in their interests, or, at least, not against their interests.

[39] See pp 61–2 below.

The poor law authorities, which were originally commanded to 'set to work' the children of the poor so they could be of benefit to society, now acquired duties to look after and educate them. The French sociologist, Jacques Donzelot,[40] following the ideas of Michel Foucault, memorably described the process in France, whereby from the nineteenth century philanthropic institutions and medical professionals used the help they gave to working-class mothers as a means of acquiring leverage to impart behavioural norms: a process he called 'normalization' through 'medical-hygienism'.[41] In England these processes were supplemented by the strong desire of the evangelical movement of the late nineteenth century to save children from moral corruption. It was considered that this was best achieved by removing them entirely from corrupting influences, including those of their family. The Poor Law Amendment Act 1889 therefore allowed the poor law guardians to remove such children into the care of guardians.[42] This 'uprooting' power was later transferred to local authority social services committees, extended, and used, until removed by the Children Act 1989. The Children Act 1948 repealed the old duty to 'set to work' the children of the poor (which had long in practice been replaced by education) and required local authorities to further the children's best interests. Dedicated Children's Departments were established to achieve this. There was, however, a change in what people thought served children best. The experiences of evacuee children during the war, and theories about the importance of attachment between babies and their mothers,[43] had undermined the view that deprived children were best 'uprooted' from a contaminating environment, and replaced it with the policy of rehabilitating them into their families with the assistance of social casework.

Welfarism reached its high point during the 1970s and early 1980s. During the 1960s proposals were made (but only partially implemented) to treat most children who had committed offences

[40] J Donzelot, *The Policing of Families* (Hutchinson, 1980).

[41] See R Dingwall, J Eekelaar and T Murray, *The Protection of Children: State Intervention and Family Life* (Basil Blackwell, 1983) 215–17.

[42] The power was exercisable by resolution; the parents might appeal to a magistrates' court, but were not told of this right.

[43] J Bowlby, *Child Care and the Growth of Love* (Pelican Books, 1953).

in the same way as children who were victims of neglect or ill-treatment.[44] In 1970 the House of Lords interpreted the word 'paramount' in the test that courts were applying in deciding disputes about a child's upbringing (that the child's welfare was to be the 'paramount' consideration) as if it meant the 'sole' consideration, all other considerations being relevant only if they affected the child's welfare, and extended its application beyond disputes between parents to disputes between a parent and a non-parent.[45] Ten years later it decided that a local authority was not obliged to return a child who it was looking after on a voluntary basis even if the parents requested this,[46] and two years after that, that whether parents would be allowed to visit a child of theirs who was in its care was entirely within the discretion of the authority.[47] In the meantime the Children Act 1975, consolidated in the Child Care Act 1980, expanded local authority powers to take compulsory measures for removing children from home by permitting resolutions to be passed on the sole ground that the child had been in the care of the authority or a voluntary association for more than three years.[48] The period from 1945 to 1975 has also been called the 'golden age' of the welfare state. The weighted average of the percentage of Gross Domestic Product of seven major OECD countries described as social expenditure rose from 12.3 to 21.9 from 1960 to 1975.[49]

No one can deny the vast humanitarian benefits of welfarism. But it had its dark side. The duty to advance the interests of the vulnerable carried with it the power to decide what those interests were. It is easy for those with such power to convince themselves that the interests which they are supposed to protect coincide with their own interests. Welfarism could be disguised instrumentalism. Nineteenth-century courts were convinced that children would usually be better off with

[44] J Eekelaar, R Dingwall and T Murray, 'Victims or Threats? Children in Care Proceedings' (1982) *Journal of Social Welfare Law* 68.

[45] *J v C* [1970] AC 668.

[46] *London Borough of Lewisham v Lewisham Juvenile Court Justices* [1980] AC 273.

[47] *A v Liverpool City Council* [1982] AC 363.

[48] See generally S Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003) chs 19 and 20.

[49] C Pierson, *Beyond the Welfare State?* (Polity Press, 1998) 124. The countries are Canada, France, West Germany, Italy, Japan, United Kingdom, and the USA.

their fathers than with their mothers.[50] This was not based on any careful evaluation of the children, but rather on a preconception of an exclusively male judiciary about the way family relations should be ordered. Most dramatically, over the period 1850 to 1960, about 100,000 young children were separated from parents whom denominational 'child rescue' organizations deemed to be morally unfit to look after them and sent to Canada and Australia.[51] The children barely participated in these decisions about their lives, and many were falsely told that their parents were dead. These policies served the interests of those who sent them by passing responsibility for looking after them to others, relieving them of the problems of dealing with their parents and, for some, promoting the cause of British colonization. However, many genuinely believed they were doing what was best for the children. Proponents saw the policy as the 'chief glory' of the child rescue mission.[52] The secrecy that surrounded adoption for many years after its introduction in 1926 provides another example.[53]

The welfarism thesis maintains that the last two decades of the twentieth century saw a movement away from welfarism of such significance as to amount virtually to its collapse. The gist was that people were less willing to allow designated persons, whether family members or institutional authorities, to define what their interests

[50] See the statement in *re Agar-Ellis* (1883) 24 Ch D 317 at 334: 'When by birth a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the court should not, except in very extreme cases, interfere with the discretion of the father but leave him the responsibility of exercising the power which nature has given him by birth of the child' (Cotton LJ). My maternal grandparents divorced (in South Africa) in 1918. Custody of the three daughters of 12, 9, and 5 was given to my grandfather, a mining prospector who could not offer the children a home, but sent them to boarding schools and (in the holidays) to relatives and fosterers. My mother had no home life after the age of nine.

[51] Barnardos was the most significant.

[52] For a full discussion, see J Eekelaar ' "The Chief Glory": The Export of Children from the United Kingdom' (1994) 21 *Journal of Law and Society* 487, and in N Lowe and G Douglas (eds), *Families across Frontiers* (Martinus Nijhoff, 1996) ch 36.

[53] The degree to which adoptive parents delayed telling children of their adoption, or did not do so at all, and the adverse effects of this on the children was first demonstrated in the ground-breaking research of A McWhinnie (*Adopted Children: How They Grow Up* (Routledge & Kegan Paul, 1967)) and J Triseliotis (*In Search of Origins: The Experiences of Adopted People* (Beacon Press, 1975)).

were. They demanded the power to decide this for themselves. This feeling was mirrored by a political ideology which favoured reducing state power in favour of individual responsibility and choice. Early indications of change can be found in the criticisms of social casework in the 1970s by radical social work theory, which argued that, instead of trying to adapt people to 'the system', the system should change in response to people's demands. Social workers should act as facilitators to assist people to achieve their 'rights'. A natural outcome was the growth of 'rights' movements during the 1970s, such as Family Rights Group, the Children's Legal Centre, and the pressure group for divorced men and their new partners, the Campaign for Justice in Divorce. Research emphasized the antagonism parents felt to social work intervention.[54] Government policy became suspicious of the claims of social casework, and public confidence in social workers was shaken by a series of highly publicized cases in which the social welfare services appeared to damage people's interests, either through failing to intervene adequately to protect a child[55] or by intervening apparently unnecessarily.[56]

In fact, social intervention into families had long been significantly influenced by the medical profession. Early in the twentieth century concerns over the population's health were thought to be best met by improving nutrition and living conditions, and reducing the damage perceived to be caused by alcohol consumption. There was little appreciation that some parents deliberately hurt their children until in the 1960s American radiographers noticed that some babies suffered bone fractures which must have been deliberately inflicted. This 'discovery' of a 'battered baby syndrome' developed into wider recognition of child abuse and neglect, in which medical professionals played an important role.[57] The 'medicalization' of child protection produced a significant welfarist orientation, backed by a strong

[54] J Packman, *Who Needs Care? Social Work Decisions about Children* (Blackwell, 1986); S Millham *et al.*, *Lost in Care: The Problems of Maintaining Links between Children in Care and their Families* (Gower, 1986).

[55] The cases of Maria Colwell (1974), Jasmine Beckford (1985) and Kimberley Carlisle (1987) were the most well known.

[56] Allegations of excessive and unnecessary intrusion into families as a result of medical 'misdiagnosis' of sexual abuse in Cleveland in the mid 1980s received much publicity. See *Report of the Inquiry into Child Abuse in Cleveland* (CM 412, 1987).

[57] See N Parton, *The Politics of Child Abuse* (Macmillan, 1985).

assertion of professional power. It reached a high point in the Cleveland affair, when two consultant paediatricians claimed to have discovered a medical 'test' which indicated sexual abuse, on the basis of which social workers were persuaded to remove and isolate children from their parents, as if they were at risk of the contamination of disease. The resulting inquiry,[58] which demonstrated the fragility of the evidential value of the test, was an important step in the process of developing controls designed to inhibit the power of welfare and medical professionals in child protection, and enhance the gatekeeping functions of the courts and legal professionals.

The lack of confidence in welfare institutions was reflected in assertions that primary responsibility for children lay with parents, rather than with the state.[59] Thus, a Department of Health Review into safeguards for children living away from home in foster care, children's homes and boarding schools proclaimed that:

> parents deciding to place a child away from home are … responsible for satisfying themselves that arrangements for keeping their children safe exist and are likely to prove effective … the decision about placement is ultimately their responsibility. In making it, parents should possess all the information they need about the arrangements for keeping their children safe.[60]

Intervention into families should be allowed only on strictly defined, and established, criteria. This legalism replaced social workers and medical professionals with the legal profession as the dominant gatekeepers to the exercise of coercive powers over the family. It was encapsulated in the Children Act 1989, which reduced the powers of local authorities to intervene into families, and defined more restrictively the circumstances in which courts could authorize such intervention.

Similar movements were seen in private family law. An early example is found in Ruth Deech's attack on the jurisdiction under which courts granted maintenance to divorced wives. This was seen as perpetuating female dependency.[61] More predictably, the theme that women should become more self-sufficient was taken up by divorced

[58] See n 56 above.

[59] See J Eekelaar, 'Parental Responsibility: State of Nature or the Nature of the State?' (1991) *Journal of Social Welfare & Family Law* 37.

[60] *People Like Us* (Utting Report) (The Stationery Office, 1997) 72.

[61] R Deech, 'The Principles of Maintenance' (1977) 7 *Family Law* 230.

husbands and their new partners, who in 1984 successfully achieved a change in the law which required courts, when making financial or property provision on divorce, to consider whether it would be appropriate to sever the financial obligations between the parties as soon as is just and reasonable.[62] Later the courts themselves repudiated the criterion of 'reasonable requirements' as the basis upon which they made such provision, at least in cases involving wealthy parties, in favour of an expanded notion of earned entitlement.[63] The 'welfare principle' which dominated judicial decision-making concerning children came under pressure from fathers' rights activists, who claimed that it was being used unfairly to benefit mothers.[64] Claims by, or on behalf of, children conceived by artificial means to information about their father were conceded by the government.[65]

The case of divorce

The story of divorce diverges in some respects from the welfarism thesis. The reason is that the prohibition against the dissolution of marriage dates from pre-welfarist times, and its foundations in the doctrines of the Church rendered it relatively immune from the humanistic values of the Enlightenment. The history of divorce mirrors the history of marriage, which was the institutional means by which men sought to exercise power over women's reproductive capacities.[66] Even today, Arlette Gautier reports that 'obedience to the husband, whether universally applied or only practised within specific groups, is approved in 33 countries (10 per cent on the American continent, 27 per cent of Asian countries, 41 per cent of African countries, and 52 per cent of Arab countries and Iran)'.[67] The Protestant concession to permit divorce on the ground of adultery, which pre-dated the Enlightenment, was not a feature of welfarist

[62] Matrimonial Proceedings and Property Act 1984. See generally J Eekelaar and M Maclean, *Maintenance after Divorce* (Oxford University Press, 1986).

[63] See p 144 below. [64] See p 160 below.

[65] Department of Health, Press Release, 21 January 2004, announcing that as from April 2005, children born from donations after that date would have a right of access to the identity of the donor.

[66] See pp 40, 57–62 below.

[67] A Gautier, 'Legal Regulation of Marital Relations: A World Survey' (2005) 19 *International Journal of Law, Policy and the Family* 47.

concern, but a manifestation of a penal mentality which, at its extreme form, decreed death for adultery between married people in Calvinist Geneva, and in Puritan England, death for a wife and three months' imprisonment for a husband.[68] Thus the origins of the matrimonial offence doctrine, which dominated English law until 1971, rested on an instrumental notion that broken marriages were to be maintained, if not for the welfare of the parties concerned, but for the benefit of wider society, unless one party deserved exclusion from the union as a matter of punishment. This implied, however, that the other party was innocent and would have held to the marriage were it not for the offence. If that assumption could not be made (for example, if the petitioner had also committed a marital wrong, or encouraged the other's wrongdoing, or had invented the wrongdoing in collusion with the other), the petition would be dismissed. The bizarre consequence was that the more hostile the parties were towards one another, or the more mutual the desire for divorce, the less likely it was to be granted.[69] A Government Official, the King's (Queen's) Proctor, was created to try to ensure that people were not given divorces they did not deserve, and the courts exercised a general supervisory role to prevent this happening.[70] In 1956, the majority of the Royal Commission on Marriage and Divorce, who successfully recommended that the matrimonial offence doctrine should be kept, argued that 'the inevitable result' of allowing parties to divorce by consent would be to allow divorce if there was no 'real necessity for the remedy'. They predicted that to allow this would create a very real risk that divorce would become widespread, and that this would destroy the concept of life-long marriage and endanger children.[71] The wishes of the couple were to be sacrificed for the greater good of society.

Welfarism did, however, bring about some amelioration of the position. It allowed divorce to be granted by judicial remedy in 1858, whereas before that it needed an Act of Parliament. But this only

[68] R Phillips, *Putting Asunder: A History of Divorce in Western Society* (Cambridge University Press, 1988) 58, 130.

[69] See the following cases: *King v King* [1953] AC 124; *Godfrey v Godfrey* [1964] 2 All ER 154; *Williams v Williams* [1966] 2 All ER 614; *Brown v Brown* [1967] P 105.

[70] This is described in detail in J Eekelaar, 'A Jurisdiction in Search of a Mission: Family Proceedings in England and Wales' (1994) 57 *Modern Law Review* 839.

[71] Royal Commission of Marriage and Divorce (Morton Commission) (1956) para 69.

extended its availability to a small section of the population who had access to the Divorce Court, and the grounds for divorce remained very narrow. A more significant measure occurred in 1878 when concerns over violence against women prompted the enactment of the Matrimonial Causes Act 1878, under which poor women could obtain a non-cohabitation order from a magistrates' court (then known as a 'police' court) which relieved them of their duty to live with a husband who had been convicted of an aggravated assault on them.[72] The husband could also be ordered to provide limited financial support. But the marriage remained intact. In 1895 these courts were empowered to make such orders on the broader grounds that a husband had been guilty of persistent cruelty that caused the wife to leave, or had wilfully neglected to provide reasonable maintenance. These 'poor person's divorces' exceeded the number of 'real' divorces granted in the High Court. In 1900 there were 9,553 such orders in magistrates' courts. Between 1900 and 1905 the annual average for High Court divorces stood at 546.

While the magistrates' jurisdiction represented the best that welfarism could achieve against a largely instrumentalist divorce law, it suffered from the grievous defect that these courts could not dissolve the marriage, despite authorizing the separation. The consequence was a growth in 'illicit' unions and illegitimate children among the poor. Although the majority of the 1956 Royal Commission clung to the instrumentalist, fault-based, ideology of divorce, the heightened welfarism of the 1960s prevailed with the Law Commission which, in 1966, recommended that divorce should become available on the sole ground of irretrievable breakdown. One reason for the proposal was that the procedure caused distress and humiliation. Another was the belief that there were some 180,000 illegitimate children who could become legitimate if the divorce law was changed.[73] The Divorce Reform Act 1969 (effective from 1971) therefore replaced the primarily fault-based divorce law by divorce based on irretrievable breakdown. The law manifested many of the

[72] See CS Gibson, *Dissolving Wedlock* (Routledge, 1994) 72–6. This is the most comprehensive socio-legal analysis of divorce in England in the twentieth century.

[73] The Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (Cmnd 3123, 1966) para 36.

fingerprints of welfarism. It stopped short of empowering the parties to bring the marriage to an end by reason only of their own decision. They still needed to comply with the conditions laid down by the law. Divorce by consent was indeed now possible, but only after a two-year period of separation. If the parties wished to divorce more quickly, it was still necessary to allege wrongdoing: either adultery or 'unreasonable behaviour'. But it did not matter that they had agreed on this course, or that both had committed such wrongs. The court could reject a petition if it felt the conditions were not established, but as the requirement for a hearing was abolished in the mid 1970s in the overwhelming majority of cases where the petitioner's statement was not contested by the other party, the court could proceed on the basis that the conditions were established without requiring supporting evidence. Furthermore, a duty, introduced in 1958, that the courts should be satisfied that the arrangements for the children were satisfactory or the best that could be devised, was removed by the Children Act 1989. It seemed that the judicial role in divorce was no longer one of regulation, but of regularization.[74]

The final chapter in the story of divorce in the twentieth century centres on the reform, enacted in the Family Law Act 1996, but never implemented. In 1990, the Law Commission expressed the view that the remnants of the fault system in the reformed 1971 law could give rise to confusion and in some cases injustice.[75] This was because the natural desire to obtain divorce quickly once a marriage had broken down led most people to use the adultery and 'unreasonable behaviour' facts, even though these either might not have occurred, or might not represent the full story of the marriage. But it would be contrary to the interests of either party to contest such allegations, for to do so risked removing the case to court for a hearing, which neither desired, and could increase friction between them.[76] The Commission preferred to substitute a period of time which must pass after an application for divorce was lodged as being

[74] See J Eekelaar, *Regulating Divorce* (Clarendon Press, 1991) ch 3.

[75] The Law Commission, *Family Law: The Ground for Divorce* (Law Com. No 192 1990).

[76] There is some evidence that the process can cause friction and prolong the negotiation process: see J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000) 155–6.

the most convincing evidence that the breakdown of the marriage was irretrievable. This proposal would have allowed either party, with the consent of the other, or unilaterally, to have brought the marriage to an end, albeit that the legal dissolution would follow after the effluxion of a period of time. Such a radical empowerment of married people was in keeping with the ideological position of the post-welfarist era. However, the reform was never implemented. The reasons are complex. As the idea developed within government, it began to be viewed as an opportunity to deter people from divorce, and to promote mediation. Thus government consultative documents suggested that the process should be preceded by one or both parties attending an information meeting which would, among other things, explain to the parties the effects of divorce on children, and point out the 'helpfulness' of mediation.[77] With these new (welfarist) goals in place, the government was disappointed when pilot studies revealed that the information meetings did not sufficiently steer participants away from legal advice and towards mediation, and may not have been successful in inducing them to reconsider their desire for divorce. This was enough to sink the scheme. While it was perhaps remarkable to find this resurgence of welfarist policy in the mid 1990s, it may also be significant that it was thought unlikely to succeed. And it could be said that, although welfarist, the policy differed from such policies which prevailed during the welfarist era. During that time the outcomes deemed to be in people's interests were simply imposed on them. In the case of the 1996 abortive reform, the policy was to construct procedures which were designed to prompt people to seek the desired outcomes themselves. The holy grail of post-welfarist policy could be said to be to enhance people's freedom to pursue goals of their own choosing, but to exercise state power surreptitiously by influencing them to choose goals which the state believes to be in their interests, or those of the community.[78] The experience of the Family Law Act 1996 was not an encouraging omen for the quest.

[77] Eekelaar, Maclean and Beinart, ibid 1–3.

[78] See H Reece, 'From Parental Responsibility to Parenting Responsibly' in M Freeman (ed.), *Law and Sociology: Current Legal Issues 2005*, vol 8 (Oxford University Press, 2006) ch 26. This is discussed further at pp 118–22 below.

Homosexuality

The taboo against homosexual relationships ensured that such relationships played no part in either instrumentalist or welfarist legal structures relating to family relationships. Instead, legal and social norms assumed their most terrible punitive and repressive aspects in the way Michel Foucault described as characterizing all penal law during the *ancien régime*. Its goal was to remove the offender from the body politic, through death, transportation or social ostracism.[79] But, while penal law (in Foucault's analysis) later moved towards working on the criminal's mind, in order to try to instil desired modes of behaviour, in the case of homosexuals, for the most part (and particularly in the case of males), it maintained its punitive posture. This was achieved both through inflicting punishment for homosexual activity and social practices which denigrated homosexual relationships. Criminalization of sodomy between adults was lifted in Britain in 1967;[80] the Texas sodomy laws were held to be unconstitutional only in 2003.[81] But discrimination continued.[82] The cruel deployment of institutional and social power against individuals for no reason other than their consensual sexual behaviour in private has only very recently been attenuated. This seems to be part of the general realignment of power in what may be a new era in the interaction between the law and personal relationships.

The New Era: From Family Law to Personal Law?

Taken as a whole, family law in the 1960s was much closer to the family law of the 1890s than the family law of the 1990s. What can account for the changes of the 1970s and 1980s? They are clearly linked to the changes in family living of the 1970s which Francis Fukuyama has called 'the great disruption',[83] or, more technically, the 'demographic

[79] M Foucault, *Discipline and Punish: the Birth of the Prison* (Penguin Books, 1991). See further DF Greenberg, *The Construction of Homosexuality* (University of Chicago Press, 1988).

[80] Sexual Offences Act 1967. For a full discussion, see S Cretney, *Same-Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (Oxford University Press, 2006) ch 1.

[81] *Lawrence v Texas* 539 US 558 (2003). [82] See pp 85–9, 151–4 below.

[83] F Fukuyama, *The Great Disruption* (Profile Books, 1999).

transition'. The facts can be simply stated.[84] The proportion of the population of Great Britain aged over 16 who were married fell from 71 per cent (men), 65 per cent (women) in 1971 to 53 per cent (men), 52 per cent (women) in 2000.[85] The average age of men marrying for the first time in 1961 was 25.6 (24 for women); in 2002 it was 30.9 for men and 28.7 for women.[86] This seems to be partly cause and partly consequence of social and demographic events such as decline in fertility (down by one-third between 1961 and 1997), postponement of childbearing, greater longevity, increased female workforce participation, and contraception. But there has also been a weakening of regard for the importance of marriage. The proportion of non-married women aged 18–49 in Britain who were cohabiting outside marriage doubled between 1986 and 1991 to 25 per cent; and the proportion of women aged 18–49 who were married fell from 75 per cent in 1976 to 53 per cent in 1998. People now standardly live together without marrying.[87] In 1976, only 4.9 per cent of children were born to a couple living together outside marriage. By 2000 this had risen to 34.6 per cent.[88] Although many couples still marry after a child is born, it has become increasingly common not to marry even when one or more children are born.[89] The consequence is a greater variety of 'family' forms: people living together without being married, with or without children, or living with second or subsequent partners, or living as a single adult with children.[90]

The increase in divorce (there were 3.2 divorces per 1,000 marriages in 1966, and 14.0 per 1,000 in 2004) must be seen as part

[84] See the excellent overview by CS Gibson, 'Changing Family Patterns in England and Wales over the last Fifty Years' in SN Katz, J Eekelaar and M Maclean (eds.), *Cross Currents: Family Law and Policy in the US and England* (Oxford University Press, 2000) ch 2, and, in detail, Gibson (n 72 above).

[85] *Social Trends 32*, Table 2.5.

[86] *Population Trends 120,* Table 9.1.

[87] In the 1950s about 2 per cent of married people lived together before marrying: by 1996 this had risen to 77 per cent: J Haskey, 'Cohabitation in Great Britain: past, present and future trends—and attitudes', *Population Trends 103*, 4. The duration of pre-marital cohabitation has also increased.

[88] *Health Statistics Quarterly* 23, Table 2.

[89] In the ten years 1988 to 1998, the percentage of families with two children not married doubled (from 4 per cent to 8 per cent): Haskey, (above n 87).

[90] See J Eekelaar and T Nhlapo (eds), *The Changing Family: Family Forms and Family Law* (Hart Publishing, 1998).

of this wider picture. It is not *simply* a fulfilment of the prediction of the majority of the Royal Commission of 1956 that weakening the divorce law would destroy the concept of life-long marriage. Studies show that there is only a weak relationship between the rate of divorce and the nature of divorce law. Marital breakdown is not just a legal event.[91] The legal reforms have made divorce, previously available only to the better off, now universally accessible to a population which in earlier years either fell outside legal regulation or was restricted to the limited remedies of the magistrates' courts. But that there has been an overall increase in marriage breakdown is also clear.[92] Initially only those who wished to make an early escape from a marriage made significant use of the easier divorce regime.[93] But since the 1980s there has been a gradual, but steady, increase in the proportion of people over 30 who divorce, so now there is not very much difference in the divorce rates of people aged between 35 and 44 and those aged between 20 and 34 (between 23 per 1000 marriages for the former, and 28 per 1000 marriages for the latter). As people are marrying later, it is possible that many people over 35 who are divorcing are relatively early into their marriage. Nevertheless, the increase in the median duration of marriages at time of divorce from 10.1 years in 1981 to 11.5 years in 2004 suggests that longer-established marriages have now become more at risk.[94]

These changes in behaviour have obviously been accompanied by changes in attitudes. Some attitudinal changes are easy to detect; for example, disapproval of pre-marital cohabitation has dropped significantly.[95] Attitudes about personal relationships are harder to pin down.[96] Some writers[97] have suggested that people now pursue the goals of individual self-fulfilment and the quest for

[91] DW Allen, 'The Impact of Legal Reforms on Marriage and Divorce', and I Smith, 'European Divorce Laws, Divorce Rates, and their Consequences' in AW Dnes and R Rowthorn (eds), *The Law and Economics of Marriage and Divorce* (Cambridge University Press, 2002) chs 11 and 12.

[92] Gibson (n 72 above) 133–4. [93] Eekelaar (n 74 above) 54–5

[94] *Social Trends 32*, Table 3. [95] Haskey (n 87 above).

[96] The following is discussed in more detail in J Eekelaar, 'Personal Obligations' in M Maclean (ed), *Family Law and Family Values* (Hart Publishing, 2005) ch 1.

[97] RE Bellah, R Madsen, WM Sullivan, A Swider and SM Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (University of California Press, 1985 and 1996).

'pure' relationships at the expense of commitment to others. Others have suggested a more nuanced picture where relationships are only provisionally accepted and continually 'renegotiated' on a basis of 'reciprocity'.[98] But the implication that such negotiations take place between self-interested individuals isolated from social and moral expectations seems implausible. Carol Smart and Bren Neale[99] concluded that the separated parents they interviewed were articulating their wishes within an ethical framework. For the mothers it was an 'ethic of care'; for the fathers, an 'ethic of justice'. But they were talking about child-care matters. Mavis Maclean and I found the reverse when separated parents talked about financial support: there the mothers stressed the fathers' obligations in justice to their biological children, while the fathers stressed their new supportive roles in their second families.[100] But whether expressed by women or men, both these 'ethics' demand that attention be paid to interests beyond those of the immediate agent. These studies concerned only separated parents. In a later study, referred to above,[101] Maclean and I explored the extent to which couples who were living together, either married or outside marriage, considered they had obligations to one another, and to their partner's family, and, if so, why. Our interviewees did not seem to regard themselves as being in a position of self-interested negotiation and renegotiation with their partners. Some (but not all) of those married regarded that the institution of marriage imposed obligations on them. Others, including some of the married, saw the very fact of being in a relationship as generating a kind of obligation to 'work at' its sustenance: the relationship itself exerted a 'normative pull'. Others, also including the married and unmarried, appealed to independent principles, such as that one should treat people well if they have treated you well,[102] or build

[98] U Beck and E Beck-Gersheim, *Individualization* (Sage, 2002); A Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Society* (Polity Press, 1992).

[99] C Smart and B Neale, *Family Fragments?* (Polity Press, 1999).

[100] M Maclean and J Eekelaar, *The Parental Obligation: A Study of Parenthood across Households* (Hart Publishing, 1997).

[101] n 18 above.

[102] This is not the same as the 'reciprocity' referred to above because the benefits received were perceived as generating a long-term obligation, not one which was constantly under view.

trust, or treat people with love, respect and care. The conclusion was that the evidence showed that the married and cohabiting unmarried people share many values; indeed, that the 'similarities in the normative determinants of their behaviour may be greater than the dissimilarities'. This also seemed to be the case when the ethnicity of the interviewees was taken into account.[103] These findings should remind us that, even though outwardly people may seem to behave in different ways, at a deeper level they may share many values.

But the fact remains that, since the 1970s and 1980s, many fewer people are willing to allow the way they behave in their personal lives to be dictated to them by social institutions, including marriage. This is so even though marriage is no longer the patriarchal institution it once was. But no sooner had welfarism made marriage benign than it suffered a relative decline. The French sociologist Irène Théry called the process 'démariage': whereby marriage changed from being a public representation of a social ideal to a private matter.[104] It is reflected in the widely held view that the fact of parenthood is assuming more legal importance than the status of being married.[105] It might be thought that the movement for 'gay marriage' contradicts this, but it does not; first, because prior to the 1970s, marriage was the *only* legitimate context in which sexual relationships and childbearing could occur, whereas the gay marriage movement at most only seeks the *option* of marriage, or an equivalent status; and second, because, as their opponents have insisted, recognizing gay marriage does significantly alter the nature of that institution.[106]

Why, then, has there been this diminution in regard for conformity with institutional demands? Could it be that revelations of past (sometimes present) abuses within institutions (domestic violence within marriage; institutional child abuse) have bred distrust? Is there a link to the contemporaneous decline, or restructuring, of the welfare state, following an (at least perceived) economic crisis of the mid 1970s, which saw reduction in economic growth, high

[103] M Maclean and J Eekelaar, 'The Significance of Marriage: Contrasts between White British and Ethnic Minority Groups in England' (2005) 27 *Law & Policy* 379.

[104] I Théry, *Le Démariage* (Editions Odile Jacob, 1993).

[105] J Dewar, *Law and the Family* (Butterworths, 1992) 52–3. Eekelaar (ed Maclean) (n 96 above) 8–11.

[106] See p 152 below.

unemployment and high inflation?[107] Could this have led to a breakdown in confidence in the competence of directive centrist institutions to understand what was really in people's interests, and can an alleged decline in the standards of civil virtue in the public domain[108] have affected institutions which formerly dominated our private lives? It would be surprising if the experience of the appalling abuses of state power by the totalitarian regimes of the twentieth century have not had at least a subliminal affect on attitudes to institutional authority. Perhaps the widespread dissemination of knowledge through the physical and social sciences has removed the mystique upon which institutional authority relies. Whatever the reasons, the result creates a problem concerning the legitimacy of authority, which is a central feature of governance.

John Dewar and Stephen Parker have gone as far as to characterize the present era, in the case of family law, as one of 'chaos'.[109] They describe the period from 1858 (when judicial divorce was introduced in England and Wales) to the late 1960s as the 'formal' era when the marital relationship was seen as an institutional matter for the state. This period emphasized rights, form, principle, and the public. This gave way to a 'functionalist' era when the law became more utilitarian, favoured substance over form, became more pragmatic (thus preferring discretion to rules) and retreated from the public domain. This was a preparatory stage for a 'complex' (or chaotic) era, which emphasizes the fact of parenthood over the status of marriage, shifts away from discretion back towards rules, and recognizes greater freedom for parties to order their family lives, each type of relationship generating its own legal form. Dewar and Parker use the concept of 'functionalism' in an unusual way. It is usually associated with the approach taken by family sociologists in the 1950s and 1960s which analysed the family in terms of the functions which the analysts perceived it to be playing; for example, Talcott Parsons

[107] Pierson (n 49 above) 138 *et seq*.

[108] As argued, for example, by D Marquand, *Decline of the Public* (Polity Press, 2004).

[109] J Dewar and S Parker, 'English Family Law since World War II: From Status to Chaos' in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents* (n 34 above); J Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467; S Parker, 'Rights and Utility in Anglo-Australian Family Law' (1992) 55 *Modern Law Review* 311.

explained the family as having two main functions, socialization of children and stabilization of adults, its many previous functions now having been taken over by the state.[110] My book, *Family Law and Social Policy*[111] in which I analysed family law in terms of three functions (providing support for and protection of the family during subsistence and providing adjustment after its breakdown) is often (fairly) cited as being in the same tradition. But these are theoretical ways of understanding social organizations (and have been criticized for making uncritical assumptions about what their purposes are[112]). They are not statements about the attitudes of the social actors themselves. It is true that judges became more pragmatic and used wider discretion after the end of the Second World War, but this merely represented a culmination of the welfarist process which had begun much earlier whereby courts increasingly ensured that family roles were exercised in a way the courts thought was for the benefit of family members. It did not mean that *the courts* became (more) 'functionalist'. They had always believed themselves to be serving some purpose. There must also be some doubt whether the law became more 'utilitarian' during this period. Utilitarianism was, after all, a significant ethical theory during the nineteenth century. It is more likely that the courts had gradually become less sure that 'utility' (or welfare) was best secured by adherence to older rules (rule utilitarianism) than by discretionary assessment.

Dewar and Parker's description of the emerging 'chaotic' or 'complex' era does, however, fit with the social changes described earlier. Their reference to a re-emergence of rules in current conditions might look surprising, for this does not seem to be consistent with the idea of 'chaos', or with the decline in institutions. Nevertheless, it is certainly supported by the evidence, such as recent attempts to make the assessment and enforcement of the child support obligation more 'rule-based'. This may partly be explained (as they suggest) by a desire to keep control of legal costs. But,

[110] T Parsons, 'The American Family' in T Parsons and R Bales, *Family, Socialization and Interaction Process* (The Free Press, 1955).

[111] Weidenfeld & Nicholson, 1978 and 1984.

[112] See M Freeman, 'Towards a Critical Theory of Family Law' [1985] *Current Legal Problems* 153.

as they also indicate, there seems to be greater attention to 'vindicating claims regardless of their outcomes or consequences'.[113] The welfarism thesis suggests that this is part of the attack on welfarist power structures, which gave persons in authority discretion to determine outcomes they believed to be in the interests of others. In fact, the origins of this attack can be glimpsed in the appearance after the Second World War of the idea that people had a 'right' to welfare entitlements by virtue of their citizenship, as proclaimed by the Universal Declaration of Human Rights.[114] But the influence of the Declaration was weak and, although in the United Kingdom some new benefits were introduced outside the social insurance framework (in particular family allowances for families with two or more children [later called child benefit], national assistance for anyone in sufficient need [later called supplementary benefit, then income support], and perhaps most importantly, a national health service) these provisions were strongly controlled by state authorities. National assistance was means tested, and the health service was a long distance from an era of patient's rights. People gradually became less willing to rely upon institutionally controlled benevolence. They wished to assert a degree of power or control over communal institutions. They did so through the language of rights and entitlement, although the terms on which the state was willing to concede such rights began to change. The goal of the welfare state under New Labour changed from 'providing extensive passive benefits to meet the needs of its citizens as a whole' to seeking to 'empower people and equip them to take the opportunities available in a flexible economy, and this includes maximizing engagement in paid work'.[115] A survey comparing social attitudes in Britain between 1987 and 2003 showed a marked shift in

[113] Dewar and Parker in *Cross Currents* (n 34 above) 140.

[114] Art 40: 'Everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and the necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.' See also RM Titmuss, 'Welfare "rights", law and discretion' (1971) 42 *Political Quarterly* 113.

[115] P Taylor-Gooby, 'The work-centred welfare state' in A Park, J Curtice, K Thomson, C Bromley and M Phillips (ed) *British Social Attitudes 21* (Sage and National Centre for Social Research, 2004) 2.

opinion, across the political spectrum, in favour of this new approach to welfare.[116]

The new problem, however, is to find a legitimate basis for such rights and entitlements. Of course they often originate through the usual sources of law creation, the legislature, and the courts. But these are institutions, and therefore afflicted with the institutional distrust of the post-welfarist era. One source of rights could lie in the claim by people themselves to decide their own futures. They seek more scope to determine the nature and consequences of their relationships, either by contract, or by choosing a 'ready-made' institution, such as covenant marriage,[117] or civil partnership between gay couples. As in the case of the first Enlightenment, there can be appeal to norms beyond the positive law: to universal rights. Such appeals are assisted by the presence of international human rights instruments, such as the United Nations Convention on the Elimination of All Forms of Discrimination against Women 1979, the United Nations Convention on the Rights of the Child 1989 and, more importantly for the United Kingdom, the European Convention on Human Rights and Fundamental Freedoms, enacted into domestic law from October 2000 by the Human Rights Act 1998. The difficulty is that it is not clear that the legitimacy of such instruments is very secure in wider society, or even among the legal or political community. In 2005, both the Prime Minister and the Leader of the Opposition have voiced their willingness to modify the application of the Human Rights Convention in the case of terrorist legislation.

The post-welfarist era has thrown up another issue which is particular to family law. We have seen that this period is characterized by an increasing variety of family forms. Yet legal rights within family relationships have tended to be defined by reference to formal definitional categories, such as those who have 'family life' under the European Convention, or are married, or are members of a 'family', or are legally recognized parents. For example, in *Fitzpatrick v Sterling Housing Association,*[118] in order to qualify for recognition, a same-sex

[116] Taylor-Gooby (n 115 above), ch 1.

[117] Some US states have introduced an optional form of marriage which is less easy to dissolve than standard marriages: see p 108 below.

[118] [2001] 1 AC 27.

couple needed to be characterized as a 'family' for the purposes of the relevant legislation, and in *Ghaidan v Godin-Mendoza*[119] the same result was achieved by allowing a same-sex couple to be treated 'as if' they were living together as husband and wife, thus importing the fiction of traditional marriage into a relationship which did not fall within the established categories. Similar problems could arise when considering in what way, if at all, relationships between unmarried heterosexual people living together without a sexual relationship, or heterosexual people with a sexual relationship but who are not living together should be subject to special legal attention. Do we need to try to bring these under some concept of 'family'? In truth, we are dealing with the role of the law in relation to what is usually referred to as people's 'personal', or 'private', lives. People's 'private' lives can of course include many matters other than relationships with others, but in this context will be understood as referring to such relationships. It would therefore seem appropriate, and could perhaps be liberating, to abandon the label 'family' law, and replace it with the expression 'personal law'. In many jurisdictions, especially those which include communities with strongly distinctive religious traditions, 'personal law', or 'personal status law' is used to refer to laws which attach to individuals because of their membership of a religious or ethnic community and which cover matters covered by family law as we understand it. The suggestion here is wider than that: it refers to laws, whether applicable on the basis of an individual's communal allegiance or not, which purport directly to regulate their private life. This usage will therefore be adopted for the rest of this book.

[119] [2004] 2 AC 557.

2

Friendship

During an interview with a married woman as part of a project seeking to explore people's sense of obligation within intimate relationships[1] it emerged that the household contained an unusual individual. Mr Schmid (as I will call him) had come to England from Berlin in the 1930s. He had no family and no possessions. He became a lodger with my respondent's mother-in-law, and, when my respondent married, they took Mr Schmid into their home while he looked for somewhere else to live. That was 22 years ago. He was still there. He shared meals and living facilities with the family. 'He was a friend,' my respondent said, 'and when we found he had nowhere to live and we had a spare room we agreed he could come and stay with us until he found somewhere else … and he's stayed ever since.' Did they see him as part of the family, I asked. 'Ummm, it's a very unusual relationship,' came the answer, 'he isn't part of the family; he has lived with us for a long time and I guess it is something that just happened.' She was anxious to dispel any idea that this was done out of a sense of obligation, or that any such obligation continued. If he could no longer look after himself, it was expected that he would find care with the welfare authorities.

'He was a friend.' Respondents sometimes talked of family ties as creating stronger duties than friendship ('Not [friends] … it's family and you make that extra effort to help them'), and living in cohabitation likewise ('Being together you should be mutually supportive … otherwise you're just living with a friend') and sometimes as if friendship added something more to a family relationship

[1] This research is reported in J Eekelaar and M Maclean, 'Marriage and the Moral Bases of Personal Obligations' (2004) *Journal of Law and Society* 510. I will refer to this as the Personal Obligations Research.

('[My mother and I] are best of friends'). But more often respondents seemed unwilling to distinguish. You could owe the same obligations, or not owe them, to family and friends. 'I have friends I would probably treat more favourably than certain family members, but again I have some family members I would treat better … it depends on who you're talking about.' So, what do we owe to family? What do we owe to friends?

We must first see if we can define 'family' and 'friend'. Neither is easy. It is perhaps taken as given that family includes 'kin' in a genetic sense, but of course 'kinship' is a social construction, manifested mostly through institutions such as marriage and adoption. But it is not confined to such institutions, and it seems we can now include adults, whether of the opposite or the same sex, who live together in an intimate relationship over a period of time, as constituting a family.[2] But does this mean that they are no longer friends? Were they ever friends? How does one cross the line between friendship and family membership in the absence of a calculated act demonstrating a clear intention to move from one type of relationship to another? Do these questions even matter?

I am going to suggest that we should reflect on the role of friendship in personal relations in order to see whether this might help in approaching some of the issues which arise with regard to their legal regulation. Discussion of such regulation tends to start with the paradigm of marriage, and to ask how far its legal incidents should be extended beyond its confines. This leads naturally to such concerns as to whether the law should 'impose' marriage on the non-married,[3] and whether to do so might 'undermine' marriage. If, however, we see the core relationship as one of friendship, we might find a new perspective on the issue of legal regulation, which has traditionally been expressive of relationships of power or dependency. We might ask not whether marriage is endangered, but whether legal regulation might challenge the possibility of a different relationship which has been important to people across the centuries: friendship. I might be

[2] *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27.

[3] The classic example is R Deech, 'The Case against the Legal Recognition of Cohabitation' in JM Eekelaar and SN Katz (eds), *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Butterworths, 1980) ch 30.

emboldened enough to conclude that, in neglecting friendship, we may be in danger of commodifying relationships, and that, in doing this, we will have impoverished our communities.

Friendship and Brotherly Love

We face, however, a formidable conceptual problem at the outset. Defining 'friendship' is possibly even more difficult than defining 'family'. The literature is vast, stretching into ancient times, and my examples are chosen only to give a sense of the perenniality of the issue and to illustrate a few selected themes. It is clear that the concept changes over time and between cultures. I am not going to be concerned about labelling: that is, whether the term 'friendship' is properly applicable only to one particular behavioural concept. I am content to note its diverse range. But I will be interested in some more than others.

A strong seam in Western thought uses words usually translated as friendship (*philia*, *amicitia*) as describing the bond that can exist between all humans, or at least all members of a political community. In Pythagorean and Stoic thought, friendship not only links all humans with one another, but identifies them with the natural world in a reflection of the divine.[4] There is a striking instance in the Christian gospel. Immediately after recounting the parable of the vine (where Jesus says: 'I am the vine; you are its branches'), St John records Christ saying to the disciples:

> This is my commandment: that you should love one another, as I have loved you. This is the greatest love a man can show, that he should lay down his life for his friends (philoi); and you, if you do all that I command you, are my friends. I do not speak to you any more as my servants; a servant is one who does not understand what his master is about, whereas I have made known to you all that my Father has told me; and so I have called you my friends.[5]

[4] J McEvoy, 'The Theory of Friendship in the Latin Middle Ages'; EG Cassidy, 'Classical and Christian Perspectives on the Limits of Friendship' in J Haseldine (ed), *Friendship in Medieval Europe* (Sutton Publishing, 1999) chs 1 and 2.

[5] John 15: 12–16.

And shortly later:

> At the time I speak of, you will make your requests in my name; and there is no need for me to tell you that I will ask the Father to grant them to you, because the Father himself is your friend, since you have become my friends …[6]

It is possible that these utterances refer to a deep personal relationship between Jesus (God) and the disciples, but it is also plausible that the friendship exists not only between disciples and Jesus (God), but between all Christians. The Pauline references to the members of that community as parts of the same body, which is also Christ's 'mystical body'[7] suggest a much wider concept of friendship binding people who may not even know each other, making them one through communion with the divine. ('I am the vine. You are the branches.') Today we might prefer an expression such as brotherly love, or love of humankind, to express such an idea. Its importance is not in question. It is the foundational motivation behind human rights claims. But it is not the aspect of friendship with which I am here concerned. For this I will turn first to Aristotle.

'Full' Friendship as a Paradigmatic Value

To be sure, Aristotle nods in the direction of this idea of universal friendship.

> So we praise those who love their fellow men. And one notices in one's travels how everybody feels that everybody else is his friend and brother man. Again, it is pretty clear that those who frame the constitutions of states set more store by this feeling than by justice itself. For their two prime objectives are to expel faction, which is inspired by hate, and to produce concord, concord being like friendship.[8]

But the bulk of Aristotle's discussion examines a much more personal type of friendship. He regards it as of immense personal importance: 'no one would choose a friendless existence on condition of having all

[6] John 16: 26–8. [7] I Corinthians xii. 12; Romans xii. 5.
[8] Aristotle, *Nicomachean Ethics* (trans. JAK Thomson), Bk 8, ch 1.

the other good things in the world'.[9] He is not one to oversimplify. He recognizes that the term can cover different types of relationship—three in fact. In one, the friendship is grounded on the utility it brings to the friends; in another, it is the pleasure it brings them. Both are forms of friendship, capable of inspiring concern for the good of the other, but the friendship is contingent on the utility or the pleasure. But full friendship exists between the good, in the sense that they want nothing else except the good of the other.

It is those who desire the good of their friends for their friends' sake who are most completely friends, since each loves the other for what the other is in himself and not for something he has about him which he need not have. Accordingly, the friendship of such men lasts as long as they keep their goodness—and goodness is a lasting quality.[10]

For Aristotle, the distinction between these categories has important consequences, which I will deal with a little later. But I need to dwell a little on the nature of what I will call 'full' friendship thus described. It is indeed deeply personal, and Aristotle says that 'besides goodness, (men) need time and intimacy to establish perfect friendship'. A similar notion of friendship was famously expounded by Michel de Montaigne in the sixteenth century.

> If a Man should importune me to give reason why I lov'd him, I found it could not otherwise be expres't, than by making answer, because it was he, because it was I.[11]

This type of relationship, Montaigne averred, could only be found between men (though he was careful to say that it was not sexual), not because it was a theoretically impossible experience between a man and a woman, but because no woman had apparently yet been found with the quality of constancy of mind to endure 'so hard and durable a knot'. Were one miraculously to appear, so that 'not only the Soules might have their entire fruition, but the Bodies also might share in the Alliance … the Friendship would certainly be more full and perfect'. But he clearly thought marriage was inimical to such an outcome because:

[9] *Nicomachean Ethics*, Bk 8, ch 1. [10] ibid ch 3.

[11] *Essays of Michael, Seigneur de Montaigne*, trans. C Cotton, London 1685: Bk I, ch 27, 332.

That is a Covenant, the entrance into which is only free, but the continuance in it is forced, compelled, having another dependence, than that of our own Free will, and a Bargain commonly contracted to other ends, there almost always happens a Thousand Intricacies in it, to unravel, enough to break the Thred, and to divert the Current of Lively Affection: whereas Friendship has no manner of Business or Traffick with any but itself.[12]

Writing in 1960, C.S. Lewis put friendship on a less elevated plane. For him, friendship was centred upon a sharing of common interests. It was an escape from the affairs of everyday life. Lewis never quite convinces how this is distinct from companionship (a kind of *camaraderie*), and he sees it as very possible for it to be shared between a number of people.[13] Because it is contingent upon shared interests,[14] he observes that, though such a relationship might arise between a man and a woman, the social worlds of women and of men were then sufficiently separate to make that difficult. But he did accept that it was possible for such friendships to arise between women. Writing at the end of the twentieth century, Ray Pahl detected the opening up of new possibilities of communication, and therefore of intimacy, between men and women.[15] However, like Aristotle, he writes of a very wide range of types of friendship, some crudely utilitarian (he calls them 'commodified'), such as where we try to 'win friends and influence people', but others where secrets are shared and 'each soul-mate is closely responsive to the direction and interpretation of the other'.[16]

While 'friendship' can therefore cover many types of relationship, I am concerned mainly with 'full' friendship, of a kind similar or close to that described by Aristotle and Montaigne. It can be seen as a paradigmatic altruistic value. Lawrence Blum argues, similarly to later virtue ethicists, that while actions motivated by altruism are not morally obligatory, they may yet have moral value. He rejects the Kantian concern that acting to benefit a friend for the friend's own sake breaches the duty of acting with impartiality. Impartiality is enjoined only in certain institutional contexts. Nor is the altruism

[12] Ibid 331.

[13] CS Lewis, *The Four Loves* (Fontana, 1960).

[14] 'Friendship must be about something, even if it were only an enthusiasm for dominoes or white mice': Ibid 63.

[15] R Pahl, *On Friendship* (Polity Press, 2000).

[16] Ibid 84.

of friendship to be seen as simply a form of self-interest. This is because actions towards the friend are *motivated* by a genuine regard for the other's welfare. It will be true that acting in this way towards a friend *will also* reflect what is important to the actor, and in that sense is not a sacrifice of the actor's self-interest, but is nevertheless an action fully for the sake of the good of the friend.[17]

Friendship and Public Constraints

Pahl claims that 'the modern idea of friendship lies in its very freedom from public roles and obligations'.[18] We do not, as Ira Ellman, a noted American family lawyer, recently observed, 'have a law of close friends'.[19] But that is not new. C.S. Lewis refers to friendship's 'exquisite arbitrariness and irresponsibility': 'I have no duty to be anyone's Friend and no man in the world has a duty to be mine. No claims, no shadow of necessity.'[20] We noticed that Montaigne stressed the incompatibility between friendship and the bargains and ancillary constraints of marriage. It seems that the absence of externally imposed restraints is an important element in many people's conceptions of their intimate relationships today. The Personal Obligations Research referred to earlier[21] found that people who were in close relationships had a strong sense that they should behave in certain ways towards their partner and their partner's close relatives. The source of such obligations varied greatly. For some, they were found in convention (for example, a marriage); for others, in distinct ethical principles (behaving well to those who behaved well to you); and for yet others, the obligations seemed to develop as the relationship developed (an 'evolutionary' approach). However, they often made the point that these were voluntarily accepted obligations; they did what they did because they wanted to, because

[17] LA Blum, *Friendship, Altruism and Morality* (Routledge & Kegan Paul, 1980), 10, ch 4.

[18] Pahl (n 15 above) 37.

[19] IM Ellman, 'Why Making Family Law is Hard', 35 *Arizona State Law Journal* 699–714, 700.

[20] n 13 above, 67.

[21] n 1 above.

they were that sort of person. It seems that the kernel of this type of relationship lies not in a sense of absence of *any* obligation, but in the belief that the obligation is *inherent, and not externally imposed*. It is voluntarily assumed. It seems to follow that such obligations are seen to be free of social coercion.

However, Aristotle does refer to external restraints on friendship, but only for utilitarian friendships, not full friendship. Where people are friends for some ulterior purpose, and do not receive the benefits they hoped for, conflict arises.

> In the same way as justice is divided into written and unwritten, so utilitarian friendship seems to carry with it a moral or a legal obligation. The consequence is that, if complaints arise, it is mainly at the time when the relative position of the friends is not the same at the end of their association as it was when the association was formed. If it was formed on certain fixed or stated terms, it has a legal character—as for the moral type of utilitarian friendship, it is not expressed in set terms. The gift, or whatever it is that passes between the friends, is given as to a friend. Still, the giver expects to get back the equivalent or better—and if he finds himself in a different position at the end of their friendly relations, he will cherish a grievance. Disputes might arise when an attempt is made to put a value on services rendered. Is the standard to be the advantage accruing to the recipient or the sacrifice made by the benefactor? And in the former case is the repayment of the service to be made in accordance with this standard? The recipient seeks to depreciate the value of the service rendered, arguing that it cost the man who gave it nothing worth mentioning and could have been had from somebody else. The giver insists that, on the contrary, it strained his resources, that no one else could have given it, that it was given in a time of danger or some such pressing occasion. Perhaps the best solution is to say that, where friendship has been formed for its utility, the service should be measured by its value to the beneficiary.[22]

Aristotle's tentative suggestion, that when utilitarian friendships end, repayment is to be measured by the value of the gift or the service to the beneficiary, rather than by the loss to the conferrer of the benefits, is subtle and insightful. We will return to it later. Before then we must consider whether this is confined to friendships

[22] *Nicomachean Ethics* Bk 8, ch 13.

Aristotle describes as 'utilitarian'. Is the distinction between such friendships and full friendships sustainable? This first requires a discussion of the relationship between marriage and friendship.

Marriage and Friendship

When one considers the public face of marriage historically, it is not difficult to see why Montaigne considered that marriage, being a covenant, was for all practical purposes incompatible with full friendship. Think of the young Marie Antoinette, sent at the age of 15 to marry the French Dauphin, a clumsy youth with no interest in her, or possibly any woman, in order to fulfil the purposes of contemporary politicians.[23] The humiliations of surveillance of the bedchamber, of reporting back to her mother, Maria Teresa, about her menstrual cycle, are no doubt at the extreme, but they were mirrored in the myriad of ways in which marriage, through the concept of legitimacy, was central to the ordering of wealth and political power.[24] Marriage also ensured that men stayed in control of the process. The incorporation of the legal personality of the wife into that of her husband, and her more or less total economic dependence, together with an unequal divorce law,[25] were powerful means of obliterating women's freedom of action. Of course there was another side to this. Marriage was the context in which something approaching the type of relationship described by Aristotle and others as full friendship might be experienced between a man and a woman, though we have seen that Montaigne felt this was a practical impossibility in the sixteenth century, and C.S. Lewis thought it was difficult in the twentieth.

There were elements to marriage that might have reflected the elevated ideal. As Blackstone noted, in English law, spouses could not contract between one another, nor could they testify against one

[23] A Fraser, *Marie Antoinette: The Journey* (Phoenix, 2002).

[24] J Eekelaar, *Family Law and Social Policy* (Weidenfeld & Nicolson, 1st edn, 1978) 5–6.

[25] J Eekelaar, *Regulating Divorce* (Clarendon Press, 1991) 7–19; see p 17 below.

another. Such things might seem inappropriate between friends. But the reason he gives is that the wife's legal existence was incorporated into that of the husband.[26] Whether or not this doctrine promoted the possibility of full friendship between spouses, it was certainly not premised on the Aristotelian principles. It passed away, slowly, during the twentieth century, giving rise to concerns that spouses might bring their 'petty grievances' to court.[27] There is a paradox here. The demise of the doctrine of legal unity has made legal relations possible between husband and wife, thus, it might be thought, diminishing the chances of friendship between them. Yet, as I have noted earlier, it is possible that partners, both unmarried and married, are increasingly regarding their inter-personal obligations as arising from the relationship itself, rather than from an external source. This reflects the paradigm of 'full' friendship mentioned earlier. To the extent that married people hold this view, it suggests a weakening of the legalistic or conventional attitude to marriage. Yet the New Zealand Property Relationships Amendment Act 2001 and the New South Wales Property Relations Act 1984 expand legal regulation beyond marital relationships. The former gives jurisdiction to courts in respect of property division and maintenance over people over 18 who 'live together as a couple';[28] the latter extends the jurisdiction of the courts to 'a close personal relationship (other than a marriage or a de facto relationship) between two adult persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care'.[29]

Milton Regan has drawn a distinction between an 'internal' and 'external' stance which, in his view, the law takes to personal relationships.[30] The latter perspective accentuates the separateness of the individuals, and would identify separate interests warranting legal

[26] William Blackstone, *Commentaries on the Laws of England* (7th edn, 1775), Bk 1, ch 15.

[27] See S Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003) 98–114.

[28] The Act gives guidance as to what may be taken into account in deciding whether this is the case. It includes the length of the relationship and 'the degree of mutual commitment to a shared life': Property Relationships Amendment Act 2001, s 2D.

[29] S 5: as amended in 1999.

[30] M Regan Jr, *Family Law and the Pursuit of Intimacy* (New York University Press, 1993); *Alone Together: Law and the Meanings of Marriage* (Oxford University Press Inc,

protection. The former promotes a context in which an individual 'acknowledges that obligation may arise not simply through consent, but from shared experience in relationship with another'.[31] Although Regan recognizes that such a sense of obligation may arise in relationships both within and outside marriage, he sees a role for marriage law in creating a kind of protective cocoon around the relationship (and, consistently, is willing to see this extended to same-sex relationships). So he argues that spouses should not be allowed to testify against one another in criminal cases because this underscores the loyalty which should be owed between spouses. And he suggests that divorce settlements should not rest entirely on notions of earning property interests, but on the idea that the 'distinctive relationship' can generate responsibilities which 'may linger after divorce'.[32]

Despite Regan's careful analysis, there seem to be inconsistencies in this position. If the obligation arises from the fact of the relationship, why does he refer only to granting remedies within *marriage*? Conversely, why should the fact of being married disable the giving of testimony if the relationship it was supposed to represent no longer exists? Regan seems to fall back to mere conventionalism, the external stance, where social roles, and social rules, determine outcomes rather than the 'situation' between the parties. It seems that, if we are to give adequate recognition to the obligation which Regan says 'may arise not simply through consent, but from shared experience in relationship with another', we should follow the route taken by the New Zealand Property (Relationships) Amendment Act 2001, or the New South Wales Property (Relationships) Act 1984. Bill Atkin has written of the New Zealand legislation:

> In a sense then it could be argued that the New Zealand reforms have gone back to the old legal core of relationships, minus the formal trappings. Legal consequences flow, whether the cohabiting parties are officially married or not.[33]

1999). These are reviewed in J Eekelaar, 'Family Law: the Communitarian Message' (2001) 21 *Oxford Journal of Legal Studies* 181–92.

[31] *Alone Together*, 12.

[32] Ibid 188.

[33] B Atkin, 'Rights of Unmarried Couples in New Zealand—radical new laws on property and succession' (2003) 12 *Child and Family Law Quarterly* 173.

But these attempts to detach the 'relationship', and its consequences, from conventional structures raise difficult questions, which I will try to address through the idea of friendship.

Friendship and Legal Rights

In some jurisdictions, being married attracts financial benefits.[34] Mary Ann Glendon has complained that if homosexuals could marry, they would attract financial benefits which would be better directed at others, such as family carers.[35] Why should marriage attract such benefits? It is sometimes said that married people are happier, healthier and wealthier than those who do not marry, but even if that is true, it is difficult to know whether marriage has those consequences or whether people blessed with those fortunes are more likely to marry than those who are not.[36] It is true that married people are less likely to separate than people who are living together unmarried, but again it may be that other factors, such as religiosity, economic security, and strength of the relationship dispose people to marry and to stay together rather than that marriage has that consequence.[37] Whatever view is taken about that, what interest does the state have in bribing friends, whether of the same or the opposite sex, to continue their friendship if they have fallen out? If they have been living together, some may say that the pressures on housing stocks caused by increasing numbers of single households could justify it. Perhaps this is true. Of course,

[34] In fact, it seems that, in the United Kingdom at any rate, such benefits for the married are relatively few. Income tax benefits linked to marriage were phased out after April 2000. However, capital transfers are exempt between spouses who are living together, and there is protection against inheritance tax. Most significantly, marriage normally allows a survivor to take pension benefits, though this is becoming increasingly available to non-married cohabitants through various devices. See The Law Society, *Cohabitation: the Case for a Clear Law—Proposals for Reform*, July 2002, 30–4.

[35] MA Glendon, 'For Better or for Worse?', *The Wall Street Journal*, 25 February 2004.

[36] See LJ Waite and M Gallagher, *The Case for Marriage* (Broadway Books, 2000). These authors often treat unmarried people who are living together as married people, so the benefits may arise from living together rather than singly, not from being married.

[37] This is discussed in M Maclean and J Eekelaar, *The Parental Obligation: A Study of Parenthood across Households* (Hart Publishing, 2000).

if they are parents, the interests of the children may be used to justify creating incentives for their continued cohabitation, although the justification is likely to be defeated if they are in a state of conflict. But the important point is that they are parents, not just friends.

If it is difficult to find a case for having financial incentives for people to remain friends, we will have to say that there can be no legal (that is, externally imposed, and enforced) duties on the friends to maintain the friendship, and to act for the well-being of one another. If we regard unmarried partners only as friends, in the full sense, then it is appropriate that, while spouses have a duty to maintain one another while they are living together, unmarried partners should not. If that is so, why should entitlements arise if they part company? Is caring behaviour and financial support to be enforced only if friends separate? Is property only then to be forcibly redistributed between them? It seems not. Of course, it is a feature of full friendship that the friends see their property as common. But this comprehends only common use during the friendship. How could such a friend, either through financial contributions or through any other form of participation in the friendship, be thought to be 'earning' a proprietary or other legal entitlement to the other's property, even if the entitlement is deferred to the moment of separation? That would contradict the central feature of friendship in the full sense.

I seem to have reached a position which should be uncomfortable for any family lawyer. It seems to be that, if we discount the framework of marriage, and look only at the underlying relationship, if that relationship is one of full friendship, and only that, it is not one which of itself generates legal entitlements. It may be very well to ground such entitlements in the institution of marriage. We could even extend them to some parallel institution, like civil partnership. But in doing so, we are recognizing that they reflect some external duty to persist in the relationship, or to make good if it is not sustained. Such a duty reflects an ideological perception of the institution. Some years ago, drawing on Tony Honoré,[38] I suggested three 'ideologies' of marriage: the lifelong partnership model, the

[38] T Honoré, *The Quest for Security: Employees, Tenants, Wives* (Stevens, 1982).

insurance model, and the individualistic model. I thought that the model revealed by the way post-divorce awards were being made in England at the time reflected mainly the last model, which

> … sees marriage as an arrangement which two persons enter for mutual benefits, but which may result in gains to one at the expense of the other. As a consequence, the goals on breakdown are to provide compensation for loss of expected advantages and restitution for investments put into the marriage, together with their increments in value in so far as they are attributable to the claimant.[39]

Now it may be that this is a good model for marriage. Marriage could be seen as a form of friendship designed to secure utilitarian benefits for each party. Why otherwise choose a legal framework? We may think it a great improvement on models of past ages in Western societies. But whether it should apply to people living together outside marriage, as friends, challenges our conception of friendship. I have indicated that the idea of full friendship is inconsistent with the acquisition of certain legal rights. But we need to look more closely to see whether at least some legal consequences are implied in such friendship. In doing this we must consider the issues of betrayal and loss.

Betrayal and Loss

Friendship involves trust, but with trust is always the possibility of betrayal, or, if not betrayal, failure.[40] So the erstwhile friend who inflicts deliberate damage on a former companion can surely not expect immunity from redress. The legal immunities between spouses conferred by the old common law, particularly the non-applicability of the law of rape, had nothing to do with the ideals of friendship, and everything to do with male domination. That is why it is hard to accept Milton Regan's support for the rule against testimony between spouses, for how can it seriously be maintained

[39] J Eekelaar, *Regulating Divorce* (Clarendon Press, 1991) 57–8.

[40] For a discussion of trust in married and unmarried relationships, see J Lewis, *The End of Marriage? Individualism and Intimate Relations* (Edward Elgar, 2001).

that a person whose trust has been betrayed should keep loyal to the betrayer? So friendship cannot confer immunity against deliberately harmful actions.

But what if the circumstances fall short of inflicting deliberate harm? The friendship has simply ceased to be. Perhaps one party dissembled or exploited the other, perhaps not; motivations are hard to unravel. Of course friends should be able to make gifts to one another, and these should not be recoverable. But when assets are treated as being for the friends' common use, the freedom and arbitrary nature of friendship surely do not imply that one party should walk away with all the other has made available for common use and enjoyment, or which they have built up together for those purposes, simply because he or she is stronger, or has acquired legal title. Aristotle thought restitution was appropriate only for utilitarian friendship, but he could conclude this only by assuming that the problems of betrayal and loss could not arise in complete friendships by definition. Full friendship, he said, exists only between the good, and goodness is enduring. But this is a fiction. We would surely want to say that if friendship is betrayed or lost, each friend should, as far as possible, be restored what they put into the commonality. Indeed, this is a general principle of justice, applicable between any people, whether friends or not. This could, under one version of the law of constructive trusts, allow a common intention to be inferred from conduct that if the friendship fails, each party's share of the acquests should be restored to them. It remains an anomaly of English law that, unless actual agreement can be proved or implied, the only conduct from which such an intention can be inferred is making monetary contribution, either directly to the acquisition in question, or to the partnership generally, or, if not a monetary contribution, then by providing the equivalent of paid labour. Looking after the home and children does not seem to count.[41] This is, however, only a local difficulty. The larger point is that the law has the means of bringing about restoration of benefits which it would be unjust to allow one party to take from the friendship should it end.[42]

[41] See the discussion in *Oxley v Hiscock* [2005] Fam 211.
[42] See, for example, *Walker v Hall* [1984] FLR 126.

This is straightforward where material contributions (in which might be included running a household) lead to material accumulations. But suppose I advise my friend how to invest his money, or what horse to back, or I spend time producing information which he uses to write a book. While the friend might behave shabbily in giving no manifestation of gratitude for his success, I surely do not have, and should not have, an enforceable claim for a share in it. The reach of the principles of unjust enrichment does not extend that far. In those cases the very fact of friendship, while falling short of full friendship, deprives the action of the requisite element of knowledge on the part of the beneficiary that the action was not offered gratuitously.[43] But there is an even more difficult case. Suppose a friend has given up much for the other and there are no acquests to which it can be said that person contributed. When the friendship finishes, should the other be required to compensate for those losses? We have seen that, speaking of utilitarian friendships, Aristotle thought the standard for compensation should be the benefit given rather than the sacrifice made. There seems good reason for this, whether the friendship is utilitarian or full. To impose an obligation on one to recompense for the other's losses is to impose an insurance-type responsibility on the friends against the risks of loss of the friendship. Can this be right? If I give up something to help my friend, I do so on the basis of trust that the friend will repay in their own way. Perhaps continuing the friendship will be enough. To convert any such moral obligation to a legal obligation if the friendship fails destroys the notion of trust. If Mr Schmid, the refugee-lodger in the Personal Obligations Research, should fortuitously come into money, and then falls out with my respondent, whatever we may think his moral obligations may be, to give her the right to claim recompense for her efforts over the years surely contradicts the virtue of her actions. Perhaps it would make such virtuous actions impossible. As longer-term financial provision (maintenance) can best be seen as a form of compensation rather than restitution for contributions, it seems to follow that there should be no entitlement

[43] See P Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) 114, 281–3. The mere fact of free acceptance of the benefit seems insufficient: A Burrows, *The Law of Restitution* (Butterworths, 2002) 402–7.

to such compensation in the case of people who are friends, and nothing else.

Perhaps the hardest case, because it rests on an apparent ambiguity between recovery of earned benefits and recompense for loss is where a friend has suffered disadvantage while promoting the other's capacity to acquire later wealth: earning capacity. I do not think this capacity should be treated as a quantifiable benefit in which the other has earned a share. The long-term value is too speculative, and the extent of the earned share too difficult to quantify. But it might be possible to compensate one friend for disadvantages incurred in helping to place the other in this favourable position. Yet again, though, is such compensation appropriate in the case of friends? If I put in time and effort to help a friend enhance his career prospects, and he succeeds in doing so, I should not expect legal entitlement to compensatory payments for any losses my efforts may have incurred for me. And, once the friendship is over, and a friend, or former friend, falls into need, it would surely be wrong to expect that person to have a legal claim against the other for help, even though there could be some moral expectation, depending on the circumstances. But provisions which operate after the death of one of the friends are different. It seems quite consistent with full friendship for the friends to be concerned about the position of one another when one of them dies during the course of the friendship, and to make mutual provision for this. Often this will be through private schemes, but pension provision, and the well-being of the elderly, are clearly state concerns, and the state has a legitimate role in this area.

So full friendship should not be incentivized by the promise of external benefits. Its value lies in the personal and other benefits freely conferred by the friends on each other for each other's sake. Should the friendship terminate, justice requires the restoration of benefits conferred between the friends, where those benefits can be characterized as an earned share in assets treated in common by the friends. But it does not require compensation, whether by way of capital transfer or ongoing provisions, for self-imposed disadvantages which a friend was prepared to undergo for the sake of the friendship, and thus negate their character as voluntary sacrifice. Provisions giving the survivor a claim on the death of a friend could, however, fit in with the values of friendship.

Friendship Plus

But friendship can form part of a more complex relationship. We could have 'friendship plus'. Marriage, or an equivalent institution, may attract special obligations, in particular, a compensatory obligation on its termination. Whether it does is dependent on the character attributed to the institution, as suggested above.[44] Would this make friendship within marriage impossible, as Montaigne thought of marriage in his time? Probably not. It would be simply irrelevant to it. The Personal Obligations Research referred to earlier[45] showed that, while some people regarded their obligations towards one another as deriving from the legal institution, many regarded marriage as merely providing a framework within which their relationship developed, and that their obligations derived from the relationship. Of course, for legal purposes, it was the marriage which counted, but this second set of people developed a sense of obligation which was independent of the legal institution. The values of friendship can surely flourish within a marriage, while staying separate from it.

But could a relationship which had not been formalized qualify as 'friendship plus', sufficient to justify a compensatory obligation? Should it arise, for example, on the ground that there has been, or is, a sexual relationship between the friends? Surely not. Apart from problems of definition and the unacceptably intrusive nature of the investigation which may be necessary, to allow this factor to give rise to a compensation claim is to demean the nature of sexuality. It would be different, though, if exploitation could be made out. Apart from that, the mere fact that a friend suffered material loss when entering the friendship, or came out of the friendship worse off, in a material sense, than the other person, would not be enough to allow a legal claim to recompense without making friendship as understood here impossible. But a case could be made out for compensation if the losses were incurred in a context where the friends had arranged their mode of living and financial arrangements as a basis upon which they followed their common life together for the long term. This kind of

[44] See p 44 above. [45] n 1 above.

'life plan' (in the sense of a plan for organizing the way we live) is surely another form of 'friendship plus', the additional element being not merely support of one by the other (or mutual support), but the use of mutual resources (effort, money) in servicing a long-term project. This is surely what the New Zealand law is referring to when it states that 'the degree of mutual commitment to a shared life' is one of the criteria for deciding whether two people qualified as a 'couple' for the purposes of exercising jurisdiction over their property.[46]

Such a 'life-plan' can usually be assumed if the friends establish a common household, at least after a certain time. This is probably why the American Law Institute's proposals for 'compensatory' payments, both for spouses and for 'domestic partners' are premised on the establishment of a common household.[47] It could also be presumed if they are living together and bringing up a child of theirs. No qualificatory period of living together would be necessary. What does parenthood do to friendship? For some in the Personal Obligations Research, it was the arrival of a child which established friendship in its fullest sense. But it will have done more than that, for, characteristically, the 'partnership of parenthood' is a life-transforming event, certainly for one, and often for both, parents. The parties are not simply acting altruistically with respect to each other, but acquiring a joint commitment to a new human being who demands care and support for a significant portion of the adults' lives. The presence of a child in a common household demands a life plan of the kind mentioned earlier. Such a plan could also be reasonably presumed even if the child they were bringing up was not the child of both of them, for its presence is surely part of the plan.

However, if they are not living together, the presence of such a plan cannot be assumed, even if they have a child. Some people, however, have a personal relationship, and see themselves as a 'couple', but do not share a household. They are 'living apart together' (LAT).[48] Researchers at Uppsala University looking at

[46] Property Relationships Amendment Act 2001, s 2D.

[47] American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) chs 5 and 6.

[48] In Sweden in 2001 it was estimated that some 14 per cent of people not married or living together unmarried were in such relationships: see I Levin, 'Living Apart Together: A New Family Form' (2004) 52 *Current Sociology* 223.

evidence in Sweden and Norway found that some people chose such an arrangement although they would have preferred to live together, but commitments to others (children or elderly relatives), or work or education requirements, prevented this. Others preferred it that way. But in most cases 'the couple already each have their own home and are used to paying for their own home expenses'.[49] The first British study found a greater variety of relationships, but they were characterized by fluidity (people moved in and out of them fairly easily) and a desire on behalf of each person for a fairly marked element of independence.[50] It therefore seems difficult to see sufficient cohesion for a 'life plan' of the kind mentioned earlier in such cases. Such people are friends, entitled to recover material benefits acquired from them by the other for common use, but not to compensation if the friendship ends. But the possibility should be kept open for a former LAT partner to establish on direct evidence that such a project had indeed been set up. Of course, there could still be grounds for imposing on one parent an obligation to support the other who is bringing up their child. But this would rest on a different basis: that the responsibility had been acquired through the parental relationship.[51] But while such a plan could not be assumed, it might be possible to demonstrate, on the evidence, that one existed.

If a compensatory obligation arises, for what is compensation being made? The American Law Institute proposes that compensation should be paid for any disparity in living standards following the division of one household into two.[52] In *Miller v Miller: McFarlane v McFarlane*,[53] where the House of Lords expressly recognized compensation as a 'rationale' or 'strand' in making awards on the breakdown of a marriage, Lord Nicholls said it was compensation for the 'way they conducted their marriage', and Baroness Hale called it compensation for 'relationship-generated' disadvantage. But there is

[49] Ibid 236–7.

[50] J Haskey and J Lewis, 'Living Apart Together in Britain: Context and Meaning' *International Journal of Law in Context* vol 2, issue I (May 2006). They estimated that in 2001–2002 19 per cent of men and 21 per cent of women were in such relationships.

[51] For a full discussion of this type of obligation, see pp 111–18 below.

[52] n 47 above.

[53] [2006] 1 FLR 1186. See J Eekelaar, 'Property and Financial Settlement on Divorce—Sharing and Compensation' (2006) 36 *Family Law* (September).

a difference between compensation for the opportunity costs incurred by one party by the way the parties conducted their relationship, for example, if one of them forewent career opportunities, and compensation for the disparity which occurs on breakdown. While the former costs might be real enough, it is very difficult to quantify them with any degree of confidence. If the claimant had not entered this relationship, they may well have entered another, perhaps with even less favourable results.[54] It therefore seems right to regard the compensation as being for exposure to the consequences of the economic disadvantages which the claimant has incurred as a result of the failure of the relationship, and not for those disadvantages in themselves. The Institute's strategy is to do this by reducing the economic gap between the parties as existed on separation. The extent of this reduction should be proportionate to the extent of the disadvantage and the duration of the relationship. The Institute recognizes the difficulty of basing an award on a hypothetical loss, and suggests a 'proxy' measure based on the extent of time in which a claimant's earning capacity would have been impaired by looking after a child or caring for a 'sick, elderly or disabled third party'. In addition, compensation could be awarded for financial contributions towards the other party's education or training. But even if there was no disadvantage, compensation could be awarded in the case of breakdown of longer relationships. The Institute's proposals are probably too detailed and complex to be assimilated into English law. Yet the principles behind them could be adopted as guides to giving redress to people who come out worse from the termination of a relationship which was more than one of friendship alone. The primary guideline would be that a person would be entitled to compensation after having shared a household with another in the context of a life plan for the financial loss caused by separation to such extent and for such a time as is reasonable, having regard to the duration of the relationship and the opportunities to reduce the loss.

[54] See J Eekelaar and M Maclean, *Maintenance after Divorce* (Oxford University Press, 1986) 146; J Eekelaar, *Regulating Divorce* (Oxford University Press, 1991) 80.

Why Consider Friendship at All?

To conclude, I ask the question which should perhaps have been addressed at the beginning. It is all very well, it might be said, to identify a certain type of value (full friendship), set this up as a model, and use it as a template against which to evaluate some current legal provisions and policies. But this may not correspond with the real world. People may have no notion of such a relationship. All friendships may now be those which Aristotle described as utilitarian. If economic theory is to be believed, they will inevitably be such. Our dealings with one another, even in the intimate sphere, should therefore be recorded as on a balance sheet, and provision made for redress from one to the other if either is economically disadvantaged by the experience.

To respond. I am not trying to usurp the democratic process. At the end of the day, the people should have the laws they want, within the constraints of fundamental rights norms. But it is not always clear what people want; nor is it always clear that they know this themselves. They may want something in general terms. They may change their wants after having gone through certain experiences. In any event, I am not at all sure that the theoretical model of the modern 'pure relationship' popularized by Anthony Giddens as a process of perpetual re-evaluation and re-negotiation to make its continuation worthwhile for each party[55] is fully supported by the evidence. The Personal Obligations Research showed that many people felt bound to one another for the classical ethical reason known as the 'golden rule': you should behave to others as you would wish them to behave towards you. But whatever the actual state of people's minds, it is important to draw attention to a form of relationship which, under whatever name, has been recognized as significant over many centuries. It has existed alongside, and sometimes within, many other kinds of relationship. It may be a challenge to find it in our diverse and economically complex society. But it is surely worthwhile looking.

[55] A Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Society* (Polity Press, 1992) 63.

3

Truth

In 1969 an Ordinance of the Northwest Territories of Canada required the Registrar-General of Births, on receiving a copy of an adoption order, to substitute the names of the adopting parents on the register of the adopted person's birth for those of the natural parents. The genuine registration was to be kept on a 'special register', which could be disclosed only on the order of a judge.[1] In 1970, Newfoundland allowed a judge to order that the place of birth of an adopted child which appears in the Adopted Children Register should be a place 'other than the actual place of birth of the adopted child'.[2] In both cases the legislation was dominated by the goal of achieving the best for children. The United Kingdom Gender Recognition Act 2004 allows a new birth certificate to be issued showing the person whose birth is recorded in the sex to which that person had been re-assigned after the original birth certificate had been made. The fact that this was not the sex with which the person was attributed in the original certificate will not be revealed.[3] Transsexual people, it was said,[4] deserve to be accepted in their acquired gender without risking discrimination and harassment.

[1] An Ordinance to amend the Vital Statistics Ordinance, ch 11 of 1969 (Third Session). I wrote of this in 1971: 'The pursuit of what society deems to be in a child's welfare is an important value. But there are others of equal, perhaps greater, significance. One is justice. Another is truth. Once these are abandoned the future looks bleak indeed': [1971] *Annual Survey of Commonwealth Law 1971* (Butterworths, 1972) 348.

[2] Adoption of Children Act, RSN 1970 ch 5, s 12(4).

[3] Gender Recognition Act 2004, s 10, Sch 3.

[4] See House of Lords, Grand Committee 14 January 2004, col GC67 (Lord Filkin).

'Physical' Truth and 'Legal' Truth

What occurs in all those cases is a representation of physical actions and events which was not the case with regard to those actions and events. The representation does not correspond with what I will call 'physical truth'; that is, what is or was the case regarding physical events and actions. No matter, one might say: a new reality has been constructed. We know that legal processes can create 'legal truth'. Gunther Teubner[5] described the way in which legal discourse 'reconstructs' the activities of the world, by forcing them into classifications which are either approved or disapproved by the law. Jack Balkin has made a similar point, pointing out how strongly legal classifications, such as between trespassers and licensees, or legal findings, such as that behaviour amounts to sexual harassment, 'shape people's beliefs and understandings'.[6] It is indeed remarkable how legal findings can be transformed into apparently infallible proclamations of fact in public perception, as when an 'alleged' offender becomes an undoubted criminal when found guilty, or when an alleged defamation is found proved. Legal truth is important. How else could someone claim to have 'cleared his name'? How could we punish people with an easy conscience if we did not feel that legal truth corresponded to physical actions and events? Perhaps that is why a judge cannot refrain from making a finding of fact if this is relevant to his decision: he cannot say he thinks that Tom may have injured Sarah, but since he's not sure, he will award only partial damages; or that George may have injured Alice, but he has doubts, so he will knock some days off his sentence.[7] He must proceed on an assumption of the truth, or not

[5] G Teubner, *Law as an Autopoietic System* (Blackwell, 1993). Michael King has been prominent in arguing that this feature of the law makes it unsuitable for application in the context, especially, of child welfare issues: M King and C Piper, *How the Law Thinks about Children* (Gower, 1990).

[6] JM Balkin, 'The Proliferation of Legal Truth' (2003) 26 *Harvard Journal of Law & Public Policy* 5.

[7] It is the same for the judge's findings about the law. For citizen's, they 'become' the law, even though they may be mistaken: see J Eekelaar, 'Judges and Citizens: Two Conceptions of Law' (2002) 22 *Oxford Journal of Legal Studies* 497, 511.

at all. And society seems to go along with this. Yet even then, the public, through the media, can sometimes be resistant to accepting verdicts, especially where, as in the case of the quasi-judicial 'Hutton' inquiry in the United Kingdom in 2003,[8] the evidence on which the findings were made was widely publicized.

There are three levels at which statements about legal truth operate. One is at the level of physical events and actions. A court makes a finding of 'fact', or applies a presumption, and proceeds on the basis that the fact is true. Both these types of legal 'truth' may or may not be defeasible. A presumption can usually be rebutted, a legal finding can sometimes be overturned with new evidence. Until those events happen, the legal truth holds good. But sometimes the legal truth cannot be challenged. Fresh evidence may not be admissible. A presumed fact—the paternity of a husband, for example—may be placed beyond question. A fictitious entry of birth may be irremovable. In those circumstances, the legal truth replaces physical truth. A second level refers to legal categories; for example, whether a certain combination of agreed 'facts' constitutes a legal wrong. The third level concerns predictions about future physical events. The question whether Mary is Henry's child operates at the first two levels of legal truth: does she fall within a presumption identifying her as Henry's child (which may go unchallenged), and does Henry fall within the legal category establishing him as Mary's father? Whether it will be in Mary's interests to receive visits from Henry is the third level. This 'truth' is nothing more than prediction. Courts sometimes have to act on predictions, especially in cases involving children's welfare. But in such cases they have to be very careful when identifying the case before them with the case characteristics upon which predictions are based. It would be a mistake, for example, to conclude that a husband whose wife complains that he regularly assaults her is unlikely to kill her from information that most husbands do not kill their wives. These questions can have enormous importance for the individuals concerned, and for others too.

[8] This inquiry, prompted by the death of an intelligence officer, investigated the intelligence upon which the decision to go to war in Iraq in March 2003 was based.

Truth, Kinship, and Manipulation

The anthropologist, Robin Fox, wrote:

> Kinship and marriage are about the basic facts of life. They are about 'birth, and copulation, and death', the eternal round that seemed to depress the poet but which excites, amongst others, the anthropologist.[9]

Family law also revolves around these 'basic facts of life'. Humans need a way to ensure that wealth and power pass from one generation on its demise to the newly born. It may be a bio-evolutionary imperative that men should seek to keep their wealth and power within their gene-pool by ensuring that the children borne by the women whose reproductive and nurturing capacities they have conscripted are their own genetic offspring. But humans have not always followed that genetic route. Matrilineal societies demonstrate cases where the father's genes are appropriated for the benefit of the wife's blood family. Nor is it always the case that the apparent father is the genetic father. Adoption has been widely practised historically, usually for very specific reasons, such as the lack of an heir. In such cases, the participants knew what they were doing. They were not under any illusion as to the biological processes. But kinship rules created a new truth, and the departure from the need for a definite biological link between the transmissor of wealth and power and the receiver avoids serious truth problems which can arise where such a link is required, or assumed.

Nevertheless, since children succeed to what the adults leave behind, and carry on this legacy, it is very important for the adults to have a clear way of identifying *which* children will come into this inheritance. In patrilineal societies, the assumption is that the children who succeed have been begotten by their male ancestors. How are we to be sure that a particular child is the true heir? Medieval records show attempts from trial by ordeal (a genetically related son was one who could hold 'glowing metal') to demonstrations of male potency (or impotency) before witnesses.[10] Such uncertainties

[9] R Fox, *Kinship and Marriage* (Penguin Books, 1967) 27.

[10] K Albrecht and D Schultheiss, 'Proof of Paternity: Historical Reflections on an Andrological Forensic Challenge' (2004) *Andrologia* vol 36, 31.

are reduced by requiring the birth to be within marriage, and assuming *pater is est quem nuptiae demonstrant* (the father is he whom marriage demonstrates to be such). The rule created a legal truth regarding physical events, whether or not it corresponded with the actual physical truth. At a time before science could demonstrate the physical truths, parental relationships were necessarily based on such legal truths. These legal truths were designed to serve social or political ends, and this has occurred throughout the history of kinship relations.

When truth is manipulated in this way, it is always important to try to understand whose interests are being served by the manipulation. This is often a complex issue. Of course, children need adults to sustain them. But institutional norms have, until very recently, been premised on the instrumental value that children have for adults.[11] Marie-Thérèse Meulders-Klein has expressed it thus, saying of traditional societies:

> In general, the prevailing impression is that the child is recognised *through* the interest of the group or of adults, that they are a source of labour, of wealth or of new alliances, that they are the means of perpetuating a race, a family or a cult, or just an individual who goes on after our death.[12]

Actions which serve the interests of parents may also benefit children, or at least certain children. When a man adopts a child to take forward his family lineage, he benefits not only the lineage, but also the child. Nevertheless, it remains possible to perceive the overall weighting of interests. In the adoption example, it is clear that the Roman institution was designed to enhance the interests of family groups, and was very different from the modern institution, which is primarily concerned with enhancing the interests of children in a world dominated by adults.

The period of the French revolution illustrated vividly, within a few tumultuous years, the way in which the truths of kinship can swing between serving the interests of the adult generation to a failed attempt to serve the interests of children. The main lines of the pre-revolutionary system were clear, although there were

[11] See p 10 above.

[12] M-T Meulders-Klein, *La Personne, La Famille & le Droit* (Bruylant, 1999) 164 (my translation).

variations of detail throughout the different regions of France. It was centred on marriage. Wealth and power passed only through the legitimate children, and primarily to males. Sisters had fewer succession rights than their brothers, and non-marital children were completely excluded. Fathers controlled the way the succeeding generation used the inheritance they left behind through arranged marriages and preferred legacies. The legal family, constituted by marriage, and limited in the way described, not the biological family, determined the flow of wealth. The early years of the revolution tore this apart. Laws of October and November 1793 and January 1794 greatly reduced freedom of testation, and imposed egalitarian succession (brothers and sisters alike), including to non-marital children recognized by their fathers.[13] Here we see a decisive shift from a system which sees the successor generation defined in such a way as to be a means for perpetuating the will of its predecessor to one where the biological successors have claims in their own right against their forebears.

This does not mean that the interests of children had been entirely neglected under the *ancien régime*. Suzanne Desan's brilliant study of regional court proceedings during the revolutionary period[14] describes how paternity suits were successfully brought by many unwed mothers during the eighteenth century. The mothers and children might not expect the social and property benefits of marriage and legitimacy, but men might be required to pay a degree of compensation for the costs their actions had incurred (though this was partly by way of compensation to the *fathers* of the women they had seduced, for damaging *their* interests in the value of their daughters). When the revolutionaries swept away the distinctions between legitimate and illegitimate children for succession purposes, they were without doubt moved by egalitarian principles. However, they also embraced the ideals of freedom of personal relations, and, just as marriage was now to be freed from family tyranny, so parenthood outside marriage was to be undertaken freely. Women did this, the revolutionaries believed, by giving birth. Men did this, they believed,

[13] S Desan, *The Family on Trial in Revolutionary France* (University of California Press, 2004), ch 4.

[14] n 13 above.

by voluntarily accepting their responsibilities. Hence revolutionary laws at first restricted, and eventually abolished, paternity suits. Conversely, freely acknowledged non-marital children had full legal status regarding their father. But it all depended on the man's willingness to accept that he was the father.

There is a terrible contradiction here. How is one to reconcile the revolutionary prioritization of the interests of children, marital and non-marital equally, over the claims of legally constructed lineage and property, with this remarkable absolution of men from the consequences of their actions? Two factors may account for it. First, the reformers saw the act of recognition by fathers as being an acceptance of *responsibilities*, which they believed men would naturally accept.[15] But they were also suspicious of false claims of paternity, which might lead men to forced acknowledgements in order to fend off damaging paternity suits. This could threaten the stability of families. Thus the revolutionary lawyers were less willing than their earlier counterparts to accept confirmation of the truth of paternity by circumstantial evidence.[16] Desan concludes that few non-marital children gained by the opportunities for recognition, especially as their claims to inheritance arose only when the alleged father died. Many were harmed by the stifling of paternity actions.[17]

The promotion of equal status among children provoked reaction. 'Three groups', writes Desan, 'were especially perceived as threats to the family line: overly independent married women, illegitimate offspring, and adult children who defied marital and succession plans.'[18] The eventual solution incorporated in the *Code Civil* 1804 was to re-centre power on to the married father. *Puissance paternelle* was re-established, going as far as to allow fathers to imprison their children. The abolition of paternity suits was formalized, and non-marital children formally recognized by their fathers could no longer become heirs on the same basis as legitimate children. Adulterine illegitimate children could not be recognized at all. To underline the re-emphasis on the role of legally constructed kinship as a means of securing order, particularly with regard to property, the *Code* introduced a new form of adoption, confined to married couples

[15] (n 12 above), Meulders-Klein, especially at 234.
[16] Ibid, especially at 208, 239. [17] Ibid, especially at 222. [18] Ibid 263.

who were over 50 and childless, and where the adopted child was over 25.[19] Meulders-Klein summarizes the position thus:

> … biological truth was not admitted to the system of the Civil Code because it did not conform to the logic, or more exactly, the policy of the system: order and harmony of families and protection of their patrimonies.[20]

Since that time, France has experienced what she calls a 'double revolution'. Filiation is now situated between two new *lignes de force*, 'equality' and 'truth', under the banner of the interest of the child.[21] Can this also be said of the law in England and Wales? Here, too, in the eighteenth century marriage was used to control the devolution of family wealth. Illegitimate children could not inherit. The power of the father was underlined, however, by a greater freedom of testation than was allowed in France. But, as in the case of France under the *ancien régime*, the illegitimate child was not entirely neglected. The remedies in England were, however, more distinctively of a public law nature. Fathers had no direct duty to support their children, legitimate or illegitimate. However, the Poor Relief Act 1601 allowed the poor law authorities to claim reimbursement from mothers and fathers of children whom they supported. They could take action against men against whom a mother laid charges. But, echoing the concerns against false charges felt across the channel, the Poor Relief Act 1834 removed this power, although it still remained possible for parish authorities to seek an order from a man against whom corroborative evidence of paternity existed. In 1844, mothers were allowed to seek maintenance in their own name against the father.[22] But the limited sums which could be ordered, and the status of the courts in which claims had to be brought, underlined the fact that this was part of the law governing the poor. Thus England and Wales were prepared to hold fathers more accountable than in France (though the requirements of proof were strict), but the motivation was less to vindicate children's interests than to protect public funds.[23] It was not until the Family Law Reform Act 1987 that

[19] Ibid ch 8. [20] n 12 above, 167 (my translation). [21] Ibid 173.

[22] *Report of the Committee on One Parent Families (Finer Report)* (Cmnd 5629, 1974), Vol 2, App 5 (By Morris Finer and OR McGregor).

[23] In France, although restrictions on paternity actions have long been lifted, support actions against unmarried fathers are still relatively less common than in other comparable

legitimate and illegitimate children were placed on an equal footing as regards claims for their support.[24] That same Act removed almost all other forms of civil discrimination against illegitimate children. The removal of birth within marriage as the controlling device for family succession has emptied marriage of its most significant legal function, the consequences of which have not yet been fully understood. This has been achieved in other comparable jurisdictions, so that during the last quarter of the twentieth century it could be said as a general proposition that the structure which 'visited the sins of the parents on their children' was gradually dismantled. The genetic tie between generations now operated mainly to create claims by the children on the source of their genetic composition, and less as an avenue by which biological procreators could utilize the result of their procreations to extend beyond their lifetimes the social world they had fashioned.

But things are never as simple as they may seem.

Truth and Personal Relationships

Parents have continued to assert claims over their genetic offspring. These have taken a different form from those made during the era of patriarchy which I have been describing. Passing on social status and family wealth are now less important. But for some men, passing on their name assumes similar significance. Surnames are legally controlled in European countries, and Carolus van Nijnatten has provided an argument for fixing the child with the father's surname. He says that this gives the child a source of identity beyond the mother–child dyad, and in this way links the child to the entire social order.[25] This argument appeals to the child's interests, as

countries: HD Krause, *Illegitimacy: Law and Social Policy* (Bobbs-Merrill, 1971) 197. B Willenbacher, 'Legal transfer of French Traditions? German and Austrian Initiatives to introduce Anonymous Birth' (2004) 18 *International Journal of Law, Policy and the Family* 344, 353.

[24] S Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003) 556–60.

[25] C van Nijnatten, 'In the Name of the Father—Changing the Law on Naming Children in the Netherlands' (1996) 10 *International Journal of Law, Policy and the Family* 221.

many patriarchal arguments do, but is founded on the maintenance of the existing social order, it being held that identification with the father is necessary for the child to be integrated with it. Less grandiloquently, fathers who are living apart from their children often see the attachment of their name as a final link to a child with whom they have otherwise lost a relationship.[26] In *Dawson v Wearmouth*[27] Lord Jauncey said that he understood an unmarried father's wish that his son should bear his surname rather than that of the mother's (estranged) former husband (Wearmouth). 'The child has after all not a drop of Wearmouth blood in his veins', he said. For Lord Jauncey, a surname is 'a biological label which tells the world at large that the blood of the name flows in its veins'. This pathetic hangover from the patriarchal era did not impress Lady Justice Hale, who said that 'it is a poor sort of parent whose interest in and commitment to his child depends upon that child bearing his name. After all, it is a privilege not enjoyed by many mothers, even if they are living with the child. They have to depend upon other more substantial things.'[28]

There is a mechanism in English law for applying for orders declaring the genetic relationship between adult and child.[29] This, coupled with the modern availability of DNA testing, appears to allow parental relationships to be indestructibly established on the basis of physical truth. But when should a man be entitled to know whether a child he thinks may be his is actually his? English judges approach this issue through the 'best interests' principle, and courts are increasingly taking the view that the best interests of the child are achieved through clearing up disputes about the child's true genetic origins through scientific means. The child's interests may justify a 'cover-up', but it is hard to see circumstances where this will happen when a judge says: 'If, as she should, this mother is to bring up her children to believe in, and act by, the maxim, which it is her duty

[26] See *re B (Change of Surname)* [1996] 1 FLR 791, where the court refused to allow the formal change of surname of three teenagers who long had abandoned their father's name and had no wish to re-use it.

[27] [1999] 2 AC 308.

[28] *Re R (A Child)* [2002] 1 FCR 170, para 13.

[29] Family Law Act 1986, s 55A.

to teach them at her knee, that honesty is the best policy, then she should not sabotage that … by living a lie.'[30]

So where the issue is in the 'public domain', or even where uncertainties have been raised within the family, the judges are likely to say that it is better for the child that the doubts are resolved by scientific means. So if a man raises such doubts, he is likely to have the 'truth' established. This was illustrated in dramatic fashion in a case in 2001 concerning a child, T.[31] All parties lived in a small village. The mother had married in 1977, but her husband had a low sperm count, and they were unable to conceive. They agreed that, in order to have a child, the mother could, or would, have sexual intercourse with another man. On this basis in 1983 she had sexual intercourse on many occasions with a family friend, Mr X. This failed to result in pregnancy. Ten years later, once more depressed at her childlessness, she had sexual intercourse on a number of occasions with four men, including, again, Mr X. This time she did conceive, and T was born in January 1994. Mr X, who was now engaged to be married (for a third time) visited the mother in hospital after the birth, and fairly frequently over the year, but then stopped, by now having children by his new wife. Although the husband proclaimed his paternity, this was publicly challenged by Mr X, and in 1995 Mr X sought parental responsibility in the family proceedings court. He could be granted parental responsibility only if he was the biological father. His claim failed on the ground that granting it would confuse T. Six years later, Mr X tried again, pinning his hopes on the right to respect for private and family life in the newly introduced Human Rights Act 1998. The mother refused permission for the tests to be taken. Bodey J remarked of Mr X's claim: 'He may or may not (depending on the facts and on whether he is in truth the biological father) have a right to respect for a family life encompassing—all things being equal—the society of, and relationship with, T, and/or knowledge of T's progress.' But he gave decisive weight to the child's equivalent rights and interests, concluding that, given that doubts about T's paternity were 'in the public domain' (this being a small

[30] *Re H (Paternity: Blood Tests)* [1996] 4 All ER 28, 44. See also *re H & A* [2002] 1 FLR 1145.

[31] *Re T (Paternity: Ordering Blood Tests)* [2001] 2 FLR 1190.

village), and taking the view that establishing the genetic truth would not undermine the stability of T's family, it was in the child's best interests to have the matter conclusively settled.

So the justification lay in the child's interests, not the father's claimed right to respect for private and family life. This must be right. If we leave aside cases where a man seeks the truth in order to avoid potential liability, what interest does a man have in simply knowing whether a child is or is not his? Perhaps he wishes to allay curiosity, but that is hardly equivalent to the interest of a child to know who its father is, for the interest does not affect the man's identity as it does the child's. So it is likely that the man will want something more than mere knowledge that the child is his. He will want to have some influence over the child's life. But we must not forget that which Meulders-Klein has strikingly referred to as *la verité du coeur*.[32] For French law, despite its commitment to voluntary acknowledgement of paternity, has long circumscribed the circumstances in which a man can claim paternity (and now in which paternity can be proved) through the concept of the child's *possession d'état*. The law will be slow to allow a child's socially established parentage to be disturbed.

So should anyone have a legally recognized interest in developing a relationship with a human being, *for no other reason than that they procreated that individual*? In Europe, the framework in which this question is addressed is Article 8 of the European Convention on Human Rights, which gives everyone 'the right to respect for his private and family life', creating a legally protected interest which may be diminished only according to law if necessary in a democratic society in the interests of national security and equivalent interests, and the rights and freedoms of others. In *Keegan v Ireland*,[33] the European Court of Human Rights said that Article 8 'cannot be interpreted as only protecting "family life" which has already been established but, where the circumstances warrant it, must extend to the potential relationship which may develop between a natural father and a child born out of wedlock'.[34] Taken literally, this would

[32] n 12 above, 206.
[33] (1994) 18 EHRR 342.
[34] Para 48. See also *MB v United Kingdom* (App No 22920/93).

re-confirm, in modern form, the claim of men to control the lives created through their biological material *simply because they are the biological origin* of those persons. Later decisions indicate that this is not the correct interpretation of 'family life'. If a woman has a casual sexual encounter, the father cannot be said to enjoy 'family life' with the child she conceives.[35] In the *Leeds Hospital* case, a man whose sperm was accidentally used in a clinic to inseminate a woman other than his wife was held not to enjoy 'family life' with the twins who had been born.[36] It might be argued that such fathers have a stronger claim to a relationship with their children on the ground that this is enjoined by giving proper respect to their 'private' life.[37] In *Evans v Amicus Health Care*[38] the use of frozen embryos was considered to be part of the 'private life' of the persons whose gametes created them. But this must be because those persons have a degree of control over the embryos.[39] The protection of private life should not in itself give the *right to establish* the relationship in all circumstances with a child: a child is not to be equated with a frozen embryo. It could not, for example, be plausibly claimed that a parent needs to know his or her child in order to form a fuller picture of his or her own identity. However, the *exercise* of an established parental relationship must indeed be an aspect of private and indeed family life.

Yet the parent may still have a duty, merely through the genetic link, to support the child. Could this form the basis of a right to have a relationship with the child? There are good reasons why society allocates the responsibility to provide support to a child's procreators.[40] It usually coincides with the instincts of the parents; it enhances bonding between child and parent; it takes advantage of economies of scale and informal distribution systems within

[35] *Re H; re G (Adoption: Consultation of Unmarried Father)* [2001] 1 FLR 646. This was the outcome in *re G*, where the relationship between the parents had lasted some years (they had even talked of marriage), but had faded away by the time the child was born. *Lebbink v The Netherlands* (2005) 40 EHRR 18.

[36] *Leeds Teaching NHS Hospital Trust v A* [2003] 1 FLR 1091; cf *G v The Netherlands* (1990) 16 EHRR 38.

[37] *Mikulić v Croatia* [2002] 1 FCR 720.

[38] [2005] Fam 1; upheld by the European Court of Human Rights: *Evans v United Kingdom* (App No 6339/05).

[39] See E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing 2001) 234.

[40] See further p 111–17 below.

households. But is the parent's *legal* responsibility to physically care for the child or only to provide the means for doing this? I mentioned earlier that when fathers have in the past been held financially responsible for their children, this has been intermittent and limited. Indeed, the modern tightening of the support obligation, whether through tougher child support guidelines for courts as in the United States, or administrative schemes, as in Australia, New Zealand, and the United Kingdom, has been driven more by concerns about welfare budgets than by the interests of the children themselves, whatever government rhetoric might suggest. Enforcement against the transgressor is important in order to reinforce the primary allocation of responsibility and retain equity between children.[41] Thus a man who procreates as a result of a 'one-night-stand' is the legal father and will be liable to support the child, whether or not he expected a child to result. Men have reacted with predictable hostility, and the ancient fears about false claims have re-surfaced, generating in some cases extreme vituperation against women in general, as a cursory glance at various 'paternity' sites on the internet will quickly reveal. Of course there are risks of false claims, but the danger should be far less than it once was as a result of DNA testing.

A duty must carry with it the entitlement to perform it. But, whatever certain legal formulations may take, it seems that the obligation should be seen as one to provide financial support rather than to provide care. That is because it is both difficult and undesirable to enforce a duty to provide care if the person concerned is hostile to giving it. Even Andrew Bainham, who believes that there should be a duty to provide care, concedes that such a duty is likely to be unenforceable.[42] But parents surely do no legal wrong if they allow

[41] See J Eekelaar, 'Child Support as Distributive and Commutative Justice: the United Kingdom Experience' in JT Oldham and MS Melli (eds), *Child Support: The Next Frontier* (University of Michigan Press 2000), 151–65; J Eekelaar, 'Are Parents Morally Obliged to Care for their Children?' (1991) 11 *Oxford Journal of Legal Studies* 340, 351–3. Scott Altman disagrees, arguing that the reason for enforcement lies in punishing the transgressor for failing to show love for his children: 'A Theory of Child Support' (2003) 17 *International Journal of Law, Policy and the Family* 173.

[42] A Bainham, 'Contact as a Right and Obligation' in A Bainham, B Lindley, M Richards and L Trinder (eds), *Children and their Families: Contact, Rights and Welfare* (Hart Publishing, 2003) 79.

their child to be brought up by the other parent and a step-parent, provided they provide appropriate financial support. The primary duty must therefore be to provide financial support, not actual care. Therefore the duty does not imply an entitlement to exercise care. Of course, the duty to support may be discharged in whole or in part by providing care. This is the standard case of child-rearing in most societies. There is a clear convergence of interests in a standard rule that children should be cared for by the parents who are living with it in the same household. But this does not mean that where parents are not living together there is a right to make this substitution. If there was such an entitlement, the child and the parent with care would be under a duty to allow it. That should not be so for the following reasons.

Insofar as it is possible to think of children being under legal duties at all in this context, these duties would seem to be confined to responding to the requirements of those who are actually caring for them. Although Bainham has suggested otherwise,[43] to put a child under a legal duty to submit to the care and attentions of someone who is not the daily caregiver simply because that person is the child's parent (even one with a right to family life with the child) is to put the child under legal constraints based not on the child's interests, but on the demands of adults, or one adult, which have arisen as a result of events in which the child had no part. Why should a child be compelled to satisfy the demands of a parent who is not looking after the child? Any arrangements which involve the child receiving such care and attention must therefore be based on a pragmatic assessment of the child's day-to-day welfare, not a legal duty.

Is the parent with care, then, under a duty to allow the substitution? The answer must be a pragmatic one, because substitution, even partial, of the primary duty (to support) by care must be contingent on a variety of factors. If the child is co-operative, and the contact is in the child's interests, and if it does not unreasonably disturb the care which the primary caregiver is giving, then the substitution should be allowed. Indeed, it is encouraged. If the parent who is looking after the child does not allow it, a solution should be sought through

[43] A Bainham, 'Contact as a Right and Obligation' in n 42 above, 76.

negotiation. If that fails, the law may sometimes attempt to impose a solution. But since, on this view, the entitlement to substitution is contingent only, it should only do so if the harm inflicted, or likely to be inflicted, on the child by the person entrusted with its care in opposing contact is greater than the harm inflicted, or likely to be inflicted, by legal intervention. Legislation should require an express finding to that effect before contact between a child and a parent is forcibly imposed.[44] The dangers of such intervention were tragically manifested in the Australian case, *re Patrick*.[45] A man allowed his sperm to be used to inseminate one of two lesbian cohabitants. Under Australian law, he was not the legal father of the child, but he insisted on playing a fatherly role (there was dispute about whether this had been agreed with the 'mothers' prior to the insemination). Supporting the father's case, Guest J said at one point:

> From what I have both heard and read, it is doubtless true that children can be happily raised within a homo-nuclear family, but the difference here is that the father desires and has always desired to play an active and fatherly role in the life of his son.

The father's desire to maintain his social status as 'dad' to this child, for no other reason than his biological connection, resulted eventually in the murder–suicide of mother and child.[46]

It must be reiterated that this discussion is primarily designed to establish that a genetic link in itself does not establish an interest

[44] I should not be misunderstood. My argument is only that the relationship should not be enforced in circumstances where enforcement would cause greater harm to the child than non-enforcement. This does not imply that the relationship should not be encouraged, at least if circumstances are auspicious. Who could object to the development of good personal relationships? The stipulation of the ECHR in classic cases like *Hokkanen v Finland* (1995) 19 EHRR 139, *Ignaccolo-Zenide v Romania* (2001) 31 EHRR 7 and *Elsholz v Germany* (2002) 34 EHRR 58 that states have a duty to facilitate contact in furtherance of the father's right to respect for family life should be understood in the context where the father actually enjoyed a relationship with the child which was disrupted. Here the claim did not rest solely on the genetic relationship. But even here the court has been careful to put emphasis on proceeding by way of negotiation and agreement: see *Nuutinen v Finland* (2002) 34 EHRR 15.

[45] (2002) 28 Fam LR 579; FLC 93–096.

[46] See D Dempsey, 'Donor, Father or Parent? Conceiving Paternity in the Australian High Court' (2004) 18 *International Journal of Law, Policy and the Family* 76.

sufficient to warrant any legal entitlement to begin a relationship. If a parent has engaged with the child, there will be an interest to maintain the engagement. If not, a more modest claim may be put forward on the basis of genetic relationship. The parent may wish to do no other than establish himself or herself as a *potential* resource for a relationship with the child. That, of course, is a different matter. There are good reasons why a parent should be in a preferred position as such a resource rather than another. A parent may be more strongly motivated to advance the child's welfare; the relationship consolidates the child's sense of identity, initiated by knowledge of its genetic origins. These reasons all appeal to strong interests of the child's. There may also be a community interest, for it may make for a more orderly allocation of a community's general obligation to care for its new members than a different arrangement.[47] The parent's interest, based on genetic link alone, seem much weaker, and to amount to little more than the satisfaction of a desire to exert control over their offspring. This may be a wholly beneficent aspiration, but for that reason its legal recognition should be contingent on an assessment of its beneficial effects, not its mere assertion. It should be clear that this argument applies with even greater force to any claims grandparents might make to a right to a relationship with a grandchild for no reason other than the genetic link.[48] But, as in the case of a parent, there may well be circumstances in which the maintenance and development of a relationship between children and their grandparents will be indicated by consideration of the children's interests.

Truth and Identity

The claims of children have acquired a significant added dimension in recent years. The modern quest for authenticity is associated

[47] See J Eekelaar, 'Are Parents Morally Obliged to Care for their Children?' (1991) 11 *Oxford Journal of Legal Studies* 340.

[48] For a discussion of the position of grandparents in the context of legal reform and public opinion in Scotland, see I Dey and F Wasoff, 'Mixed Messages: Parental Responsibilities, Public Opinion and the Reforms of Family Law' (2006) 20 *International Journal of Law, Policy and the Family* 225.

with openness about the physical facts of one's birth rather than constructed legal truths. Movements for open adoption have become important since the 1970s.[49] In 1989 the United Nations Convention on the Rights of the Child proclaimed the child's right to 'know and be cared for by his or her parents' and 'to preserve his or her identity, including nationality, name and family relations'.[50] The child's right to an identity was fully acknowledged by the European Court of Human Rights in 2002 in *Mikulić v Croatia*.[51] A man constantly evaded court proceedings by a mother and child who were alleging his paternity. The child complained that the courts' inefficiency amounted to a violation of her private and family life by prolonging uncertainty over her identity. In contrast to the *Keegan* judgment, where the court was prepared to hold that the potentiality of a relationship with his child might amount to 'family life' for a father, the court held that there was no 'family tie' between the child and the alleged father. However, it went on to decide that the child's 'private' life 'includes a person's physical and psychological integrity, and can sometimes embrace aspects of an individual's physical and social identity. Respect for "private life" must also comprise to a certain degree the right to establish relationships with other human beings.'[52]

The court therefore held that the facts fell within Article 8, and that the procedural deficiencies constituted a violation. This recognition of a right to identity, however expressed, constitutes a significant claim by the successor generation on its predecessor. The British government accepted the validity of the claim when on 21 January 2004, it announced that the system of sperm donor anonymity would be changed so that children born as a result of donations after April 2005 will have a right of access to the identity of the donor once

[49] See SN Katz, 'Dual Systems of Adoption in the United States' and NV Lowe, 'English Adoption Law: Past, Present and Future' in SN Katz, J Eekelaar and M Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (Oxford University Press, 2000), 290–3; 326–7. In France, the first organizations of children born under *accouchement sous X* (discussed), appeared in the 1970s: N Lefaucheur, 'The French "Tradition" of Anonymous Birth: the Lines of Argument' (2004) 18 *International Journal of Law, Policy and the Family* 322, 323 (*Droit des pupilles de l'Etat à leurs origins*).

[50] UN Convention on the Rights of the Child, Arts 7 and 8.

[51] [2002] 1 FCR 720.

[52] Ibid para 53.

they reach the age of 18.[53] Objections, usually voiced by the medical profession, that this would result in a reduction of donors, are, even if true, clearly entirely anchored in the interests of the adult generation. The never-existing can have no interest in being born. The older generation struck back in the European Court of Human Rights in *Odièvre v France*.[54] The court upheld the French system allowing mothers to give birth anonymously: *accouchement sous X*. Introduced as a humane measure in the seventeenth century to protect women and children from the deprivation and ostracism which would accompany extramarital birth, the measure is relatively little used today (about 600 cases occur each year) and has led to intense controversy in France.[55] Recent modifications allow non-identifying information about the natural family to be provided to the children, and for the mother to waive her confidentiality should she later so choose. But it remains in the mother's power to veto disclosure, thus depriving the child of maternal and paternal affiliation.

The majority of the court saw this as a conflict between the interests of one adult to know their genetic origin and of another to have her parenthood remain anonymous. The way this was resolved, the majority thought, fell within the state's margin of appreciation. By characterizing the conflict as being between two adults, the majority sought to evade the priority which is usually given to children's interests. But a major reason for prioritizing children's interests above those of adults applies whatever the age of the child. It is that the offspring are not responsible for the circumstances that have arisen. They have been placed in it by the actions (excusable or otherwise) of others. Those others have an inescapable responsibility to those whom they have procreated. Another claim was that the institution reduced abortion, and the protection of life was a higher value than the claim to knowledge about identity. This argument has all the attraction of condoning human rights abuse on the ground

[53] Department of Health Press Release 21 January 2004. See also *Rose v Secretary of State for Health* [2002] 2 FLR 962.

[54] (2004) 38 EHRR 43.

[55] For a full account, see N Lefaucheur (n 49 above). Lefaucheur locates its origin in laws of the revolutionary period.

that the abuser would otherwise kill the victim. But the institution does not prevent, or even conceal, the fact of birth, but merely the possibility that the child, when an adult, might acquire knowledge of the mother's identity. It must be difficult to know whether it is this possibility rather than the avoidance of giving birth which motivates abortion. Abortion is, in any event, legal in France.

Truth and Justice

I have presented the material about truth from two opposing standpoints: those of the older and those of its successor generation. Yet, it may be said, these interests need not be opposed. A very significant impetus in the movement for reform of adoption laws like those of Newfoundland mentioned at the beginning of this chapter has come not only from adopted children themselves,[56] but also from mothers seeking to trace their children. The beneficiaries of the 2003 Adoption Act in Newfoundland and Labrador have been adopted children who, on reaching 19, have access to their adoption records (subject still, however, to a veto entered by the mother). But parents will characteristically frame their claims as being beneficial to the children. How could they not? So requiring unwilling teenagers to keep their father's surname at least for official purposes, while they used a different one in everyday life, was justified as retaining a potentially beneficial link.[57] Allowing a non-residential father to keep contact is standardly justified as furthering the interests of the children concerned.

Of course there must be a convergence of interests. The family itself is premised on the assumption that it is in the interests of both the adult members and the children that the adults provide care and nurture for the children. But we cannot assume, in our complex society, that there will always be such a coincidence of interests. We must remember that adults are capable of articulating, and taking

[56] See for example the Green Ribbon Campaign for Open Record in the United States.

[57] *Re B (Change of Surname)* [1996] 1 FLR 791.

steps to actualize, their interests. It is much more difficult for children to do this. This should require strict scrutiny of adult assertions about children's interests. We must remember, too, that adults create the social structures into which children are introduced, and the interests of children are often measured against these structures. Where, for example, arranged marriage is the norm, there is no scope for a child to actualize an interest which does not comply with the norm. The child has to take what is on offer, however unwilling they may be to conform to it. Yet Ronald Dworkin has said that a daughter who lives in an 'associative' community which genuinely believes that depriving her of freedom to marry is in her interests, and who marries against her father's wishes, '… has something to regret. She owes him at least an accounting, and perhaps an apology.'[58] Such is the extent to which even one of liberalism's foremost exponents allows the present generation to impose its will on its successors.

Physical truth plays an important part in the interaction between the generations. Adults can create legal truths which are at odds with physical truth. They may deliberately disguise physical truths. When they do that, you can be sure that it is in order to project the social order constructed by the adults into the future. Access to 'physical truth;' then, is an important way in which the new generation can challenge these adult powers. Physical truth provides the raw material of the world into which the new member is introduced. A child may live their life in the belief of the 'truth' of their parentage which is in fact false. But informed of the physical truth, the child can say: 'My conception occurred in such-and-such a way. Given these circumstances, what are *my* needs and wants? What should these people be doing for *me*? What should *I* be doing for them? What other relationships might be open to me?' Of course, young children will not be able to answer these questions immediately, but they will some day form an opinion about them. So this knowledge, or its prospective availability, allows the individual to confront the world as it is *on his own terms*, and influence solutions according to his perception of his interests given the physical truth. But with physical truth forever obscured, society's new members are doomed to manipulation.

[58] R Dworkin, *Law's Empire* (Fontana, 1986) 205.

Conclusion: Truth and Shame

It is possible for a woman to conceal from the child, and indeed from her partner, her child's true paternity. The soap opera staple, where a woman conceals from her partner that the child she is carrying is fathered by another, may or may not reflect widespread reality. Estimates, based on very unreliable data, vary wildly (from 3 per cent to 30 per cent) as to the extent to which men are deceived by their partners about the paternity of the woman's children. So mothers are able to rely on the legal truths generated by registration or presumptions to conceal the physical truths of their children's paternity. They may do so for many reasons, such as avoiding the shame that would be thrown on them, or the complications to their relationships, by the revelation of their unsuspected sexual actions. These of course concern their own interests rather than those of the children, for the degree of importance which knowledge of genetic identity holds for an individual can be judged only by that individual, not by someone else. The state, too, may have an interest in exposing the mother's concealment, for it may lose the opportunity to claim reimbursement from the father for supporting his child. But there are limits to which state agencies can intrude into private affairs which have not been brought into dispute, or where state assistance has not already been invoked.[59] Compulsory DNA testing of all children would be too great an intrusion into private life. So these mothers have to weigh the moral issues for themselves.

But genetic truth has a public dimension. The Crown, like other titles of honour, devolves in Britain only on the male genetic offspring conceived in marriage. Yet other non-marital offspring are treated equally for inheritance purposes. Should a duchess conceive as a result of artificial insemination by donor, the child thus conceived does not succeed to the dukedom, although for all other purposes the duke is his father.[60] That is how the adult world wishes to order things for the future. Children have an interest in having knowledge of the physical truth because it provides an underlying certainty

[59] See the similar issues regarding procreation, p 100 below.
[60] Human Fertilisation and Embryology Act 1990, s 29(4).

about the world they have come into, incapable of manipulation by the adults. The children may stake their claims against those responsible for their being. My argument has been that the interests that children have in knowing the physical truth are always stronger than those of the adults, because for children they give rise to claims in justice, whereas for adults they form the basis for attempts at exercising power, sometimes beyond the grave. In addition to these interests, there is another which speaks for physical truth. Its concealment has usually been associated with shame over departures from conventional norms. But these departures have not always been dishonourable. Conception outside marriage has reflected the strong currents of human sexuality which conventional norms have frequently oppressed. Maintaining secrecy of illegitimate birth supports those oppressive norms by sustaining the stigma and shame of illegitimate conception. Fictitious fatherhood in cases of parenthood by donor insemination sustains a perception of the shame of infertility, and the deviant nature of artificial reproduction. Concealing the fact of gender re-assignment through altered birth certificates feeds the climate of discrimination and harassment it seeks to avoid. If society provides the means of artificial reproduction, and of gender re-assignment, it presumably believes they are morally acceptable practices. Let it then shout it from the rooftops. As for the rest, let us confront the world, as our children do when they come into it, as we have made it.

4

Respect

Since the implementation of the Human Rights Act 1998 from October 2000, the European Convention on Human Rights and Fundamental Freedoms has become part of United Kingdom law. All our family law therefore has to measure up to the standards set by the relevant articles of the Convention. Article 8 is one of the most important. It states that 'everyone has the right to respect for his private and family life'. A public authority may not 'interfere with the exercise' of this right except in defined circumstances. The wording is unhappy. How can one *exercise* a right to respect? The drafters must have meant that public authorities should not interfere with the exercise of the right to family life and might even have positive duties in promoting it.[1] But why talk about respect at all? Why not simply say that 'everyone has the right to private and family life'? Does 'respect' add or subtract anything?

I want to argue that the idea of respect is a pivotal value in personal law, and I want to do this by looking at the values which come into play if the law is to be respectful.

What is Respect?

Rather unexpectedly, the idea of respect was propelled into British political rhetoric when the third Blair government placed in the Queen's Speech on 17 May 2005 the line: 'My government is committed to creating safe and secure communities, and fostering a culture of

[1] Such positive duties are now well established: for example, to assist parents to maintain contact with their children: *Hokkanen v Finland* (1995) 19 EHRR 139, and many subsequent cases.

respect.' What has been called the government's 'respect agenda' has been derided as nothing more than an alternative phrase for 'law and order',[2] and the linkage with 'creating safe and secure communities' seems to support this view. But this may be too quick. Law and order could be achieved through a culture of fear. Achieving it through a culture of respect might be significantly different. But in what way?

It is common to trace the concept of respect for individuals to Kant's injunction that people should be treated as ends and not as means. Ronald Dworkin believes that the justification for democracy is that 'it enforces the right of each person to respect and concern as an individual'.[3] Joseph Raz thinks that respect for law can form the basis of a 'quasi-voluntary obligation' of obedience.[4] Multiculturalists claim that people's distinct identities should be respected.[5] Most people think that we should show respect to the dead; and this has been extended to the idea that we should respect to body parts of individuals who have perished. The Report into the storage of body tissue at the Alder Hey Hospital in Liverpool (and elsewhere) stated that 'in relation to retained organs and tissue, it is the right of surviving relatives to request respectful disposal, and they must be given that opportunity'.[6]

What 'respect' is in these contexts is not easy to discern. Dworkin mentions a number of ways in which failure to comply with equal respect and concern may be manifested. One is where weight is given in a utilitarian calculus to people's preferences as to how others should behave: he calls these *external preferences*. What is wrong about that, in his view, is that to do so causes disadvantage to a person against whom the preferences are directed 'in virtue of the fact that his concept of a proper life is despised by others'.[7] That violates a 'right to moral independence'. He puts it another way in saying that 'liberalism insists that government must treat people

[2] See the columnist J Dickson, 'Our Modern Obsession with Respect' in *The Independent*, 29 June 2005.

[3] R Dworkin, *A Matter of Principle* (Clarendon Press, 1986) 196.

[4] J Raz, *Ethics in the Public Domain*: Essays in the Morality of Law and Politics (Clarendon Press, 1986), 354.

[5] C Taylor, 'The Politics of Recognition' in A Gutman (ed), *Multiculturalism* (Princeton University Press, 1994) 25–75.

[6] Report of The Royal Liverpool Children's Inquiry (January 2001), para 1.9.

[7] n 3 above, 366.

as equals in the following sense. It must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of equal worth.[8] Put plainly, people should not be told what to do by others for no other reason than that other people, because of who they are or claim to be, prefer them to act in that way. For if you did that, you would have lost your sense that you are worth the same as them. Yet again the idea of respect seems redundant. It could simply be that liberals should accept people's right to moral independence. In fact, in both instances Dworkin refers to the prescriptions as a feature of *equality*.[9] He has dropped the formulation 'concern and respect'. To treat people as equals, as liberalism says we should, requires recognizing their right to moral independence.

Colin Bird discusses this difficulty in finding 'work' for the concept of respect in abstract statements about equality.[10] He tries to find it by drawing on Stephen Darwall's[11] distinction between 'recognition respect' and 'appraisal respect'. Appraisal respect occurs when we hold individuals in high regard for features of special excellence; as such it is not owed to everyone. Recognition respect describes what occurs when we give appropriate recognition to people as people, and are willing to constrain our behaviour accordingly. That process does not involve admiration or approval, but a 'deliberative disposition'. But Bird recognizes that this still does not completely account for the notion of 'respect', for one may restrain one's behaviour with regard to others without necessarily respecting them, and Bird seeks to complete the account through the idea that the deliberative disposition leads us to recognize that people have a 'status' before which we 'submit' in the same way as we demonstrate respect through submission to higher authority.

It is not clear that it is necessary to try to construct a kind of metaphysical hierarchy in order to make sense of the notion of respect. Nor is Darwall's distinction between recognition and appraisal respect completely convincing. The two share a common

[8] Ibid 205.

[9] Ibid 196. ('The decision invades rather than enforces the right of citizens to be treated as equals') and 205.

[10] C Bird, 'Status, Identity, Respect' (2004) 32 *Political Theory* 207.

[11] SL Darwall, 'Two Kinds of Respect' (1977) 88 *Ethics* 36.

element which is more important than the differences: namely, that respect for something or someone lies in acknowledging that a feature of that entity has value in and of itself, the value usually not being assessable in monetary terms.[12] This may involve admiration, as in appraisal respect. But one can respect something without admiring it: such as the dogged determination of someone to persist in a misguided view. One respects the dead, but we do not admire them for being dead. In those cases respect acknowledges a value: consistency in the first case; in the second, remembering that we are to some extent all beneficiaries of the efforts of our forebears, and acknowledging our own mortality. A remarkable case occurred in 2004 when a woman, tracing her ancestry, discovered she was descended from a notorious murderer of the early nineteenth century. As was the custom, the murderer had been executed and his body given to medical research. His skeleton was subsequently publicly displayed by the Royal College of Surgeons with a mechanical device on its arm, which moved to indicate a receptacle into which donations could be placed. The shocked relative demanded the cremation of the skeleton. Trivializing or desecrating human remains affronts the value which they, albeit symbolically, hold of recalling the gift of life, and the role of our forebears in passing it down to us, even if they be people of disrepute.

Bird[13] distinguishes between respect for persons and respecting difference between people. It is a good distinction. His reason for making it is that the object of respect must bear 'an independent significance and weight', which difference alone does not have. This can be explained well in terms of value. The fact that A is of a different culture from B, speaks a different language, or worships a different god, is not in and of itself a matter of value. Some might disagree, believing that diversity in itself is valuable. But if that is so, it cannot be a very high value, for why should a society in

[12] This looks similar to the proposition advanced by Carl Cranor, and criticized by Darwall, that respect involves judging a person as having a characteristic which is a 'good thing': 'Toward a Theory of Respect for Persons' (1975) 12 *American Philosophical Quarterly* 303–19. It is different, though, in that Cranor's idea of a 'good thing' implies something which is morally desirable, whereas I use 'value' simply in the descriptive sense as referring to something which is (highly) valued in its own right.

[13] n 10 above, 216.

which half the population speak one language and the other half a different language be said to possess a higher value than one where everyone speaks the same language? If that were so, we would wish to encourage a proliferation of languages, religions and other cultural practices amongst our community. That would be difficult to accept. The point about respect for difference is that the common attributes of humanity should be valued *irrespective of cultural (etc) difference*. What is then valued is the *ability to choose* the variety of ways in which cultures give expression to the human goods, rather than the fact of difference itself. It is irrelevant whether we individually enjoy, or find irritating, the resulting choices.

We can now suggest a sense in which couching a 'law and order' agenda in the language of respect might be different from expressing it in terms, say, of deterrence. The reference to respect suggests that the policy goal is to try to instil in the members of the community a perception of the value of the community and the people living in it. The hope would be that from that sense of value individuals would not only desist from harming the community and its participants, but perhaps contribute to it in a positive way. We can also see that the addition of the term 'respect' in Article 8 does add a dimension which would be lost without it. If the provision merely read 'everyone has the right to private and family life' and that a public authority must not 'interfere with the exercise' of that right, except in specified circumstances, it would indeed have imposed a defeasible obligation on the state. The insertion of the word 'respect' gives the provision the character of a statement that family life has a timeless quality and is to be held to have value in and of itself. That value does not disappear even if intervention is justified. It persists in a world of many values. So Article 8 seeks to entrench family life as a value. It goes further, of course, in setting up its exercise as a protected legal interest. There are other values which may not have similar protection.

Love

What values, then, does personal law need to acknowledge if it is to be respectful? I want to argue that, if personal law is to be respectful,

it must be informed throughout by recognition of the value of the intimate. This is essential because without it love is unlikely to flourish. By 'the intimate' I do not refer to a geographical or temporal space. I mean by it that there is, or should be, a sphere of personal interaction, whether between adults with one another, or between adults and children, which is privileged in the way I will describe. I have in mind behaviours ranging from everyday communication and modes of dealing with routine events, and the allocation of domestic roles, to emotional interactions, strategies for coping with difficulties and crises, mutual participation in diversionary activities, modes of care and so on. My claim is that, while individuals of course draw upon moral and social norms in their conduct in these contexts, they should do so free from institutional constraint and censure. I will call this the 'privileged sphere'.

How does personal law show that it values this? I can start by showing how it has failed to do so.

The early feminist cry, 'the personal is political', has been valuable in exposing the significance which domestic circumstances have had for the ordering of public affairs.[14] But the conclusion sometimes drawn that this revelation should put all aspects of intimate relationships into the public domain is too swift.[15] The intimate has in fact been regulated from time immemorial. Wives have been placed under a legal or social duty to obey their husbands.[16] Male and female genital cutting have been widely practised. In our recent history, nullity law has defined and investigated 'incurable' impotence.[17] Penetration without ejaculation,[18] or coitus interruptus,[19] consummates a marriage; ejaculation without penetration does not.[20] In *L v L*,[21] a wife persisted for six years while her husband attempted therapeutic means to overcome his impotence, and had herself inseminated by

[14] For a discussion, see K O'Donovan, *Sexual Divisions in Law* (Weidenfeld & Nicolson, 1985) 1–20.

[15] See SM Okin, *Justice, Gender and the Family* (Basic Books, 1989) 127–33. See also J Eekelaar, 'What is "Critical" Family Law?' (1989) 105 *Law Quarterly Review* 244, 254–8.

[16] See p 17 above.

[17] *S v S* [1962] 1 All ER 33 (Need someone submit to an operation to cure it?).

[18] *R v R* [1952] 1 All ER 1194.

[19] *Cackett v Cackett* [1950] 1 All ER 677.

[20] *Clarke v Clarke* [1943] 2 All ER 540.

[21] [1949] 1 All ER 141.

his sperm. After much argument, the court decided that she was not to be prevented from seeking annulment because she had not accepted this 'abnormal' relationship. In divorce law, the definition of adultery,[22] and the whole edifice of fault-based law, including the doctrines of connivance, condonation, provocation and recrimination, all provided opportunities for extensive judicial analysis of what went on in people's private lives, and for pronouncements to be made approving or condemning the way they dealt with crises in their emotional lives. Stephen Cretney has given many examples, including the decision in 1962 that a wife had to put up with her drunken husband because there was no evidence of 'any disgusting behaviour such as vomiting or being unable to control his bladder'.[23] All this was of course inherent in the nature of the conditions which the legal regime laid down for the establishment and dissolution of such relationships. Even today, in the much attenuated version of the previous fault-based system which makes up the English divorce law, when undefended divorce is sought on the basis of unreasonable behaviour, statements about behaviour in people's personal lives must be put before a judge for (at least theoretical) evaluation, and sometimes courts have to pronounce on how someone should handle living with another person of a very different disposition.[24]

What is the value which is not being respected here? It could not be the actions themselves, which range across all manner of intimate behaviours, including a variety of sexual practices (and attempts). It is the value of having space to develop one's personality and personal interaction free from the external gaze. Susan Moller Okin is right to claim that there must be matters which legitimately should be kept beyond the reach of public scrutiny and knowledge. Thomas Nagel, writing angrily in the wake of the humiliation of President Clinton, argues that public life would be impossible if the space for public figures to exercise intimacy is not respected.[25] A stronger argument

[22] Sexual gratification less than full penetration does not count: *Sapsford v Sapsford* [1954] P 394.

[23] S Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003) 262, citing *Hall v Hall* [1962] 1 WLR 1246.

[24] *Birch v Birch* [1992] 1 FLR 564.

[25] T Nagel, *Concealment and Exposure & Other Essays* (Oxford University Press, 2002) ch 2.

could be made: that love itself demands such a space if it is to sustain a lifelong partnership. The value of the privileged sphere lies in the freedom to engage in unregulated activity *irrespective of the inherent capacity of the activity to advance the well-being either of the actors or of others*. Such activities may have much, little, or no value. Compared to Picasso's solitary jottings, my idle efforts have no value, either for me or others. I would be better off reading philosophy. Compared to the value of intercourse resulting in pregnancy, some other types of sexual activity may have little or none. At least, whatever value they have is of no relevance to the recognition of the value of allowing unregulated space to perform them. That value is violated when the most intimate aspects of adult relationships are measured against the prescriptions of a legal or social norm.[26]

This value is similar to, but not the same as, the value of privacy upheld by the US Supreme Court in cases from *Griswold v Connecticut*[27] to *Lawrence v Texas*.[28] The value of privacy covers a wider range of activities. It also seeks to protect against *intrusion, external observation or disclosure*. The behaviour I am considering is valued by reason of its freedom from external *regulation*. This may imply freedom from observation or disclosure, but not always. It could take place very publicly and I will argue that privileged behaviour in parent–child relationships should in principle always be open to observation. The behaviour is also interactional. Privacy, on the other hand, can protect solitary actions. Nor is respect for the privileged sphere based on the good of autonomy. This is partly because the value of autonomy extends beyond the privileged sphere, but also because some argue that an autonomous life is valuable only if it is worthwhile. Why should we value an autonomous life if it is misspent? As Raz writes: 'we value autonomous choices only if they are choices of what is valuable and worthy of choice'.[29] In contrast, my argument is that recognition of the privileged sphere is a value *whatever the value of the activities (if not harmful) that take*

[26] Of course, the parties to a relationship respond in different ways to each other's behaviour. The result might be relationship breakdown, and the law may need to deal with that.

[27] 381 US 479 (1965) (prohibition on use of contraceptives held unconstitutional).

[28] 539 US 558 (2003) (Texas sodomy laws held unconstitutional).

[29] J Raz, *Ethics in the Public Domain* (Clarendon Press, 1986) 120.

place within it. This creates the conditions necessary for flourishing (love) and the living of a worthwhile, autonomous life, but it is not the same as those. Nicholas Bamforth stresses the unique centrality of sexual activity to an individual's well-being.[30] This may be so (though many people lead fulfilled lives without engaging in sexual relationships), but is of no relevance to the value of recognizing the privileged sphere.

I must not be misunderstood. The personal sphere is privileged, not licensed for irresponsibility. The general legal norms, of criminal law, or of tort law, are not displaced. In particular, the value that is respected by conferring freedom in the privileged sphere is defeated if the behaviour harms anyone within or outside that sphere. This is a further difference from the good of autonomy, for it can be argued that autonomous persons should be free to undergo consensual, and therefore victimless, harm.[31] Whatever view may be taken on that, I am not arguing that respecting the privileged sphere in itself demands acknowledging freedom to engage in consensual harmful activity. On the other hand, it is important to be cautious about how harm is understood. For example, behaviour does not become harmful merely by assertion.[32] And if prevention of harm is to allow intrusion into the privileged sphere, harm must be understood in terms of violations of physical integrity, or of emotional oppression. Victims of domestic violence sometimes resist protective intervention

[30] N Bamforth, 'Same-Sex Partnerships and Arguments of Justice' in R Wintemute and M Andenaes, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart Publishing, 2001) especially 41–3.

[31] n 29 above, 124.

[32] J Finnis, 'Law, Morality and Sexual Orientation' (1994) 69 *Notre Dame LR* 1049 describes homosexual acts as being 'manifestly unworthy of the human being and immoral', and 'morally worthless'. 'Whatever the generous hopes and dreams and thoughts of giving with which some same-sex partners may surround their sexual acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client to give him pleasure in return for money, or (say) a man masturbates … after a gruelling day on the assembly line.' The worthlessness of the activity would not matter under my argument. However, Finnis goes further in claiming that same-sex relationships are actually harmful to the participants because the partners' bodies do not fit together in the same way as a man and a woman's do and are 'deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage'. Of course, some intimate actions can be harmful, but they do not become so by mere assertion.

because they claim they love the perpetrators. They may well do. But they surely love them despite, not because of, the violence. Its protection in the privileged sphere is not to be bought at such a price. Love would surely grow, not fail, were the violence to be eradicated. Respect for the privileged sphere may therefore demand intervention where harm is inflicted within it, though the effectiveness of the manner of intervention is a matter of pragmatic assessment.[33] But this does not refer to the upsets and heartaches that are the sadly frequent accompaniments of the joys of intimate lives, and the capacity of individuals to cope with and be enriched by personal relationships would be reduced by social or legal regulation in such matters.

Furthermore, legal norms could guide the *consequences* of behaviours within the privileged sphere. It does so by allocating broad responsibilities, which arise as a consequence of such behaviours. For example, post-divorce settlements may reflect the fact that the wife looked after the children while the husband provided income; child support obligations may arise whether a child's conception was deliberate or not. But the law does not lay down how the couple should divide their labour or attempt to control their fertility. Accepting the consequences of such actions is the hallmark of true responsibility.[34]

Community Values

So, those cases apart, the violation of the privileged sphere is itself an abuse. Such violation can occur directly or indirectly. Writing in 1994, John Finnis[35] defended what he called the 'standard European position' regarding homosexual conduct. Under that dispensation, while it was 'unjust for A to impose any kind of disadvantage on B simply because A believes that B has sexual inclinations towards persons of the same sex', it was acceptable for the *state*, in its

[33] For a trenchant recent statement of the justification for state intervention in cases of domestic violence, see S Choudhry and J Herring, 'Righting Domestic Violence' (2006) 20 *International Journal of Law, Policy and the Family* 95.

[34] See further p 113 below. [35] n 32 above.

supervision of the public realm, to discourage the expression of such inclinations through sexual activity by allowing disadvantage and discrimination against homosexuals in order to manifest its judgment that 'life involving homosexual conduct is bad even for someone unfortunate enough to have innate or quasi-innate homosexual inclinations'. Such 'acceptable' discrimination included a higher age of consent for homosexual than for heterosexual intercourse, forbidding homosexuals to adopt children or marry one another, and the prohibition the United Kingdom Parliament placed on local authorities against promoting 'the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship'.[36]

This perfectionist argument maintains that states can and must take sides in matters which take place in the privileged sphere. I do not disagree with this. Whatever opinion one might hold of Dworkin's view[37] that respect for autonomy requires the state to be neutral as to what constitutes the good, recognition of the privileged sphere does not require abandonment by the community of common ideals. But the argument does not suppose that the activities within the privileged sphere should be treated as being valuable (though they should not be harmful). On the contrary, some might be valueless. There is no reason for the community to be neutral between valuable and valueless activities. Suppose two friends indulge their spare time in a harmless, useless, activity (say, planespotting); another two play tennis (equally harmless, marginally less useless). The community may choose to promote tennis over planespotting (to encourage exercise, socialization, national achievement, and pride) without inhibiting the activities of planespotters. Indeed, it must make such choices. In open societies these choices will be accompanied by debate and criticism in the public domain. Unless criticism occurs in a context where it is an element in social forces which create burdens likely to obstruct the activities, it is consistent with respecting the privileged sphere. Pro-natalist policies favour some kinds of activity in the privileged sphere without impeding those unlikely to lead to

[36] Local Government Act 1988, s 28.

[37] R Dworkin, 'Liberalism' in *A Matter of Principle* (Oxford University Press, 1986) ch 8.

procreation. Iconic images of sports stars with their babies as much as paternity leave encourage greater involvement of men in child care without imposing constraints upon those who adopt a more old-fashioned division of labour. Marriage and partner counselling is premised on the desirability of the endurance of relationships, but imposes no burdens on those who choose against it. Policy might encourage marriage provided its consequences do not discriminate harmfully against people taking a different option.[38] Nor does it disrespect a form of intimate life to provide alternatives outside that realm, as the Children's Aid Society thought the provision of school meals did at the beginning of the last century in England.[39]

But there is a significant difference between encouraging and discouraging an activity within the privileged sphere if that discouragement goes beyond criticism and leads to denigration, stigmatization and social ostracism. These penalties would then amount to institutional constraint and censure within the intimate sphere and be disrespectful of it. The 'standard European position' in regard to same-sex relationships as described by Finnis crossed that line,[40] and has since disintegrated. The European Court of Human Rights is gradually accepting that discrimination on the basis of sexual orientation is a breach of human rights,[41] and in the United Kingdom the age of consent to sexual activity has been equalized,[42] joint adoption by gay couples permitted,[43] gay cohabitants held to have been living together 'as (if) man and wife',[44] the prohibition against 'promoting' homosexuality as a 'pretended' form of family living quietly repealed.[45] In 2004 the United Kingdom followed earlier European developments, particularly in the Scandinavian countries, and introduced civil partnerships for gay persons of equivalent status

[38] Such policies may also be misguided because they assume that marriage in itself strengthens relationships, whereas it is possible that marriage is often a symbol that a relationship has strength. See p 43 above.

[39] See H Hendrick, *Child Welfare in England 1872–1989* (Routledge, 1994) 105.

[40] See the examples of deleterious consequences for homosexuals of the policy given in Wintemute and Andenaes (n 30 above).

[41] *Da Silva Mouta v Portugal* (2001) EHRR 41; *Karner v Austria* (2004) 38 EHRR 24.

[42] Sexual Offences Act 2003, ss 9–22.

[43] Adoption and Children Act 2002, s 144(4).

[44] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

[45] Local Government Act 2003, s 122.

to marriage.[46] It may be argued that creating an institution with a different name and a formally separate legislative code from marriage for gay persons fails to respect gay relationships by impeding access to the benefits of social approbation supposedly uniquely conferred on marriage.[47] Whether that is true depends on an evaluation of changing social perceptions. The descriptions of civil partnerships in the British media as 'weddings', and the tendency to refer to heterosexual couples as 'partners' suggest that a convergence between the social perception of gay partnerships and marriage is likely. These developments might be seen as illustrations that European communities now see that what occurs in the intimacy of gay relationships is valuable, and to be encouraged. This may be true, but the argument presented here is that these moves should be supported whether or not gay (or heterosexual) relationships are, or a particular gay (or heterosexual relationship) is, valuable. They should be supported because they break down a social system which failed to give proper respect to the privileged sphere in the case of homosexuals.

Care and Nurture

Over time, various reasons have been given for affording parents the entitlement to care for and nurture their children. One is the sentiment that parents in some sense 'own' their children, which might still be reflected in continued references to 'my' children, but, whatever may have been the view in past times, this cannot be taken seriously today.[48] It may seldom have been literally followed.[49] More significantly, historically, has been the perception that children, certainly during minority, and frequently beyond that, are a means by which parents promote their own interests, or their own perception

[46] Civil Partnership Act 2004.

[47] This argument was accepted by the Supreme Judicial Court of Massachusetts in *Goodridge v Department of Health* 440 Mass 309; 798 NE 2d 941 (2003). See WK Wright, 'The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales' (2006) *International Journal of Law, Policy and the Family* 249. See p 151 below.

[48] For a discussion, see D Archard, *Children: Rights & Childhood* (Routledge, 1993) 98–102.

[49] Even the original power of the Roman *paterfamilias* to kill a child or sell a child into slavery became heavily circumscribed.

of the community's interests. These are unappealing reasons. The justification is best seen as grounded in respect for the privileged sphere, in this case, one in which caregivers interact with children. The justification starts with the scheme for identifying which adults have primary responsibility for caring for the children. These are normally the child's genetic parents, and for good reason: these are normally the people who will feel disposed to care for the child and, now, can be easily identified through genetic testing. We hope parents will love their children. If they do not, the law cannot make them. Nor should it try to make them act *as if* they did.[50] That simply intrudes too deeply into the dynamics of our behaviour in the intimate realm. And care without love is a painful, even dangerous, thing. Societies have been wise enough therefore to allow alternative provision for caring and nurturing children where parents, whether married men who have fathered children in adultery, or unmarried mothers have felt unable to bear the burden.

But while the 'allocation' of a child to a parent is a matter of social organization, the interaction between them, like that between adult partners, falls within the privileged sphere, and is to be valued in the same way. David Archard perceptively and sensitively expresses doubts about drawing this parallel. He points out that, unlike intimate partners, children have no choice in the relationship; it is not a relationship between equals.[51] But Archard is criticizing the invocation of 'privacy' as a means to protect intimacy, and I am not arguing for privacy in itself, but for space for unregulated action within intimate relationships. Between adults, privacy may sometimes be necessary to allow this to occur. It is, however, never necessary in the case of the parent–child relationship. Indeed, it is undesirable. All actions between parents and children must in principle be open to scrutiny because of children's vulnerability to harm and exploitation. However, the practice of such scrutiny is subject to a number of practical constraints. The first results from what has been called 'the rule of optimism', which is the

[50] S Altman, 'A Theory of Child Support' (2003) 17 *International Journal of Law, Policy and the Family* 173 argues that the support duty can be explained as a punishment for failing to love one's child, or to act as if one did.

[51] n 48 above, 124–5.

presumption professionals make that parents treat their children well.[52] This means that possible indicators of the infliction of harm will initially be given a benign interpretation. The 'rule' is adopted as a way of limiting intrusion into the private sphere. Imagine if agencies adopted a 'rule of suspicion'.[53] Like all interpretations, those of indicators of harm will be contextualized, resulting in a form of cultural relativism so that, for example, physical injury to a child in a middle-class environment is likely to be read as accidental, whereas the same injury to a child in a rougher neighbourhood may be assumed to be deliberately inflicted. Likewise, signs of neglect are more likely to be considered suspicious in a well-off area than a poorer one. Any interpretative process requires some generalization based on the interpreter's experience, but professionals should be trained to treat them with caution.

Another constraint is found in libertarian principles which restrain intrusion into private space in the absence of evidence-based, formal, authorization. These should be seen as designed to protect individuals against excessive official intrusion into their domestic space (such as their dwellings), and not as protecting them against surveillance of their interaction with their children, although it will partially do that. For this reason, there should be no objection to monitoring a parent's interaction with a child in a public place, such as a hospital.[54] A third constraint is that, since there can be a degree of uncertainty over what behaviours are harmful to children, there is a danger that preventive intervention could cause greater harm than the parental behaviour. Therefore the legal threshold for forcible intervention will allow a degree of latitude to parental behaviour. This is demonstrated

[52] This term is used in R Dingwall, J Eekelaar and T Murray, *The Protection of Children: State Intervention and Family Life* (Basil Blackwell, 1983) ch 4. For further discussions, see Postscript (by R Dingwall) to the second edition (Avebury, 1995) and R Dingwall, 'The Jasmine Beckford Affair' (1986) 49 *Modern Law Review* 489.

[53] The consequences of doing this can be glimpsed by the dawn raids and the holding and interrogation of children when moral panic over feared satanic or ritual abuse gripped some social services departments in the early 1990s: see C Lyon and P de Cruz, *Child Abuse* (Family Law, 1993) 52–7. Such events were clearly exceptions to the operation of the 'rule of optimism'.

[54] This has caused controversy: see N Shabde and A Croft, 'Covert Video Surveillance: An Important Investigative Tool or a Breach of Trust?' (1999) 81 *Archives of Diseases in Childhood* 291.

by the requirement in English law that state intervention is restricted to instances where the harm is thought to be 'significant'.[55] And to rule out harms originating in causes beyond the parents' control, it must be a result of a failure of care. Where harm has not, or cannot be proved to have, occurred to a child, but is feared, the matter becomes one of calculation of risk.[56] These are aspects of a 'liberal compromise' between the community's duties towards children and other values. It needs to be recognized that an inevitable consequence of this compromise is that some cases of child mistreatment will go undetected. But that is not necessarily because of systemic or individual failures. It is an indication that the compromise is working.

The scrutiny is to detect harm and exploitation, not to impose a favoured ideal of upbringing. It is a difficult distinction to make, but the difficulty is one of application, not of principle. An English decision provides a fine example. A separated father complained that the mother and her new partner sometimes walked naked around the home and bathed communally with the children. The trial judge ordered the children to be returned to the father. The Court of Appeal overturned that decision. Butler-Sloss LJ said: 'A balance has to be struck between the behaviour within families which is seen by them as natural and with which that family is comfortable, and the sincerely held views of others who are shocked by it. Nudity is an obvious example. Both on the beach and in the home some grown ups walk around nude—indeed you see it at one end of Budleigh Salterton Beach—and they bring up their children to do the same. Other parents pass on to their children a more inhibited approach to nudity. Communal family bathing is another example … in a happy

[55] Children Act 1989, s 31.

[56] *In re H and Others (Sexual Abuse: Nature of Proof)* [1996] 1 All ER 1. Lord Nicholls said that where the fear is based on allegations of past conduct, 'the more serious the allegation the less likely it is to have occurred'. That may be so, but it is equally the case that the more serious the allegation, the greater the harm should it turn out to be true. Where allegations of past conduct are made, the courts seem to have abandoned their child-protective role of risk assessment in favour of a presumption of innocence, more suitable to the criminal law. This has almost certainly reduced the effectiveness of legal protection of children. The chance that something serious, and repeatable, has occurred is relevant to deciding the degree of risk to which a child should be subjected in the future. See also *re O & N* [2003] 1 FLR 1169 and *re U* [2004] 2 FLR 263.

well run family how the members behave in the privacy of the home is their business and no one else's.'[57]

Some have argued that the use of corporal punishment on children should be seen only as a means of bringing them up, and that making it unlawful is to impose improperly one means over another when there is no empirical proof whether its use or non-use is better for children.[58] But the argument can be reversed. The use of corporal punishment could be considered wrong in itself (like lying[59]), and therefore improper whether or not it led to 'better' results for the children: more so if the outcome were unclear. This raises the question, though, whether its use is wrong in itself. After the European Court of Human Rights held that allowing adults a defence of 'reasonable chastisement' had failed to protect a child from 'inhuman and degrading' treatment, as Article 3 of the European Convention required,[60] section 58 of the Children Act 2004 removed the defence if hitting a child causes grievous or 'actual' bodily harm, which means some visible injury. Striking alone is not sufficient. This must be seen in a wider context. Neglect which causes unnecessary suffering or injury to health is a criminal offence,[61] and, as has been said above, the state may intervene and remove children if they have suffered, or are likely to suffer, significant harm. It does not matter whether or not the child has been struck. The question is whether hitting should be singled out, and criminalized, whether or not the circumstances fall into these broader categories.

For some, the compromise in the Children Act 2004 is unacceptable. But if we hold to the view that the privileged sphere is not one of legal immunity, and that children's vulnerability justifies scrutiny of parent–child interaction, it is hard to see why the law should not treat the physical integrity of children in the same way as it treats that of adults, for whom any unwanted invasion of their physical integrity is unlawful, except in special circumstances. How does it respect children to treat them differently? Its application will of course differ. Very young children will not be competent to consent

[57] *Re W (Minors) (Residence Orders)* [1999] 1 FLR 869 (Butler-Sloss LJ).

[58] See R Ahdar and J Allen 'Taking Smacking Seriously: the Case for Retaining the Legality of Parental Smacking in New Zealand' [2001] *New Zealand Law Rev* 1.

[59] See the earlier arguments about truth.

[60] *A v UK* (1999) 27 EHRR 611.

[61] Children and Young Persons Act 1933, s 1.

to certain bodily invasions (for example, for medical treatment) and in these cases, and probably a number involving disciplinary or security measures, such invasions can be justified on the same principles as the exceptions allowed in the case of adults: namely, where necessary for the immediate protection of themselves or others. Similarly, the law does not concern itself with trivial incidents.[62] If striking in itself were to be made unlawful, the law would be applied within the context of the 'liberal compromise' referred to earlier. The parents' private space would remain protected; the 'rule of optimism' would put a favourable interpretation on a parent's actions, and punitive legal action would be restricted to only significant or flagrant cases. Perhaps the compromise of the 2004 Act will work like this in practice.

Religion

Freedom of religion is respected because of the value of allowing human beings to assess the wisdom of the past and find their own answers to questions about the place of mankind in the world. The value is not the same as that described above concerning the privileged sphere, which concerns interaction between individuals. But it is akin to it. It was expressed in a wonderful passage of the United States Supreme Court, referring to marriage, procreation, contraception, family relationships, child-rearing and education, drawing on the liberty and equality interests of the equal protection clause:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[63]

[62] This argument was advanced in detail by Arbour J in *Canadian Foundation for Children, Youth and the Law v Attorney General in Right of Canada* [2004] 1 SCR 76. However, it was rejected by the majority of the court.

[63] *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 851 (1992).

The value of freedom of belief does not imply that the belief itself is valuable: for others, it might seem quite absurd. But without that freedom and that space, a creative, psychological need, akin to the need for love, cannot develop. Although religious and other beliefs of the same nature are ultimately private, many demand public manifestation; respecting such public manifestations is therefore part of the sustenance of private beliefs.

It is widely held that respect for a person's religious or philosophical beliefs requires allowing that person to pass those beliefs on to his child. Article 2 of the First Protocol of the European Convention of Human Rights requires states to 'respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'. The International Covenant on Civil and Political Rights requires state parties to respect 'the liberty of parents … to ensure the religious and moral education of their children in conformity with their own convictions'. But what value does this respect? Archard states the common view that it is 'the liberal ideal of tolerating a diversity in adult ways'.[64] But while diversity may sometimes be attractive, its value is purely contingent on its consequences. It can sow discord. Some adult ways may be better than others. Diversity is merely a likely consequence of respecting individual beliefs, which may be attractive or unattractive, not an end in itself. So could the value in respecting a parent passing religious belief to children be the perpetuation of the parent's belief? But why should its perpetuation be valuable? Society might be much better off with a different belief. Could it be the satisfaction of the parent? This may be politically expedient, but it is an unattractive value, resting on the perception of children as mere instruments of their parents' wish to control the nature of the world after their death.[65]

The real value in allowing parents to pass on their religious beliefs to their children is respect for the privileged sphere of the parent–child relationship. The United States Supreme Court appeared to acknowledge this recently when it said that 'the state cases create a zone of private authority within which each parent, whether custodial or noncustodial, remains free to impart to the

[64] n 48 above, 131. [65] See pp 62, 74 above.

child his or her religious perspective'.[66] Seeing the value as being that of interaction in the privileged sphere allows it to cover imparting all kinds of ideas, and to extend beyond the parental relationship to that where any person is acting in the parental role. Claims that this authority extends beyond the privileged sphere have met with little success. In the United States such attempts have come up against the Establishment clause of the First Amendment, prohibiting the advancement of religion in schools.[67] English parents are constrained by the national school curriculum.[68] The European Court of Human Rights has held that compulsory sex education did not interfere with the parental right, provided it was not done in a doctrinaire manner.[69] And while the European Court of Human Rights has held that the infliction of corporal punishment on a child in Scotland violated the parents' rights under the Protocol,[70] this referred to a mode of discipline, not instruction. Other parents in England[71] and South Africa[72] have been unsuccessful in attempts to *require* schools to use corporal punishment for religious reasons. However, parents are sometimes able to withdraw their children from exposure to ideas with which they disapprove. In England they are expressly permitted to withdraw them from classes in religion and sex education. The United States Supreme Court allowed Amish parents to withdraw their children from the secular education system.[73]

The only justification for allowing parents to control what happens beyond the privileged sphere is if what happens outside it threatens the ability of parents to impart their beliefs in that sphere, or if

[66] *Elk Grove Unified School District v Newdow* 124 S Ct 2310 (2004) (Stevens J). In that case the court rejected an attempt by an atheist father to challenge the requirement that his daughter should take the Pledge of Allegiance as it contained the words 'under God'. The court held that this was not in fact a religious exercise.

[67] See CJ Russo (2002) 3 *Education Law Journal* 152–8.

[68] L Lundy, 'Family Values in the Classroom? Reconciling Parental Wishes and Children's Rights in State Schools' (2005) 19 *International Journal of Law, Policy and the Family* 346.

[69] *Kjelsden, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711.

[70] See *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293. It would appear that the infliction of such punishment on a child at school in itself undermined the parents' beliefs practised in the intimate sphere that such punishments were wrong.

[71] *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246.

[72] *Christian Education South Africa v Minister of Education* (2000) 9 BHRC 53.

[73] *Wisconsin v Yoder* 406 US 205 (1972).

exposure to new ideas threatens the stability of the child. *Instruction in* a different belief might have such consequences, but it should not be easily assumed that exposure to other beliefs obstructs the parent's activities in the privileged sphere (unless they are seriously hostile to them) or that exposure of children to differing values and beliefs is necessarily harmful to the child.[74] It is also important to see this value within a wider context. Imparting ideas (religious or otherwise) is part of care and nurture, and therefore subject to the same constraints necessary to protect children from clear harm. I will also argue later that adults should have the right to make their own decisions on such issues, and that this implies constraints upon their upbringing as children.[75]

Respecting the beliefs of adults therefore has only limited consequences with regard to the way children should be taught in the public sphere. But the beliefs of children, too, demand respect, even if we must accept that those beliefs might only be provisional while they are developing their ideas. Thus issues of a child's religious education in the public sphere, and of allowing the child to observe religious practices, should be seen as aspects of the rights of children rather than of parents. To be sure, the child is likely to reflect the parents' beliefs and, while it is young, the parent must be taken to speak for the child. But this conceptual realignment allows more space for attention to be paid to the emerging views of the child. This seems to have happened in English adoption law, where the earlier duty imposed on agencies when placing a child to 'have regard (so far as is practicable) to any wishes of the child's parents and guardians as to the religious upbringing of the child'[76] has been replaced by the duty to 'give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background'.[77]

[74] Such as where children spend time with separated parents who hold different religious beliefs: see J Eekelaar, 'Children between Cultures' (2004) 18 *International Journal of Law, Policy and the Family* 178.

[75] See pp 156–7 below.

[76] See Adoption Act 1976, s 7 See also SN Katz, *Family Law in America* (Oxford University Press, 2003) 171–3, on 'religious matching' in adoption placement in the United States. Katz remarks that this has now been replaced by attempts at 'racial' matching.

[77] Adoption and Children Act 2002, s 1(5).

It cannot be that a child's right to 'freedom of thought, conscience and religion', protected by Article 9 (1) of the European Convention, is violated by exposure to other beliefs, especially as the article proceeds to elaborate that the right 'includes the right to change his religion or belief'. On the other hand, non-provision of instruction in the child's beliefs, and requirements concerning dress, attendance at religious services, or periods of study, which conflict with those beliefs, may fail to give them sufficient value. But this value must be balanced against the duty which schools have to promote social harmony, and to balance the need to recognize the influence parents (and their culture) have over their children against providing children with opportunities to distance themselves from those influences. In an important decision the House of Lords held that a school which imposed a uniform dress code for Muslim girls which was considered appropriate by religious figures in the local Muslim community had conscientiously balanced these interests and was therefore justified in not allowing one pupil to wear a *jilbab*, which was not considered a religious requirement in mainstream Muslim opinion.[78] So compromises over the extent to which a child's religious views can be accommodated may be necessary for the sake of providing efficient education and the equal treatment of all children. Under European human rights law, such infringements may be justified if according to law, in pursuit of a legitimate aim, proportionate and 'necessary in a democratic society in the interests of public safety, for the protection of … health or morals, or for the protection of the rights and freedoms of others'. In *Leyla Şahin v Turkey*[79] the European Court of Human Rights has allowed a ban on wearing headscarves in Turkish Universities on the basis that it fell within a state's margin of appreciation to permit such a ban based on its perception that such symbols might place unacceptable pressures on those who did not wish to wear them, might lead to discord, and was therefore necessary in protecting democracy. This ruling could

[78] *R (on the application of Begum, by her litigation friend Rahman) v Headteacher and Governors of Denbigh High School* [2006] 2 All ER 487. For a good account of the compromises available, and generally, see S Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 *Oxford Journal of Legal Studies* 43–74.

[79] (2005) 41 EHRR 8.

support the blanket ban on the display of conspicuous religious symbols in state schools imposed in France in June 2004. But this does not look like a justification of necessity, or to be founded on a duty to promote social harmony, but rather an assertion of a preferred *policy* of secularism (*laïcité)* in schools,[80] which by definition places insufficient value on children's beliefs.

Procreation

The privileged sphere of interaction includes decisions taken about conception and actions consequential to them. The US Supreme Court has long recognized the protected status of heterosexual relations, both within[81] and outside[82] marriage, on the basis of the right to privacy. If the decision is against procreation, there is no reason for constraint upon the privilege, although, as suggested earlier,[83] there can be no objection if the community wishes to encourage conception for pro-natalist reasons. But if the decision is in favour of conception, other interests become relevant. Children have an interest in actions taken before their conception which may affect them, and in the environment into which they are born, and the community can have an interest where an anti-natalist policy restricting population growth is adopted.

Yet libertarian principles inhibit restraints being placed on decisions to procreate. There are good reasons for such inhibition. The eugenics movement of the late nineteenth and early twentieth centuries produced policies in many countries, especially the United States and Sweden, which forced unwanted sterilization on people thought to be mentally or socially unfitted to produce children.[84] The policies were taken to horrific extremes by German Nazism. Now, under UK law, unwanted sterilization will only be visited on people who are mentally incompetent and if a court has decided

[80] See MM Idriss, '*Laïcité* and the Banning of the "hijab" in France' (2005) 25 *Legal Studies* 260.

[81] *Griswold v Connecticut* 381 US 479 (1965).

[82] *Eisenstadt v Baird* 405 US 438 (1972).

[83] See p 87 above.

[84] See generally, E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001) ch 2.

that this is in the individual's best interests.[85] It is noticeable that modern arguments about fertility control are framed in terms of the interests of the adults concerned, and not of the prospective children. Emily Jackson argues that 'policies that exert *any* pressure upon disadvantaged women to consent to the semi-permanent removal of their reproductive capacity must … be prima facie illegitimate'.[86] Children must therefore accept the physical characteristics with which and the social conditions into which they are born as a result of the adults' freedom of procreation. Perhaps this price is worth paying because history has shown that when states place restrictions on fertility they do it more to advance the interests of some segments of the community over others than to promote the interests of future generations. Furthermore, it seems that the interests of future generations may be better enhanced by improving the economic well-being of the present. But circumstances change, and the interests of successor generations may need to be given greater prominence when considering the consequences of protecting adults' interests in bearing children.

Jackson also argues that respect for individual autonomy demands that infertile people should, through the provision of medical services, have the same opportunities to procreate as fertile people, since procreation and childbearing are significant aspects of individual well-being.[87] This is an attractive position, but raises broad political and ideological issues, such as upon whom the duty to make such provision should fall, and how the resources needed should be provided.[88] I leave those questions open. The position maintained here is only that withholding or obstructing such treatments as are available through standard processes of medical provision would be as much an intrusion into the privileged sphere as was making the sale of contraceptives illegal in *Griswold v Connecticut*.[89] Jackson also attacks the requirement in section 13(5) of the Human Fertilisation and Embryology Act 1990 that providers of infertility treatment

[85] See *re F (Mental Patient: Sterilization)* [1990] 2 AC 1.

[86] n 84 above, 52. [87] Ibid ch 1.

[88] I do argue later that parents, or others caring for children, need to advance children's autonomy interests (see p 156 below). But there the allocation of the responsibility is determined by the existence of the parent (caregiver)–child relationship.

[89] n 81 above.

should take into account the welfare of any child who may be born as a result of the treatment. She states that 'the future welfare of would-be patients' children should be irrelevant when deciding whether to help them to conceive'.[90] The matter, she says, should be left to the parents. But in this case the libertarian fears about the abuse of fertility control by eugenics policies seem not to apply. Is it necessary to place the future children so completely at the disposal of infertile parents who seek external assistance to conceive? There is here no danger that community intervention on behalf of such children might cause greater harm to the child than non-intervention,[91] for no one is harmed by not coming into existence. For the same reason, it cannot be held that existence, even if in damaged state and adverse conditions, is always better than non-existence. That would be to attribute negative effects to not coming into existence, which has no meaning. So people can sensibly be held to account for bringing children into being when such existence brings them suffering or disadvantages beyond the normal range of experience.[92] Yet section 13(5) may be too broadly drawn. Ideas of what will turn out good for children are fluid and speculative, and the application of the provision can be capricious and inconsistent. The effect of the additional stipulation that the child's welfare is to be understood as including 'the need of that child for a father' adds to the uncertainty. But it would be reasonable to impose a constraint that providers should not proceed if they believe that the child when born is likely to experience clear harm. This is unlikely to happen often.

Respecting Children

So what is it to respect children? Partly, it is the same as for any person. Respect acknowledges the value of those features of individuals which

[90] E Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 *Modern Law Review* 176, 182. For a contrary view, see D Archard, 'Wrongful Life', (2004) 79 *Philosophy* 403.

[91] See p 91 above.

[92] So it makes sense that parents can recover the additional costs for bringing up a disabled child born as a result of an attempted sterilization which was negligently performed, but not if the child was born without disability: *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] 3 All ER 97.

allow them to flourish. Physical abuse and neglect clearly contradict this. Allowing any physical striking of a child in circumstances where to do the same against an adult would be unlawful also fails to respect the child. But that cannot be the whole story. Respect for a child demands more than the kind of respect one has for one's pet hamster. It is more than merely providing the child with a happy childhood.[93] It involves recognizing the gradual emergence of the child as an individual with interests and aspirations which are their own. The English Court of Appeal showed this respect when confirming that a person under 16 was owed a duty of confidentiality by the medical profession when provided with medical advice and treatment, including abortion advice and treatment, if they properly understood what was involved. The child's parents had no right to be told if the child did not want this to happen.[94]

This is one aspect of a deeper value. Just as we show respect to our elders by putting value on those things they have achieved and handed down for our benefit, so we show respect to the coming generation by accepting that their contribution to the nature, beliefs and ideals of the society in which they will live has value. All societies reflect their past, whether transmitted from the previous generation through the intimate sphere or by public means. But we must value the privileged spheres and relationships in which members of the next generation develop new ideas with which to face the new realities which confront them.

[93] See pp 155–62 below.
[94] *R (on the application of Axon) v Secretary of State for Health* [2006] 1 FCR 175.

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Responsibility

We all like to think of ourselves as being 'responsible': or, at least, we surely do not like to think of ourselves as being 'irresponsible'. But what we mean by being 'responsible' cannot be so quickly answered. In 1991[1] I suggested that proponents of the expression 'parental responsibility' as it was employed in the discussions which preceded its enactment in the Children Act 1989 used it in two senses. One denoted the duties of care owed by parents to their children. It was put forward to qualify the idea that parents only had 'rights' regarding their children. The other expressed the idea that it was the role of parents rather than of the state to promote their children's interests. In this sense it has become a significant catchword in the process of disengagement by the welfare state in favour of 'empowerment' of parents. That was the simple part. Already HLA Hart had distinguished between four senses of 'responsibility': Role-Responsibility, Causal-Responsibility, Liability-Responsibility, and Capacity-Responsibility.[2] My dichotomy seems to be merely two aspects of Role-Responsibility. It says nothing about the other three types. Peter Cane,[3] who argues that closer analysis of the idea of responsibility from the legal point of view will enrich its understanding even beyond legal contexts, contrasts 'historic responsibility' with 'prospective responsibility'. The former assesses past acts in terms of accountability, answerability, and liability. The latter imposes responsibility through certain roles either to promote what are believed to be good outcomes, or to avoid

[1] J Eekelaar, 'Parental Responsibility: State of Nature or the Nature of the State?' (1991) *Journal of Social Welfare & Family Law* 37–50.

[2] HLA Hart, *Punishment and Responsibility* (Oxford University Press, 1968) 212.

[3] P Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002).

bad ones, whether by protecting against harms caused by actions or by preventing harms caused through failures. Cane is anxious to emphasize the pre-eminence of prospective responsibility over historical responsibility:

> … prevention is better than cure, and fulfilment of prospective legal responsibilities is more to be desired than punishment of non-fulfilment, or repair of its consequences. A well-functioning and successful legal system is one in which non-compliance with prospective responsibilities, and hence occasions for the imposition of historical responsibility, are minimised. Historical responsibility … is subsidiary and parasitic.[4]

'Responsibility' has come to be a much-worked concept in personal law. I have already mentioned 'parental responsibility'. Its ascent to prominence in the late 1980s had been prefigured in a government Consultative Document in 1985 which stated that:

> The interests of the children are best served by their remaining with their families and the interests of their parents are best served by allowing them to undertake their natural and legal responsibility to care for their own children. Hence the focus of effort should be to enable and assist parents to discharge those responsibilities.[5]

This should be contrasted with the Committee on the Care of Children (Curtis Committee) of 1946,[6] which spoke throughout in terms of the responsibility of *social services* to assist children in their families. The new language talks of 'allowing' parents to 'undertake' *their* 'natural and legal responsibility' to care for their children. The state's role now is to be residual, confined to action only where the risks to the children are thought to be too great. The rhetoric of parental responsibility accelerated during the 1990s, especially in the context of the criminal law. In 2000 the courts were placed under a duty to 'bind over' parents of a convicted child or young person if satisfied that this 'would be desirable in the interests of preventing the commission by him of further offences'.[7] Parents may enter 'parenting contracts' and courts may make 'parenting orders'

[4] Cane n 3 above.

[5] Consultative Document, *Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party* (1985) para 2.8.

[6] Cmd 6922, 1946.

[7] Powers of Criminal Courts (Sentencing) Act 2000, s 150.

in a range of circumstances, and these were extended in 2003 to cover exclusion from school, and dealing with truancy and anti-social behaviour.[8] This policy is heavily reliant on the assertion that parents have a responsibility to instil, or attempt to instil, patterns of behaviour in their children.

Responsibility is therefore an important idea in personal law. I wish to explore its role in some detail. In doing this I will adopt Cane's distinction between historical and prospective responsibility. The interaction between the two is the location of many contested issues in personal law. But I will go further than Cane does in his description of prospective responsibility. Cane criticizes Hart for apparently associating prospective responsibility too closely with roles and tasks;[9] for Cane it can be more open-ended, and that is supported by one aspect of the debate over divorce, considered later. However I am less sure about Cane's assertion that 'the law's ethic of responsibility is an ethic of obligation, not of aspiration' and that the law is concerned only with minimum standards.[10] Hart's more expansive view that 'a responsible person is one who is disposed to take his duties seriously; to think about them, and to make serious efforts to fulfil them'[11] may be closer to some aspects of the contemporary ethos in personal law and policy. But, as will be seen, even that might not go far enough. I will therefore make a distinction, as far as prospective responsibility is concerned, between the allocation of responsibility, and the exercise of responsibility.

Historical Responsibility: The Case of Divorce

The doctrine of the matrimonial offence was premised on the idea that divorce was a punishment against a person who had committed a wrong against the other spouse. Responsibility in this sense connoted blame for wrongdoing: the historical sense. In his dissenting opinion in the House of Lords in *Williams v Williams* in 1963, Lord Hodson, an experienced divorce court judge, was

[8] See A Bainham, *Children—the Modern Law* (Family Law, 2005) 636–40. See further pp 129–30 below.
[9] n 3 above, 33. [10] Ibid 33–4. [11] n 2 above, 213.

probably right when he said that, when introducing cruelty as a ground for divorce in 1937, 'Parliament must … have recognised cruelty as connoting blameworthiness.'[12] But that was the older view. The majority of the Law Lords was prepared to hold that in that case, where one party to a marriage was suffering mental illness, the petitioner had suffered cruelty even though the respondent could not be blamed for his actions because of insanity. This was a significant step on the road to no-fault divorce because it was taken within a framework in which divorce was presumed to be a remedy against a wrongdoer,[13] and later cases were reluctant to follow its logic, reintroducing requirements of intention to harm and blameworthiness. It is now accepted that, after the reformed divorce law of 1971 replaced 'cruelty' with the ground that the 'respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent',[14] blameworthiness is no longer a necessary ingredient in the conditions for granting a divorce in English law. But the view that the law should not ignore morally blameworthy conduct during a marriage persisted. In 1980, Jan Gorecki surveyed the growing international tendency to abandon the requirement that divorce could be obtained only on proof of a wrong done in favour of tests such as 'irretrievable breakdown'.[15] He accepted that the former practice could be frustrating because marriages might break down in circumstances not covered by specific offences. However, he also noted that legal systems were abandoning the 'defence' of recrimination which would have allowed a person against whom divorce was being sought to defend the action on the ground that the person seeking the divorce was the 'guilty' party. Gorecki lamented the loss of the defence in the following terms:

> … it is not true that no one is ever guilty of failure of his marriage; the radical determinism … underlying the total disclaimer of guilt is ill conceived and harmful.

[12] [1963] 2 All ER 994, 1017.

[13] See pp 17–19 above. There was a narrow exception when a spouse was undergoing treatment for mental illness: Divorce (Insanity and Desertion) Act 1958.

[14] Matrimonial Causes Act 1973, s 1(2)(b); see *Katz v Katz* [1972] 1 WLR 955.

[15] J Gorecki, 'Moral Premises of Contemporary Divorce Laws: Western and Eastern Europe and the United States' in JM Eekelaar and SN Katz (eds), *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Butterworths, 1980) ch 13.

Those who are unilaterally guilty of disrupting their marriages, in particular if the amount of the guilt is great, should be punished, not rewarded, for what they did. Their punishment conveys a message to the general society: minimum of responsibility is anyone's family obligation, and so is an effort to avoid inflicting suffering on one's spouse and children, and wrecking their lives.

Here Gorecki expressly articulates the idea of responsibility as being a duty to avoid blameworthy conduct. Although he spoke explicitly of punishment, he did not wish to introduce criminal penalties. If, however, the matter is one of civil law, as it is, then we are concerned with what Cane calls the 'civil law' paradigm for responsibility, under which the 'nature and quality of outcomes on their victim' are central to the determination of the agent's responsibilities.[16] Under the doctrine of recrimination, as supported by Gorecki, the remedy given to the victim of the agent's wrongdoing is the denial of divorce. This might, Gorecki claimed, help to redress the damage inflicted by the wrongs because 'if the other spouse wants to remarry, he will often pay any possible price for the freedom to do so'.[17] Apart from that, Gorecki offered no clear indication as to how denial of divorce may 'repair' (to use Cane's terminology) the interests of the victim. But Gorecki's solution, with its dubious overtones of encouraging a form of legal extortion, has become even less convincing than when he wrote it. It is usually only on granting a divorce that the courts acquire their most extensive powers to make financial provision when a marriage breaks down; they can do little if the marriage continues. And with the decline in marriage, a wealthy husband (for simplicity I assume that the wrongdoer is the husband) is likely to prefer to live with a new partner without marrying her in order to avoid the risks of the divorce court. Denying him divorce achieves nothing. That is precisely why the proportion of wives who seek divorce is greater than husbands. But in any event the strategy would achieve nothing if the husband is lacking in sufficient resources to make it worthwhile for the wife to pursue it.

But that does not dispose of the issue. Gorecki in fact accepted that withholding divorce may not be a very good means of repairing the wrong done, but thought that alternatives, such as allowing the

[16] n 3 above, 50. [17] n 15 above, 128.

wrongdoer to be punished through tort actions, property transfers or increased financial orders, are ineffective in practice. Let us, however, suppose, for the sake of argument, that effective measures could be devised to bring about significant reparation. Is 'blame' to be a relevant factor in imposing them? Many believe that it should be. One, who can be taken as speaking for that constituency, is Katherine Spaht.[18] Spaht takes issue with the assumption underlying the strategy of the American Law Institute concerning what it calls compensatory payments on divorce, that issues connected with the moral behaviour of the parties with respect to each other cannot be assessed in the legal process and should not therefore be relevant to the outcome in this matter.[19] Spaht sees this as expressing a 'psychological', and not a 'moral' view of relationships. She claims that, if fault is excluded as being a basis for making compensation, it is hard to find any basis at all. The alternatives, breach of contract or unjust enrichment, fail. The former fails because under no-fault divorce there is no longer any implied term to remain married, so no one can be in breach. Unjust enrichment fails because no reasons are given why the compensated losses were unfair. Ultimately, Spaht considers that the basis for the divorce jurisdiction reflects a view about marriage. The American Law Institute's view, Spaht claims, is that marriage is a 'joint venture', terminable when no longer of benefit to either party, and thus devoid of responsibilities. Spaht therefore advocates the adoption of covenant marriage, under which responsibilities are expressly articulated.[20]

Spaht's critique echoes the language of Carl Schneider who, 20 years ago, remarked on what he called the diminution of the 'moral' content of family law brought about by the willingness of legislators to transfer such moral judgments from legal institutions

[18] See KS Spaht, 'Solidifying the "No-Fault" Revolution: Postmodern Marriage as seen through the Lens of ALI's "Compensatory Payments"' in RF Wilson (ed), *Reconstructing the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution* (Cambridge University Press, 2006). See also CE Schneider, 'Rethinking Alimony: Marital Decisions and Moral Discourse' *BYU L Rev* 197 (1991). The view also surfaced in the English Court of Appeal in *Miller v Miller* [2006] 1 FLR 151, but was rejected by the House of Lords: *Miller v Miller* [2006] 1 FLR 1186.

[19] See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

[20] These have been introduced in a few US states as an option to 'standard' marriages.

to the subjects of the law themselves.[21] Although early in his piece Schneider warns against misreading it as a lament against 'less' morality or a call for a return to an earlier dispensation; its ultimate drift hankers after some reaction against the trend he describes. On a number of occasions he refers to the older concepts of 'responsibility',[22] which have been replaced by a pragmatic psychological theory and 'nonbinding commitments'. The evidence of the retreat from a punitive family law is, of course, clear. The American Law Institute welcomes this because of the difficulty of reaching sound moral conclusions through the legal process. Spaht is sceptical about this, remarking that the law is in fact increasingly willing to engage in moral evaluations in other areas, including contract law. But there are very good reasons why the law should respond differently in personal law to seemingly similar issues which arise in other contexts. One is that, unlike the area of commercial relations, family interactions cover a vast and diffuse area of activity, making moral evaluation through the legal process hazardous. Another reason is that the legal process often inflicts further damage on the individuals concerned, including their children. But there is an even stronger reason for severely limiting moral evaluation through the legal process in these kinds of family matters. It is that if people suffer punishment at the behest of others, even if those others hold judicial office, there must be reasonable confidence that those others are not themselves guilty of the offences for which they are imposing punishment. That is why judicial integrity is so highly valued. In most of the matters for which judges impose penalties, there can be reasonable confidence that they are not themselves contravenors. This most definitely cannot be said with regard to the matters which advocates of punitive family law would like to see reintroduced. The chances that judges would be

[21] CE Schneider, 'Moral Discourse and the Transformation of American Family Law' 83 *Mich L Rev* 1803 (1985).

[22] 'Marital responsibility in the form of alimony continued even where the marriage itself had ended.' (p. 1820); 'Moral discourse has in some areas been diminished and moral responsibility has in some respects been transferred because of a considered choice to relieve the law of moral discourse or because of a considered opinion that individuals will make better decisions than the state.' (p. 1822); and mostly in his description of 'psychologic' man who 'must learn not to judge himself, his relationships, or other people according to moral rules' (p. 1848).

acting with hypocrisy would be very high. The risk of damaging the legal system should not be contemplated.

In any event, the fact that moral blame is removed from the assessment of compensation does not negate responsibility. As Cane observes, although punishment implies blame and fault, responsibility does not.[23] He makes the telling point that 'the restitutionary obligation of the passive recipient of a mistaken payment is not only strict, but arises regardless of whether any conduct of the recipient was causally related to the transfer, however indirectly. In other words, both in law and outside it, an obligation to repair an undesirable outcome can arise independently not only of fault, but even of conduct.'[24] The responsibilities of marriage, whether expressly articulated, as in covenant marriages, or implicit, as in the standard case, can be seen as prospective responsibilities: guides as to what is expected in the relationship and what should be done if it ends. They need not be seen as articulating historical responsibility, breach of which requires a holding to account in a punitive manner. So it is surprising that a difference over whether or not the exercise of the jurisdiction to make financial and other awards on divorce should take into account moral blameworthiness, or, in this context, historical responsibility, should lead to the advocacy of covenant marriages. There may be a number of reasons to establish a means by which people who marry can sign up to a more explicit set of commitments than is legally required for standard marriages (although many people reinforce the legal regime with solemn religious undertakings). But that does not resolve the issue of whether the responsibilities should be seen as historical or prospective.

Prospective responsibilities can be recognized by rewarding their fulfilment. This is what the American Law Institute's proposals do. They link both the amount and the duration of compensatory payments to time spent living together and caring for children. Thus the entitlement is based on fulfilling a commitment to the marriage and the responsibility is to reward the commitment fairly. The fact that the time spent making the relationship work and time spent caring for children count as input into the relationship shows that the discharge of those responsibilities is treated as significant by the law.

[23] n 3 above, 110. [24] Ibid 109–10.

The individual who benefits by their discharge is under a duty to give recompense, in the same way as is the passive recipient of a mistaken payment. So it is not correct to talk of such responsibilities as being 'non-binding'. They can have clear consequences, recognizable in law.

The American Law Institute's proposals are just that: proposals. They are controversial in the United States, and unlikely to be directly applied by courts in the United Kingdom. But the issues they raise are pertinent to all systems of divorce law and in *Miller v Miller: McFarlane v McFarlane*[25] the House of Lords adopted an approach very similar to that of the Institute with regard to asset distribution after divorce. Lord Nicholls thought that a partner may have a stronger claim against what he called 'non-matrimonial' property (equivalent to the Institute's 'separate' property) in a longer relationship than in a shorter,[26] and Baroness Hale said that 'the source of the assets may be taken into account but its importance will diminish over time'.[27] In these cases the law is both allocating responsibility and regulating the way in which it should be exercised. Blameworthy behaviour may have a part, but it is only a very marginal aspect of the responsibilities defined and enforced.

Prospective Responsibility: Allocation

In *Leeds Teaching Hospital NHS Trust v A* [28] the sperm provided by a man for insemination of his wife was mistakenly inserted into the wife of another man, and she gave birth to twins. The mistake was revealed on the birth of the children because the sperm donor was black, and the other couple where white. The case was notable for the unusually 'responsible' behaviour of all the adults concerned: the white couple were willing (indeed, keen) to keep the children and bring them up as theirs, and the black donor was prepared to allow this. The court was simply asked to decide whether the mother's husband could be characterized as the children's legal father. The court held that the legislation did not allow this. Indeed, the donor, being the biological father, was the legal father under the normal

[25] [2006] 1 FLR 1186. [26] [2006] 1 FLR 1186 [24] and [25].
[27] [2006] 1 FLR 1186 at [152]. [28] [2003] 1 FLR 1091.

rule which allocates parenthood to biological fathers, since these events did not fall within the excepted category which disapplies that rule when donated sperm is used in a licensed clinic in the manner agreed by the donor.[29] Since the adults appeared to be receptive to the acute sensitivities of the case, it is unlikely that the father would have used his legal status to challenge the stability of the children's actual family, nor that the mother would have sought to exact child support payments from him, although both of these eventualities could have been suggested by the legal structure governing the various relationships. Does this suggest, then, that the method of allocation of responsibility for children provided by English law is flawed?

An American lawyer might think that it is. Although child support obligations in the United States are grounded in biological connection between parent and child, as they are in the United Kingdom, in cases of artificial reproduction, which are not controlled by statute as they are in Britain, American courts have often used an adult's 'intention' to be a parent to determine the allocation of parenthood. They have also referred to intention as a way of fixing step-parents, or the partner who is in a lesbian relationship with a mother, with the responsibilities of parenthood. The idea that a person should be designated a parent only with their agreement, or as a result of acts from which their agreement can be properly inferred or assumed, is common, and has led Katharine Baker to argue that legal fatherhood should arise solely as a result of a bargain with the gestational mother.[30] There would be no paternity suits. Baker sees a law which fixes a man with the obligations of parenthood on the basis of biology when he did not agree to it as having three possible justifications: punishment of the man, entitlement of the child, or assumption of risk. She thinks they are all flawed. She rejects the first by arguing that we should not punish men who have done nothing wrong. But we have already seen that responsibility can arise quite apart from punishment. She rejects the second on the

[29] Human Fertilisation and Embryology Act 1990, s 28(6).

[30] KK Baker, 'Bargaining or Biology? The History and Future of Paternity Law and Parental Status' 14 *Cornell JL & Pub Policy* 1 (2004). For a different view, see J Carbone, 'The Legal Determination of Parenthood: Uncertainty at the Core of Family Identity' 65 *Louisiana Law Review* 1295 (2005), arguing that the attribution of parenthood should be seen as constitutive of a child's identity.

ground that not all biological fathers are recognized as fathers by the law (for example, in some cases of artificial reproduction, or when legal presumptions of paternity apply). But the issue is not whether all biological fathers should be liable, but whether biology could be an acceptable ground for imposing responsibility. There could be exceptions. And she rejects the third, saying that throwing the risk on to unwilling, or unsuspecting, men is an inappropriate use of parental status as a means of deterring careless behaviour, and that it is unfair to expect men to shoulder the risk of supporting children when the state does not impose a legal obligation on children to support their elderly parents. These, however, are variants on the 'punishment' objection, which, as we have seen, is not a necessary feature of responsibility.

As was so maliciously suggested to Malvolio about greatness,[31] some are born to responsibility, some achieve responsibility, and some have responsibility thrust on them. It may be that the political world of executive monarchy has passed, but we do not find the idea that a king's son inherited responsibilities to be an odd idea about responsibility.[32] Politicians, however, achieve responsibility with political success. Someone who could save a child from harm without risk to themselves has responsibility for the outcome thrust on them, and it probably does not go too far to suggest that we all have some responsibility for our environment simply by being born. Furthermore, among the justifications for holding certain rights could be that they carry with them concurrent responsibilities.[33] So it is not inconsistent with the concept of responsibility if legal or social norms designate certain adults as standing in a special relationship to children, whether those adults had chosen to do so or not. The position could be reversed: a person could have responsibilities towards another adult simply because he is that person's child, as is indeed the case in many jurisdictions.

These responsibilities may be defeasible (for example, if asomeone else has taken over care of the child, or the if a parent has abandoned

[31] Shakespeare, *Twelfth Night, Act 2, scene 5*.

[32] As illustrated once again by Shakespeare's portrait of the future Henry V in *Henry IV, Parts One and Two*.

[33] See p 139 below.

the child). But their initial imposition has nothing to do with intention or blame. Cane, writing about tort liability, points out that 'once we take account of the interests of the victim, it seems less clear that victim-focused obligations of repair should always depend on fault'.[34] If we substitute children, or elderly people, for 'victims', and consider obligations to support them, rather than of 'repairing' a wrong, it may also seem that those obligations need not always depend on fault, or even intention. There does, of course, need to be a rational ground for imposing such responsibilities. Random selection would not do. But there are good reasons to choose a genetic parent, or a child, as the first source of responsibility in these cases *rather than*, say, a neighbour, or even the community. The parent has brought the child into existence; the child owes its existence to the parent. The duty is likely to reflect the predispositions of each in most contexts. A society may indeed prefer a different mode of allocation of responsibility. But such decisions are contingent on context-specific factors, whether cultural or economic. The United Kingdom, for example, dropped the legal obligation on grandparents to support their grandchildren, and children to support their parents, in 1948.[35] It was presumably felt that these duties should fall on the community. But this could change. There is nothing intrinsic in the nature of responsibility which would prevent this.

The following seem to be the necessary guiding principles in allocating responsibilities to adults over children.

(1) The purpose for fixing a relationship between a child and an adult is to provide the child with an identifiable resource for both material and emotional support.

(2) There should be two such adults, one of whom is the gestational mother.[36] Outside certain exceptional categories when an alternative figure is established (such as adoption, or sperm donation within recognized or controlled environments, and perhaps if procreation has taken place by extracting the genetic material from the procreator by violence or duress), the father

[34] n 3 above, 107. [35] National Assistance Act 1948, s 42(1).

[36] Who is defined as the gestational mother in the English legislation: Human Embryology and Fertilisation Act 1990, s 27(1). Baker uses the same definition.

should be the person whose sperm has procreated the child. This should not be seen as a matter of assumption of risk, or deterrence, but as an allocation of responsibility designed to protect the interests of society's newest members from the moment of their birth. It is also important in establishing the truth about the child's genetic origins, which might be important for the child.[37]

(3) This might be achieved simply by imposing a support obligation on men so recognized, but without creating a parental relationship. This is partly a matter of legal technique. However, confining the relationship to one only of support misses out possible inheritance or other property-based rights. Also, having the relationship legally recognized could encourage participation by the man in the child's life, and recognizes his potential availability as a resource for the child's benefit in the longer term.

(4) It must be remembered that the purpose of the allocation is entirely for the child's benefit. It should be understood, therefore, that recognition of the relationship should not, in and of itself alone, establish any entitlement by the man over the child.[38] This refers of course to the allocation of *responsibility*. A parent may well have an interest in establishing, and maintaining, a relationship with a child.[39]

(5) It will follow that in some cases fixing a man with responsibility will result in him bearing some of the burdens of parenthood without the benefits. It is hard for a man to have the prospect of the exercise of fatherhood of a child borne by a woman he loves plucked away by the collapse of his relationship with the mother and her resistance to its continuation. The hoped-for experience of fatherhood is no more than an expectation, as is the case when the woman falls pregnant: a man has no protected right that a mother should give birth to his child.[40] It is hard for a mother to have her hopes of a father

[37] See pp 70–3 above. [38] See pp 65–70 above. [39] See pp 161–2 below.
[40] *Paton v UK* (1981) 3 EHRR 408. Similarly a mother cannot insist that the father not retract his consent for the implantation in her of a fertilized embryo: *Evans v Amicus Healthcare and Others* [2004] 3 All ER 1021.

bringing up her child dashed. But the frailties of the adults in question can be harder for the child. Entering sexual relationships carries inherent risks. They can bring the adults immense happiness; or a good enough life; or great heartache. There can be no guarantees. Some people will suffer great misfortune. But as Tony Honoré has written: 'To bear the risk of bad luck is inseparable from being a choosing person.'[41] If that misfortune cannot be corrected without harming the innocent, it is something which a truly responsible person must accept.

(6) This is not the only way in which such responsibility is acquired. Transfers or sharing of parental relationships do not diminish the child's resources, although it is important not to conceal the truth of the biological connection.[42] Such responsibility may also be acquired by assuming a position in which a child comes to depend on its exercise. So in English law, a man can acquire an obligation of support towards a child who is not his own, but whom he has treated as a child of the family, to the extent that he assumed responsibility for it.[43] American law is much less willing to allow an obligation to be acquired in that way.[44]

(7) It is open to debate whether a parent's prospective financial responsibility towards a child should be accompanied by similar responsibility towards the other parent if that parent is caring for the child. Responsibility towards the other parent could be characterized as an element of the responsibility towards the child, for the child needs care as much as clothes and food. Yet American child support guidelines have tended to calculate the obligation by reference to the marginal

[41] T Honoré, 'Responsibility and Luck' (1988) 104 *Law Quarterly Review* 530, 553.

[42] See pp 70–3 above.

[43] Matrimonial Causes Act 1971, ss 25(4), 52(1). In deciding the extent of his obligation, the court can take into account the responsibilities of any other person towards the child.

[44] See C Rogerson, 'The Child Support Obligations of Step-Parents' (2001) 18 *Canadian Journal of Family Law* 9.

costs which children impose on a family budget, rather than to the overall economic position for each parent.[45] More recently, however, the American Law Institute has recommended that a supplement be added to such payments as a means of redressing disparities between the financial position of the parent paying the support and the household receiving it.[46] This would mean that the payments would benefit the child's carer financially as well. The formula which was first used when the United Kingdom introduced a child support scheme run by an administrative agency also included an element designed to benefit the child's carer.[47] This proved to be politically sensitive, and was not repeated when a simplified formula was later introduced.[48] Many fathers are reluctant that their child support payments should benefit, or even be controlled by, the mother, but there is evidence that some think it is acceptable.[49] The problem is that non-residential parents will be inclined to see their obligation towards the other parent in terms of historical responsibility, which raises issues of blame, rather than of role, which they are more willing to accept as a basis of their responsibility to their children. It would be better to see the issue of liability towards the child's carer in the context of what was called 'friendship plus', discussed earlier.[50]

[45] See M Garrison, 'The Goals and Limits of Child Support Policy' in JT Oldham and MS Melli, *Child Support: the Next Frontier* (University of Michigan Press, 2000) 16–45.

[46] American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) s 3.05.

[47] M Maclean and J Eekelaar, 'Child Support: the British Solution' (1993) 7 *International Journal of Law and the Family* 205, 206–7.

[48] *A New Contract for Welfare: Children's Rights and Parents' Responsibilities* (Cm 4349 July 1999).

[49] J Bradshaw, C Stimson, C Skinner and J Williams, *Absent Fathers?* (Routledge, 1999) 152–3 and 192–4.

[50] See pp 49–52 above, where it was suggested that where parents of a common child were living together there was evidence of a 'life plan' which created a reason for compensation.

Prospective Responsibility: Exercise

Divorce

In an impressive analysis, Helen Reece[51] described the system for divorce proposed in the Family Law Act 1996 as an exemplification of the 'post-liberal' conceptions of responsibility. Being responsible means thinking seriously about the situation, in order to be sure that you are expressing your authentic self. In order to avoid the self-serving implications of this concept, the 'self' is understood as authentic only if seen in relationship to others.[52] In short, the goal of the scheme was to establish greater freedom to divorce, but to convince people to exercise the freedom in a responsible way. It sought to achieve this through a process under which, one or both parties having attended an information meeting, either party could (no less than three months later) initiate a period for 'consideration and reflection'.[53] Once this had lasted nine months (or 15, if there were children), an application could be made for a divorce, which in most cases would be granted. But the scheme was never introduced, largely because pilot studies of the information meetings showed that they did not, in the government's view, sufficiently deter people from divorce or divert them from solicitors to mediators.[54]

The distinction between the 'liberal' sense of self, which is isolated from its social context, and a 'post-liberal' sense of self, which is located within social relations, is not easy to sustain. One might say that the 'liberal' sense of self pre-dates the liberalization of the divorce laws in the 1960s and 1970s and is consistent with the conception of responsibility associated with fault-based divorce, and the belief inculcated throughout the ages by those with power (but which Reece associates with 'post-liberalism') that true authenticity is to be found through compliance with religious precepts and social practices.

[51] H Reece, *Divorcing Responsibly* (Hart Publishing, 2003).

[52] Ibid ch 3.

[53] J Eekelaar, 'Family Law: Keeping Us "On Message"' (1999) 11 *Child and Family Law Quarterly* 387.

[54] See J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000) 1–9. See also pp 20–1 above.

Whatever view one takes of these issues, it is certainly true that the proposed scheme represented an attempt to use legal processes to promote what the state perceived to be 'responsible' behaviour. It is nothing new for personal law to try to influence behaviour. In an earlier essay,[55] I maintained that law operated coercively in two ways. One was through punishment and oppression; the other was to seek to incorporate the dissident into the dominant ideology. I characterized the legal means of seeking to achieve the latter 'normative law'. States use it when behaviour perceived as dysfunctional is considered a social threat. So the English poor law 'legalized' a father's formerly merely moral obligation to support his children when the social turbulence of the sixteenth century disturbed the expectation that this would normally occur.[56] Indeed, it could be said that, in regard to legal enforcement of support duties within the family, 'the strength of legal involvement in enforcement of family solidarity is directly related to the extent to which the family system is failing to fulfil its role as resource distributor within the community'.[57] Responsible actions, ensured previously perhaps by greater social cohesion, now needed to be propped up by institutional mechanisms. This was paralleled by administrative measures, which Jacques Donzelot[58] saw developing in France from at least the nineteenth century through the distribution of medical and social care designed to 'restore marriage to the working classes'. In the twentieth century, when family dysfunctionality began to threaten the wealthier classes, and expectations of fair participation in a family's wealth by all its members grew, personal law increased the claims of a surviving spouse against the estate of a deceased partner,

[55] J Eekelaar, 'Family Law and Social Control', in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence (Third Series)* (Oxford University Press, 1987) ch 6.

[56] See J Eekelaar and M Maclean, 'The Evolution of Private Law Maintenance Obligations: the Common Law', in M Meulders-Klein and J Eekelaar (eds), *Family, State and Individual Economic Security* (Story Scientia, 1988), vol 1, ch 6. In *R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42, Baroness Hale explained the obligation as being legal rather than moral. But since it was legally unenforceable, it is perhaps better seen as a moral obligation. Those familiar with the writings of Ronald Dworkin may see this as being an example where the distinction has little meaning.

[57] J Eekelaar, 'What is "Critical" Family Law?' (1989) 105 *Law Quarterly Review* 244, 255.

[58] J Donzelot, *The Policing of Families* (Hutchinson, 1980). See p 12 above.

improved the protection of occupation rights during marriage and the claims of a divorced spouse against the income and assets of the other partner, and tried to ensure that child support obligations were complied with more effectively. In short, models of responsible family behaviour were created, and if someone did not comply, the law provided mechanisms to bring about an outcome as close as possible to what would have happened had the deviant acted responsibly.

We can therefore see that what have been called the 'responsibilization'[59] strategies of the present day are linked to what Donzelot also called the 'normalization' processes which started well over one hundred years ago. But the approach of the Family Law Act 1996 is significantly different, in two ways. The first is that the earlier regime operated within a welfarist paradigm, according to which the authorities sought to impose on the population their vision of what was in people's interests, whether material or moral.[60] So divorce was limited to circumstances when society, not the couples, decided it was worse for the marriage to continue than for the couple to stay together. By way of contrast, the failed divorce reform would have openly allowed either party to exit from the marriage if they wanted to strongly enough.[61] Also, the general basis for ordering post-divorce financial support common before its eclipse in 2000[62] was that provision must be made to meet the 'reasonable requirements' of the parties, those requirements being decided by the courts. But from the 1980s parties have been given wide freedom, through consent orders, to agree the terms of the exit themselves with minimal scrutiny by the court.[63] However, as noted earlier, there will be an expectation that the agreement will give proper recognition of the investment each put into the marriage, because if they cannot agree their own solution,

[59] J Flint, 'Social Housing Agencies and the Governance of Anti-Social Behaviour', 17 *Housing Studies* 619.

[60] See pp 9–22 above.

[61] This statement must be modified because a late amendment would have allowed a court to make an order 'preventing' divorce in cases of hardship: Family Law Act 1996, s 10. However, the experience of a similar provision under the present law suggests that it may not have had much practical effect.

[62] See *White v White* [2001] 1 AC 596. See further p 147 below.

[63] See J Eekelaar, 'A Jurisdiction in Search of a Mission: Family Proceedings in England and Wales' (1994) 57 *Modern Law Review* 839.

the courts will impose one.[64] It will also be expected that each party will accept a degree of self-responsibility and become self-sufficient after the separation.[65] The movement has not been dramatic and complete. There are limitations and inconsistencies. The courts still need to give first consideration to the welfare (that is, the needs) of any child of the marriage, but this can be seen as giving priority to the rights of children when they come in conflict with those of adult family members.[66] There is reluctance to allow the adults complete control to determine the outcome, for example, by pre-marital contract. This seems to be a remnant of the welfarist approach. But the shape of the legal structure has changed from one of welfarist control, according to which one's responsibility would have been to comply with the precepts and decisions of the authorities, to one in which control has, at least as a matter of form, passed to the parties.

But this has in turn generated the second difference from the earlier policies of 'normalization'. This is a new sense of what responsible behaviour is. It surely goes beyond compliance with the minimal standards mentioned by Cane. It is closer to the one used by Hart when he talked about a responsible person as 'one who is disposed to take his duties seriously; to think about them, and to make serious efforts to fulfil them'.[67] But even this is probably too narrow. The responsible divorcer would seriously consider whether to exercise the right at all. What seems to be sought is nothing less than a person who thinks not just of the legal rights of other family members, but of their general well-being, and is willing to forego, or abridge, his or her own rights to achieve this. This is to be done by persuasion and through the provision of information. It may, however, prove difficult to achieve this. The attempt to make people more responsible through persuasion at information meetings seemed to fail. On the other hand, there is also evidence that, when solicitors negotiate with their clients the 'position' they should put to the other party, while they do not 'preach' to them about their responsibilities in the way the government intended should happen in the information meetings

[64] n 63 above.

[65] Matrimonial and Family Proceedings Act 1984. See J Eekelaar, *Regulating Divorce* (Clarendon Press, 1991) 63–70.

[66] See pp 161–2 below.

[67] n 2 above, 213.

proposed for the abortive divorce scheme, they explain that it is in their client's interests to put forward proposals which are likely to be acceptable.[68] This might be a more effective way of making people take into account the interests of others than appeals to altruism. But the quest for bringing about responsible behaviour is nowhere more apparent than in the area of parenthood.

Parenthood

The long period during which the legal structure of the parent–child relationship was designed to protect the parent's interest in the child, rather than to advance the interests of the child, began to be modified from the early nineteenth century by the same welfarist considerations which sought to protect children from exploitation by the adult world at the onset of the industrial revolution.[69] By the 1980s, both public child protection law and private family law placed the interests of children, at least as perceived by courts and welfare agencies, above those of adult family members. It is therefore somewhat surprising that the Children Act 1989, at the behest of the Law Commission, felt it necessary to attempt to banish the concept of a parent's 'rights' with respect to children, saying that parents had only responsibilities towards them, not rights over them.[70] That parents were expected to exercise their powers over their children in the child's best interests was nothing new, and had been recently reasserted by the House of Lords in the *Gillick* case in 1986.[71] It was a well-established principle of law that in decisions about a child's upbringing, courts were to give 'paramount' consideration to the child's welfare.[72] The more significant change was that responsibility *for* the welfare of children was beginning to be seen as more of a matter for the parents than for the state than it had been in the 30 or so years after the end of the Second World War. So, although the Children Act 1989 reiterated the 'paramountcy' principle in statutory form,[73]

[68] n 54 above, 100–101.
[69] See pp 9–22 below.
[70] See Eekelaar (n 1 above).
[71] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
[72] *J v C* [1970] AC 668. It seems that the House of Lords in that case interpreted 'paramount' as if it meant the sole determining factor. See p 13 above.
[73] Children Act 1989, s 1(1).

the conceptual difficulty arose that this ideological movement could not escape characterization as an enhancement of parent's rights. This view was encouraged by the increasing attention being given to the position of the European Convention on Human Rights and Fundamental Freedoms, which was eventually incorporated into United Kingdom domestic law in 2000, and which demands that states respect people's right to private and family life.

Claims by parents to rights regarding their children were first importantly asserted against public authorities.[74] But there is no reason why they should not be asserted by one parent against the other, at least through arguments that the decisions or practices of the courts do not sufficiently recognize those rights; and indeed, such claims began to be made.[75] The structure of arguments based on rights will be considered in the next chapter.[76] Although it is difficult to prove empirically, it is possible that treating individual family members as right holders (even though the content of the rights is by no means absolute) could encourage them to wish to seek vindication of their rights in a court. But it is well known that such conflicts are harmful to children. The challenge then becomes how to make sure that parents use their recently enhanced rights in a responsible way.

The problem became acute in the context of divorce. The exercise by parents of their increased right to divorce appeared to conflict with their responsibilities towards their children, because it seemed to be the case that divorce harmed children. A solution was seen in allowing divorce, but acting as if the relationship between both parents and the children remained unaffected. Irène Théry, drawing on experience in France, called this the '*logique de pérennité*'; reflecting the belief that marriage was just one stage in the continuum of a family's existence.[77] In 1986, the English Law Commission

[74] *WOB & R v United Kingdom* (1988) 10 EHRR 29 (right to visit children 'in care' of local authorities); *re S; re W* [2002] 1 FLR 815 (powers of local authorities to depart from care plans); *KA v Finland* [2003] 1 FLR 696 (how states should respect parents' family life).

[75] *Da Silva Mouta v Portugal* (2001) EHRR 41; *Hansen v Turkey* [2004] 39 EHRR 18.

[76] See pp 132–40 below.

[77] I Théry, *Le Démariage* (Editions Odile Jacob, 1993) 154–6. R van Krieken, 'The "Best Interests of the Child" and Parental Separation: on the "Civilizing of Parents"' (2005) 68 *Modern Law Review* 25.

had demonstrated the same belief. It criticized the way in which the courts often granted 'custody' (which seemed to mean all parental rights) of children to one divorcing parent, leaving the other only with the vague 'reasonable access'.[78] The Commission proposed that both married parents should have equal 'parental responsibility', which would survive the dissolution of the marriage intact. If necessary, courts could make orders for practical arrangements, such as where the children should live ('residence'), and how they should maintain a relationship with the 'non-resident' parent ('contact'). These proposals were enacted by the Children Act 1989. In America, Elizabeth Scott went even further and put forward the proposition that after divorce a child's time should be allocated between its parents in proportions as closely approximate to the way it was allocated before the separation.[79] This has been adopted as a model by the American Law Institute.[80] These can be seen as attempts to reconcile the parental right to divorce with a sense that the responsibility of each parent towards one another, and also towards the children, demanded that the substance of the social unit should survive its legal breakdown.

In fact it seems that most parents have been sensitive to the spirit of this perception of their responsibilities. Consistently with other studies, Mavis Maclean and I found that in the mid 1990s contact between children and a separated parent was maintained in nearly three-quarters of cases where the parents had been married, and that the most significant predictor that contact would continue was the length of time the non-resident parent had lived with the child before the separation. Furthermore, the longer the contact persisted, the better the relationship between the parents became.[81] But this did not

[78] Law Commission, *Family Law: Review of Child Law: Custody*, Working Paper No 96 (1986). For an earlier discussion, see J Eekelaar, *Regulating Divorce* (Clarendon Press 1991) ch 6.

[79] ES Scott, 'Pluralism, Parental Preferences and Child Custody', 80 *California L Rev* 615 (1992).

[80] American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002) s 2.08.

[81] M Maclean and J Eekelaar, *The Parental Obligation: A Study of Parenthood across Households* (Hart Publishing, 1997). Contact was less frequent where the parents had not been married (45 per cent), or had never lived together (35 per cent). This seems

always happen, and an impetus developed towards finding measures which would propel parents towards acting together in regard to their children even though the marriage was over. One example is the view that parents should be legally obliged to consult together over important decisions concerning the children. Neither the Law Commission nor the Children Act 1989 had gone this far, but the judiciary favour the idea.[82] While an order for consultation over specific issues may be a suitable way to resolve some conflicts, there are serious objections against making consultation a general legal obligation. It gives too many opportunities for aggravating conflict. What amounts to consultation? What matters are important enough to require it? How much effort needs to be made to communicate? What if communication would inflame conflict or upset the children? Suggestions have also been made that the law should stipulate that post-separation parenting should be shared, or that its sharing should be presumed beneficial.[83] But these are open to objections similar to those against compulsory consultation. The benefits of such arrangements for the parties and the children are dependent on their voluntary character.[84] The empirical evidence does not support the idea that *the mere fact that* a child maintains contact with a parent who is not living in the home, or that the child spends equal time with both parents after they have separated, is beneficial for the child.[85] Too much depends on the circumstances. If they become occasions for conflict, they cease to benefit the children, for it is widely agreed that overt parental conflict is damaging to children.

to be a function of the fact that the non-resident parent lived with the child for shorter periods (or not at all) in those cases.

[82] See J Eekelaar, 'Do Parents have a Duty to Consult?' (1998) 114 *Law Quarterly Review* 337. A Bainham takes a different view: see A Bainham, 'The Privatisation of the Public Interest in Children' (1990) 55 *Modern Law Review* 206.

[83] See H Rhoades and SB Boyd, 'Reforming Custody Laws: A Comparative Study' (2004) 18 *International Journal of Law, Policy and the Family* 119.

[84] See L Trinder, 'Working and Not Working Contact after Divorce' in A Bainham, B Lindley, M Richards and L Trinder (eds), *Children and Their Families: Contact, Rights and Welfare* (Hart Publishing, 2003) ch 19. Trinder reports that where contact was working well family members were least likely to refer to legal prescriptions.

[85] For a comprehensive review of the evidence, see S Gilmore, 'Contact/Shared Residence and Child Well-Being: Research Evidence and its Implications for Legal Decision-Making' (2006) 20 *International Journal of Law, Policy and the Family*, 347.

There are limits to what can be achieved by trying to control the way people interact at a personal level by legislation. If government wishes to educate parents with the virtues of acting responsibly in these matters, options other than creating potentially contentious legal duties are available. An alternative strategy has therefore been to try to persuade parents to co-operate with one another.[86] In the United States and Canada separated parents are often compelled to attend 'parenting skills' classes. Schemes which aim to enhance sensitivity to the children's interests through information,[87] or achieving resolution through mediation, could be seen as trying to make parents behave responsibly. Felicity Kaganas and Alison Diduck detect attempts to persuade even children that they should co-operate in this endeavour.[88] While most parents view such schemes favourably, their results have not been rigorously evaluated.[89] The value, however, of imparting skills on how to handle significant family change, and be responsive to the needs of other participants, cannot be minimized. But there is a danger that these efforts will create expectations that specific outcomes should be attained, such as living arrangements similar to the circumstances which prevailed prior to separation. The research evidence is overwhelming that to act as a parent after separation often requires considerable adjustment, which is highly context-sensitive, and which many parents find extraordinarily difficult to make. It may be better to accept that parental separation requires a complete renegotiation of the family dynamics, focused on the

[86] *Making Contact Work* (Lord Chancellor's Department, 2002). Adoption and Children Act 2006.

[87] Such as the Family Resolutions Project: see (2004) 34 *Family Law* 919. For a full discussion, see H Reece, 'From Parental Responsibility to Parenting Responsibility' in M Freeman (ed), *Law and Sociology: Current Legal Issues 2005*, vol 8 (Oxford University Press, 2006) ch 26, 472–81.

[88] F Kaganas and A Diduck, 'Changing Images of Post-Separation Children' (2004) 67 *Modern Law Review* 959. They see this largely in the growing willingness to allow children to be informed of, and participate in, post-separation arrangements. Possibly their fear that these opportunities will be used to 'persuade' children to act 'responsibly' by taking part in arrangements they do not like is exaggerated. On the contrary, it is possible that children's participation will lead to less ideologically driven processes.

[89] J Hunt and C Roberts, *Intervening in Litigated Contact: Ideas from Other Jurisdictions* (Family Policy Briefing 4, University of Oxford Department of Social Policy and Social Work), September 2005.

circumstances of each family, rather than to aim at an idealized state of affairs which may not suit the individuals or their particular circumstances.[90]

A Fuller Concept of Responsibility

Helen Reece argued that 'post-liberal' responsibility is to be found in a way of thinking rather than in actions. As long as we can understand what we do, or make a serious attempt to do so, we are acting responsibly.[91] There is certainly a substantial literature which supports this position. But it is not so clear whether the concept of responsibility it describes does not exist more in the books than in people's perceptions. After all, the government abandoned its divorce proposals when people demonstrated, through their actions, that they were not less likely to divorce, or to go to lawyers, as a result of their cogitations. A mother who opposes contact for what a court considers to be no good reason, or a father who resorts to vexatious litigation to acquire contact, will be considered to be irresponsible because of what they do. Attitudes may be important as preludes to actions, or as indicators as to whether actions will be sustained, but if the actions or inactions have unacceptable outcomes, it will not matter how deeply they have been pondered. On the other hand, like Cane's and Hart's views about the exercise of responsibility,[92] Raz's sentiment that: 'Surely what counts, from the point of view of the person in authority, is not what the subject thinks but how he acts. I do all that the law requires of me if my actions comply with it'[93] does not capture the broader thrust of this policy. This presumes that, to be fully responsible, people must sometimes refrain from doing what they are legally entitled to do, or do more than is necessary to comply with the law.

[90] B Smyth, 'Parent-Child Contact in Australia: Exploring Five Different Post-Separation Patterns of Parenting' (2005) 19 *International Journal of Law, Policy and the Family* 1, B Neale, J Flowerdew and C Smart 'Drifting towards Shared Residence?' (2003) 33 *Family Law* 33; GB Wilson, 'The Non-resident Parental Role for Separated Fathers: A Review' (2006) *International Journal of Law, Policy and the Family*; Rhoader and Royal (n 83 above).

[91] n 51 above, ch 6. [92] See pp 103–5 above.

[93] J Raz, *The Morality of Freedom* (Oxford University Press, 1986) 39.

Perhaps John Gardner, thinking possibly more of historical than prospective responsibility, captures the middle ground well for each sense of responsibility when he states that responsibility 'in the basic sense' is the ability to give an account of oneself as a rational being.[94] This means that it is not sufficient simply that people think about their actions; or indeed, that they only comply with the law. They must be able to account for themselves rationally, which means engaging with others in an evaluative dialogue. But Gardner's, professedly 'basic', definition does not explain what kinds of reasons would need to be proffered, successfully, to establish responsible action. The examples of divorce and parenthood given above suggest that, when we think of responsibility in these circumstances, we signal an expectation that the agent should demonstrate an appreciation of the effects of their actions, or inactions, on other people by modifying their behaviour accordingly even if this means modifying claims to one's entitlements. It is a manifestation of recognition of 'the other' and of acceptance of community. It is the counterpoise to the engine that drives the language of rights, which are the claims individuals make for recognition of the sectional interests of themselves and others similarly placed.[95] Its absence is seen in the action of the mother in Brecht's *Caucasian Chalk Circle* (whose insistence on asserting her right to have her child back by pulling him from the circle lost him to the maid, Grusha, who let him go for fear of injuring him) as much as its presence was demonstrated in the behaviour of both men in the *Leeds Hospital* case, one by accepting duties he was not legally obliged to accept, the other by foregoing claims he might legally have made.[96] This is hardly new. A 'responsible' utility will not enforce payment of debts owed by customers suffering emotional or sometimes even financial crises. Many people thought that, while those European newspapers which published cartoons of the Prophet Mohammed in February 2006 had the right to do so, the publication was not the responsible thing to do. Responsible people will exercise restraint within their legal rights. They will also act beyond their legal duties. A child who keeps

[94] J Gardner, 'The Mark of Responsibility' (2003) 23 *Oxford Journal of Legal Studies* 157, 161.

[95] See pp 132–40 below. [96] See n 28 above.

in regular touch with her parents when she leaves home, especially in times of crisis, has no legal duty to do this, but will surely be regarded as acting more responsibly than one who rarely takes this trouble. Responsible parents will try to ensure that their children behave with consideration to others. None of these, at least hitherto, have been legal obligations. So while we can say that a responsible person follows their legal obligations, responsibility does not stop there.

This fuller concept of responsibility is, then, well established. What is, perhaps, new is the attempt by government to embrace it within the workings of the law. We have seen how such an attempt failed in the case of the Family Law Act 1996. We have noted movements in that direction as regards the way parents approach their parenting role after separation. But a much more significant attempt is being made in the third Blair government's policy to instil a culture of 'respect'. The trajectory of the legislation is striking. As so often, these expansions of state action are a response to perceived social instability. In 1996 Parliament allowed local authorities to apply for an injunction against anyone causing or likely to cause a 'nuisance or annoyance' to their tenants or their tenant's visitors.[97] The following year it made 'harassment', if done on more than one occasion, both a civil wrong and criminal offence. Harassment was defined to include 'alarming' or 'causing … distress' to someone.[98] In 1998 courts were permitted to make anti-social behaviour orders with respect to anyone aged ten or over who has acted 'in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not in the same household,' if the order was necessary to protect against such effects.[99] These orders can be reinforced by Individual Support Orders, breach of which is a criminal offence.[100] Under the Powers of Criminal Courts (Sentencing) Act 2000, parents or guardians of children under 16 who breach orders or commit offences must, and where the child is between 16 and 18, may, be required to pay any fine or compensation where this is deemed a

[97] Housing Act 1996, s 152(1).
[98] Protection from Harassment Act 1997.
[99] Crime and Disorder Act 1998, s 1.
[100] Criminal Justice Act 2003, s 322 (inserting s1AA into the Crime and Disorder Act 2003).

suitable penalty.[101] But also, when making an anti-social behaviour order, a court could make a 'parenting order', requiring a parent to attend counselling or guidance programmes.[102]

Anti-social behaviour clearly covers behaviour which previously escaped any form of legal sanction. But it would probably have been thought to be irresponsible. The apparent failure of parents to have prevented such behaviour might previously have been considered irresponsible: but it would have fallen outside the scope of official intervention. There is no difficulty, in principle, with a policy which seeks to bring about such changes in behaviour. It does not violate the privileged sphere of parent–child relations, because that loses its privilege where the actions or inactions within it cause harm either inside or outside that sphere.[103] There would be a problem if mechanisms were built in to the law with the object of persuading people to abandon their legal rights. Such actions could be said to threaten the rule of law,[104] for what would be the value of legal rights if legal institutions themselves systematically obstructed people's exercise of them? However, educational programmes, or programmes directed at encouraging settlement out of court (if not unduly coercive), or bringing about better 'parenting' practice, are different. Since responsible behaviour may involve abandoning, or modifying, legal claims, or acting beyond the scope of one's legal duties, there can be no objection to encouraging it.

But the difference between *encouraging* such responsible behaviour and *enforcing* it is pivotal. It is true that strongly orchestrated measures by governments to instil moral behaviour, such as has been reported in China,[105] illustrate that in some political contexts the distinction can be blurred. But in principle, once the line is crossed, the fuller

[101] Powers of Criminal Courts (Sentencing) Act 2000, s 137.

[102] Crime and Disorder Act 1998, s 8; Anti-social Behaviour Act 2003, s 18.

[103] See p 85 above.

[104] I argued this in the context of government hostility to the legal process in family matters in 'Family Justice—Ideal or Illusion? Family Law and Communitarian Values' (1995) 48 *Current Legal Problems*, 2, 191–216 (Oxford University Press).

[105] See *The Independent* (London) 28 March 2006, reporting the measures taken to instil 'eight socialist honours' (Love the Motherland, Serve the People, Be united, Struggle hard, Work hard, Advocate science, Be honest, Obey the law). It is reported that 'tutorials' were being offered in virtue ('obeying the law, protecting trees and cleaning up dog faeces').

sense of responsibility is lost, for the behaviour, while remaining a responsibility, is now a legal duty. So should parents be liable to be fined for the wrongdoing of their children? This could be seen as simply one of the responsibilities of parenthood, like a duty to maintain one's own parents. The problem is that it mixes historic and prospective responsibility: the child is liable on the principles of blame, the parent on the basis of role. A parent might have role responsibility to pay compensation for damage caused by a child, and also to meet fines incurred by a child who has no resources. But if the measure is a fine or other form of punishment, it should not be exacted from a parent unless the parent too has been guilty of wrongdoing. Could a parent be guilty for failing to prevent the dereliction of the child? The actions which comprise anti-social behaviour, and, more so, the parental behaviour thought to be necessary to prevent it, are inevitably broad and indeterminate. There will be differing interpretations about what kinds of parental actions are appropriate in the multitude of micro-situations which arise in family relationships, and severe problems of monitoring what actions are actually taken within the home. It is difficult to know what could be achieved in using criminal penalties to punish parents because it is thought they have not done enough to make their children behave better. Children's behaviour could be affected more by events outside the parents' control than in the home. Perhaps we are all responsible, as politicians, educators, writers, employers, entertainers—just as citizens, for the behaviour of our society's children.

6

Rights

The language of rights is replete with ambiguity. If I say that 'I have a right to *x*', do I mean that I think that as things stand I expect some person or persons to make *x* available to me? If so, do I expect such person or persons to drop everything and present me with *x*, disregarding what anyone else may say about the effects of doing this on them? Do I expect to have some form of redress if none of this is done? Or am I expressing only the ardent wish that the world should be ordered in a fairer way, and if it was, *x* would become available to me? It becomes more complicated if I say 'My grandfather had a right to *x*.' Am I saying that had my grandfather, during the last century, sought *x* (which he might have done), he could have expected *x* to be made available to him? Or that, although he could never have expected it in his society, a better organized, or more moral world would have made it available? And if I say that women have a right to *x*, am I saying that I think *x* should be made available to them, even though some may not expect it, or want it? And in any of these cases, am I restricting my observations to what I think the *legal system* provides, or should provide, or am I looking beyond the law to how people in general should behave towards one another?

It is possible that I might mean any of these things. It is not surprising therefore that there is so much disagreement about what rights are. Indeed, it is arguable that the fact that there is no stable basis in which the concept can be grounded means that its meaning will inevitably be contested.[1] This does not mean that one should not attempt to defend a particular version of it if it is believed to be useful. It is clear that references to rights are now widely made

[1] See WB Gallie, 'Essentially Contested Concepts', (1955–6) 56 *Proceedings of the Aristotelian Society* 167.

in relation to family matters. This has caused some alarm, especially when applied to children. A perceptive writer on children, Michael King, has warned that the promotion of children's legal rights is unlikely to make a better world for children, and may even cause harm;[2] and it has been suggested that it would be better to talk of 'doing right' for children rather than about children's 'rights'.[3] On a wider level, Mary Ann Glendon has argued that talk about rights has promoted a perception that society is constituted of self-interested individuals,[4] a theme taken up by Tony Blair shortly after he became British Prime Minister when he told the Labour Party Conference in September 1997 that: 'a decent society is not based on rights. It is based on duty. On duty to each other.' This view of rights underlies the argument of Sir John Laws that interpersonal morals should be based on the language of duty, not rights.[5] Against those sceptical views, I wish to argue that one particular way of thinking about rights is very important in the context in which personal law operates. Or perhaps it should be put this way: using the concept of rights in a particular way helps in the understanding and exposition of an approach to the application of personal law which I would wish to defend. The approach is one which both promotes and appropriately limits the different interests which are affected by personal law. Above all, it provides pathways by which power can be more appropriately distributed within the population. But before I can start the attempt, I must set out the particular way I propose that the concept of rights should be understood.

The Central Case of Rights

The understanding of rights I will set out must take its place alongside many others. It is not intended to be a useful way of

[2] M King, *A Better World for Children?* (Routledge, 1997). See also M Guggenheim, *What's Wrong with Children's Rights* (Hanard University Press 2005) reviewed by M Freeman in (2006) 2 *International J of Law in Context* 89.

[3] RE Goodin and D Gibson, 'Rights, Young and Old' (1997) 17 *Oxford Journal of Legal Studies* 15.

[4] MA Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press, 1991).

[5] Sir John Laws, 'Beyond Rights' (2003) 23 *Oxford Journal of Legal Studies* 265.

analysing *legal* rights. Such analyses, which usually take as their starting point the work of Wesley Newcombe Hohfeld,[6] are helpful in assisting more precise understanding of legal relationships. But their range is narrow, and can lead to extreme reductive outcomes, such as Kocourek's conclusion that legal rights ultimately boil down to powers to initiate legal proceedings,[7] or Hart's formulation that a legal right exists when there is a legal system, under whose rules some person is obliged to do or abstain from action and this is made by law dependent on the choice or authorization of another.[8] Even Dworkin, who broke down conceptual distinctions between legal and moral sources of law, in his early work advanced the disappointing proposition that it was only after a court had weighed up all the consequences of the possible decisions available to it, and made its choice between them, that it could be said that the successful litigant had a 'right' to its decision.[9] This idea of having a right is much more restricted than the 'right to moral independence' for which Dworkin later argued.[10] My concern will be with the idea of rights in this second, wider, sense.

It is useful to distinguish between two senses in which it can be said that a person 'has' a right. One sense is where we say (for example) that slaves in ancient times 'had' rights even in a world which did not recognize them. There the appeal is to a contemporary moral principle believed to be of universal value, holding even in societies, or a whole world, remote from ours for which the principle may be foreign. The other sense arises when the reference is descriptive of a social context where the content of the right is recognized through social or institutional mechanisms. For convenience, I call the former the 'weak' and the latter the 'strong' sense. When someone *claims*

[6] WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1923).

[7] A Kocourek, *Jural Relations* (Bobbs Merrill, 1927).

[8] 'Definition and Theory in Jurisprudence' (1953), re-published as ch 1 in HLA Hart, *Essays in Jurisprudence and the Philosophy* (Oxford University Press, 1983). Later Hart examined a much wider concept of rights in 'Are there any Natural Rights?' (1955), re-published in J Waldron, *Theories of Rights* (Oxford University Press, 1984) ch 4.

[9] R Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 303–5.

[10] See R Dworkin, 'Do we have a Right to Pornography?' (1981) 1 *Oxford Journal of Legal Studies* 177.

to have a right, they are either claiming that the content of the right *is* socially recognized (and that this recognition should be matched by action) or that it *should be* socially recognized (and acted on). Someone claiming a right is unlikely to be concerned only to state a moral proposition: the whole point is to bring about social action. Those kinds of references are to rights in the strong sense.

But what is recognized, or claimed, in the case of rights? Raz gives a clear answer, which is widely accepted: 'Rights themselves are grounds for holding others to be duty bound to protect or promote certain interests of the right-holder.'[11] There are, however, difficulties with this encapsulation. It is not obvious that what constitutes the right are the *grounds* (reasons) for imposing duties rather than the state of affairs the claimant seeks to achieve (for example, an interest like good health), or even the actions or abstentions of others designed to achieve or protect that interest. I have called the results of such actions or abstentions 'end-states'.[12] The end-state may be the interest to be protected, or the act or abstention necessary to achieve it. It seems better to see rights as being a complex amalgam comprising a claim of entitlement to an end-state necessary to protect an interest and an implication that the interest possesses sufficient weight to impose a duty to activate the means contemplated to achieve the necessary protection. Each of these elements itself requires elucidation they will therefore be considered in more detail.

End-states

Famously, Neil MacCormick claimed that rights must be seen as protecting interests rather than giving effect to expressions of will, because if we thought about rights in the second way, very young children could not have rights, since they are incapable of

[11] J Raz, *The Morality of Freedom* (Clarendon Press, 1986) 44.

[12] What follows is a summary of a more detailed exposition of the concept of rights made in the context of advancing a theory of human rights. J Eekelaar, 'Invoking Human Rights' in T Endicott, J Getzler and E Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) ch 16.

exercising choice, and we surely think that they do have rights.[13] This seems reasonable, until we consider the position of people who *can* articulate their interests. 'Interests' formulations of rights are notably reticent in stating how the 'right holder's' interests are constructed, and by whom. The interests must surely be in some way beneficial to the right holder, or allow the right holder to perform some function more efficiently. But what is beneficial or efficient can be very subjective. Are we to allow some people to define the interests of others, ignoring the way those others do in fact articulate their interests, and enforce these as rights? This may not matter if the discussion is about rights in the 'weak' sense. If I (and like-minded academic commentators) can agree that certain interests of certain people (alive or long dead) justified the imposition of protective duties on others, we may refer to those people as having rights to the performance of those duties. But strong rights consist in social and institutional action designed to produce end-states which can change people's lives. It is not enough simply to say that the action is what well-meaning people have decided should be done. If this were so, powerful social actors could proclaim what they deem to be in the interests of others, establish institutional mechanisms for promoting or protecting those interests, and claim to be protecting the rights of those others, whether or not the others approved or even knew that their interests were being constructed in that way.

It is true that many rights are socially recognized through international instruments and legal decisions which are probably unknown to large populations. Sometimes the rights are said to be inalienable. But, even though people may not constantly articulate claims to these rights, even to themselves, many of these proclaimed rights can be viewed as rights in the fullest sense because they specify interests or end-states which it can safely be assumed anyone would want protected: conditions such as freedom from torture, provision of education and health care, and freedom of religion and speech.[14] In

[13] N MacCormack, 'Children's Rights: a Test Case for Theories of Rights' in *Legal Right and Social Democracy* (Clarendon Press, 1982) ch 8; see also Goodin and Gibson (n 3 above).

[14] It follows that where in an specific case an individual rejects the perception of their interest represented by a right, they must be allowed to do so. So when Diane Pretty sought legal permission to be assisted in her suicide when her disease made her

the same way we can speak of unconscious people, or very young children, as having rights in the strong sense even if they are not capable of articulating them. They refer to protection of interests which we can safely say they would recognize as theirs. This upholds the centrality of the definition by right holders of their own interests to the idea of rights. But as a corollary, if the evidence showed that people consciously repudiated an alleged interest, its protection could not be said to be in furtherance of their rights. One can imagine a situation (in the European Union, for example), where 'rights' are created for use by populations of the member states, but large sections of those populations are indifferent or hostile to such rights. These would be rights only in a minimal, weak, sense, lacking the force of articulated rights-claims. Hence, the central case of rights advanced here is premised on the capacity of the individual to have a genuine appreciation of his or her goals; that is, it is assumed that the individual is fully competent and acting in conditions of freedom. If talking about people having rights is to have any force at all, we must believe they have a right to be freed from oppression and to achieve competence as far as possible so that they can comprehend and articulate their own self-interest. That is consistent with what Hart appeared to argue when he stated that 'in the case of special rights as well as of general rights, recognition of them implies the recognition of the equal right of all men to be free'.[15] In so far as competence and freedom are always imperfectly achieved, then rights are correspondingly less fully realized.

Grounds for entitlement

A claim to a right is a claim to a distribution of power as a matter of entitlement. The claim must therefore be capable of being supported by justificatory reasons. The claim therefore *presupposes* a moral system in the same way as Hart showed that claims to legal rights presuppose the existence of a legal system.[16] But the rights which

life unbearable, and failed, it seems perverse to see this outcome as an enforcement of *her* right to life. The outcome must have *diminished* the total sum of her rights. See *Pretty v United Kingdom* (2002) 35 EHRR 1.

[15] HLA Hart, 'Are there any Natural Rights' (n 8 above) 90.

[16] HLA Hart, 'Definition and Theory in Jurisprudence' (n 8 above).

are claimed do not *constitute* morality. Since a right is contingent on the strength of the justificatory reasons, and these reasons themselves involve moral claims or assumptions, it is evident that the present account of rights does not in itself tell us what rights people have. It is simply an account of the structure of claims to rights. The strength of rights-claims is that, like legal cases in common law systems, they focus on fact-situations which apply, interpret and, often, extend the *application* of moral principles through the extension of duties. Such accretions can be strongly contested, of course, as the history of rights claims shows. But the overall result is the expansion of the scope of obligations.[17]

There is a second element to the issue of justification. I will call this the *social base* for the right. It is a consequence of the fact that moral claims must be generalizable. Hence if a person claims that they are morally entitled to a specific end-state, they are committed to holding that any other person experiencing a relevantly similar position will be entitled to it too. The position will characteristically be some social category, event, condition, or activity with which the claimant identifies and which the claimant claims to ground an entitlement. Victims, prisoners, patients, fathers, and so on are obvious examples. This important implication is much neglected in contemporary rights analyses. Indeed, the failure to recognize it accounts for the misleading picture of the nature of rights expressed by all those who seem to view rights-discourse as a manifestation of selfish individualism.[18] In fact, claims to rights (other than to human rights) are more characteristically associated with assertions of sectional interests. It is probable that this aspect of rights-claims has led to the view, which I argue below to be mistaken, that these sectional interests, or groups, can themselves have rights as a collectivity.

The strength of the justification may be related to the extent to which the exercise of the right is bound up with responsibilities. There is no *necessary* linkage between rights and responsibilities of

[17] This explains why the rhetoric of rights appears to be most important in circumstances where the right is threatened or contested. See J Donnelly, *Universal Human Rights in Law and Practice* (Cornell University Press, 1989).

[18] See Glendon, (n 4 above) ch 3. See also O O'Neill, Second Reith Lecture, BBC Radio 4, 10 April 2002 and Sir John Laws, n 5 above.

this kind. It is conceptually possible to claim a right, and indeed to have one, without undertaking any corresponding responsibility. Rights to humane treatment are perhaps of this kind: claiming such rights necessarily implies recognizing the rights of others to humane treatment, but does not necessarily imply that you owe any other duties to those you expect to act humanely towards you. The right not to suffer violence, or to be afforded freedom of marriage, demands no payment in return, other than recognition of the same rights in others. However, though there is no necessary linkage, such a linkage may be important. One could characterize the rights claimed by men over their wives of fidelity and domestic subservience through traditional marriage law and custom as being part of a compact under which husbands, in return, undertook to provide lifelong economic support to their wives. And if you think this is no longer acceptable, consider what the position would be if husbands undertook no such reciprocal responsibility. Such linkages, then, may play an important part in the grounds for justification of rights. Even such claims as those for economic well-being and good environmental standards raise issues of the responsibility of the claimant, among others, towards achieving those goals. This is, therefore, another way in which rights-discourse promotes community morality.

Weight

The third element to be considered as a ground for entitlement is whether the claim is strong enough to impose an obligation. This is an evaluative and empirical matter. Since the claim is that social action should be taken, its strength will depend on an evaluation of its importance in the context of resources and other social demands. Disability rights (for access to buildings) may be an example.

In assessing the weight of an interest it is important to remember that the claim is to an end-state which the claimant perceives as an element of his or her well-being. Is it possible to evaluate the importance of various end-states to the well-being of different claimants? The concept of rights in itself cannot generate measures for assessing the relative weights of different interests. But that does not mean that there can be no standard against which rights claims can be measured. We could assess the impact they have on an individual's life.

It is normally more important for someone to attend a job interview than that another should attend a sporting event, so while both may be claimed as rights in some contexts, if only one can be achieved, the former should be chosen. The decision about with whom a child should live is more important to the child than it is for either adult who disputes it because of the potential long-term effects on the child's life. A woman's decision about whom she wishes to marry is more important to her than it is to any of her family members.

Rights in Personal Law

Rights claimed through political action

During much of the nineteenth and twentieth centuries married women struggled to achieve greater social recognition of their interests for rights. This is a classic instance of claims for rights. For example, in the 1880s 150 petitions with 15,000 signatories were presented to Parliament in the attempt by women to achieve equal rights with their husbands with respect to their children. This was not so much about keeping the child after divorce or separation (welfarist nineteenth-century thinking had modified the strong rights of the father in that regard, at least in the case of children of 'tender years') but the 'right' of mothers to make decisions about their children during the marriage. The common law ascribed this power to husbands alone. The effort was defeated because it was believed that there should not be 'duality of control' over the family. The rights-claimants were bought off by the welfarist provision in the Guardianship of Infants Act 1886 which required a court dealing with disputes over a child's upbringing to have regard to the wishes of the mother as well as of the father, 'having regard to the welfare of the infant'.[19] The battle was fought all over again in the 1920s by individual activists (in particular, members of the National Union for Societies for Equal Citizenship: NUSEC), and was again defeated, for the same reason.[20] This time the activists had to be content with

[19] See S Maidment, *Child Custody and Divorce* (Croom Helm, 1984) 126–7.

[20] See S Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2003) ch 16.

an amendment to the 1886 welfarist provision, which now required the court to regard the child's welfare as the 'first and paramount consideration', and that it 'should not take into consideration whether from any other point of view the claim of the father was superior to that of the mother or the claim of the mother was superior to that of the father'.[21] Formal equality was achieved only in 1973.[22] But the price paid by both parents for this welfarist compromise turned out to be a high one, because in 1970 the House of Lords decided that, in determining what was best for the child, the parents' interests were relevant only in so far as they had a bearing on the child's interests: they had no independent weight of their own.[23] This position is probably incompatible with the Human Rights Act 1998.[24]

In the 1970s it was the turn of married men to become seriously concerned about their rights. This was because in January 1971, when the reformed divorce law came into effect,[25] statute embedded the principle, which had only fleetingly appeared in the cases, that the courts' purpose in dealing with financial consequences of divorce was to try, as far as possible and just, to keep the parties in the position in which they would have been if the marriage continued (sometimes called the 'minimal loss' principle).[26] At the same time the courts acquired extensive new powers to order husbands to transfer their capital to their former wives on divorce.[27] This could include their entire interest in the matrimonial home. It seems that, when recommending this power, the Law Commission did not appreciate its significance. Women, who previously would have had to leave the home on divorce, now had the chance of staying in it (usually with the children). Between 1971 and 1981 the total number of divorce petitions increased by 53.6 per cent; but the increase in petitions by wives was by 85.5 per cent, and by husbands

[21] Guardianship of Infants Act 1925, s 1. See Cretney (n 20 above).

[22] Guardianship Act 1973, s 1.

[23] *J v C* [1970] AC 668. See J Eekelaar, 'Families and Children' in C McCrudden and G Chambers (eds), *Individual Rights and the Law in Britain* (The Law Society & Oxford University Press, 1994) ch 10.

[24] See pp 160–1 below.

[25] See pp 19–20 above.

[26] This 'minimal loss' or 'continuing obligation' principle was almost certainly based on a misreading of *Sidney v Sidney* (1865) 4 Sw & Tr 178; see J Eekelaar and M Maclean, *Maintenance after Divorce* (Oxford University Press, 1986) ch 1.

[27] By the Matrimonial Proceedings and Property Act 1970; subsequently consolidated in the Matrimonial Causes Act 1973, s 24.

only 5.5 per cent. It seems as if the new power had the effect of giving wives the same freedom to divorce as men had enjoyed earlier. In 1978 the Campaign for Justice in Divorce was established to enhance the rights of divorced husbands and their new partners. It was partly rewarded by the Matrimonial and Family Proceedings Act 1984, which repealed the 'minimal loss' principle and encouraged courts to make 'clean break' orders which would eliminate, or at least greatly reduce, the period of time for which a divorced husband could be required to support his former wife. However, the campaign had concentrated on a largely illusory problem, for very few former wives were being 'kept' by their divorced husbands. Where payments were made at all, they were usually too small to provide a living, and would either simply reduce the woman's entitlement to social security, or make it worthwhile for her to take low-paid employment.[28] In any case, payments were usually made only where the woman was looking after a child, and the former husband's liability to make these payments was later transformed into a statutory child support obligation. And the courts' powers to make capital transfers remained.

Later, the focus of male campaigners shifted to a perceived failure of the courts to sustain contact between fathers and their children after parental separation. The movement had started as far back at 1974 when Families Needs Fathers was established, but achieved high political profile later through publicity stunts supported by Fathers4Justice. Although both these bodies expressed a commitment to the welfare of the child, they (especially the latter) heavily employed the rhetoric of rights. The articulation of a sectional interest rises to a howl from Bob Geldof: 'A huge emptiness would well in my stomach, a deep loathing of those who would deign to tell me they would ALLOW me ACCESS to my children—those I loved above all, those I created, those who gave meaning to everything I did, those that were the very best of us two and the absolute physical manifestation of our once blinding love. Who the fuck are they that they should ALLOW anything?'[29] Geldof, like others claiming these

[28] n 26 above.

[29] B Geldof, 'The Real Love that Dare not Speak its Name' in A Bainham, B Lindley, M Richards and L Trinder (eds), *Children and Their Families: Contact, Rights and Welfare* (Hart Publishing, 2003) 175, emphases in original.

rights, insisted that there should be a presumption that children should share their time equally between separated parents. This is clearly a claim about justice between the parents, similar to one which was emerging regarding the distribution of property between divorced partners. It cannot be viewed as a presumptive evaluation of what is in the child's interests, or even what the child wants. Children's interests involve much wider matters than the time they spend with their parents.[30]

Rights developed through judicial lawmaking

People do not only claim rights through the political process. They also do so through litigation. In the 1950s and 1960s married women found a champion in Lord Denning, who asserted, perhaps created, a right which allowed a deserted wife to remain in occupation of the matrimonial home, even if it belonged to her husband, and even if he had disposed of his interest to a third party.[31] Lord Denning also promoted the view that a wife could acquire a share of her husband's property through looking after the home, so that, if the couple separated, she should be allocated the share she had acquired in that way.[32] This last doctrine would, of course, have effectively anticipated the powers the courts eventually acquired by statute only in 1971 to order the transfer of property between people who divorce, and it is not surprising that the House of Lords rejected it in 1970.[33] After 1971 the courts operated within the framework of the Matrimonial Causes Act (consolidated in 1973). In the Court of Appeal, Lord Justice Ormrod favoured a strongly welfarist approach. He was unwilling to hold wives to agreements they had reached during negotiations,[34] and felt that it should always be possible for them to return to court after an order was made to ask the court to vary an agreed order if circumstances changed.[35] Later courts

[30] See further pp 126–7 above, concerning child contact, and p 147–8 below concerning property.

[31] *Bendall v McWhirter* [1952] 2 QB 466.

[32] *Rimmer v Rimmer* [1953] 1 QB 63.

[33] *Pettitt v Pettitt* [1970] AC 777.

[34] *Camm v Camm* (1982) 4 FLR 577; other judges took a more robust line: *Edgar v Edgar* [1980] 3 All ER 887.

[35] *Dipper v Dipper* [1981] Fam 31. This was made much more difficult after the Matrimonial and Family Proceedings Act 1984.

were stricter in holding parties to their negotiated agreements,[36] and the 1984 reforms, mentioned above, allowed courts to make it difficult for wives to keep extending orders beyond their initial duration. But most significantly, Lord Justice Ormrod 'rephrased' the statutory duty on the courts to take into consideration (among other things) the parties' 'financial needs' with the expression 'reasonable requirements', believing that this allowed the courts to order the husband to meet a wider range of expenses.[37]

As it turned out, this invitation to courts to evaluate a former wife's 'reasonable requirements', made at the culmination of the welfarist era,[38] and intended to lead to more generous orders for wives, in fact opened the way for courts to make wide-ranging judgments about the life-style which a divorced wife could reasonably expect to lead, and to assess her moral desert in the light of her activities during marriage, including such matters as entertaining and cooking skills.[39] There was an uncomfortable air of paternalism about a male-dominated judiciary deciding how wives should, or should not, be rewarded at the termination of their marriages, particularly as the courts maintained their view that a married person should not be allocated any part of the business assets of their partner if they had not worked in the business or contributed directly to it. The reaction came in 2000, when, in *White v White*,[40] the House of Lords repudiated Lord Justice Ormrod's gloss on the statutory text. The wife's needs which the courts were to take into account in deciding how much to order the husband to pay were to be narrowly understood. Once these were dealt with, the issue became one of deciding whether one partner had 'earned' a share in the assets of the other. If they had, then they would be entitled to it, even if it gave them more than their 'reasonable requirements' demanded. So an elderly person with a limited life expectancy after a long marriage could be awarded far more than they could be expected to need to keep them comfortable for the remainder of their life. It was like an entitlement to property: what they did with it was their business.

[36] *Xydias v Xydias* [1999] 2 All ER 386, building on *Edgar v Edgar* [1980] 3 All ER 887.

[37] *O'Donnell v O'Donnell* [1976] Fam 83.

[38] See pp 12–13 above.

[39] *F v F* [1995] 2 FLR 45; *A v A* [1998] 2 FLR 180.

[40] [2001] 1 AC 596.

This moves from the weaker sense of having a right under welfarism to a stronger form. For the right under welfarism is only to what another deems that you need, and depends on whether you have conducted yourself properly. The new kind of right reflects the claim people make for just reward for what they have earned.

The new approach is still subject to the seemingly welfarist requirement to ensure that the children are properly housed. Also, the 'earned share' runs alongside a principle of compensation, whereby a former spouse is, or should be, entitled to redress from the other for financial disadvantages suffered as a result of the breakdown of the marriage. The concurrence of these two principles was accepted by the House of Lords in *Miller v Miller: McFarlane v McFarlane*.[41] A third principle, the relief of need, was also recognized, but since this can be subsumed within the compensation principle (that is, compensation includes meeting needs generated by the breakdown, but can go beyond that[42]), the approach to financial provision on divorce now effectively rests on those twin principles, earned share and compensation, subject to the interests of the children.

Of course the principles require further elaboration. In *White v White*[43] Lord Nicholls had stressed that, in deciding what had been earned, no distinction should be drawn between contributions which each partner made in their respective spheres. So a wife could be held to have earned a share in the husband's business assets simply by looking after the home and family. The problem now was to know how such a domestic contribution was to be valued. This is relatively easy for financial contributions, or paid work, but it is more difficult for contributions to the home. One solution could be to discover what it would have cost to employ a housekeeper or child carer to do the work which the person making the domestic contributions actually did. There is some attraction in this, but this could involve complex hypothetical calculations, especially over a long time span. It therefore seems simpler to assume that the

[41] [2006] 1 FLR 1186. The House does not use the expression 'earned share', but 'sharing' (Lord Nicholls), or 'the sharing of the fruits of the matrimonial partnership' (Baroness Hale).

[42] [2006] 1 FLR 1186, at 140 (Baroness Hale).

[43] [2001] 1 AC 596.

contribution of each should be deemed to be equal, so that no matter how large a financial contribution one partner made, the 'domestic' contribution of the other will always be considered equal, at least in the absence of exceptional circumstances.[44] The trouble is that this breaks down when one partner alone has made a significant financial contribution during the course of a short marriage. To treat domestic contributions which lasted a very short time as equivalent to a large financial contribution over the same period appears to overvalue them. One way to resolve this is to build into the calculation of the share which is earned by non-financial contributions a factor which represents the duration of the relationship. It must be remembered that the purpose is not to reach some objective assessment of the value of such contributions, but a view of the extent of each partner's contributions *relative to the other*. This should therefore be influenced by the origins of the contributions (was it brought into the marriage by one of them, or was it an inheritance?) and their quantity. The relative contribution which one year's housekeeping makes to assets constituted entirely of a large inheritance to which the other succeeded seems smaller than five years' housekeeping would amount to. But if the inheritance was very modest, the one year's housekeeping seems to be a relatively greater contribution than it would in the case of the larger inheritance. For this reason it can be argued that, in the case of non-financial contributions, the period of time over which they have been made should be a relevant factor in deciding the extent of the share in the totality of assets which such contributions should have earned. This can be called the 'duration' principle.

It seems that this is how the courts should approach the matter in the light of *Miller v Miller: McFarlane v McFarlane*.[45] Baroness Hale said that property that was generated by the parties' joint efforts, or were 'family' assets, should always be divided equally, irrespective of the duration of the marriage, but that other types of property, with respect to which 'it simply cannot be demonstrated that the domestic contribution, important though it has been to the welfare and happiness of the family as a whole, has contributed to their acquisition' should be subject to the duration

[44] *Lambert v Lambert* [2003] 1 FLR 139. [45] n 41 above.

principle. Unfortunately, Baroness Hale suggested that the earned share principle could apply to entitle a spouse to a share in the future earnings of the other. This would be a mistake. It is inappropriate for someone to be entitled to a share in the fruits of another's talents and labours into the indefinite future, regardless of their own circumstances. It is preferable to regard any claim against a former partner's earned income as a claim for compensation. The House of Lords was, however, not clear how the compensation principle should apply. Apart from recovering specific expenditures (such as payments towards the other's education) the compensable loss should be the disparity in standard of living (usually measured through income levels) after the separation, and not, as some passages in the opinion suggest, the speculative loss of career opportunity caused by the marriage.[46]

The movement away from distributing assets on the basis of 'reasonable requirements' to entitlement for an earned share marked a significant shift in the ground upon which legal intervention into these personal issues can claim legitimacy. When courts were assessing reasonable requirements, they were asserting a paternalist function consistent with a welfarist ethos. The new basis seeks legitimacy in the general principle of justice that assets earned through a person's efforts should benefit that person. This principle was adopted by the American Law Institute[47] at roughly the same time as *White v White*[48] was decided. The American Law Institute scheme can be compared to the drawing up of a balance sheet at the end of a relationship, where an attempt is made to match what each party has put into the relationship (in terms of assets and effort) with what each takes out of it. This requires deciding what types of contribution are entered on the balance sheet. Pre-marital and inheritance property is usually kept off the balance sheet (but this

[46] See IM Ellman, 'Do Americans Play Football?' (2005) 19 *International Journal of Law, Policy and the Family* 257. J Eekelaar, 'Property and Financial Settlement on Divorce—Sharing and Compensation,' (2006) 36 *Family Law* (September).

[47] See pp 50–2 above. J Eekelaar, 'Empowerment and Responsibility: The Balance Sheet Approach in the Principles and English Law' in RF Wilson (ed), *Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution* (Cambridge University Press, 2006).

[48] n 40 above.

depends on circumstances, especially the length of the marriage), as is the extent of the parties' earning capacity. If there is too great a gap between what a party put in and what it can take out, the resources of the other can be required to redress the balance. Efforts towards supporting joint living and accumulating assets will therefore usually be equally rewarded, especially if they persisted over a period of years. This approach should in principle also give greater scope for the parties to agree to contract out of these rights, for someone should be able to decide what value to put on their efforts. But English law is more reluctant to allow such freedom, perhaps because the courts have not yet fully moved away from the welfarist approach, and are unlikely to do so where children are concerned.

Human rights

A claim that a right is a human right is best understood in the same terms as explained earlier for all rights-claims, except that the social base is the whole of humanity: that is, the claimant claims to be entitled by virtue of his or her identification with the human race. Such an approach avoids unsatisfactory attempts to define, a priori, certain features as being essential to human well-being.[49] This is not just a theoretical matter, for if anyone claims to be owed an end-state because they are human, then they must believe that all human beings have the same entitlement as they are claiming. But that establishes human rights only in the weak sense. They become rights in the strong sense to the extent that they are claimed also by others, and the claims are recognized.

Such recognition should lead to practical action, as is often observed in the works of international organizations, and, legally, through international human rights instruments. Of course, not all international instruments purport to deal with rights which it is believed everyone would claim, but are specific to certain nations: for example, the European Council Regulation concerning recognition and enforcement of child custody decisions in the European

[49] See Eekelaar (n 12 above).

Union.[50] Such instruments (usually) bind governments to take certain actions. But they could go further and disable governments from acting in certain ways within their own jurisdiction, or require courts to disapply legislation which conflicts with proclaimed human rights. This is not a *necessary* feature of human rights, however, and nor is it the only basis on which governments might be so disabled or legislation disapplied. These are issues about constitutional governance, not human rights. In the United Kingdom, legislation cannot be disapplied even if it conflicts with human rights standards, but the courts can issue a declaration that it is incompatible with such standards as are manifested in the Human Rights Act 1998, which incorporated most of the provisions of the European Convention on Human Rights and Fundamental Freedoms into United Kingdom law as from October 2000. The courts must also interpret legislation where possible to make it compatible with those standards. The proclamations of the Convention most relevant to personal law are that:

(1) no one shall be subject to torture or to inhuman or degrading treatment or punishment (Article 3);

(2) everyone has the right to respect for his private and family life, his home and his correspondence (Article 8);

(3) men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right (Article 12);

(4) these rights shall be enjoyed without discrimination on any ground such as sex (which includes sexual orientation[51]), race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Article 14).

Although phrased in terms of a right, the second of these proclamations can perhaps more easily be seen as a statement of background value, from which concrete rights can be extracted as a consequence of a judgment involving application of that value in the context

[50] Council Regulation (EC) No 2201/2003, known as Brussels IIA.

[51] *Da Silva Mouta v Portugal* (2001) 31 EHRR 47; *Karner v Austria* (2004) 38 EHRR 24.

of other values which are set out in Article 8(2), namely national security, public safety or national economic well-being, prevention of disorder or crime, protection of health or morals, or the protection of the rights and freedoms of others. They all involve claims which people actually make or can be assumed to wish to make. These claims are mediated through the judiciary. We have already seen that the courts have played an important role in developing 'rights' in personal law, so it should not be too alarming that they do so when applying human rights standards. The law and government action must be held up to the human rights standards and adapted to comply with them. No area of law or government action is immune. In personal law, the House of Lords, in *Ghaidan v Godin-Mendoza,*[52] interpreted the phrase 'living together as husband and wife' in legislation concerning the succession of protected tenancies as applying to a same-sex couple because not to have done so would have been to have discriminated against the claimant with respect to his 'home' on the ground solely of sexual orientation.

This has the potential of bringing about significant re-structuring of some aspects of personal law. If an individual's private or family life, or their home, is in issue, the court will have to give that interest proper weight in applying the law. It seems certain that the interpretation given by the House of Lords to the duty to give paramount consideration to the best interests of the child when making a decision about the child's upbringing in *J v C*[53] cannot be followed, because it allowed weight to be given to the parents' interests only to the extent that they had a bearing on those of the child. But now the standards of Article 8 will have to be applied to the interests of all parties. How this might be done in cases involving children is considered later.

The possibility of making a finding of incompatibility seems to give the judges even greater power. Some commentators, notably Jeremy Waldron, have objected to giving judges powers which seem to remove or diminish the democratic rights of ordinary citizens to participate in the lawmaking process.[54] This suggests that there

[52] [2004] 2 AC 557. [53] [1970] AC 668.
[54] J Waldron, *Law and Disagreement* (1999) chs 10–13.

is a conflict between the interests of individual citizens, represented through Parliament, and those of members of the sectional interests whose claims are articulated by the judges. But what usually occurs is an iterative process, whereby the courts indicate in general terms what needs to be done if the rights of the claimants are to be satisfied, and Parliament, through the democratic process, brings the law into line with human rights standards. Thus the law on corporal punishment of children was changed because the earlier law did not protect children properly against 'inhuman or degrading treatment or punishment',[55] and a statutory scheme was introduced allowing transsexuals to be recognized in their new gender because the earlier law, denying such recognition, failed to give proper respect to their 'private and family life' and denied them the right to marry.[56] A similar process occurred in Canada after the Canadian provincial courts held that the restriction of marriage to opposite-sex couples contravened section 15(1) of the Canadian Charter of Rights and Freedoms, which states that 'every individual is equal before the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or physical disability'.[57] The Canadian government decided not to appeal against such a finding by the Ontario Court of Appeal, drafted legislation recognizing same-sex marriage, and referred the draft legislation to the Supreme Court of Canada, asking both whether this and the opposite-sex requirement in the existing law were consistent with the Charter. The Supreme Court[58] held that the draft legislation was consistent with it, but refused to answer the question about the opposite-sex requirement on the ground that the issue had become redundant. The Civil Marriage Act 2005, redefining marriage as being between 'two persons'

[55] *A v United Kingdom* (1999) 27 EHRR 611; see Children Act 2004, s 58.

[56] *Bellinger v Bellinger* [2003] 2 AC 487; see the Gender Recognition Act 2004.

[57] *EGALE Canada Inc. v Canada (Attorney General)* (2003) 225 DLR (4th) 472 (BC); *Halpern v Canada (Attorney General)* (2003) 65 O.R. (3d) 161. The full story is told in WK Wright, 'The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales' (2006) 20 *International Journal of Law, Policy and the Family* 249.

[58] *Reference re Same-Sex Marriage* [2004] SCC 79.

(irrespective of gender), was passed by a free vote in the Canadian House of Commons. In all these cases the judicial interpretation of the human rights standards turned out to be consistent with the law enacted by democratically elected representatives of the population.

The position is very different in the United States. In *Goodridge v Department of Health*[59] the Supreme Judicial Court of Massachusetts held that denial of marriage to same-sex couples infringed Article 1 of that state's Constitution, which requires that '[E]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.' The court decided that there was no rational basis for confining marriage to opposite-sex couples. Monte Stewart has argued that, by holding that there are no good reasons to keep marriage heterosexual, the courts have chosen one theory of marriage (that its purpose is to promote a close personal relationship) over a 'deep logic' of marriage (an institutional means of providing a normative link between sexual intercourse and raising children).[60] He points to an apparent inconsistency in the judgments which simultaneously recognize the significance of the change to the institution of marriage which they bring about, while asserting that heterosexual marriage will remain unaffected. The judiciary, on this argument, exceeded their proper role in choosing between these theories. As happened when a similar ruling was threatened in Hawaii in 1993,[61] the legislative response in the United States has seen a series of constitutional attempts to embed man-woman marriage in state constitutions, and the passing of a federal statute defining marriage for federal purposes as being only between a man and a woman and authorizing states not to recognize same-sex marriages contracted in other states.[62] The United Kingdom may have avoided such controversies by establishing civil partnerships exclusively for same-sex couples.[63] The legal consequences of entering such partnerships are almost identical to marrying, so a claim that this applies the standards of Articles 8 and 12 in a discriminatory way is weakened.

[59] 440 Mass 309; 798 NE 2d 941 (2003).

[60] M Stewart, 'Judicial Redefinition of Marriage' (2004) 21 *Canadian Journal of Family Law* 11.

[61] *Baehr v Lewin* 74 Hawaii 530; 852 P 2d 44 (1993).

[62] Defense of Marriage Act 1996.

[63] Civil Partnership Act 2004.

However, it may still be argued that the historic nature of marriage confers more favourable social status than civil partnership.[64] It is also true that civil partnerships cannot be established in a religious ceremony, whereas marriage can be, and (unlike a husband) a civil partner does not become the legal parent of a child conceived by her partner by artificial means. If the United Kingdom courts were to be asked whether the Civil Partnership Act 2004 fell short of human rights standards, they would be entering the same territory as the Canadian and United States courts.

The case of gay marriage may look different from other issues over rights in personal law because there may seem to be a sharper clash between the rights which courts say people have and what governments or legislatures wish to do. The reaction to the Massachusetts decision could demonstrate a conflict such as Waldron feared between democratic rights of citizens and the rights which the judges believe gay people have. It might be said that, even in the United Kingdom, the process by which the law is amended after a declaration of incompatibility does not truly represent Parliament's opinion because it is acting under threat of censure in, or expulsion from, the Council of Europe. Leaving aside the fact that majority parties do not always reflect the majority of voters, we might wonder whether it is really the case that legislators elected through a democratic process always use their powers, or refrain from using them, in the way intended or expected by the electors. So can we say that all the courts are doing is holding the elected representatives to standards to which they have already signed up, as the people's representatives, and that they are therefore enforcing the people's will? Waldron thinks not, because even if we could accept a 'pre-commitment' of this kind as having force, its application in later, unforeseen, circumstances, is likely to be controversial, and giving the power to settle the controversy to judges rather than to the representatives who made the pre-commitment moves away from democratic towards 'aristocratic' government.[65] It would, he concludes, be more appropriate for the issue to be resolved on the basis of equal participation by all members of the community.[66] The argument could be put even more strongly. It might be said that to hold a community to the

[64] But see p 89 above. [65] Waldron (n 54 above) 265. [66] Ibid 297.

standards set by its predecessors, even if the standards are interpreted through a respected elite, is to subject the present generation to the will of past generations in precisely the way rejected by open societies. After all, is this not how theocracies operate?

The answer to this powerful objection also addresses Waldron's worries. It is that if the standards of constitutional instruments are to bind governments and legislatures through constitutional protections or otherwise, they must be consistent with human rights requirements. That means that they must not only be such that the values they assert are seen as extendable to any human, but also that their application to anyone in the form of rights is contingent on that person's willing participation. A theocratic constitution which imposes religious requirements on people for certain purposes may perceive access to the religion as a right everyone has, but most others will claim only the right to practice that religion *or not to do so*. They would not claim observance of the religion as a right they must be able to exercise as a condition to achieve other ends. By contrast, the value of respect for family and private life satisfies not only the universality test, but also the requirement of acceptance (for it will only be applied as a right where people claim it as a right).

But this still does not meet Waldron's concern that *applications* of constitutionally set standards will be controversial, and that such controversies should not be settled by elite courts. But the alternatives are unattractive. Most cases in which claims are made that human rights standards give rise to individual rights will indeed be controversial. But can one expect all of them to be determined by the legislature? (And would the legislature necessarily be a good representative of 'the people'?). Should the government always have a right of appeal to the people's representatives if they lose a case? Remember that in parliamentary democracies governments are often drawn from the majority of the people's representatives. It is hard to see that the questions whether governments are under a duty to ensure that where children are removed from their parents for their own safety, serious efforts must be made to try to reunite the child and its family before permanent separation is made;[67] or whether governments must provide reasonable means by which

[67] *K & T v Finland* (2003) 36 EHRR 18.

contact between children and a parent who lives outside the home should be facilitated[68] should be decided by the legislators, even if the government opposed the rulings. It is not just a question of practicality. If the issues reverted to the legislators, a profoundly important feature of these values would be lost. That is that, while emerging from a social culture, they are also partially autonomous from it, in the same way as law itself, while emerging from a political process, is relatively autonomous from politics. They possess a sufficient degree of 'externality' for them to be used as a critique for a culture and its laws.[69] This is of great importance when considering cultural rights.[70] The mechanism within which this takes place must therefore also enjoy some autonomy, which independent and uncorrupt courts have the best chance of providing. Citizens are not totally excluded from the forensic process because legal arguments of this kind are not conducted in a vacuum, free of influence from opinions expressed outside the courtroom. So even if the United States and Canadian courts may be criticized for the way they interpreted and applied the relevant values in these cases, to criticize them for engaging in the process is misplaced. For the dual claim people make to popular self-determination coupled with entitlement to laws which comply with explicit standards would have to be abandoned if such a process did not exist. And it would be a great loss, because we should have learned to be very fearful of the unrestricted exercise of power in the name of popular self-determination.

Children's Rights

Children have three types of interest: 'basic', 'developmental', and 'autonomy'.[71] The first two cover satisfaction of the necessary

[68] *Hansen v Turkey* (2004) 39 EHRR 18. *Re D (Intractable Contact Dispute: Publicity)* [2004] 1 FLR 1195.

[69] On 'externality' see J Estler, *Ulysses and the Sirens: Studies in Rationality and Non-Rationality* (Cambridge University Press, 1984), discussed in Waldron (n 54 above) ch 12.

[70] See pp 162–73 below.

[71] J Eekelaar, 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 161.

means to sustain healthy life, including psychological well-being, and to develop capacities. They can be considered as a sufficient basis for rights in the strong sense because even very young children demonstrate biological and psychological drives which identify many end-states as being in their interests, and these are maintained throughout a child's development. They are socially recognized in many ways, notably in the provisions of the UN Convention on the Rights of the Child. But an 'autonomy' interest requires further elucidation. Joseph Raz's statements that 'significantly autonomous agents are part creators of their own moral world' and that 'people's well-being is promoted by having an autonomous life'[72] are judgments of value. A society can be imagined whose members consider that autonomous self-determination by children, and indeed by the succeeding adult generation, is deemed to be in no one's interests. But such a society would not be an open society. It is a precondition for an open society that the exercise of autonomy by an agent is assumed to be in that agent's interests, and it is a precondition of believing that people have rights to hold that they have a right to achieve competence and articulate their own self-interest. It then becomes possible to regard an actual claim by such an agent to entitlement to exercise that autonomy as a claim to a right in the strong sense.

In this context, the 'developmental' interest of children therefore refers not only to physical and intellectual capacities, but is also a preparation for the exercise of autonomy. This is hardly a novel proposition. It was advocated over 20 years ago by Joel Feinberg[73] and Michael Freeman.[74] I reformulated it about ten years later with the label 'self-determinism'.[75] The duty of a child's carers is 'to establish the most propitious environment for the child further to develop the personality growing within him or her and in this way to fashion the

[72] J Raz, *The Morality of Freedom* (Oxford University Press, 1986) 154, 191.

[73] J Feinberg, 'The Nature and Value of Rights' in J Feinberg (ed), *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton UP, 1980).

[74] MDA Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983) 57.

[75] J Eekelaar, 'The Interests of the Child and the Child's Wishes: the Role of Dynamic Self-Determinism' in P Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford University Press, 1994) 54. This is now said to be an 'emerging' new 'construct' of childhood: Felicity Kaganas and A Diduck, 'Changing Images of Post-Separation Children' (2004) 67 *Modern Law Review* 959.

outcome'. I have described the introduction of a child into the process of deciding the outcomes which will affect him or her as 'dynamic self-determinism': it is dynamic because it allows for revision of outcomes in accordance with the child's developing personality, and involves self-determination because of the scope given to the child to determine the outcome. Its operation involves a range of complex practical factors. These include exposure (or at least openness) of the child to a range of influences to enhance the scope of choice, and assessments of the child's competence to bring about results, especially if these are irreversible. The major constraints on children's competence are insufficient comprehension of what Raz calls 'social forms' (the workings of the world), instability in the child's appreciation of its own (at least medium-term) life-goals, and the presence of excessive or improper pressure.[76] Self-determination under a mistake is a cruel illusion. This possibility permits certain restraints on children's freedom to be imposed in order to further the basic and developmental interests.[77] Other restraints could be imposed for social convenience, as where general age restrictions are placed on attainment of legal competence because it would be unreasonable to expect individual assessments of actual competence in each case.

Where such constraints are satisfied, and a child claims an end-state in circumstances which satisfy the other conditions necessary for a claim of right, the child can be said to claim a right. The adult world has, however, been reluctant to recognize, or act on, such claims. In *Gillick v West Norfolk and Wisbech Area Health Authority,*[78] Lord Scarman was willing to allow such a child the right to receive medical treatment without the consent of its parent. But courts have been unwilling to extend this if the decision would be harmful to the child (for example, by refusing treatment). One can understand this reluctance. How would we know whether a young person whose decision led to irreversible damage to health or even death would not have later regretted it? But we could say that of anyone. Perhaps we

[76] J Eekelaar, 'Children's Rights: From Battle Cry to Working Principle' in *Liber Amicorum Marie-Thérèse Meulders-Klein* (Bruyland, 1998) 206.

[77] But even here caution must be exercised lest the adult world misreads the child's expression of genuinely innate and productive inclinations as immature obstruction.

[78] [1986] AC 112. See also *R (on the application of Axon) v Secretary of State for Health* [2006] 1 FCR 175.

think young people are never competent to make decisions of such gravity. But when do they become competent to do so? In whatever way this issue is resolved, it is clear that not to allow a child who meets the constraints on competence to make such a decision is to withhold from the child a right he or she is claiming, for if the right claimed is not socially recognized, the child does not have it.

The reason why rights are withheld in such cases is that to allow their exercise is not thought to be in the child's best interests. Section 1 of the Children Act 1989 (perpetuating a principle which emerged during the nineteenth century[79]) requires that when courts make decisions concerning the upbringing of children, the 'child's welfare shall be the court's paramount consideration'. If a court considers that a competent child's decision contravenes its assessment of the child's welfare, the section therefore requires the court to disregard that decision. In fact, the section could be applied in such a way as to render the child's viewpoint always irrelevant. There is much evidence that this is exactly how decisions regarding children have often been made, as when thousands of children were sent to the colonies in order to cut them off from the morally corrupting influence which it was believed they received from their families and home environment.[80] A contemporary example appears in the Court of Appeal's decision to return a ten-year-old Zulu boy who had been brought to England when he was six to his parents in Soweto, South Africa, despite his vehement opposition to the move. The court thought it was his 'right' to be brought up in Zulu culture.[81] Although the language of children's rights was employed in these instances, such rights, without any evidence of support by the children themselves, could only be considered rights in the weakest sense.

But how can children of limited competence have rights in a strong sense when their futures are decided by judgments about their welfare? The answer is to regard children always as potential right holders, in the strong sense. This means that attention will *always* need to be directed towards ascertaining the child's viewpoint, and

[79] See p 11 above.

[80] See J Eekelaar, ''The Chief Glory': the export of children from the United Kingdom' in N Lowe and G Douglas (eds), *Families Across Frontiers* (Nijhoff, 1996) ch 36.

[81] *M v M* [1996] 2 FLR 441. The child was returned to England after six months.

assessing it against the constraints of competence mentioned earlier. As I have written before: 'No society will have begun to perceive its children as right holders until adults' attitudes and social structures are seriously adjusted towards making it possible for children to express views, and towards addressing them with respect.'[82] If the child is not deemed to be presently competent, it will be necessary to consider whether it could be placed in an environment where it might become competent and affect the outcome later, even if this occurs after entering adulthood. So the Zulu child could have been brought up in England but kept in communication with his parents until such time as visits would be possible and he would be in a position to decide where his future lay. This is a working principle for those who take decisions for children: it operates within a world of practicality and, above all, of the interests and rights of others.

It can be seen that the 'welfare' or 'best interests' principle could be applied inconsistently with the working principle just outlined. Indeed, it has often been applied in that way, as the case of the Zulu child illustrates. For, if the decision-maker is convinced about what is best for the child, why should the child's own views matter? This is one reason why concerns have recently been expressed about the welfare principle. The principle (like welfarism generally) has been very beneficial for children. It developed a discourse which focused on children's interests, making it possible to move away from treating children as instruments of adults' interests. But, important though it was, it only made the move possible; it did not ensure it. For treating children's interests independently did not necessarily mean considering the child's *viewpoint*. It might mean only defining the child's interests in such a way as to coincide with those of the adults: such as that it was better for a child to be with its father rather than its mother if they separated (recall the statement in *re Agar Ellis* in 1883: 'when by birth a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interests of the particular infant, that the court should not, except in very extreme cases, interfere with the discretion of the

[82] J Eekelaar, 'The Importance of Thinking that Children have Rights' in P Alston, S Parker and J Seymour (eds), *Children, Rights and the Law* (Clarendon Press, 1992) 228.

father but leave him the responsibility of exercising the power which nature has given him by birth of the child'[83]), or, more recently, that it is best for children to spend an equivalent amount of time with each of their separated parents as they did before their separation.[84] Robert van Krieken goes as far as to say that a central characteristic of the welfare principle has been to operate as a 'code' or 'proxy' for 'other' concerns.[85]

So the welfare principle can be said to lack transparency in its application. It could also be said to be unfair if it is applied in such a way that no one's interests except the child's are given any weight.[86] Although the courts have often seemed to apply it in that way, this would seem to ignore the interests of other relevant actors whose private and family life is protected through the Human Rights Act 1998. A parent's relationship with a child is part of his or her private and family life. Its value must therefore be reflected in the decision. Likewise, a child's bonds with a parent, or any caregiver, and a settled home environment, are also part of its private and family life (and indeed an element of the psychological component of its basic and developmental interests). It has therefore been suggested that, where all these interests are at stake, the way forward should be through a 'parallel analysis', treating them side by side, and deciding whether infringement of any one by another could be justified under Article 8(2) as being 'necessary' in a democratic society.[87] In *re S (A Child) (Identification: Restrictions on Publication)*[88] the House of Lords decided that a child's protected right under Article 8 ranked equally alongside the Article 10 right to freedom of expression. The House held that, given the indirect nature of the impact on the child

[83] *Re Agar-Ellis* (1883) 24 ChD 317, 334 (Cotton LJ).

[84] See American Law Institute, *Principles of the Law of Family Dissolution,* s 2.08. See also ES Scott, 'Pluralism, Parental Preferences and Child Custody', 80 *California L Rev* 615 (1992); IM Ellman, 'Why Making Family Law is Hard' 35 *Arizona St LJ* 699 (2003).

[85] R van Krieken, 'The 'Best Interests of the Child' and Parental Separation: on the 'Civilizing of Parents'' (2005) 68 *Modern Law Review* 25.

[86] H Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267, 303.

[87] S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 *Oxford Journal of Legal Studies* 453.

[88] [2005] 1 AC 593.

of the publication in question, freedom of expression in this case outweighed the child's rights in what Lord Steyn called the 'ultimate balancing test'. This is acceptable because one cannot give children's interests primacy in all public activities. For example, it may well be that a child's welfare will be harmed by sending its parents to prison for criminal offences. But we cannot compromise the public interest on that account (although we should no doubt do everything we can to reduce the adverse impact on the child). However, if the competing rights protected in Article 8 (to respect for private and family life) are of similar weight, there is good reason to rank the child's interests above those of the adults. This is because children are the innocent victims of the way the adults have conducted their lives.[89] Therefore the need to weigh the respective interests according to the principle of proportionality must result in the children's interests being privileged, or prioritized, over the others.[90]

Interpreted in this way, the welfare principle can properly be described as 'paramount' without unfairly disregarding the protected interests of other participants. But adopting a 'rights' perspective in its application has the following features. First, it insists that efforts must be made to adopt the child's perspective in the way recommended by the idea of self-determinism explained earlier. Only by doing this can there be any hope of separating out the child's interests from the 'other concerns' for which the principle has so often been a 'code' or 'proxy'.[91] This does not mean that children should always take part in court proceedings, or even be interviewed by the judge, although this has been suggested by the European Court of Human Rights.[92] This might be more suitable for the more inquisitorial procedure used in continental Europe than for English procedure. Whatever the context, it is difficult to make court procedures child-friendly, and great care has to be taken about the context in which children's views are elicited and conveyed. They may be better reported through a trained court reporter than expressed directly to the court, although if a child takes the initiative

[89] See pp 115–16 above.

[90] See J Eekelaar, 'Deciding for Children' (2005) 7 *Australian Journal of Professional and Applied Ethics* 66.

[91] Van Krieken, (n 85 above).

[92] *Sahin v Germany* (2003) 36 EHRR 43.

and clearly desires to be heard in court, to deny this[93] could be a breach of procedural fairness.

The second feature of adopting a 'rights' approach in applying the welfare principle is that its inclusivity[94] allows the protected interests of other participants to be explicitly acknowledged. If the only issue for discussion in court is the child's welfare, disputing parties will be forced to present their own interests as if they were also the child's interests. This might make them less willing to modify their position, or to accept its rejection, because they would seem to be acting contrary to their view of the child's interests.[95] If their interests were detached from those of the children, they might accept compromise or defeat as a virtuous sacrifice in favour of their children.[96] But it is equally important that it is properly understood what the interests of the other participants are, the limits of the judicial process in adjudicating on personal behaviour,[97] and that the interests of the children should be given the greater weight. The adults must be aware that their interests should give way to those of the children where to do otherwise risks harming them. This links with the third element of this approach. The decision should not contemplate children undergoing likely clear harm (such as disruption of relationships or instability in their living environment) for the sake of speculative future benefits.

Personal Law and Cultural Rights

If you are an Anglican, a Jew, or a Quaker, and you marry in accordance with the requirements of your faith, the marriage will be recognized by English law. But if you are of any other faith, your religious marriage will not be recognized unless specified preliminaries have occurred, and the marriage has taken place in a registered building, conducted by an authorized person and contains recitation

[93] As occurred in *re N* [2003] 1 FLR 652.

[94] See J Eekelaar, (n 90 above).

[95] For evidence of this, see F Kaganas and S Day Sclater, 'Contact Disputes: Narrative Constructions of "Good" Parents' (2004) 12 *Feminist Studies* 1.

[96] The point is made in J Eekelaar, 'Beyond the Welfare Principle' (2002) 14 *Child and Family Law Quarterly* 237, 248.

[97] See p 126 above.

of a specific form of words.[98] Anyone may marry according to an entirely civil procedure (with no religious element),[99] and afterwards take part in a religious ceremony of any kind. These distinctions seem to allow people to enjoy the right to marry proclaimed in Article 12 of the European Convention on Human Rights in a discriminatory way, contrary to Article 14.[100] Conversely, once a marriage is legally constituted, its legal consequences will be determined without any distinction. Any rules or practices governing the relationships between the parties, or the parties and their children, which derive solely from their religion, will not be legally recognized. This includes any system of divorce.

Some of this might seem uncontroversial. Could English law really apply its marriage law to a marriage where the husband has more than one wife? If it is thought it could not, then it will not recognize the second marriage of a polygamous marriage, even if it recognizes the first.[101] This will not breach the European Convention.[102] Nevertheless, it might be said, this should not prevent the law accepting as marriages those which are accepted as marriages within other faith communities, as it does for Anglicans, Quakers, and Jews; and if it accepts such marriages, should not those communities be entitled to lay down the consequences of entering into those marriages, or at least many of them? After all, many countries, including India, Pakistan, and many in Africa, operate a pluralistic system which allows adherents to recognized faith or ethnic groups to follow the tenets of their own faith or community in these matters. Even Iran, whose legal system follows Islamic law, allows some religious communities to use their religious law in private matters.[103]

[98] *A-M v A-M: (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6 (Islamic ceremony); *Gandhi v Patel* [2002] 1 FLR 603 (Hindu ceremony).

[99] Marriage Act 1949; Marriage Act 1994.

[100] See S Poulter, *Ethnicity, Law and Human Rights: the English Experience* (Oxford University Press, 1998) 205–6.

[101] *Hussain v Hussain* [1983] Fam 26.

[102] *Bibi v United Kingdom* (App No 19628/92).

[103] The Constitution states that 'Zoroastrian, Jewish, and Christian Iranians are the only recognized, minorities who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education': SN Ebrahimi, 'Iran' in A Bainham (ed), *International Survey of Family Law, 2005 edition* (Jordan Publishing 2005) 319.

Group or collective rights

Could it be said that members of such communities have a 'right' to be regulated by special laws in this way? This might be thought to depend on whether their communities have 'group' or 'collective' rights of this kind. There has been much debate on whether such rights can exist; and, if they do, how they interact with individual rights. Groups may be thought to have rights for (at least) four reasons. One is through institutions which represent a collectivity of individuals, whether of a public nature (such as legislatures or governments), or private nature (such as corporations or unincorporated associations). Such institutions can have rights, even in the strong sense, since there are institutional means by which their preferences may be expressed. They will not be further considered here. 'Informal collectives'[104] may *seem* to have rights because it is a characteristic of all *individual* rights that a rights-claimant identifies himself or herself with a 'social base' through which the entitlement derives.[105] The person claims the right, for example, 'as a citizen', or 'as a disabled person', or 'as a student'. However, when such rights are socially recognized, they are not conferred on the group as such but on *all individual members of the group*. A third reason why collectives may be thought to have rights is that rights usually presuppose the existence of social structures in order to be effective. But, as James Griffin has pointed out,[106] this applies to many individual rights (perhaps to all), but does not convert them into group rights. The fourth reason is found in the argument of Joseph Raz that a collective right can exist where the interests of individual members of a group to a public good can only be realized by the group as a group.[107] An example is the right to

[104] Y Tamir, 'Against Collective Rights' in LH Meyer, SL Paulson and TW Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press, 2003) 190–1.

[105] See p 138 above.

[106] J Griffin, 'Group Rights' in Meyer, Paulson and Pogge (eds) (n 104 above) especially 167.

[107] J Raz, *The Morality of Freedom* (Clarendon Press, 1986) 208–9. See also 'National Self-Determination' in J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1994) ch 6.

national self-determination. Each member of a nation has an interest in this good, but it can only be realized by the group collectively. It 'rests on the cumulative interests of many individuals'.

We must be cautious about this last reason too. The fact that an individual claim to a right is conditional upon the concurrence of the same claim being made by other individuals does not mean that the claims are not to individual rights. An offer to buy shares subject to a condition of a minimum subscription by the offeree shareholders does not rob the rights of each shareholder of their individual character if the condition is met. This is, after all, the standard feature of majority decision-making, where an individual vote is only socially recognized if it is among the majority. What is gained by thinking of the majority as holding a 'group' right rather than of each individual having a right to the claim being recognized? Against whom is it held? It could hardly be the collectivity itself. Perhaps it is held against the group's institutions or representatives, who might be thought of as having a duty to the group to follow the majority's claims. Yet surely the representatives have a duty to respect the interests of *each individual* member of the collectivity, including those of the minority. The claims of those individuals who are in the majority may in some (but not all) cases have greater weight than those of the minority because of their concurrence, but that is just a reason for preferring the claims of individual members of the majority to individuals in the minority in those cases.[108] It is unnecessary to imagine a right vesting in the collectivity itself.

Not only is it unnecessary; it could be undesirable. Claims made on behalf of groups are usually made by sectional interests within those groups. This is often true even with regard to claims for political self-determination, as the history of many secessionist movements shows. So claims for independence from external control may simultaneously be claims to exercise control over other sections of the group. Will Kymlicka's well-known account of group rights distinguishes between claims by which 'groups' seek 'external' protection

[108] See M Hartney, 'Some Confusions Concerning Collective Rights' in W Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press, 1995) ch 9.

against outsiders ('group-differentiated' rights), and 'other' groups which 'seek powers over the behaviour of their own members'.[109] He believes that these two types of claim do not necessarily coincide, and that it is possible to recognize the former while at the same time imposing conditions on the latter. A difficulty is apparent in this exposition of his view itself. For how can 'groups' seek powers over their own members, when the members themselves constitute the group? This language conceals the fact that claims are made on behalf of the group by certain (usually powerful) members of the groups. They will identify with the group, and other groups in a similar position, as the social base for their claimed entitlement, and thereby commit themselves to the extension of their claim to all the group members, whether or not the other members associate themselves with the claim (as they would need to do if, for them, the rights conferred would be rights in the strong sense[110]). This could often be innocuous, or even beneficial, to those others; for example, if the claimants were making claims for disability benefits. But self-determination claims are claims to exercise power, and this will inevitably include its exercise by sections of the group on behalf of, and over, other members. As Fareda Banda has powerfully observed, this is also true of those who seek distinctive treatment on the basis of cultural identity.[111]

Cultural rights, personal law, and the open society

People can only thrive within social and cultural structures. That is uncontroversial. But those structures can also inhibit or suffocate individual flourishing. Tensions arise when there is conflict between cultures over the interaction between a culture and the members within it. The response of an open society to this issue must proceed in two stages.

(1) The prerequisites for the existence of an open society must be maintained absolutely.

[109] W Kymlicka, *Multicultural Citizenship* (Clarendon Press, 1995). The quotations are from p 37.

[110] See pp 134–5 above.

[111] F Banda, *Women, Law and Human Rights: An African Perspective* (Hart Publishing, 2005) 252, 260.

(2) Values believed to be of a universal character must be upheld.

(i) Prerequisites of an open society

An open society must above all ensure that all its members have the opportunity to evaluate, on their own terms, the norms which govern them, and contribute to the adaptation and evolution of those norms. It follows that such a society cannot cede to any sectional interest the power to remove or restrict this opportunity in their dealings with others, even others on whose behalf they say they are making a claim. Such a society would go further, and actively promote avenues for communication and shared living experiences between members of communities. This involves a wide series of policies, from anti-discrimination legislation, promotion of equality and ethnic monitoring in the workplace and education services, to media policy.[112] These conditions are of particular importance with regard to children. Children are a hard case because they need guidance appropriate to their degree of maturity, and yet, following the principle of self-determinism,[113] must be allowed sufficient freedom to develop their own critique of the norms guiding them. Yet cultural groups have a natural inclination to perpetuate themselves, and therefore to wish to ensure that the children of the group identify with their practices. But children who are brought up by parents who come from different racial, cultural, or religious groups are seldom able to satisfy the demands of each group completely. Evidence suggests[114] that children are capable of reconciling these demands, often by adapting them to their new circumstances. Sometimes they reject one community or the other; sometimes both. In the most painful scenario, they are themselves rejected by each culture. The most positive results occur where the children create for themselves a new identity, though it seems that this is likely to be successful only in a tolerant social context. This is significant because it illustrates that, in order to thrive, children do not need to be closeted within a pre-existing cultural paradigm. They are capable, given the appropriate

[112] It is not clear that promotion of separate faith-based schools is consistent with it.

[113] See the discussion of self-determinism, pp 156–7 above.

[114] This is based on J Eekelaar, 'Children between Cultures' (2004) 18 *International Journal of Law, Policy and the Family* 178.

wider environment, of finding support from more than one (even conflicting) set of structures, and fashioning some new ones. This in turn contributes to cultural diversity. If they can achieve this from more than one cultural source, they can surely do it where their primary experience is with only one such source.

Adults should be easier. They must, in an open society, be free to determine which culture best serves their interests. That is why the 'right of exit' is seen as fundamental. Prohibition on exit, or the imposition of penalties on those who choose to exit, cannot therefore be accepted by open societies. But leaving a culture can be difficult.[115] The lesson to be drawn from this is that cultural groups in open societies must be expected to tolerate dissent from within their membership. Open societies recognize that people need cultures in order to thrive. They do not concede to any group the right to retain or constrain people in order that *the culture* may thrive in the version some members see it, or at all. Of course where differences open up within communities over what are thought to be defining features of the culture, one may expect these to be expressed openly, and probably to be reflected in fragmentation of association (such as in places of worship, schools or life-styles). But no segment can be permitted to employ coercive methods to deny another the opportunity to express their version of the group identity, and to live accordingly.

(ii) Values to be upheld

But what if a group conforms to those requirements, but its members willingly tolerate practices which conflict with the laws and other values of the outside society? It may perpetuate patriarchal values and rules on children's status considered unacceptable in a liberal society. Yet people may prefer to identify with such systems, submitting willingly to the authority of their dominant members.[116] They may even interpret its restrictions (as seen from without) as a form of existential liberation. Submission to religious or communal authority may be part of the manifestation of their identity. This may be symbolized through rituals (such as separate seating during worship),

[115] See the discussion in Kymlicka (n 109 above) 84–93.

[116] See J Rawls, 'Justice as Fairness: Political, not Metaphysical' (1985) 14 *Philosophy and Public Affairs* 223, 241.

speech, and dress.[117] Idriss explains that there are many reasons why Muslim women may wear the *hijab*, ranging from symbolic cultural assertion against colonial oppression, to a conscious signifier of a role of mediator between traditional and evolving cultures.[118] These are manifestations of identities and beliefs which should be respected as being part of the 'privileged' domain.[119]

But in applying those values, personal law must take into account other matters. In *R (on the application of Williamson and Others) v Secretary of State for Education*[120] Lady Hale said, in the context of religious beliefs, that 'respect is one thing. Allowing them to be practised is another.' Respect for one person cannot be bought with the price of loss of respect for another. Thus the House of Lords in that case was correct in declining to enforce the claim of Christian parents that corporal punishment should be inflicted on their children by a school since this conflicted with a legitimate policy designed to respect the bodily integrity of all children. That was relatively straightforward, for the children could not be said to have been free to give full consent to participation in the cultural practice. For the same reason, practices which inflict injury on children cannot be justified on cultural grounds,[121] and it would seem that this is very rarely, if ever, claimed.[122] There are, however, varying perceptions of what constitutes harm, or indeed what may be perceived as harm by children themselves.[123] The scope for uncertainty over what practices are good for children or which harm them, discussed earlier,[124] suggests that considerable caution should be exercised especially where cultural factors are concerned, and the safeguard

[117] See *R (on the application of Begum, by her litigation friend Rahman) v Headteacher and Governors of Denbigh High School* [2006] 2 All ER 487.

[118] MM Idriss, '*Laïcité* and the banning of the "hijab" in France' (2005) 25 *Legal Studies* 260, 290.

[119] See p 82 above. This is analogous to the 'autonomy-based' reasons of Will Kymlicka.

[120] [2005] 2 AC 246 at [77]—[78].

[121] See the *Report of the Victoria Climbié Inquiry (Laming Report)* (2003) ch 16.

[122] J Brophy, JJ Jhutti-Johal and C Owen, *Significant Harm: Child Protection Litigation in a Multi-Cultural Setting* (Lord Chancellor's Department Research Series 1/03).

[123] Child labour is an important example of the last: in some contexts children may see this as an advantage.

[124] See pp 89–94 above.

that state action should occur only where the harm is, or is likely to be, significant seems to strike the right balance. The prohibition of forced marriage is a similar issue, for children could not be said to acquiesce freely in such practices.[125] Perhaps inconsistently, English law is content to accept the validity of the marriage where one party (usually the female) is very young.[126] This seems to give greater weight to the status of marriage than to the child's interest in being able to have a significant opportunity to control its future.

But what if people do freely consent to practices within the privileged sphere which seem to deprive the sphere of the respect owed to it?[127] Banda gives examples of Sierra Leonean women who told human rights interviewers that husbands had a right to beat their wives, and that it was the duty of a wife to have intercourse with her husband whenever he wanted: 'her wishes were irrelevant'.[128] Note that the women are not saying that they wished these outcomes: but that their wishes were of no account. That is not surprising, since no one could believe that their fulfillment and sense of worth is to be reached through being beaten, humiliated, or raped. So they say their views are just irrelevant. Since one of the purposes for respecting the privileged sphere is to make possible the development of self-identity, a person who disowns their own conception of self-worth, and places it in the hands of another, is not acting in a way which attracts respect. It may engender compassion, sorrow or even anger: but not respect. And of course those who carry out the violations are not owed respect either.

But there are more complex cases. A woman may wish to be associated with a system allowing polygyny, or with differential access to divorce (such as under Islamic or Jewish law), and a disparity of 'rights' thereafter (whether in terms of financial allocation or care of the children), as part of overall acceptance of a cultural

[125] See Foreign and Commonwealth Office and Home Office, *Forced Marriage: A Wrong Not a Right* (2005); *re KR (A Child)* [1994] 4 All ER 954.

[126] *Mohammed v Knott* [1969] 1 QB 1. See M Freeman, 'Cultural Pluralism and the Rights of the Child' in J Eekelaar and T Nhlapo (eds) *The Changing Family: Family Forms and Family Law* (Hart Publishing, 1998) ch 17.

[127] See p 85 above.

[128] n 111 above, 174. She also refers to cases of women's resistance to campaigns against female genital cutting, ibid 230–1.

system she values. The reconciliation between giving such views proper respect and upholding the values of an open society lies in accepting the practices as social rules, with the potential for having legal consequences,[129] but to disapply them in specific cases where a participant claims they have violated their rights protected by human rights norms. For example, in the case of polygyny, there is sufficient evidence that, as a system, polygamy carries substantial risks for exploiting young women recruited as 'later' wives, and humiliating marginalization of earlier ones.[130] Open societies should not therefore formally recognize such systems within their marriage laws. But, should such an arrangement supported by social rules survive without challenge, the legal system could give the rules practical effect in certain matters, such as support obligations, distribution of property on death and, if relevant, children's claims.[131]

Ontario may have gone further. Disputes between members of religious communities over family matters may be referred to arbitration.[132] Unlike mediation, where the process is designed to produce agreement between the parties, people who submit to arbitration agree to be bound by the arbitral award. The consequence is that the arbitrator may apply the religious law, and the award be enforced in the courts. On its face, this would seem to allow the recognition of multiple systems of personal law which could diverge from the secular law. The arbitral award would be justified on the ground that the parties freely consented to the arbitration. However, there are likely to be limits to the scope of application of the laws of faith-based (or other) communities.[133] It will not be possible to 'contract out' of financial support obligations if the consequence

[129] See pp 6–7 above.

[130] See E D'Onofrio, 'Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States' (2005) 19 *International Journal of Law, Policy and the Family* 373; Banda (n 111 above) 117–18.

[131] English law does this where a marriage is potentially polygamous. The extent to which it also does so in the case of actually polygamous marriages is unclear: see J Murphy, *International Dimensions in Family Law* (Manchester University Press, 2005) 76–9.

[132] Arbitration Act, S.O. 1991, c 17.

[133] The following is based on N Bakht, *Arbitration, Religion and Family Law: Private Justice on the Backs of Women* (National Association of Women and the Law). I am grateful to Professor Martha Bailey for the reference.

is to burden the state, and the courts are likely to retain their power to intervene to protect the interests of children, at least if an issue were to be brought to their attention. Appeals are possible, and arbitral agreements and awards may be set aside on various grounds relating to procedural fairness, including the presence of duress. Nevertheless, the possibility for extensive enforcement of a community's law through this system appears to exist, and has been seen by some faith groups as a step towards overt legal pluralism. The Canadian National Association of Women and the Law has opposed the use of arbitration in family law, particularly if it is faith-based, because they felt it could lead to, or perpetuate, discrimination against women.

Yet in Britain mediated and negotiated agreements of a religious nature have been enforced judicially. A promise by a husband to pay the Islamic form of dowry (*mahr*) has been enforced as a contract,[134] and in *X v X (Y & Z Intervening)*[135] the High Court overruled a District Judge's refusal to incorporate into a Consent Order an agreement made with legal advice whereby a divorcing wife paid the husband £500,000 for him to obtain a *Get*. Although there were special circumstances which the judge found redressed the imbalance, the underlying position was that the wife's need (for religious reasons) to obtain a *Get*, and the fact that this could be acquired only by the husband, created an unequal bargaining position based on gender attributable solely to the norms of their faith group. Yet the arrangement had not been challenged by the wife. Had she done so, she would have demonstrated a perception of discrimination or unfairness. She would, in terms of the analysis of rights used earlier, have converted a right she already possessed in the 'weak' sense (by the fact that the law giving protection against inequalities within marriage applied to a person in her position) into a claim to a right in the strong sense by asserting it as being part of her well-being. Such claims, being instances of conversions

[134] *Shahnaz v Rizwan* [1965] 1 QB 390. A court in Ontario has refused to enforce such a promise on the ground that it was for a religious purpose: *Kaddoura v Hammoud* [1998] O.J. No 5054: Bakht (n 133 above) 20.

[135] *X v X (Y & Z Intervening)* [2002] 1 FLR 508. J Munby stated: 'The husband had something the wife's family wanted—power to give a *Get*.; the wife's family had something he wanted—money.' He was content to allow the bargain to stand.

to rights-claims of the background anti-discrimination principles of human rights norms, should be upheld.

Acting in this way does not undermine the open society, nor does it adopt an imperialistic stance towards other cultures. I have argued earlier that the state need not adopt a 'neutral' attitude in matters of value,[136] so it may actively promote the values of the open society while respecting different ones. Its willingness to allow individuals to discard the social norms of their culture where they are able to claim that their rights are infringed is not imperialistic. Banda makes a forceful point that social norms which infringe people's rights should not be justified by an appeal to cultural values: 'A feeling that injustice has been perpetrated upon one is not culture- or nation-specific. We all know when we feel discriminated against or unfairly treated.'[137] This striking expression illustrates that the ultimate justification for human rights norms reduces to an invocation of what we all know human nature is like. It is self-evident[138] and irrefutable. It also demonstrates that the relative autonomy[139] of the background values expressed in human rights norms should not be seen as the imposition by one culture of its culture-specific values on another, but as an independent standard against which the behaviour of *both* cultures must be measured. The challenge to open societies does not primarily rest on their response to claims of human rights infringements by members of other cultures, but on their response to claims of such infringements within themselves.

[136] See pp 87–8 above.

[137] Banda (n 111 above) 305–6.

[138] For the sense in which 'self-evident' is used here, see J Boyle, 'Natural Law and the Ethics of Traditions' in RP George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press, 1992) 23; J Finnis, *Fundamentals of Ethics* (Clarendon Press, 1983) 17–19. This is so even though some people may not acknowledge themselves as recipients or purveyors of unfair discrimination in certain circumstances. The point is that the only justification for saying unfair discrimination is wrong is to appeal to our (reflective) knowledge of human nature, and to claim that if you understand human nature correctly, no further evidence is necessary to establish the wrongness of unfair discrimination.

[139] See p 155 above.

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